

1998

Heidi Alloway v. Kurt Alloway : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Alloway v. Alloway*, No. 981537 (Utah Court of Appeals, 1998).
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IN AND FOR THE STATE OF UTAH

Respondent/Appellee

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Priority 15

**AN APPEAL FROM A FINAL DECISION OF THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR TOOELE COUNTY, STATE OF UTAH
DATED AND ENTERED AUGUST 4, 1998
THE HONORABLE JUDGE LEE A. DEVER**

REPLY BRIEF OF APPELLANT

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FILED

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COURT OF APPEALS

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TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	ii
Summary of Argument.....	1
Argument.....	1
I. Heidi Properly Marshalled the Facts.....	1
II. The Trial Court Abused its Discretion in Awarding the Parties Joint Legal and Physical Custody Based on their Capacity to Execute Such a Custodial Arrangement where the Court Admitted the Parties are unable To Get Along and Should Not Even Speak to Each Other.....	2
Findings Are Clearly Erroneouos.....	5
III. The Trial Court Did Not Abuse its Discretion in Its Division of Property.....	9
IV. Heidi is Entitled to Attorney Fees on Appeal.....	11
Conclusion.....	11
Mailing Certificate.....	12
Appendix A	

TABLE OF AUTHORITIES

Utah Code Annotated

Section 30-3-10.2.....	3
------------------------	---

Utah Code of Judicial Administration

Rule 4-903.....	3
-----------------	---

Utah Supreme Court

Utah Court of Appeals

<u>Bell v. Bell</u> , 810 P.2d 489, 494 (1991).....	11
<u>Deeben v. Deeben</u> , 772 P.2d 972, 973 (1989).....	2
<u>Enrody v. Enrody</u> , 914 P.2d 1166 (1996).....	9
<u>Marchant v. Marchant</u> , 743 P.2d 199 (1987).....	5
<u>Marshall v. Marshall</u> , 915 P.2d 508 (1996).....	11
<u>Naranjo v. Naranjo</u> , 751 P.2d 1144, 1146 (1988).....	9
<u>Tucker v. Tucker</u> , 881 P.2d 948, 952 (1994).....	3
<u>Walters v. Walters</u> , 812 P.2d 64, 66 (1991).....	10

SUMMARY OF ARGUMENT

The Court abused its discretion in awarding the parties joint legal and joint physical custody of the minor children. Dr. Stewart performed a custody evaluation and testified before the Court that Heidi should be awarded sole custody. The Court clearly recognized that the parties are incapable of getting along and should not communicate with each other at all. Nonetheless, the Court made a finding that the parties are capable of executing joint legal and physical custody and so ordered.

The trial Court abused its discretion in awarding relief to Kurt where such relief was never pled or even requested. The relief granted was prejudicial to Heidi.

ARGUMENT

I. HEIDI PROPERLY MARSHALED THE FACTS.

Heidi properly marshaled the facts in her opening brief. In fact, the Appellee, prior to setting forth its argument that Heidi has failed to marshal the facts, specifically states, "The Appellee, Kurt Alloway, does not challenge the rendition of facts and procedural history as outlined in the Appellant's brief. And while Heidi's brief does, in fact, list much of the evidence presented in support of the Court's ruling, it is minimized."

Appellee should not be permitted to argue that Heidi has failed to marshal the evidence while at the same time stating that she has in fact done so.¹

II. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING THE PARTIES JOINT LEGAL AND PHYSICAL CUSTODY BASED ON THEIR CAPACITY TO EXECUTE SUCH A CUSTODIAL ARRANGEMENT WHERE THE COURT ADMITTED THE PARTIES ARE UNABLE TO GET ALONG AND SHOULD NOT EVEN SPEAK TO EACH OTHER.

The trial court abused its discretion in awarding these parties joint legal and physical custody of the minor children. This abuse of discretion arises from the clear unrefuted evidence that Heidi should be awarded sole custody of the minor children and the Court's own admission that the parties are not capable of getting along. The Court specifically stated that these parties should not even talk to each other. While trial courts are given broad discretion in child custody matters and their determinations will not be disturbed upon appeal so long as they are consistent with the standards set by appellate courts and are supported by findings of fact and conclusions of law. Deeben v. Deeben, 772 P.2d 972, 973 (Utah App. 1989), Heidi believes that the trial court's conclusion that

Heidi has attached hereto as Appendix "A" a fact statement augmenting her prior statement of facts in the format of (a) Challenged Finding; (B) Facts in Support; and (C) Facts Contravening in an effort to clarify the materials which she has previously submitted to this Court in her opening brief.

the parties were "capable" of implementing joint legal custody is a legal conclusion to which this Court should give no deference.

In the instant case, the trial court abused its discretion in awarding joint legal and physical custody of the children to the parties. The trial court failed to follow the requirements of the statute. Further, the trial court failed to make the required nexus between its conclusory findings and the factual basis upon which it reached those conclusions.

The trial court abused its discretion in awarding the parties joint legal and joint physical custody of the minor children because it misapplied the law. Section 30-3-10.2, Utah Code Annotated requires the Court to consider specific factors prior to awarding joint legal custody of the children to the parties. In making its findings, the Court clearly made some findings regarding the factors set forth in Rule 4-903. (R. 853-857). However, it did not make findings regarding the factors as set forth in 30-3-10.2, Utah Code Annotated (1953 as amended). The Court specifically made a finding that joint legal custody was in the best interest of the children but without providing any nexus or rationale for why it was in the children's best interest. (R. 854). This is an abuse of discretion. Tucker v. Tucker, 881 P.2d 948, 952 (Utah App. 1994).

The Court's finding that the parties are capable of implementing joint legal custody is so clearly against the weight of the evidence that it is an abuse of discretion. The Court found that both parties have significant emotional and psychological problems that interfered with their ability to function as parents. (R. 855). The Court found that Kurt has significant problems with anger management as it relates to Heidi. (R. 855). The Court found that Heidi has anger management problems as it relates to Kurt. (R. 854). The made findings that Heidi would not alienate the children's affection toward Kurt but failed to find that Kurt had engaged in a pattern of conduct designed to ruin Heidi's reputation and that he preferred his child in foster care to Heidi's care. (R. 927 L.16-23; R. 1207 L. 20-25; and R. 1469 L 1-10). The Court found that Heidi had the ability to set limits for the children but without making any finding about Kurt's ability despite testimony that he lacked such an ability. (R. 909 L 17-22). Finally, and perhaps most importantly, the Court specifically noted that these parties cannot get along without judicial intervention and should not even speak to each other. (R. 1528 L. 10-16; R 1546 L. 20-22; r. 1546 l. 25 to 1547 L. 21; R. 1549 L. 1-7; R. 1552 L. 12-15; R. 1553 L. 12-17; R. 1550 L. 25 to 1551 L. 4). The Court's findings that the parties were capable of implementing joint legal custody is an abuse of discretion and an erroneous legal

conclusion.

Findings are Clearly Erroneous

This Court should reverse the findings of fact and conclusions of law reached by the trial court on the issue of custody because when all of the facts are marshalled in favor of those findings, the conclusions drawn therefrom are clearly erroneous Marchant v. Marchant, 743 P 2d 199 (Utah App 1987) This court should reverse the custody award of the trial court and grant Heidi sole custody

The trial court found that it was in the best interest of the minor children that the parties be awarded joint legal and physical custody of the minor children As stated above, these findings were an abuse of discretion Moreover, the clear weight of the evidence presented reveals that Heidi should be awarded sole legal and physical custody of the minor children. Heidi has marshalled all of the evidence which supports both the findings of the trial court and the reason those are clearly erroneous in the Factual History of this brief

The expert testimony in this case was presented by Dr Elizabeth Stewart, Dr Donald Strassberg, Jane Bebb, LCSW, and reports from Brad Peck, a clinical psychologist. Dr Stewart interviewed both parties, reviewed voluminous documentation

mostly submitted by Kurt, interviewed Brad Peck who counseled Kaio and Kurt, and interviewed friends, family members and persons who submitted various affidavits in support of the parties (R 906 L 15-18) She performed her evaluation in accordance with the statutory requirements (R 906 L 18-21) Her conclusion was that Heidi should be awarded sole legal and physical custody (R 906 L 2-14) Dr Stewart found that Heidi had been the primary care giver (R 915 L 2-R 916 L 3), set appropriate limits, loved both children equally, was the parent most likely to foster a positive relationship with the other parent, and was the parent with the best parenting skills Mr Peck reported that Kaio had problems with social skills, an inability to control his aggression and that Kurt failed to follow counseling advice and set appropriate limits for Kaio (R. 910 L 1- R 911 L 22, R 909 L 17-22) Jane Bebb, an LCSW who counseled Kurt stated he was obsessive and compulsive but believed that he was making improvements in his intensity control and parenting of Kaio (R 906 L 10-13) She stated that she had no reason to question the conclusions reached by Dr Stewart in her evaluation (R 964 L 13-15) Finally, Dr Strassberg testified that Dr Stewart's interpretation of the MMPI II "over-pathologized" Kurt but that he did not have an opinion on the ultimate issue of custody presented before the Court and he had not met or interviewed Heidi (R 1221 L

4-20 and L. 1229 L 1-3). Interestingly, Dr. Strassberg's testimony and conduct is almost identical to that in Tucker v. Tucker, 881 P.2d 948 (Utah App. 1994). Thus, the only expert testimony before the Court by an expert who had contact with both parties and the children was Dr. Stewart who recommended to the Court Heidi be awarded sole legal and physical custody of the children.

Kurt put on a number of lay witnesses which supported his position. These witnesses testified that Kurt was compassionate (R. 1044 L. 18-22; R. 1106 L. 10-16), had the ability to set limits (R. 1049 L. 2, 13-16; R. 1058 L. 11-15; R. 1110 L. 10-150, loved Kaio and Saige (R. 1012 L. 23-R. 1013 L. 4; R. 1057 L 12-15; R. 1110 L. 3-6), was bonded to both, was involved in their lives, Kurt has strong family support with which family Kaio is bonded (R. 1191 L. 12-17). These witnesses were two aunts, his mother, a cousin and a long time friend. Kurt additionally testified on his behalf stating not only the foregoing, but also that Heidi was a negligent parent (R. 1394 L. 12-16; R. 1400 L 7-22; and R. 1417 L. 2-18), who was erratic (R. 1395 L. 18-25 ad R. 1416 L. 17) and incapable of properly caring for his children, in part because of her polygamist background (R. 1413, L. 11-20 and R. 1443 L. 12-20). Most of Kurt's witnesses admitted on cross examination that they had very little contact with Heidi (R. 955 L 1-6; R. 1229

L 8-10, and R 1267 L 23-24) and spent very little time with them prior to separation to observe the parties' respective care of Kaio (R 1121 L 9-11, R 1192 L 15-25, and R 1193 L 11- R 1194 L 2)

In contrast, Heidi had very few witnesses testify Donna Abe, a long time friend testified that she observed both parties with the minor child, (R 885 L 22-23), Heidi was the primary care provider for Kaio during the parties marriage (R 885 L 19 and R 887 L 6-13), that Kurt's relationship with Kaio was through Heidi (R 888 L 1-12), Kurt was violent toward Heidi, and that he did not want their second child (R 893 L 13-17)

As noted above, Dr Stewart testified that Heidi should be awarded sole legal and physical custody which recommendation came following a complete custody evaluation There was no expert evidence which refuted this recommendation

Heidi testified that her relationship with Kurt was abusive (R 1286 L 14-16, R 1296 L 20-21, and R 1310 L 1-6) She denied having any interest in polygamy (R 1386 L 19-25) She stated she was the primary care provider for both children (R 1316 L 5-16) She testified that she worked at home and could provide personal care for the children She stated she never disparaged Kurt to third parties in the presence of the children She supported the children's right to maintain a relationship with their father

(R. 1377 L. 14-21).

It is clear that upon marshalling all of the evidence in favor of the findings reached by the trial court, they are clearly erroneous. The Court failed to make sufficient findings. Moreover, where it did make findings, the clear weight of the evidence preponderates against the finding reached. This court should reverse the trial court and award sole physical and legal custody of the children to Heidi.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS DIVISION OF PROPERTY.

The trial court did not abuse its discretion in the manner in which it divided the parties property. Once a trial court has made a property division, it will only be set aside upon a showing of abuse of discretion. Enrody v. Enrody, 914 P.2d 1166 (Utah App. 1996). "There is no fixed formula upon which to determine a division of properties in a divorce action[;] the trial court has considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity." Naranjo v. Naranjo, 751 P.2d 1144, 1146 (Utah App. 1988) (citations omitted). In dividing marital property, the trial court should consider the following:

the amount and kind of property to be divided, the source of the property, the parties' health, the parties' standard of living and respective financial conditions,

their needs and earning capacities, the duration of the marriage, what the parties gave up by the marriage, and the relationship the property division has with the amount of alimony awarded.

Id. at 1147-48. "This court will not disturb the trial court's decision [concerning property division] unless it is clearly unjust or a clear abuse of discretion." Walters v. Walters, 812 P.2d 64, 66 (Utah App. 1991), cert. denied, 836 P.2d 1383 (Utah 1993).

Kurt objects to two specific findings regarding the division of property. Specifically, Kurt objects to the order that he pay Heidi \$1,500.00 for a portion of the value of an automobile (R. 847) and pay the parties VISA bill in the amount of \$3,400.00 (R. 847). He does so especially in light of the prior order that he pay for the custody evaluation performed by Dr. Stewart. Finally, Kurt argues as set forth below, that he should not have been obligated to pay any of Heidi's attorney fees.

First, it is noteworthy that the Court did not award alimony in the instant action. Moreover, the Court specifically found that parties had been married for five years. (R. 857). Kurt was awarded the parties' real property. (R. 847). The Court found that Kurt had an earning capacity of \$2,605.00 per month while Heidi earned only \$1,700.00 per month. (R. 850). The totality of the circumstances reveal that the Court did not abuse its discretion in the manner in which it awarded the assets of the marriage. Finally, it is

clear that Kurt has failed to overcome the presumption of validity of the trial Court's division of assets and marital obligations. There is no basis for this Court setting aside or otherwise modifying the trial court's award of property or attorney fees.

IV. HEIDI IS ENTITLED TO ATTORNEY FEES ON APPEAL.


The trial court awarded Heidi attorney fees below. R. 863. Heidi is entitled to attorney fees on appeal. Marshall v. Marshall, 915 P.2d 508 (Utah App. 1996) citing to Bell v. Bell, 810 P.2d 489, 494 (Utah App. 1991). Thus, Heidi believes that she should be awarded her attorney fees for this appeal in an amount to be proffered by affidavit from counsel.

CONCLUSION

The trial court abused its discretion in awarding the parties joint legal and physical custody. The trial court failed to make relevant findings as required by the Utah Code. The Trial Court failed to make function related factor findings as required by the case law of this jurisdiction. Finally, the weight of the evidence preponderates against the findings which the Trial Court did make. This court should reverse the decision of the trial court and award sole legal and physical custody of the minor children to Heidi. The trial court **abused** its discretion in awarding joint legal custody and joint physical custody where it

had neither been requested nor pled. The trial court properly divided the parties property and obligations. Finally, Heidi is entitled to her attorneys fees on appeal.

DATED this 15 day of October, 1999.

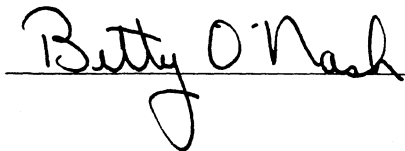

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CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing Reply Brief was mailed postage prepaid on this 15 day of October, 1999, to:

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ADDENDUM A

Challenged Conclusions, Supporting Facts and Contravening Facts

CHALLENGED CONCLUSION:

"After a review of the factors outlined by the statute and case law, the Court determines that it is in the best interest of the children to have joint legal custody awarded and that the parents are capable of implementing joint legal custody. The term "capable" is not defined by statute. The court notes that both parties are educated and intelligent adults. "Capable" is not synonymous with "desiring." The Plaintiff may not "desire" or want joint legal custody, but the parties are "capable" of implementing joint legal custody. In deciding custody, the Court has attempted to maximize the strengths of each parent." (R. 850-51).

MARSHALLED FACTS SUPPORTING CONCLUSION:

1. At the time of the filing for divorce, there was one child born, Kaio, born March 21, 1994. A second child, Saige, was expected at the time of filing and born January 5, 1997. R. 1-9.
2. Dr. Elizabeth Stewart testified that she performed a custody evaluation.
3. Dr. Elizabeth Stewart testified that:
 - a. Dr. Stewart considered the statutory requirements in performing the evaluation in this case (R. 905 L. 18-21);
 - b. Therapist Brad Peck reported to Dr. Stewart that while both parents were attentive to the children;

- c. The Director of Building Blocks for Life described Kaio as a normal healthy child who runs, jumps, hugs and kisses both Heidi and Kurt when they come to pick him up;
 - d. Kurt was attentive to Kaio during the time Kaio was actually in his physical care (R. 936 L. 23 to 937 L. 1);
- 4. Jane Bebb, Kurt's therapist testified. R. 945.
- 5. Jane Bebb testified that
 - a. Kurt made progress in anger management therapy (R. 954 L. 11-14);
 - b. She had no basis to challenge the conclusions of Dr. Stewart in the custody evaluation (R. 964 L. 13-15);
 - c. However she believed the evaluation was biased against Kurt (R. 965 L. 2-7);
 - d. Kurt had strength of character (R. 965 L. 17-20);
- 6. Noi Hone testified as follows:
 - a. Heidi was a polygamist (R. 988 L. 2-4);
 - b. in polygamist society's the woman is responsible for the care of the children and the home (R. 999 L. 16-19);

- c. During the week she stayed with Kurt and Kaio, Kaio seemed happy and Kurt appeared loving (R. 1012 L. 23 to R. 1013 L. 4)
- 7. Joan Knipple Paine testified as follows:
 - a. On one occasion when Kaio awoke, Heidi yelled at him to go back to sleep (R. 1019 L. 7-14);
 - b. Kurt on one occasion was concerned about Kaio's health (R. 1020 L. 3-12);
- 8. Patricia Holden, Kurt's aunt, testified as follows:
 - a. Kurt possessed both integrity and honesty (R. 1044 L. 15-17);
 - b. Kurt does not have a temper and is compassionate (R. 1044 L. 18-22; 22);
 - c. While she did not see it, she had been told that Heidi put cayenne pepper in Kaio's mouth when he was a baby so tha he would learn to not cry (R. 1047 L. 16-17);
 - d. Kurt was a wonderful father who set appropriate limits and expectations for Kaio (R. 1049 L. 2; 13-16).
- 9. Betty Thomas, Kurt's aunt, testified as follows:
 - a. Kurt is devoted to Kaio (R. 1053 L. 3);

- b. Kurt is very dedicated and concerned about children (R. 1053 L. 25);
 - c. she had no fears about Kurt's ability to discipline or set appropriate limites for his son (R. 1054 L. 2-7).
10. Betty Grizzle, Kurt's cousin, testified as follows:
- a. Kurt provides personal care for Saige during his visits (R. 1056 L 8-11);
 - b. Kurt is very good with Saige and she is comfortable with him (R. 1056 L. 16-17);
 - c. There is a bond established between Kurt and Saige (R. 1057 L. 12-15);
 - d. Kurt and Kaio are bonded (R. 1058 L. 6-8);
 - e. Kurt is capable of setting limits for Kaio (R. 1058 L. 11-15);
 - f. Kurt is extremely patient with children (R. 1059 L. 4);
 - g. Kaio is flourishing in Kurt's care (R. 1059 L. 14-17);
 - h. Kaio is healthy, well fed, well rested, clean and properly dressed (R. 1059 L. 19-23); and
 - i. When Saige comes to visit for periods of not more than two hours, she does so without provisions for diapers or bottles (R. 1060 L. 6-9).
11. Daryl Mecham, Kurt's friend, testified as follows:

- a. Kurt is compassionate, caring and goal oriented (R. 1106 L. 10-16);
- b. Kaio is appropriately disciplined by Kurt (R. 1109 L. 4-9);
- c. Kurt sets limits for Kaio which are age appropriate (R. 1110 L. 10-15);
- d. Kurt and Kaio love each other (R. 1110 3-6); and
- e. Kurt's desire for custody of Saige arose after a DNA test confirming his paternity (R. 1111 L. 20-23).

12. John McCartney, Kurt's Pastor at the First Baptist Church testified as follows:

- a. Kurt regularly attends church (R. 1120 L. 12-15);
- b. He observed Kurt in Kurt's home with Kaio only twice (R. 1121 L. 9-11);
- c. Kurt's home was clean and safe (R. 1121 L. 17-19);
- d. Kurt and Kaio appear bonded (R. 1121 L. 20-25);
- e. Kurt is sincere in his concern for his son (R. 1124 L. 8-11);
- f. Kurt's is concerned about Saige but his concern for Kaio takes precedence (R. 1125 L. 10-19);
- g. Heidi shared some concerns about Kaio and Kurt with him but he was unable to verify those concerns (R. 1123 L. 12-22);
- h. He has no concerns about Kurt's ability to parent Kaio (R. 1129 L. 13-18);

- i. He has no concerns about Heidi's ability to parent both children (R. 1143 L. 5-14);

13. Ann Alloway, Kurt's mother, testified as follows:

- a. On one occasion prior to the parties separation, Kaio, Kurt and Heidi visited the homestead and Kaio was ill dressed for the weather (R. 1176 L. 2-10);
- b. At the time of the parties separation, Kaio was very quiet and chewed his fingernails (R. 1178 L. 14-17);
- c. Once he was placed in his father's custody, Kaio stopped chewing his fingernails (R. 1179 L 1-2);
- d. Kurt thinks that his child should come first (R. 1179 L. 14-16);
- e. She denied performing **personal** care for Kaio on the weekends and that Kurt maintains control over Kaio on weekends at the ranch (R. 1180 L. 9-15; 22-25);
- f. She has no fears that Kurt would not set appropriate limits for Kaio and Saige (R. 7-11);
- g. Kurt told her that Kaio was very secure with him and that he reads to him

nightly (R. 1182 L. 20-25);

- h. Kurt is bonded with Saige and Kaio (R. 1185 L. 12-19);
- i. She has no animosity toward Heidi simply worried about her as a mother because she thought Heidi did not always pay attention to Kaio (R. 1186 L.5-19);
- j. She believes her extended family is close including Kaio and Saige (R. 1191 L. 12-17);
- k. She did not believe that Kaio and Saige would have a similarly close support group from Heidi's family (R. 1192 L. 5-9);
- l. She had never seen Kaio behave in a destructive manner (R. 1205 L. 14-17);
- m. Everytime Kaio says something about his what his mother says, he spits (R. 1206 L. 7-8).

14. Dr. Donald Stephen Strassberg, with the Department of Psychology at the University of Utah testified as follows:

- a. Dr. Strassberg reviewed Dr. Stewart's MMPI II evaluation of Kurt (R. 1212 L. 11-14);

- b. Dr. Strassberg concluded that Kurt responded honestly to the questions asked by Dr. Stewart (R.1214 L. 4-8);
- c. Dr. Strassberg concluded that all of the scores were within the range of normal limits (R. 1214 L. 12-14);
- d. Dr. Strassberg concluded that Dr. Stewart misapplied the results of the MMPI II to find that Kurt harbored grudges, is suspicious, mistrusts others, and blames others for his problems (R. 1221 L. 4-20);
- e. Dr. Strassberg testified that he had experience in custody evaluations and that he might minimize the significance of psychological testing results if other evidence contradicted those results (R. 1224 L. 16 to R. 1225 L. 5);
- f. Dr. Strassberg specifically stated that he was not attempting to present an opinion regarding the custody of the children or which parent was the most fit (R. 1229 L. 1-3);

15. Frederick Allen Betzold, Jr. testified as follows:

- a. On the evening of approximately August, 1997, he saw Kurt and Kaio when he was working with his horses (R. 1263 L. 5-11);
- b. Kaio was not upset and acted excited about being near the animals and

- acted appropriately (R. 1264 L. 7 to R. 1265 L. 14);
- c. Kaio responds appropriately to Kurt (R. 1266 L. 18-19);
16. Myrl Benson, a long time family friend of Kurt Alloway, testified as follows:
- a. She babysat for Kaio every other Wednesday while Kurt went to parenting classes (R. 1270 L. 14-16);
- b. she has not noticed any major anxiety disorders with Kaio (R. 1271 L. 4-7);
- c. Kaio does not exhibit abusive behavior (R. 1271 L. 15-17);
- d. Kaio appropriately responds to commands (R. 1271 L. 18-21);
- e. Kurt has set appropriate limits for Kaio and told him no in her presence (R. 1272 L. 5-13);
- f. she has no concerns about Kurt's parenting skills (R. 1272 L. 17-20);
17. Kurt Alloway testified on direct examination as follows:
- a. Kurt testified that he attended all of Kiao's therapy sessions (R. 1392 L. 8-14);
- b. Kurt testified that he had the ability to set limits for Kaio and Saige (R. 1393 L. 5-9);
- c. Kurt testified that he followed the advice of Ms. Bebb (R. 1411 L. 4-10);

- d. Kurt felt that Dr. Stewart's conclusion that his parenting skills were not as good as Heidi's was in error (R. 1412 L. 13-16);
- e. Kurt testified that Heidi's problem as a parent is that she never had a good example and that she was affected by her background (R. 1413 L. 11-20);
- f. Kurt believes that he has a greater concern that his children receive appropriate medical care (R. 1414 L. 1-4);
- g. Kurt worries about the medical treatment the children will receive if he is not awarded custody (R. 1415 L. 19-24);
- h. Kurt testified that Heidi sporadically paid attention to the children (R. 1416 L. 17);
- i. Kurt testified that Heidi leaves hot irons on the floor near Kaio's toys, hot curling irons, and solvents in accessible places (R. 1417 L. 2-18);
- j. Kurt denied ever physically abusing Heidi (R. 1432 L. 23-25);
- k. Kurt testified that he loves Saige and Kaio (R. 1436 L. 17-21);
- l. Kurt stated that Heidi did not provide him with food to feed Saige during his visits with her (R. 1439 L. 8-13);
- m. Kurt denied that he ever abused Kaio or Saige (R/ 1441 L. 21 to R. 1422 L.

1);

- n. Kurt feared Heidi would continue to associate with polygamists (R. 1443 L. 12-14);
- o. Kurt is concerned that Kaio and Saige will be raised in a polygamist environment (R. 1443 L. 15-20);
- p. Kurt testified that he would not object to Heidi having visitation if he were awarded custody of the children (R. 1449 L. 4-9);
- q. Kurt believed that it was important for the noncustodial parent to have a lot of contact with the children (R. 1450 L. 4-7);
- r. Kurt testified that he should be awarded custody because he is a great Dad, can provide the children with a warm and loving home, and he has roots in the area (R. 1505 L. 13-22);
- s. Kurt stated he would like as much visitation as possible with both children at the same time (R. 1506 L. 13-14);

18. Dr. Stewart's custody evaluation was admitted into evidence and included but was not limited to the following:

- a. Child's Preference: While Saige is too young for a preference, Kaio is

emotionally torn;

c. Relative Strength of the Children's Bond with the Parents: Kurt has developed a strong bond with Kaio

Depth and Desire for Custody: Both parents have a long standing desire for custody;

4. Reasons for Having Relinquished Custody in the Past: Neither party has relinquished custody in the past;

5. Religious Compatibility: Kurt has a christian background and was baptised into the Church of Jesus Christ of Latter Day Saints; He considered a polygamist lifestyle; He recently has attended Baptist, Lutheran, and Presbyterian churches;

FACTS CONTRAVENING CONCLUSION:

1. A custody evaluation was performed by Dr. Elizabeth Stewart. See Court record generally.

2. Donna Abe testified at trial as follows:

a. she had been Heidi's friend for approximately five years (R. 885 L. 10-15);

- b. she observed both parties with Kaio (R. 885 L. 22-23);
- c. that Heidi had been the primary caregiver for Kaio fixing his meals, diapering him, taking him to day care, dressed him and put him to bed at night (R. 885 L. 19 and R. 887 L 6-13);
- d. Kurt was distant in his interaction with Kaio preferring such interactions to go through Heidi (R. 888 L. 1-12); and
- e. Kurt expressed displeasure and directed blame at Heidi when she became pregnant with their second child and further stated that he did not want the child (R. 893 L. 13-17).

3. Dr. Elizabeth Stewart testified as follows:

- a. she performed the court ordered custody evaluation (R. 899 L. 11-14);
- b. Heidi submitted 59 pages of documentation in support of her positions in the evaluation while Kurt submitted 679 pages (R. 901 L. 17-22);
- c. Dr. Stewart recommended sole custody of both children be awarded to Heidi subject to standard visitation pursuant to the guidelines for Kurt (R. 906 L. 2-14);
- d. Dr. Stewart spoke with therapists for both Heidi and Kurt (R. 906 L. 15-

18);

e. Therapist Brad Peck reported to Dr. Stewart that while both parents were attentive to the children, Heidi had the ability to be attentive to both Kaio and Saige at the same time whereas Kurt did not have that ability (R. 909 L. 8-12);

g. Kurt had difficulties setting limits whereas Heidi set appropriate limits (R. 909 L. 17-22);

h. Kurt would not listen to Dr. Peck's parenting advice, got angry during counseling and behaved inappropriately (R. 910 L. 1 to R. 911 L. 22);

i. During court ordered therapy Kurt's parenting skills did not improve and Kurt did not have the ability to manage Kaio (R. 912 L. 1-8);

j. Jane Bebb informed Dr. Stewart that Heidi was taping some interactions between herself and Kurt while Kurt was making detailed daily dairy entries (R. 914 L. 13-17);

k. Prior to the parties separation, Heidi was the primary caregiver (R. 915 L. 2 to R. 916 L. 3);

l. The parties had a traditional marriage where Kurt would leave in the morning and return in the evening and Heidi would stay home to care for Kaio and

the home (R. 916 L. 6-19);

m. Heidi had been the exclusive care giver for Saige since her birth (R. 916 L. 20-23);

n. Day care providers reported that Heidi reacted too harshly but not abusively to Kaio's toilet training failures in the day care environment (R. 917 L. 9 to R. 918 L. 10);

o. There were a number of people who filed affidavits in support of Kurt who did so at his request who had very little contact or interaction with Kurt and/or Kaio (R. 918 L. 20 to R. 921 L. 21);

p. Kurt was not involved with Kaio's day care providers prior to the parties' separation (R. 922 L. 3-13);

q. The Director of Building Blocks for Life, Kaio's day care provider, stated that once custody had become joint physical Kaio's attendance at day care became irregular (R. 923 L. 4-19);

r. The Director of Building Blocks for Life described Kaio as a normal healthy child who runs, jumps, hugs and kisses both Heidi and Kurt when they come to pick him up but that he was hard to handle at daycare when he came from

- his father's house because Kurt let's him do whatever he wants (R. 924 L. 2-11);
- s. Building Blocks for Life recommended that Kurt take a parenting and discipline class but Kurt was not interested (R. 924 L. 19-24);
 - t. No day care provider stated that Heidi discussed Kurt with them (R. 925 L. 16-19);
 - u. Kurt's violation of good faith and fair dealing through derogatory comments about Heidi to third parties affected Kaio in that all such third parties were more suspect of Heidi and that such behavior creates an awareness on the child's part of his mother's allegedly bad reputation (R. 926 L. 15-25);
 - v. Kurt engaged in a continual pattern designed to destroy Heidi's reputation (R. 927 L. 16-23);
 - w. Heidi did not speak negatively about Kurt to third parties (R. 927 L. 9-15);
 - x. Kurt was fully aware of and intrigued by Heidi's polygamist background prior to their marriage (R. 928 L. 3-14);
 - y. Kurt fantasized about sexual relations with multiple female partners (R. 930 L. 4 to R. 931 L. 2);
 - z. Kurt's first wife, Jennifer, told her that it would be an injustice to Kaio to

permit Kurt to have custody (R. 933 L. 1-2);

a-1. Dr. Stewart had no concerns about placing custody with Heidi based on her polygamist background (R. 935 L. 2-8);

b-1. After the parties separation and the order of joint physical custody, Heidi did not use surrogate care to care for Kaio (R. 936 L. 3-5);

c-1. After the parties separation and order of joint physical custody, Kurt put Kaio in surrogate care approximately 11 hours per day (R. 936 L. 6-17);

d-1. On weekends, Kurt would often work on the ranch while his mother, Kaio's paternal grandmother, rendered care (R. 936 L. 18-23);

e-1. Kurt was more concerned about keeping Kaio away from Heidi than for Kaio's best interests (R. 937 L. 15-18);

f-1. Kurt's interest in custody of Kaio were motivated by his desire to maintain control and demonstrate to third parties' that he was a good father (R. 938 L. 15-22);

g-1. Kurt was not concerned about Kaio's needs (R. 938 L. 23-25);

h-1. Kurt's enthusiasm for Saige was different and conflicted when compared with his feelings for Kaio (R. 941 L. 1-8).

11. Jane Bebb, Kurt's therapist testified. R. 945.
12. Prior to examination of Jane Bebb, portions of an audio tape were played wherein Kurt used extremely abusive language toward Heidi stating that he was sick of looking at her and that she was the scum of the earth. R. 946 L. 13-17.
13. After listening to portions of the tape, Jane Bebb testified as follows:
 - a. Kurt was verbally abusive to Heidi (R. 950 L. 12-15);
 - b. She had never met Heidi (R. 955 L. 1-6);
 - c. She reviewed the custody evaluation and found some inaccuracies as it related to matters she had allegedly said to Dr. Stewart (R. 957 L. 7-11);
 - d. Kurt is obsessive and compulsive (R. 960 L. 10-13);
14. Noi Hone testified as follows:
 - a. Heidi told her there was physical and verbal abuse in the home (R. 1006 L. 15-21);
15. Joan Knipple Paine testified as follows:
 - a. Heidi displayed jealousy over Kurt (R. 1021 L. 9-12);
 - b. prior to the parties separation, in raising Kaio Heidi was the mom and Kurt brought home the money (R. 1024 L. 17-21); and

- c On several occasions she socialized with Heidi without Kurt being present and on each occasion Kaio was with Heidi (R 1036 L 2-6)
- 16 John McCartney, Kurt's Pastor at the First Baptist Church testified as follows.
- a Kurt and Heidi have a volatile chemistry together (R 1143 L 12-13),
 - b Kurt fears lack of access to his son if Heidi gets custody (R 1143 L 20-21)
- 17 Ann Alloway, Kurt's mother, On Cross Examination, testified as follows
- a Prior to the court proceedings, Kurt's mother had seen Saige only once when Heidi brought her to Delta to visit (R 1192 L 15-25),
 - b She had not had an opportunity to observe Kurt, Heidi and Kaio in their home during their marriage (R 1193 L 11 to 1194 L 2),
 - c As a parent, if a child's therapist recommended the child not play with a particular toy because of the child's behavior, she would take the toy away (R 1204 L 15-19),
 - d She believed that foster care was not a good place for Kaio to be, especially away from Kurt, but that foster care may be better than having Kaio in Heidi's custody (R 1207 L 20-25),

18. Dr. Donald Stephen Strassberg, with the Department of Psychology at the University of Utah testified as follows:

- a. Dr. Strassberg specifically stated that he was not attempting to present an opinion regarding the custody of the children or which parent was the most fit (R. 1229 L. 1-3);
- b. Dr. Strassberg did not evaluate Heidi's MMPI II (R. 1229 L. 8-10);
- c. Dr. Strassberg stated that a range of 50 to 65 is normal on the PA (paranoia) portion of the MMPI II and that Kurt scored a 68 (R. 1233 L. 6-8; R. 1215 L. 18);
- d. Dr. Strassberg did not discuss with Dr. Stewart how she arrived at her conclusions from the MMPI II (R. 1236 L. 11-13);
- e. Dr. Strassberg stated that approximately 100 times as many MMPI II tests are scored by NCS who scored the test for Dr. Stewart than any other test scorer (R. 1239 L 16 to R. 1249 L. 22);

19. Dana Orton, a volunteer for the Rape Recovery Center, testified as follows:

- a. She was a volunteer on June 9, 1997 when Kaio was brought to Primary Children's Hospital (R. 1244 L. 2-10);

- b. she was present when Kaio reported that a mean boy had kissed him (R. 1247 L. 4-6);
 - c. she had not formed an opinion whether Kaio was sexually abused (R. 1254 L. 6-14);
 - d. she did not know what the final outcome of any hospital report, police report or child protective services report was (R. 1255 L. 18 to 1256 L. 1);
 - e. As part of the report prepared by Ms. Orton, she included a statement from Kaio wherein he said, "Dad says mom is possibly involved in a cult." (R. 1258 L. 18);
 - f. during her information gathering, Ms. Orton included in her report specific concerns presented by Kurt about Heidi including that they may have been other incidents of abuse, she may be involved in a cult and there may have been other assaults (R. 1261 L. 19-25);
20. Frederick Allen Betzold, Jr. testified as follows:
- a. He did not know Heidi (R. 1267 L. 23-24)
21. Myrl Benson, a long time family friend of Kurt Alloway, testified as follows:
- a. While Kurt provided her with emergency numbers to reach him, he never

provided her Heidi's number (R. 1273 L. 24 to R. 1274 L. 4);

22. Heidi Alloway testified as follows:

- a. Kurt always threatened to take the children from Heidi because of her polygamist past (R. 1283 L. 10-15);
- b. Heidi testified that she had spanked Kaio on one occasion (R. 1284 L. 1);
- c. Heidi testified that she had on one occasion struck Kurt with a hairbrush on the hand in self defense (R. 1284 L. 4-7);
- d. The verbal abuse represented on the tape was language used by Kurt throughout the marriage (R. 1286 L. 14-16);
- e. When Kaio was a baby, Heidi worked part time (R. 1288 L. 16-18);
- f. Kurt was continually derogatory and always putting Heidi down (R. 1296 L. 20-21);
- g. Heidi testified that Kurt and his father frequently fought (R. 1309 L. 4-7);
- h. Kurt told Heidi that there was a lot of terrible fighting in his home as a child (R. 1309 L. 16-23);
- i. During their marriage, Heidi was subjected to verbal, physical, sexual and spiritual abuse (R. 1310 L. 1-6);

- j. Heidi testified that she was terrified of Kurt (R. 1313 L. 17-19);
- k. Counsel for Kurt stated that he would stipulate to a permanent mutual restraining order (r. 1313 L. 25 to R. 1314 L. 2);
- l. Kurt was verbally abusive and threatening toward Heidi during the course of these proceedings in the presence of Kaio (R. 1314 L. 11-18);
- m. Heidi had been Kaio's primary care giver (R. 1316 L. 5-7) bathing, dressing, feeding, taking and picking up from day care, playing, reading and rocking him to sleep (r. 1316 L. 9-16);
- n. Kurt's involvement prior to their separation was primarily to request Heidi to get Kaio away from him (R. 1317 L. 1-9);
- o. During their marriage, Kurt was frequently away from the home for two to three weeks at a time (R. 1317 L. 19-24);
- p. Heidi attended parenting classes (R. 1318 L. 11-12);
- q. Kurt used corporal punishment on Kaio (R. 1318 L. 23-25);
- r. When Heidi became pregnant with Saige, Kurt told her to "get rid" of the pregnancy (R. 1320 L. 4-7);
- s. Kurt refused visitation with Saige until the results of the DNA test were

completed (R. 1325 L. 1-2);

- t. Heidi has noticed a change in Kaio's behavior since he has been in Kurt's custody including increased temper tantrums, aggressiveness and insecurity (R. 1332 L. 1-9);
- u. Heidi testified that Kaio told her that Kurt was going to beat her and break her (R. 1332 L. 14-15);
- v. Heidi testified that she was living in a three year old apartment complex which was fairly new, clean and bright in a three bedroom apartment. (R. 1373 L. 11-21);
- w. Heidi stated that if Kurt was awarded custody she would want the right to render daycare and would seek every minute of visitation possible but that Kurt should be awarded only standard visitation (R. 1374 L. 14-21);
- x. Heidi stated that she is not angry with Kurt (R. 1376 L. 23-24);
- y. Heidi testified that she should be awarded custody of both children because she could love them equally, raise them unbiased, would not degrade Kurt in front of the children, and would encourage them to be happy when with their father (R. 1377 L. 14-21)

23. On cross examination, Heidi testified as follows
- a. she instructed the doctors during Saige's birth to not permit Kurt near the baby because of threats he had made to steal the baby (R 1364 L 16-21),
 - b. Kaio exhibits tantrums for the first two days following each nine consecutive day period with Kurt (R 1369 L 11-15),
- 24 In response to Judge Dever's questions, Heidi testified
- a She was not contemplating leaving the State of Utah (R 1385 L 15-18),
 - b she had no interest in returning to a polygamist relationship (R 1386 L 19-25),
- 25 Kurt Alloway testified on direct examination as follows
- a Kurt testified that he attended all of Kaio's therapy sessions (R/, 1392 L. 8-14),
 - b Kurt testified that he had the ability to set limits for Kaio and Saige (R 1393 L 5-9),
 - c. Kurt stated that during the course of their marriage, he witnessed physical abuse of Kaio by Heidi (R 1394 L 12-16),
 - d. Kurt observed Heidi engaging in erratic behavior (R 1395 L 18-25),

- e. Kurt stated that Heidi shook Kaio (R. 1396 L. 9-13);
- f. Kurt testified that on one occasion Heidi left Kaio in the bath tub and that his mother stated she put him on a fence post (R. 1400 L. 7-10 and L. 21-22);
- g. Kurt testified that he interviewed with Dr. Stewart on one occasion (R. 1404 L. 9-18);
- h. Dr. Stewart inquired of Kurt whether he had a religious foundation in his life (R. 1405 L. 9-12);
- i. Kurt stated that Dr. Stewart's use of the term "hostile" to describe his involvement with Mr. Peck was an overstatement (R. 1410 L. 2-10);
- j. Kurt testified that Heidi had physically abused him (R. 1433 L. 1-2);

26. On cross examination, Kurt testified as follows:

- a. Kurt testified that he was afraid of Heidi (R. 1466 L. 2-10);
- b. Kurt submitted affidavits to the Court where he adamantly opposed Heidi rendering day care for Kaio (R. 1469 L. 1-10);
- c. Kurt believed that Heidi orchestrated the conduct of persons who refused to side with him in this case (R. 1473 L. 9 to R. 1474 L. 25);

- d. Kurt testified that prior to the parties separation, he was out of town frequently (R 1477 L 11-15),
- e. Kurt testified that he worked lengthy hours (R 1477 L 20-22),
- f. Kurt testified that he believed Dr Stewart recommended Heidi have custody of the children because Heidi was some how mysteriously able to convince her (R 1479 L 6-11),
- g Kurt conditioned his visitation with Saige upon the outcome of the DNA test (R 1484 L 4-10),
- h Kurt explained that he was seeking custody of Kaio's little sister (R 1484 L 16-18),
- i Kurt stated that Heidi's desire for custody was all about money (R 1486 L 8-11),
- j Kurt feels victimized and duped by Heidi believing that she has duped many people involved as witnesses in this case against him (R 1501 L 20-25),
- k Kurt is mistrustful and suspicious of Heidi (R 1502 L 2-5),
- l Kurt admitted spanking Kaio (R 1503 L 17-25),

27. Dr. Stewart's custody evaluation was admitted into evidence and included but was not limited to the following:

- a. Child's Preference: While Saige is too young for a preference, Kaio is emotionally torn; Kaio interacted more frequently and positively with his mother; Heidi's setting of limits makes Kaio comfortable as compared to Kurt's permissiveness;
- b. Benefit of Keeping Siblings Together: siblings benefit from being kept together; because Kurt has difficulty setting limits while Heidi can do so, the children would be better off raised with the same expectations which are clearly understood by the children; the children would develop better if they believed they were valued equally; Kurt has not demonstrated that he values the children equally;
- c. Relative Strength of the Children's Bond with the Parents: Kurt has developed a strong bond with Kaio but has not done so with Saige and in fact denied paternity until proven by DNA testing; Kurt showed no sense of responsibility for Saige prior to the DNA results; Heidi has a very strong sense of responsibility for

and interest in both children without differentiation between boy and girl, first born or last; She does not have to learn to care for and love Saige as does Kurt;

d. General Interest in Continuing Previously Determined Custody Arrangements where the Children are Happy and Well Adjusted: There were no custody arrangements prior to the parties separation; prior to separation, Kurt worked long hours making his contact with Kaio fewer and shorter than Heidi's contacts; Temporary Custody orders resulted in Kaio being with Kurt before 7:00 a.m. and after 6:00 or 6:30 p.m.; Kaio spends full days with his mother;

e. Factors Relating to the Parents Character or Status or to Their Capacity or Willingness to Function as Parentings Including the Following:

1. Moral Character: Both parents accuse each other of sexual behavior which could be harmful to the children; Heidi complains about Kurt's interest in other women during the marriage; Kurt complains that Heidi is from a polygamist cult; Heidi denies any interest in the polygamy; Kurt has violated the tenets of good faith and fair dealing by using acquaintances and professional people to make statements that are not always supported by their observations; Heidi more directly states her concerns and has not

asked people to make statements based on something other than their own experience;

2. Depth and Desire for Custody: Both parents have a long standing desire for custody; Kurt stated that he would rather Kaio be raised in foster care than in Heidi's care; Kurt does not appreciate the stress the current arrangement and this custody dispute has caused Kaio; Heidi is fully aware of the stress caused to Kaio;

3. Preferences for Personal Rather than Surrogate Care: Heidi provides personal care for Kaio at all times when he is with her whereas Kurt works long hours out of the house; Kaio has neighborhood friends with whom he plays at Heidi's house;

4. Reasons for Having Relinquished Custody in the Past: Neither party has relinquished custody in the past;

5. Religious Compatibility: Kurt has a christian background and was baptised into the Church of Jesus Christ of Latter Day Saints; He considered a polygamist lifestyle; He recently has attended Baptist, Lutheran, and Presbyterian churches; Heidi was raised in a polygamist

environment which she has abandoned and has been baptised into the mainstream LDS church where she currently attends. Kurt would not raise the children with any particular religious affiliation preferring to let the children decide for themselves. While Kurt has expressed concerns about Heidi returning to a polygamist environment, there is no basis for these concerns;

6. Financial Ability: Kurt has good employment skills and could raise the children without contribution from Heidi; Heidi is resourceful and productive but does not have the same income potential as does Kurt; Heidi will need child support from Kurt;

7. Other Factors:

Parenting Skills-Heidi has better parenting skills because she can handle Kaio's tantrums as well as deal with him when he is calm; Heidi can handle both children at the same time; When both parents were present, Kaio more frequently turned to his mother; Kurt paid more attention to Kaio and only asked to hold Saige at the end of one appointment; Kurt had people

submit letters of support of his parenting skills who had little or no contact with him or knowledge of his parenting skills whereas Heidi's supporting documentation came from people who had personal knowledge and had seen both parents interact with Kaio; It was only after the parties separation that Kurt took an interest in parenting Kaio.

Summary and Recommendation: Heidi had been responsible for the children until the parties separated; She did a good job both before and after losing custody of Kaio; Kurt has Kaio in day care 11 hours per day; Heidi is able to provide personal rather than surrogate care; Kurt has almost no experience in the day to day care of his children; by his own admission, Kurt does not use good judgment in his handling of Kaio's tantrums; Heidi is the more competent parent; Heidi is more emotionally stable, has better self control, parenting skills, endurance, and patience. She is more honest and straight forward; Heidi does not alienate the children from Kurt. Heidi protects his reputations while promoting the children's welfare.

See generally Record, Sealed Custody Evaluation [no record pagination on Custody Evaluation].

28. Argument was heard on the Post Trial Motions for Clarification on the following issues relevant to this appeal:

- a. that both parties had significant emotional and psychological problems that interfered with their ability to function as parents (R. 1520 L. 6-8);
- b. that there was no evidence that Heidi participated in anger management and parenting classes (R. 1520 L. 14-16);
- c. joint legal custody (R. 1520 L. 25 to R. 1521 L. 4);
- d. joint physical custody (R. 1522 L. 15-17);
- e. restraining the parties from making derogatory comments about the other (R. 1534 L. 24 to 1535 L. 1);

29. The Court frequently stated that these parties do not have the ability to get along or to work together. (R. 1528 L. 10-16; R. 1546 L. 20-22; R. 1546 L. 25 to 1547 L. 21; R. 1549 L. 1-7; R. 1552 L. 12-15; R. 1553 L. 12-17).

30. The guardian ad litem stated that the parties are not capable of dealing with one another in a civil manner (R. 1542 L. 5-7).

31. The Court stated that the parties should not be talking to each other at all. (R. 1550 L. 25 to 1551 L. 4).