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Grindstaff v. Grindstaff : Reply Brief

Utah Court of Appeals

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Aug. 30, 2010
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IN THE UTAH STATE COURT OF APPEALS

OLGA LUCIA GRINDSTAFF,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	Appeal No. 20090505
ROBERT LEE GRINDSTAFF,	)	
	)	
Appellee.	)	

REPLY BRIEF OF APPELLANT

THIS IS A DIRECT APPEAL FROM A FINDINGS OF FACT CONCLUSIONS OF LAW AND FINAL ORDER ENTERED IN THE FOURTH DISTRICT COURT, IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE JAMES R. TAYLOR, PRESIDING.

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ORAL ARGUMENT/PUBLISHED OPINION REQUESTED

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STATEMENT OF THE CASE

This is a custody case between two good parents where the trial Judge adopted the legal conclusion of the custody evaluator and both applied the wrong standard. Everyone involved in this case, from the Domestic Relations Commissioner, GAL, Custody Evaluator, to the District Court Judge found this case to involve two good parents, and a "very close call." The custody evaluator and the Judge found the "most important factor" to be maintaining the children in their community. The divorce was granted without fault.

The defendant's statement of the case and statement of the facts is, at best, an attempt at creative writing. In so many ways, Olga fits a stereotype: a thick tongued Latina who married a gringo to get her green card and then dumps him for a flashy salesman from Las Vegas. It makes a good story and it is juicy gossip. It is simply not true. Robert continually attempted to demonize and impugn the Petitioner. But the truth of the character evidence is that Robert is the one that lied to the custody evaluator (ex. R. 0694, p. 345 line 15 - 346 line 8), engaged in illegal wiretapping of his wife (R. 0694 p.33 line 4 et seq.), and was three times found in contempt of the Court.

This case is on appeal because the Court made improper decisions regarding the best interests of the minor children, as the children currently are left unattended in the mornings, and are "warehoused" in the afternoons; all the while this very good mother is at home 24 hours a day being a homemaker. That does not appear to be the type of discretion that this Court has entrusted to the trial Courts.

STATEMENT OF FACTS

1. Olga filed a Petition seeking a divorce and custody of the parties five minor children. She also filed a motion for temporary custody. Robert filed an Answer and affidavit, alleging physically abusive conduct on the part of mother toward the children. The parties agreed "Based on [Robert's] allegations of physical abuse, to have the Court appoint a GAL." (R. 0689 p. 3). A continuance was based solely on Robert's allegations.

2. After his review, the GAL reported there had been a DCFS investigation. The investigation resulted in an "unsupported finding." (R. 0690 p.7).He did not believe there was a danger of any physical issues (R. 0691, p9 ll 1-4).

3. Although the claim of Olga being abusive continued to be raised by Robert, after the De Novo hearing of March 23, 2007, the Court held: "I'm not particularly concerned about the previous allegations of abuse and, and neglect. Having had the circumstances explained to me a, I'm just not satisfied on any basis that there's a continuing concern for danger to the children from the mother's behavioral parenting." (R. 0691 p.118).

4. In ¶6 of his brief, Robert claims that "Olga decided to end the marriage because she felt that she was about to be successful in her Herbal Life business, and she did not want to share her success with the father." That's not what the record states.

5. Olga filed for divorce and custody because the family was being evicted from their rental tenement and Robert would not disclose what the plans were. R. 180 par 12. She feared homelessness. R. 693 p 31, ll 4-25 - p32, ll 1-11. She knew he wanted to move to public housing in South Provo R. 693, p29, ll22-25 and she wanted something better for her children. The divorce was already a foregone conclusion and it was the uncertainly caused by Robert that forced Olga to take action at that time.

6. Olga is criticized for having abandoned the family by securing and sleeping in a studio apartment. (Appellee's Brief p.9, ¶13). This was after Robert moved the family of 10, plus his mother, to a small 4 bedroom house in Orem. (R.694 line 18-25). Olga was in the home, every day, taking care of the children from the time they got up until they went to bed. (R. 694 p. 74). Then she would go to her apartment to sleep.

7. In the hearing for temporary Orders, Commissioner Patton evicted Olga from the home. (R.228 #8). After being excluded from the family home, Olga and her three children went to Vegas (a decision supported by Judge Taylor 694, p 501, ll19-23). While Robert claimed this as abandonment, the Court saw it as a great move for Olga and her family.

8. Yes, Olga had a suitor waiting in the wings, and she "married up." Regarding marrying Tom Bradley and moving to Las Vegas, the Trial Court said: "Relocating with two of her older children to Las Vegas to live in a home provided by Mr. Bradley was very sensible in that she and those two children were in immediately and dramatically better circumstances." (R. 0553).

9. Robert claims "At the hearing on March 23, 2007, Judge Taylor awarded the

father temporary custody during the school year, awarded the mother parent-time during the summer, and made other orders incident thereto." (Emphasis added). That is not what the record shows. Judge Taylor overruled the commissioner regarding the issue of sole custody of the children to father. He said: "I'm going to order that from this point that the parents have joint legal custody. I think that's appropriate. They both have an ongoing relationship, concern and care for the children. I'm going to order that physical custody of the children remain with their father until the end of the school year. . . . After the school year ends this year, custody, physical custody, will shift to mother who will have custody through the summer." (R. 694 p. 119).

ARGUMENT

I. THE TRIAL COURT FAILED TO APPROPRIATELY APPLY AND WEIGH THE CUSTODY FACTORS

Olga believes that the trial Court failed to properly weigh the relevant custody factors in awarding sole custody to Robert.

In Hutchison v. Hutchison, 649 P.2d 38, 41 (Utah 1982), the Supreme Court itemized and affirmed some 13 separate factors that the Courts should evaluate in determinating custody. The relative weight of the various factors was left to the discretion of the trial court. See also: Jorgensen v. Jorgensen, Utah, 599 P.2d 510, 512 (1979)." Id. at 41. However, despite the Appellate Courts' desire to defer to the Trial Courts, the application of the factors and the relative weight to be given to each continues to be abused by the trial Court.

As the policy has developed, the appellate courts have directed that all factors are not equally weighted. In Pusey v. Pusey, 728 P.2d 117 (Utah 1986), the Utah Supreme Court stated that:

"[T]hat the choice in competing child custody claims should instead be based on function-related factors. Prominent among these, though not exclusive, is the identity of the primary caretaker during the marriage. Other factors should include the identity of the parent with greater flexibility to provide personal care for the child..." (Emphasis added).

See also: Davis v. Davis, 749 P.2d 647 (Utah 1988).

Appellee now claims that this Court has long recognized that stability for the children trumps the "primary caretaker" factor, citing Erwin V. Erwin, 773 P2d 847; 108 Utah Adv Rep 55; 1989 Utah App LEXIS 731. The Erwin Court did not so hold. In that case, the Court was concerned with instability of mother's residence, relationships, keeping the children together and fostering sibling bonds, open cohabitation, and the mother's past and present demonstrated moral standards (all of which weighed in favor of father). In this case, at the time of the trial, Olga was remarried, living in an owned home with her husband Tom, and three children Juan, Olguita, and Mary Catherine. She was financially secure, and her living arrangements were more secure than Robert who was living in a rental apartment, using various forms of welfare and community assistance.

The overwhelming weight of authority direct that the primary caretaker and which parent with greater flexibility to provide personal care for the child, are prominent factors. And yet, in this case, there was none. The Court said: "Both of these parties were equally engaged in the care and nurturing of these children before the divorce. (R. 0557). The Court might just as well have said: "I reject your reality and substitute my own." There is no analysis, no finding of fact, on this prominent issue. And it is an interesting statement in light of the fact much of the time Robert was working two jobs (R. 693 p. 99 ll 13- 23), and at the time of trial, was committed to surrogate care both before and after school. Both the Judge and the Commissioner had previously found Mother to be the primary caretaker, and Robert

and Olga both so testified.

But in this case, Dr. Jensen, the custody evaluator, stated that the most important factor in this case was keeping the children in their community.[1] That claim was previously rejected by this Court in Larsen v. Larsen, 888 P.2d 719 (Utah Ct. App. 1994), discussed *infra.*

The trial Court stated that Dr. Jensen's findings and observations were "adopted in full." (R. 0560¶ 2). It is one thing to allow the custody evaluator to assist the finder of fact in determining and evaluating facts. It is plain error to allow the expert to make legal conclusion, such as the "most important factor" to decide the case. Especially when he applies the wrong law.

This case is more closely related to Larsen v. Larsen, 888 P.2d 719 (Utah Ct. App. 1994), cited to this Court in our principal brief. In Larsen, this Court determined that the Trial Court erred in awarding Custody to father on the grounds that mother's move from Park City to Oregon, to marry, would not be in the children's best interest, as it would inhibit father's ability to maintain a parental relationship with his children, disrupt their religious training, and remove them from their friends and relatives. This Court determined that:

1

24) Q. Okay. Now getting back to my initial question on this. What, what determination did you make regarding that (p. 0284) factor's impact on, on your evaluation?
2) A. It a, the, the factor of greatest impact was, probably pertained less to the orders, a, and more to the duration of time that the children had their, the children's integration a, were the, the factors pertaining to the kids' happiness and adjustment, a, stability of residence which were, which are factors imbedded in this criterion. The friendship relationships, integration with schools, a, church and community, a, that were established in the a, here in the, in the Provo area.
(R. 0694 p. 0283, 0284) (Emphasis added).

"The focus of the trial court's analysis and decision, then, was not on the parties' respective parenting skills. 3 Instead, the court's order can only be taken to mean that the trial court believed that the children's domicile in Summit County is so essential to their well-being that removal from that community would be more detrimental to them than separating them from their custodial parent--the person who has been primarily responsible for their day-to-day care for the entirety of their lives. While such a conclusion is not inherently impossible, a factor of considerable importance in determining the best interest of children is the maintenance of continuity in their lives, and removing children from their existing custodial placement undercuts that policy. 4 (string cite omitted). Therefore, unless there were compelling evidence that residing in Summit County, Utah, would be better for the children than allowing them to continue to reside with their life-long primary caregiver, we would conclude that the trial court exceeded the exercise of sound discretion in entering the order before us."

(n. 3. It is undisputed that both Alicia and Marc are exemplary parents, each deeply committed to the well-being of their children."

n.4. In any event, especially in the case of younger children, the disruption of moving with their life-long primary caregiver would usually be less detrimental than a sudden change in who is serving that important role. Such disruption might be exacerbated in this case by the fact that Marc's long work hours would necessitate the use of surrogate care, which has not been present in the children's lives heretofore, although Marc testified that he would cut back on his work hours if he had custody of the children.)"

Larsen, at 722 (Emphasis added)

In this case, the Court failed to properly weigh and apply the custody factors, had he done so, the Court would have made a different decision regarding Custody.

At the January 16, 2007, hearing, the trial court did find that Olga being the primary caretaker weighed in her favor. Tr. at p. 50. Similarly, at the March 23, 2007, hearing, the trial court acknowledged Olga was in a better situation to care for the Children, as she could provide full time constant care. *Id.* In both referenced hearings, the Court found no abuse issues. These findings became the "law of the case." Yet, without notice or an opportunity to address the issue, the Court changes his mind after trial.

Olga has greater flexibility to provide personal care for the children. Robert leaves for work at about 5:00 a.m. while the Children sleep. (R.0694 p.22). Robert would return home at about 7:30 am to get the Children to school and make sure the youngest Child was taken

care of. (R.0694 pp. 22-23). At Trial, Robert testified similarly, that he does not have someone at the house watching the Children while he is working in the morning before he comes back to get them. Tr. at p. 436. Robert also testified the younger Children are in daycare and the older Children attend after school programs until 5:30. Tr. at pp. 424, 428, 429, 444. Dr. Jensen testified that he understood that a surrogate caretaker was present with the children in the morning, and that if they were unattended, that would be "inappropriate." (R.0694 p.345 l. 2 - 346 l.8)

That is not to say that other factors cannot (or should not) be considered. In Hansen v. Hansen, 2009 UT App. 365, this Court held that the primary caretaker is not the single controlling factor, and while more heavily weighted than other factors, must yield where multiple showings in other areas override the primary caretaker factor.

Judge Davis' dissent in Hansen, raises an important issue in such cases, "Reversal would have little, if any, effect on Mother's ability to obtain a change of custody," apparently because the error committed by the Trial Court has resulted in a *de facto* reversal in the primary caretaker status of the parties so on remand, the erroneous judgment would be affirmed. That means that the Trial Court (and by assignment, the Custodial Evaluator) are authorized to amend the test at will, because under the current law, the failure to properly weigh and apply the primary caretaker factor becomes non-appealable, because there is no remedy. A remedy for that problem would be to disregard the factor of primary custody pending trial or hearing in cases of remand, and look only toward the historical primary caretaker.

The trial court failed to set forth objective findings of fact that Robert was the better

parent to care for the Children and further failed in its basic facts as to why such a conclusion was justified. Sukin v. Sukin, 842 P.2d 922, at 924. (Utah Ct. App. 1992).

Respondent has claimed that Dr. Jensen spent three pages analyzing the primary caretaker factor. (Appellee's brief, p. 22). Even a cursory review of the written evaluation shows this is not true. Under the title *"General Interests of Continuing Previously Determined custody Arrangements"* neither the primary caretaker role nor any analysis of which parent could provide personal as opposed to surrogate care was mentioned. What was analyzed was Michelle's treatment for Selective Mutism who the best treatment provider might be. Ultimately, the evaluator said that three of the five children thought Michelle responded move favorably to the father's approach, which apparently meant he was the better caretaker in the eyes of three of five children under 10 yoa. The court never properly weighted the function related factors of primary caretaker and which parent had greater flexibility to provide personal care for the child.

Accordingly, this Court should reverse the determination of custody in this matter.

II. THE TRIAL COURT ERRED IN ITS EXCLUSION OF APPELLANT'S EXPERT WITNESS.

A. Dr. Hopper was prepared to Rebut Dr. Jensen's findings in the Custody Evaluation Report.

UTAH CODE OF JUD. ADMIN. R. 4-903(7)states as follows:

> In cases in which psychological testing is employed as a component of the evaluation, it shall be conducted by a licensed psychologist who is trained in the use of the tests administered, and adheres to the ethical standards for the use and interpretation of psychological tests in the jurisdiction in which he or she is licensed to practice. If psychological testing is conducted with adults and/or children, it shall be done with knowledge of the limits of the testing and should be viewed within the context of information gained from clinical interviews and other available data. Conclusions drawn from psychological

testing should take into account the inherent stresses associated with divorce and custody disputes.

In the instant case, Dr. Hopper was called in anticipation of trial to testify as a mixed fact and expert witness. R0491. He had been providing care to Michelle in Las Vegas and had evaluated Olga. In her disclosure of Dr. Hopper's proposed testimony, Olga stated as follows:

> Dr. Hopper has indicated that he has reviewed the report of Dr. Jensen, which fails to mention or utilize any of the testing conducted. Dr. Hopper has indicated that he feels it is not very thorough where it counts and heavy on attacks on [Olga], without reference for any factual cause. He also said he found as strange the complete lack of mention of all the tests the parties took. He thought the attacks on Olga, without any clinical or factual evidence to support them, were unprofessional and outside the standard of the profession. He has requested all testing materials, but has been delayed (or denied) by Dr. Jensen. His opinions are subject to a final review of additional documentation to be provided by Dr. Jensen. *Id.*

Dr. Hopper was expected to rebut Dr. Jensen's anticipated findings concerning Olga's psychological testing. Dr. Hopper's anticipated testimony was crucial to Olga's case, particularly since Dr. Jensen's findings were adopted by the trial court in its Memorandum, Findings and Conclusions, and Order. Accordingly, the main issue regarding Dr. Hopper's testimony became whether his scientific, technical, or other specialized knowledge would assist the trial court to determine facts at issue, facts central to an award of custody. UT. R. EVID. 702(a) and (b). See Advisory Committee Note, ¶ 2: "Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education".

Robert argued Dr. Hopper was incompetent as a custody evaluator under Rule 493, which provides only for social workers or licensed, doctorate level psychologists, or those state licensed where they practice. Tr. at p. 409. Dr. Hopper is a PhD Psychologist, and runs

a licensed facility in Las Vegas. However, Olga argued Rule 702, which does not require a license, education, or degree, only that the witness have training, education, and/or experience sufficient to assist the fact finder with regard to the specialized issues. Tr. at p. 410. Counsel herein argued Dr. Hopper was qualified to testify concerning the evaluation and treatment of M.G. and of the clinical testing that was administered to Olga by Dr. Jensen in connection to the custody evaluation. Tr. at pp. 410-411.

B. The Trial Court's Exclusion of Dr. Hopper's Testimony Prejudiced the Outcome of the Trial.

We note that "[t]he determination of whether there is a reasonable likelihood of a more favorable outcome is based upon a review of the record." Glacier Land Co., L.L.C. v. Claudia Klawe & Associates, L.L.C., 2006 UT App. 516, ¶34, 154 P.3d 852 *citing* State v. Lindgren, 910 P.2d 1268, 1274 (Utah Ct.App.1996). "This review requires the appellate court to determine from the record what evidence would have been before the jury absent the trial court's error." *Id. citing* Lindgren at 1274.

Olga must demonstrate prejudice resulted from the trial court's error in excluding Dr. Hopper's testimony. As already insinuated herein, this matter was a close call and any further information regarding the best interests of the Child, which was within Dr. Hopper's purview, would have greatly aided the trial court in its determination of permanent custody. Therefore, as this Court reviews the record in this matter and determines what it would have been with Dr. Hopper's proffered testimony, Olga avers the outcome would have been tipped in her favor.

The trial court relied upon Olga's objection to the use of Prozac for Michelle in his

determination the parties could not effectively communicate regarding decisions involving the Children. The trial court also found Robert seemed to be better situated to keep the lines of communication open. However, Dr. Hopper's testimony would have demonstrated Olga's sincere concern regarding Prozac, its dangerous effect on young children, how M.G. fared in Las Vegas away from the area in which she was integrated, and her favorable progress on GABA and other treatment. The trial court relied on the fact the Children's integration in the Provo area overcame Olga's ability and right to provide personal care, particularly as it related to M.G. Accordingly, Dr. Hopper would have given the trial court valuable insight as to how M.G.'s feeling of integration may have changed, in response to her time in Las Vegas.

Through exclusion of Dr. Hopper's testimony, the trial court in essence left Dr. Jensen's testimony unrebutted and thus susceptible to being erroneously adopted in its entirety, as is argued *supra.* Allowing Dr. Hopper's testimony would not have worked to prejudice Robert's case since he had an expert to rebut the matter; however, exclusion of Olga's rebuttal witness became a crucial turning point of the trial in that the trial court did not maintain the discretion or authority to reject Dr. Jensen's testimony in light of no other evidence on the issues being presented. There was no weighing of the witnesses' opinions since only one was allowed to testify, making the case very one-sided. The prejudice heaped upon Olga through such exclusion is readily apparent.

Ultimately, Hopper found Olga to be in a better situation than Robert, and Olga could adequately meet the needs of the Children in Las Vegas. However, the trial court refused to allow Olga to fully demonstrate this by excluding Dr. Hopper. Hence, not only

did the trial court commit error as argued *supra* but its error resulted in prejudice against Olga in the outcome of this matter. Therefore, this matter should be reversed.

III. THE TRIAL COURT ERRED BY FAILING TO SUFFICIENTLY SET FORTH ITS FINDINGS CONCERNING ITS AGREEMENT WITH AND DEVIATION FROM DR. JENSEN'S REPORT.

Dr. Jensen recommended Joint legal custody, and the Court rejected that recommendation, and further, restricted parent time. UT. CODE ANN. § 30-3-10.1 (1) defines "Joint legal custody" as follows:

> [T]he sharing of the rights, privileges, duties, and powers of a parent by both parents, where specified; (b) may include an award of exclusive authority by the court to one parent to make specific decisions; (c) does not affect the physical custody of the child except as specified in the order of joint legal custody; (d) is not based on awarding equal or nearly equal periods of physical custody of and access to the child to each of the parents, as the best interest of the child often requires that a primary physical residence for the child be designated; and (e) does not prohibit the court from specifying one parent as the primary caretaker and one home as the primary residence of the child.

UT. CODE ANN. §30-3-10.1(2) defines "Joint physical custody" is as follows:

> [T]he child stays with each parent overnight for more than 30% of the year, and both parents contribute to the expenses of the child in addition to paying child support; (b) can mean equal or nearly equal periods of physical custody of and access to the child by each of the parents, as required to meet the best interest of the child; (c) may require that a primary physical residence for the child be designated; and (d) does not prohibit the court from specifying one parent as the primary caretaker and one home as the primary residence of the child.

This Court has stated, "[w]e first note that child custody evaluations in divorce cases are specifically provided for by Rule 4-903, Utah Code of Judicial Administration (1990). The rule provides that the evaluator 'shall submit a written report to the court,' and thereby clearly contemplates that such reports will be used in making custody determinations." Merriam v. Merriam, 799 P.2d 1172, 1175 (Utah App.,1990) (further citations omitted.) "In

divorce cases where custody is at issue, one evaluator may be appointed by the court to conduct an impartial and objective assessment of the parties and submit a written report to the court." UTAH CODE OF JUD.ADMIN.R. 4-903(4). The rule continues as follows:

> The purpose of the custody evaluation will be to provide the court with information it can use to make decisions regarding custody and parenting time arrangements that are in the child's best interest. This is accomplished by assessing the prospective custodians' capacity to parent, the developmental, emotional, and physical needs of the child, and the fit between each prospective custodian and child. Unless otherwise specified in the order, evaluators must consider and respond to each of the following factors:
>
> (5)(A) the child's preference; (5)(B) the benefit of keeping siblings together; (5)(C) the relative strength of the child's bond with one or both of the prospective custodians; (5)(D) the general interest in continuing previously determined custody arrangements where the child is happy and well adjusted; (5)(E) factors relating to the prospective custodians' character or status or their capacity or willingness to function as parents, including: (5)(E)(i) moral character and emotional stability; (5)(E)(ii) duration and depth of desire for custody; (5)(E)(iii) ability to provide personal rather than surrogate care; (5)(E)(iv) significant impairment of ability to function as a parent through drug abuse, excessive drinking or other causes; (5)(E)(v) reasons for having relinquished custody in the past; (5)(E)(vi) religious compatibility with the child; (5)(E)(vii) kinship, including in extraordinary circumstances stepparent status; (5)(E)(viii) financial condition; and (5)(E)(ix) evidence of abuse of the subject child, another child, or spouse; and (5)(F) any other factors deemed important by the evaluator, the parties, or the court.

UTAH CODE OF JUD.ADMIN.R. 4-903(5).

In the instant case, the parties could not resolve the issue of custody themselves. In its fact-finding concerning custody, the trial court determined to diverge from Dr. Jensen's final recommendations, but adopted his findings and observations. R0560. Dr. Jensen testified that, in regard to the factor of the strength of attachment to the Children to their parents, Dr. Jensen found this to be a nondifferientiating criteria. Tr. at pp. 283-284. Dr. Jensen evaluated the general interest of continuing the previously determined custody

arrangement and found the Children's integration in the Provo area was the most important factor and central to the Children's adjustment. Tr. at pp. 284-285. Dr. Jensen additionally testified that, (A) concerning M.G. and her need for treatment, there was concern with having two (2) different treating professionals in the two (2) different areas in which the Children lived; (B) there were hiccups in the communication between Cannon and Dr. Hopper and they were not necessarily unified in their approach to treatment; (C) proximity of residence that preserves the Children's integration is clearly in the best interest of the Children; (D) Olga had the slight advantage over Robert in her ability to provide personal care to the Children; and (E) he based his recommendation the Children stay in Provo on more than the desires of the Children, specifically that they are integrated there. R.0694 at pp. 287-288, 290-291, 299, 334. Dr. Jensen testified it was a very close case. R.0694 at p. 343.

Dr. Jensen ultimately recommended Joint legal custody with Robert designated the primary residential parent. Dr. Jensen testified he hoped M.G. could remain in therapy with Cannon; however, a change occurred but did not impact his custody recommendations. R.0694 p. 320.

Dr. Jensen recommended the parties share joint custody, where Olga and Robert would share the rights, privileges, duties, and powers of a parent. UT. CODE ANN. §30-3-10.1(1). However, the trial court granted sole physical and legal custody to Robert indicating it was based on Dr. Jensen's custody evaluation, but failed to make any specific findings on the variance of declining to order joint legal custody.

Dr. Jensen was presumed to have conducted an impartial and objective assessment of the parties, and he submitted his resulting written report to the trial court. CODE OF

JUD.ADMIN.R. 4-903(4). Dr. Jensen was required to consider a myriad of factors in his report, some of which he found to be nondifferientiating and others to weigh in favor of a party, as already described herein. However, in arriving at its conclusion regarding custody, the trial court did not make any findings regarding the reason for variance, even though it determined to adopt Dr. Jensen's findings. *See,* R0560.

While UTAH CODE OF JUD.ADMIN.R. 4-903(5) does not bind a trial court to an evaluation report, the report is presumed to be relied on by a trial court in making its custody determination, particularly since the evaluator must perform an impartial and objective assessment of the parties. *See,* UTAH CODE OF JUD.ADMIN.R. 4-903 (4). Accordingly, the trial court's failure to make specific findings as to its divergence from Dr. Jensen's recommendation that the parties share legal custody constituted error in light of the weight afforded to custody evaluator reports. Thus, the award of sole physical and legal custody to Robert should be reversed.

IV. THE TRIAL COURT ERRED IMPOSING RESTRICTIVE PARENT TIME AND REJECTING DR. JENSEN'S VISITATION RECOMMENDATION

This Court has stated, "[w]hen the parents cannot agree on a visitation arrangement, the Utah Code delineates minimum parent-time schedules." Trubetzkoy v. Trubetzkoy, 2009 UT App. 77, ¶14, 205 *citing* UTAH CODE ANN. §30-3-35(2).

The minimum schedule for parent-time for children 5-18 years of age is outlined under UT. CODE ANN. §§ 30-3-35 and 30-3-37(5). In Udy v. Udy, this Court analyzed a trial court's award of expanded visitation under statute to the noncustodial parent. *Ibid.*, 893 P.2d 1097, 1101 (Utah App.,1995). The custodial parent appealed, arguing the trial court had abused its discretion; however, the court determined the appellant had not presented

evidence to rebut the testimony of experts who recommended the schedule. *Id.* In this case, the Court amended the schedule, and did not explain why neither the statutory scheme nor the evaluator's recommendation was followed.

Dr. Jensen ultimately recommended at trial that the parties be awarded Joint Legal Custody, (A) the Children remain in Provo and continue to reside with Robert; (B) Olga received holiday visits and frequent parent-time with the Children, but to avoid full Summers; and (C) half-summer visits with Olga occur. Tr. at pp. 310-312. Dr. Jensen testified he was deviating from the standard visitation schedule as his proposed schedule would provide predictability, long term scheduling and longevity. Tr. at p. 318. Dr. Jensen testified he hoped M.G. could remain in therapy with Cannon; however, a change occurred but did not impact his custody recommendations. By the time of trial, Cannon had left Provo and moved to Salt Lake City. Tr. at p. 320. Jensen recommended that Olga get seven (7) weeks in the summer, holidays and one visit per month. See exhibit "A."

In its divergence from Dr. Jensen's recommendations, the trial court ordered: Robert to have the following holidays every year: Martin Luther King weekend; Spring Break; Pioneer Day, and; Labor Day Weekend. Olga to have the following holidays every year: President's Day weekend; Memorial Day weekend; Independence Day, and; Fall Break. Robert was awarded Thanksgiving in odd numbered years and Christmas break in even numbered years. Olga was awarded Thanksgiving in even numbered years and awarded Christmas in odd numbered years. Olga was awarded summer parent time beginning every year the day after Father's Day and ending July 23rd at 9:00 p.m. Order at pp. 3-4.

Based on the parties' visitation disagreements, the trial court was required to apply a minimum parent-time schedule. Trubetzkoy at ¶14. However, the trial court granted substantially restricted parent time and failed to specify why he was doing so. In fact, the Court said: "substantial parent time should be awarded to the non-custodial parent." Although the trial Court gave Olga less than half of the statutory parent time, he apparently felt like he had given her an expanded parent time role.

Simply put, Utah Code §30-3-37(5) provides "...the minimum requirements for parent-time with a school-age child." The trial court gave less and failed to explain why.

V. THE TRIAL COURT ERRED BY FAILING TO IMPOSE SANCTIONS FOR ROBERT'S CONTEMPT OF COURT.

Robert was found in contempt of Court on three separate occasions. In each finding of contempt, the Court reserved the issue of sanctions (with the exception of an "order" to comply with a prior "order" by paying a reduced sum of $175 per month), and attorney's fees were reserved for trial. At trial, sanctions and attorney's fees were summarily denied on the grounds that Robert could not afford to pay. Robert now defends the trial courts ruling, directing this Court to §30-3-3(1) and the "Jones factors." Robert fails to even address Olga's claims pursuant to the long standing policy of our Courts to impose sanctions to enforce compliance with our Courts' orders. Robert cites Utah Code 30-3-3(1), as support for the Trial Court's decision. The proper authority is Utah Code §30-3-3(2), and the authority in Appellant's principal brief.

In January, 2008, this Court decided the case of Anderson v. Thompson, in which it was stated as follows:

> Because of Husband's noncompliance with multiple provisions of the Decree, the trial court held Husband in contempt of court and awarded judgment to Wife in the amount of $ 44,311. In addition, the trial court awarded Wife $ 7652.97 in attorney fees based on the court's finding that 'attorney fees are justified and necessary and reasonable.' Husband appealed. This Court reversed the finding of Attorney's fees because the "trial court did not enter sufficient findings on the reasonableness of Wife's attorney fees or Wife's need for such fees.

Ibid., 2008 UT App 3, 176 P3d 464. The analysis of this Court was referenced as having been based ***not*** on the contempt statute or case law, but instead on UTAH CODE ANN. §30-3-3(1), which provides that a trial court "may order a party to pay the costs, attorney fees, and witness fees . . . of the other party to enable the other party to prosecute or defend the action." *Id.* at 475. This is the wrong standard for Contempt sanctions.

Even if this Court adopts the discretionary function of the Judge under §30-3-3(2), the Trial Court made no finding of Robert's impecuniosity. Olga also testified Robert had been working two (2) jobs at the time she filed for divorce but had quit one (1) subsequent to filing. Tr. at p. 100. Robert was resourceful in obtaining help for the Children's care and assistance from various outside sources to make up the difference between what he was earning and what was needed to provide for their family. Tr. at pp. 138-139. Robert would rely on Olga's income so he could work less and still rely in welfare assistance to make ends meet. Tr. at pp. 148-149. Robert was capable of manipulating his income.

The trial court ultimately determined Robert was unable to pay. R0648. However, such determination was against evidence presented at trial, summarily that Robert purposefully relies on welfare to make ends meet and does have the ability to pay Olga's attorney's fees, particularly since he had worked two (2) jobs throughout the marriage. This

Court needs to make a determination whether impecuniosity is a "free pass" to commit contempt and refuse to comply with the Court's orders, or whether the "Jones Factors" are required to find contempt under §30-3-3(2), as implied in Anderson.

VI. APPELLANT HAS PROPERLY MARSHALED THE EVIDENCE.

In point 7 of his brief, Robert claims that the Olga has failed to marshal the evidence in support of the trial courts' decisions. Pursuant to Rule 24(a)(9), a party challenging the trial courts' finding of fact must marshal all record evidence which supports the challenged finding. Olga has met this burden, although the marshaling of the evidence may not be mandated in this case since her challenges on appeal are directed at conclusions of law. In this case, Olga properly summarized the testimony of each and every witness in both pretrial proceedings and the trial itself, summarized all documentary evidence as it related to the findings of the Court, and provided the trial courts' findings in connection therewith.

Robert cannot and does not specify one single fact which he believes supports the trial courts' decision that Olga did not touch upon. Olga's challenges pertain to the improper application of the custody factors analysis, specifically as it relates to the weight to be given to various elements. While Robert claims the trial court was exhaustive in its analysis of the primary care taker of the Children, he ignores the fact that this was found by all to be a traditional household, with the father as the primary bread winner and the mother as the primary care provider for the Children [Brief p. 27, 28].

Olga provided a comprehensive statement of facts to this Court and has fully satisfied her obligation to marshal the evidence. Robert's claim otherwise should be rejected and a determination made on the merits of the issues.

VI. THE ISSUE OF CHILD SUPPORT IS PROPERLY BEFORE THIS COURT.

Olga claims that the trial court erroneously refused to adopt and utilize the "low income table" set forth in UTAH CODE ANN. §78b-12-302. Robert claims that Olga failed to property preserve or raise the issue of child support in connection with this action. R. 0621 see ¶ 9. Attached hereto as exhibit "B". However, Olga raised the issue of child support below in both her *Petition and Complaint for Divorce*, which requested reasonable child support, and her July 29, 2008, filing of a *Motion to Alter, Amend or Supplement Findings of Fact and Conclusions of Law*, arguing the trial court failed to consider statutory issues relating to child support. Robert's claims of failure to preserve the issue are thus flawed.

The Utah Child support act provides, in part:

§78B-12-205. **Calculation of obligations.**

> (1) Each parent's child support obligation shall be established in proportion to their adjusted gross incomes, unless the low income table is applicable..."
> (2) Except in cases . . . where the obligor's adjusted gross income is $1,050 or less monthly, the base child support award shall be determined as follows: (sub (a) and (b) omitted as not applicable).
>
> (4) In cases where the monthly adjusted gross income of either parent is between $650 and $1,050, the base child support award shall be the lesser of the amount calculated in accordance with Subsection (2) and the amount calculated using the low income table. If the income and number of children is found in an area of the low income table in which no amount is shown, the base combined child support obligation table is to be used. (Emphasis added)

This Court determined Olga's income at the time of the trial to be $623.04 per month, to which she objected based upon the analysis given by the trial court, and indicated

that the proper computation was $539.70 per month. This claim was rejected by the Trial Court and is not appealed here.

The primary issue is whether or not the Court should have utilized the "low income tables contained at UTAH CODE ANN. §78b-12-302. By it's express terms, -302 applies to "the obligor parent only" in the event the obligor parent currently earns less that $1050 per month for the purpose of child support. Olga filed a motion to alter, amend or supplement the trial courts' findings and conclusions requesting recalculation of child support. Following the Court's ruling on that Order, Appellant sent a letter to the Court on March 19, 2009, [R. 622] and attached a formal objection to the proposed order [R. 621] specifically referencing the Courts failure to adopt the low income tables of §78b-12-302, which should have resulted in a child support obligation of $31 per month. On or about March 20, 2009, the Court issued a signed minute entry wherein the Court declined to make further changes, but noted that the remaining issues were "resolved by the incorporation of its Memorandum Decision by reference." [p.24 P. 9] [R. 0624, 0625]. However, the trial courts' Memorandum Decision only references the issue of joint physical and legal custody of the Children and parent time. The trial court failed to ever consider the issue of the adjustment of child support and the use of the low income tables, despite that fact having been directly being brought to its attention.

VII. APPELLEE FAILED TO ADEQUATELY PRESERVE HIS ISSUES THROUGH CROSS-APPEAL IN THIS MATTER.

Appellee claims the trial court erred in failing to "impute income" to Olga, or in the alternative, by failing to calculate some or all of the income of her husband to her as income

for the purpose of calculating child support. Robert seems to be making an affirmative claim, which should have been brought by cross-appeal.

Robert raised this issue at the trial of the case. R. 0694 p. 0493. Robert now tries to advance this exact issue on appeal.

Robert filed no affirmative claim, filed no cross-appeal under UT. R. APP. P. 4(d), but now seeks to overturn the trial court's ruling on his issue. Any request for affirmative relief, which is not merely offered as a ground for affirming the trial court, is not properly before the Court unless a proper cross-appeal has been filed. Since this affirmative issue is not properly before the Court, Olga will decline the invitation to brief this issue. The only error committed by the Court was in failing to adopt the statutory scheme, as argued *supra.*

VIII. THE APPEAL IS NO RENDERED MOOT BY THE TEMPORARY ORDERS ISSUED IN THE MOTHER'S PETITION TO MODIFY.

A father makes the claim that the appeal is moot as a result of a Stipulation reached by the Parties for a Temporary Order during the pendency of Petition to Modify, this results from the mother moving from Las Vegas to Provo, and the father's denial of visitation because it was not provided for in the Custody Decree. He adds very little analysis. It is interesting to note that the Order attached to the brief is not even the current Order in effect in this case. See Attached as exhibit "C."

"This Court has stated that an issue only becomes moot when the requested judicial relief can not effect the rights of the litigants." Winters v. Schulman, 1999 UT App. 119; 977 P.2d 1218. The issue in this case is not moot for multiple reasons. First, the Decree of Divorce is still in effect providing for a specific schedule of visitation if the mother resides in Las Vegas, Nevada. Second, the current Order in effect is "Temporary." Third, the Order

only alters local visitation under Utah Code § 30-3-35. Finally, even if the requested relief were deemed to render moot the issue of visitation or custody, or be seen as a waiver of custody, this case would constitute an exception to the general rule governing mootness.[2] For example, this issue has already arisen without remedy in Hansen and Larsen, saved only by this Court affirming the trial court decisions.

This case presents an issue that effects virtually every contested custody case to heard in the future. Should this Court decide that the Court wrongfully decided the issue of custody, and that custody should be transferred to the mother, mother would not be granted non-custodial parent time pursuant to § 30-3-35, as she would be designated the custodial parent. Finally, a change in custody by this court, or a remand, would constitute a substantial and material change upon which the Order for Temporary Parent Time had been granted, and would justify a re-evaluation at the Trial Court of that issue as well.

In the alternative, a remand in light of the general change in circumstances of the Parties, with the Petitioner now residing in the same neighborhood the Parties occupied at the time of the separation, should justify a remand and redetermination of the issues of custody, joint custody , and parent time.

---

[2] Exceptions to mootness include that the issue is one of wide public concern, and because of the short period any one litigant is affected by it, the issue is "'capable of repetition yet evading review.'" Id.; see also KUTV v. Conder, 668 P.2d 513, 516 (Utah 1983); Wickham v. Fisher, 629 P.2d 896, 899-900 (Utah 1981).

CONCLUSION

WHEREFORE, based upon the foregoing, Olga respectfully requests t at this Cc urt reverse the Order in this matter and take any such further action as this Court de ns nec ss ry.

DATED this 27th day of July, 2010.

JAMES G. Clark, Attorney t Law

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 2010, I served and true and correct copy of the *Brief of Appellant*, first-class mailing, postage prepaid and addressed as follows:

Guy L. Black
GREENWOOD & BLACK
1840 North State Street, Suite 200
Provo, Utah 84604

JAMES G. Clark, Attorney at Law

Exhibit “A”

IN THE FOURTH JUDICIAL DISTRICT - PROVO COURT

UTAH COUNTY, STATE OF UTAH

OLGA LUCIA GRINDSTAFF, PETITIONER vs. ROBERT LEE GRINDSTAFF, RESPONDENT	TWO DAY BENCH TRIAL JUNE 3, 2008 SESSION DAY 2 OF 2 CASE 064402197 APPEAL 20090505-CA JUDGE JAMES R. TAYLOR

BE IT REMEMBERED that this matter came on for hearing before the above-named court on June 2 and 3, 2008.

WHEREUPON, the parties appearing and represented by counsel, the following proceedings were held:

OFFICIAL CERTIFIED TRANSCRIPT

(From Electronic Recording)

ORIGINAL

PENNY C. ABBOTT, REPORTER-TRANSCRIBER
LIC. 102811-7801
PHONE: (801) 423-6463 EMAIL: abbpe@yahoo.com

availability without a, making the children a, suffer the consequences of that, which is very difficult to do without residences being close to one another. And so a, I, some of that is a moving target because a, there is some uncertainty about the sacrifices that parents are willing to make a, when it really, when the rubber hits the road literally. And a, with accelerated gas prices, the distance between homes can sometimes be monumental a, in terms of costs to families.

Q. Who would, who would have the greater ability in this case to a, to pay for a, or be able to afford the a, the a, cost of the gas and the trips to visit the children?

A. Certainly Olga and Tom have the greater financial ability. But I also appreciated Tom's a, history of a, employment, that he's established himself effectively, and a, that the possibility, the ease of moving at the time, the ease of his moving away from his career or, career and what he had developed there was also not a very good option a, for him in order to reestablish a residence here and continue his employment without being on the road traveling all the time.

Q. Okay. So it would be your recommendation then that the children remain here in Provo. Is that correct?

A. That's correct.

Q. And, and that they reside principally with their

father?

A. Yes.

Q. And, and in terms of parent time for Olga a, what a, what would you recommend in that regard? Specifically If you can be as specific as possible regarding that recommendation.

A. I think to take care, I think a, to take care of maintaining regularity of contact, to try and build a contact around red lettered holidays for her to travel to see the children. To be careful about a, full summers away, a, that tends to prioritize the children's relationships with parents over their children's integration and development of skills and involvements in the community.

A lot of kids a, when they, as they get older they have more and more involvements which they have to sacrifice. And a, here we have a number of daughters who it will be particularly important for them to have a, opportunities to build skills and value themselves in a, in various areas of their interests.

Sometimes a, when we create parent time arrangements in the summer we still make the kids make all the sacrifices. And I would, I discourage people from doing that a, because of the, in the name of their relationship with parents.

Q. So, so you don't recommend that we engage in a

situation go down to Las Vegas for the entire summer, is that--

A. I do not.

Q. -- what I you saying?

What, what do you recommend for these children in terms of parent time during the summer?

A. I'd say half the summer and a, and try and build more frequent parent time throughout the year for frequent regularity of contact. Take advantage of red letter holidays. Encourage the kids to stay a, up in school, perform well in school so that they can be withdrawn from school to expand time. Support the kids in their education in both homes a, so that when they do leave a, for periods of time their education will be supported. And a, confer regularly with teachers a, to make sure work is in, and be, for both parents to be really involved with the schools.

Q. Okay. Would you also recommend that for this, this summer that's just beginning?

A. Well, I would. The other problem that occurs when a, when we, with... The problem with visitation generally is it creates artificial experiences. We, we often create a parent nonparent phenomenon where the kids come to idealize a parent in a nonparental role. This is what it would be like if I lived here, we would be having fun, it would be in the summer, I'm not stressed, I'm not

in school a, and my parents are not working, we're maximizing our time together, we're having a lot of fun, so on and so forth. But the reality of it is if there was a flipflop thing they would experience that parent and themselves under the stress of school, following through with homework, and the parent having to a, take time with them during work time. And so those issues a, are dangerous for creating in children an artificial understanding of real families.

Q. I notice on page 29 of your, this is in the actual a, recommendation itself, you indicate that you recommend the children spend the entire period to commence the day after Father's Day until the children return to Utah, or I guess the start of the school year, that they spend that with their mother. Is that correct? Is that what your recommendation is?

A. Yes.

Q. Why did you, why did you set it up that way? Why, why do you think that's better for the children? Or is that just an arbitration designation on your part?

A. I think they're young enough now to do it. But it creates a discomfort that it's a pattern that's established permanently a, that as they, as they become teens, a, that it's, it's really sacrificial a, to, to create schedules like the one that's proposed here.

Q. That it is or is not sacrificial?

A. It is sacrificial in the long-term to have the full summer with, in one environment away from friends. It's disintegrating.

Q. I understand that. I'm just, I'm asking, you set up, you recommend a specific schedule for the summer where the father would have the children until the day after Father's Day and then they go down to Las Vegas to be with the mother. Do you see where I'm reading--

A. Uh-huh (affirmative).

Q. -- on page 29?

A. That, that gives a slightly briefer period with the father a, in that summer.

Q. And would you recommend that that be, that that period be the same every single year that a, that we not have a, a flexible summer schedule but that the children have that same schedule every year?

A. I don't like those kind of schedules because a, they ignore the children's a, needs and wants and changes to the family in terms of making it permanent. But I understand the need a, and the requirement of them in order to come back to court to modify a schedule.

Q. Well, do you think it would minimize conflict between the parties if there was a fixed schedule for summer visitation?

A. By all means it would, yes.

Q. Would, would that outweigh the flexibility in this case?

A. Yes. I don't want to organize them into conflict. I... At the same time I, I would make an appeal to them to, to listen to their kids and, and their kids needs with respect to things.

THE JUDGE: Counsel, we're at a time to take a break. Why don't... Let's take a break, you can assess where you are then wrap it up and Mr. Clark can cross after a 10 minute break.

(Recess)

THE JUDGE: Please be seated.

MR. BLACK: I'll go retrieve him.

THE JUDGE: Thanks. Go ahead.

Q. (MR. BLACK:) We were discussing I think before we left a, the summer parent time that you would recommend for the children in this case. And a, I think it was, correct me if I'm wrong, but I think it was your recommendation that the children spend a, the summer until the day after Father's Day with their father in Utah. Is that correct?

A. (THE WITNESS:) That's correct.

Q. And then that they go with their mother after that for the rest of the summer?

A. Yes.

Q. At the end of the summer what would be your recommendation regarding when the children should be returned? The day before school? The week before school?

A. A week before school, at least a few days before school so that a, they can sort of... It's a good idea to get back in time for them to go into the school, meet their teachers. Usually the school calendar gives that day a, identifies that day. That would be the date I would have them at least the day before that day that they go to school to meet the teachers and--

Q. Okay. And, and you also had said in, in your recommendation that a, Robert would, should be permitted to schedule two consecutive uninterrupted weeks of parent time with the children each summer. Is that correct?

I guess, I guess my question in that regard is a, do you anticipate that the court would have interrupted parent time from the beginning of summer until Father's Day or not?

A. Well, and it would be difficult to do a, and meet the requirements of this statement actually. Because a, if the children were to go after, after Father's Day then they will not have been out of school for a full a, two... Okay.

Q. I guess, I guess--

A. No.

Q. -- my confusion is--

A. I was thinking four. I was thinking in terms of statute. So no, that's consistent. They would have two consecutive uninterrupted weeks of parent time--

Q. In addition to that first half of the summer or as part of that first half of the summer?

A. I think a, as part of that first half that that time would be uninterrupted time.

Q. Okay. So that entire time would be uninterrupted?

A. Yes.

Q. What about Mother's Day?

A. Mother's Day--

Q. Oh, that would be before the end of the summer.

A. -- typically takes place in May.

Q. My mistake.

A. Right.

Q. Okay. So you don't and anticipate there will by interruptions during that first half of the summer--

A. No.

Q. -- for the mother to come visit?

A. No. And I don't anticipate, I mean, I believe that a, I believe the kids would handle the schedule pretty well of, of what would basically amount to four weeks, close to four weeks with Dad of summer parent time. Of course,

this year it would have only been three, about three. And a, and then the remainder with, with the mother would be another seven weeks. I think they'll handle seven, seven weeks without parent time a, away from Mr. Father is fine.

Q. Okay. Do you... Specifically holidays I noticed on page 28 you, you indicated certain holidays that a, and your division of holidays.

Have you followed the standard a, out-of-state parent schedule for those holidays that you've specified or have you deviated somewhat from those?

A. Well, I attempted to persuade the legislature this past legislative session to fix the holidays and rather than rotating them so that a, because they can be rather equally distributed for parents.

So that's what you have here is a fixing of the holidays a, in accordance with, you know, to, so they wouldn't have to a, rotate them. And it's rather arbitrary with the exception of how complimentary they are to one another.

Q. And, and the reason, just for the court's sake, what reason would you give for deviating from the standard schedule in this case?

A. Predictability, long-term scheduling and longevity. The longevity of fixed holidays allows parents a, to have holidays you're always going to have. And when

Exhibit "B"

LAW OFFICE OF JAMES G. CLARK

ATTORNEY AND COUNSELOR AT LAW

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March 19, 2009

Honorable James R. Taylor
Fourth Judicial Center
125 North 100 West
Provo, Utah 84601

Re: Grindstaff v. Grindstaff, 4th District Civil No. 064402197

Your Honor,

Your research clerk called and asked if we had any objections to the Documents prepared by Mr. Black. Rather than filing post judgment motions or proceedings after the documents are signed, we are providing our objections herewith.

I thank you for the opportunity to attempt to resolve these issues before the final Orders are entered in this case.

Sincerely,

JAMES G. CLARK
Attorney at Law

enclosure
cc: Attorney Guy Black

JGC/

JAMES G. CLARK, USB #3637
Attorney for Petitioner
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Provo, UT 84606
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Facsimile: (801) 375-1172

IN THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR UTAH COUNTY, STATE OF UTAH

OLGA LUCIA GRINDSTAFF Petitioner, vs. ROBERT LEE GRINDSTAFF, Respondent.	**OBJECTION TO RESPONDENT'S PROPOSED ORDER** Civil No. 064402197 Judge Taylor

COMES NOW the Petitioner, by and through counsel James G. Clark, and hereby objects to the Proposed Order prepared by the Respondent in connection with the Trial and the Hearing heard on or about January 30, 2009. Petitioner provides the following objections.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Paragraph 2 Respondent refers to the Petitioner (Olga Grindstaff) as "hereinafter Mr. Grindstaff." See Paragraph 2.

2. Mr. Grindstaff has not remarried as of the time of the trial, also an apparent drafting error in paragraph 2.

3. Paragraph 3 lists the Petitioner as "(hereinafter "Mrs. Bradley")." This is correct, but does not track with the case heading and style, which lists the Petitioner as Olga Lucia Grindstaff.

4. On page 3, line 1, the word "that" should be "than."

5. Paragraph 14 imputes income to Olga based on the average of her last two years gross reported income "which is, for child support purposes, 623.04 per month." Her income for 2006 was 6619.80 and for 2007 was 6333.10 per paragraph 13. The average is therefore 6476.45 / 12 = $539.70 per month (call it $540).

6. Paragraph 15 is still incorrect. Olga has three children living at home with her, an adult daughter and 14 year old son from a prior relationship, and an infant child from her present marriage. The second sentence references "another child petitioner had from a prior relationship..." This creates the impression that Juan, the 14 year old child, does not reside with his mother. He does.

7. The calculations of Paragraph 18 are incorrect, as per paragraph 14's incorrect figures. The present family credit should be $33.00.

8. Total family income in Paragraph 19 should be $3,283.00

9. Per Paragraph 19, child support under the standard tables would be $165.00, but Olga's income falls into the low income tables of §78B-12-302, resulting in a child support obligation of $30 / month, per the statutory and administrative guidelines of section 302.

10. Paragraph 21 adopts Dr. Jensen's recommendations for Parent time "for the most part," but the court expressly has rejected both the joint custody recommendation and the parent time recommendation which was testified to by Dr. Jensen.

11. The specific Order of the Court failed to adopt the parent time statutes set forth in Utah Code §30-3-35 and §30-3-37. Section 30-3-34 sets forth a presumption: "The advisory guidelines as provided in Section 30-3-33 and the parent-time schedule as provided in Sections

30-3-35 and 30-3-35.5 shall be presumed to be in the best interests of the child." While presumptions can be rebutted, the proposed findings fail to adopt a factual analysis to reject the statutory presumption.

CONCLUSIONS OF LAW

12. The conclusions of law should likewise be amended in paragraph 19 to provide for statutory support in the amount of $30 per month.

13. Paragraph 22 imposes the cost and obligation of transporting the children for parent time purposes on the mother, Petitioner. However, the findings of fact do not specify that the factors of §30-3-37(4)(a) - (d), which are required findings by the Court.

FINAL ORDER

1. The final Order contains a provision in paragraph 15 that Olga is entitled to parent time with the children if she is in Utah "assuming it does not interfere with Mr. Grindstaff's time with the children. This provision is ambiguous and is not supported by the Findings of Fact and Conclusions of Law set forth above.

2. The child support amount set forth in Paragraph 20 is not consistent with the statutory child support guidelines, as set forth above.

DATED AND SIGNED this 19TH day of March, 2009.

JAMES G. CLARK
Attorney for Olga Grindstaff

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the above and foregoing document as follows:

__✓__ mailed a true and correct copy of the foregoing first class postage prepaid and addressed as follows; or

___ hand-delivered to the following: or

__✓__ sent by facsimile to the following:

GUY L. BLACK
1840 N. State Street, Ste 200
Provo, UT 84604

DATED AND SIGNED this 19TH day of March, 2009.

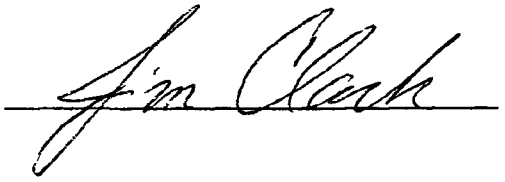

Exhibit “C”

GUY L. BLACK, No. 6182
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Attorneys for Respondent
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Facsimile (801) 377-4673

ORIGINAL

**IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH**

OLGA LUCIA GRINDSTAFF

Petitioner,

vs.

ROBERT LEE GRINDSTAFF,

Respondent.

AMENDED ORDER ON MOTION FOR TEMPORARY ORDERS

Civil No 064402197

Judge: Taylor
Commissioner. Patton

This matter came before the Court, Commissioner Thomas Patton presiding, on November 30, 2009. Petitioner was present and represented by counsel, James G. Clark. Respondent was present and represented by counsel, Guy L. Black The parties reached an agreement regarding the Motion in this matter. The parties' agreement was stated by counsel on the record, and each party consented on the record Based upon the parties' agreement, and good cause appearing, it is HEREBY ORDERED AS FOLLOWS:

1. Respondent, Robert Lee Grindstaff, shall retain physical and legal custody of the parties' minor children.

2. Except as otherwise set forth in this order, Petitioner, Olga Lucia Bradley, shall be

entitled to parent time with the parties' minor children in accordance with Section 30-3-35, Utah Code Annotated.

3. The Petitioner may participate in the children's school activities and functions, provided she does so appropriately and without interference with the children's education or activities.

4. For the next sixty (60) days, from November 30, 2009 through January 31, 2010, the Petitioner's parent-time shall be altered somewhat, as follows:

a. During that sixty-day period, in lieu of Petitioner's midweek visit, the Petitioner shall have the children on Tuesday, Wednesday. and Thursday evening from the time the children are dropped off at the Petitioner's house, as specified in paragraph 4.c., infra, until 8:00 p.m.

b. During that sixty-day period, Petitioner shall deliver the children to Respondent's home ward for church services at the beginning of those services, and shall retrieve the children from Respondent's home ward at the end of those services. The children shall attend church services in Respondent's home ward every Sunday.

c. The parties' children participate in an after-school program each day after school. Notwithstanding the foregoing parent-time schedule, Petitioner's parent time shall commence only after all of the children have finished their after-school program. If all of the children have finished the after-school program by 4:00 p.m., then the Respondent shall deliver the children to Petitioner's home at that

time. If the children have not all finished the after-school program by 4:00 p.m., then the Respondent shall deliver the children to the Petitioner's home after all the children are finished at 5:30 p.m During Petitioner's midweek visit(s), Petitioner shall return the children to Respondent's home at 8:00 p.m. During other visits, Petitioner shall return the children to Respondent's home at the time specified in Section 30-3-35, Utah Code Annotated.

5. Unless the parties agree otherwise in writing, beginning January 31, 2010 the provisions of paragraph 4 of this order shall no longer apply, and the additional midweek visits and Sunday church attendance shall automatically cease. Thereafter, Petitioner will have to elect the pick-up time and day as set forth in Utah Code §30-3-35(2)(a), et seq.

6. The parties shall participate in mediation. Petitioner's attorney shall attempt to schedule mediation through the Utah Court of Appeals. If he is unable to obtain the Court of Appeals' services for mediation, then mediation shall be conducted by Sandra Dredge, unless the parties agree on the use of some other mediator.

DATED this 14th day of April, 2010.

BY THE COURT:

DISTRICT COURT JUDGE

Recommended by:

THOMAS PATTON
District Court Commissioner

Approved as to form:

JAMES G. CLARK
Attorney for Petitioner