

1989

# Marcelene Pierce Wehry v. Terry Ray Pierce : Brief of Respondent

Utah Court of Appeals

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**BRIEF**

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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MARCELENE PIERCE WEHRY,	*	
Plaintiff	*	ARGUMENT PRIORITY
Respondent,	*	CLASSIFICATION 7
	*	
vs.	*	
	*	APPEALS NUMBER 890239-CA
TERRY RAY PIERCE,	*	
Defendant	*	CIVIL NUMBER 814900255
Appellant.	*	

---

BRIEF OF RESPONDENT

Appeal from the Third Judicial District Court,

Salt Lake County, State of Utah

Judge Michael R. Murphy

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DEPOSITED BY THE  
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COURT OF APPEALS



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IN THE UTAH COURT OF APPEALS

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Appeal from the Third Judicial District Court,  
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MARCELENE PIERCE WEHRY,	*	
Plaintiff	*	
Respondent,	*	
	*	
vs.	*	
	*	APPEALS NUMBER 890239-CA
TERRY RAY PIERCE,	*	
Defendant	*	
Appellant.	*	CIVIL NUMBER 814900255

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STATEMENT OF JURISDICTION

The Appellant has brought this action in the hope of overturning a decision made by Judge Michael Murphy of the Third Judicial District Court. The Utah Court of Appeals has jurisdiction over this matter pursuant to Rule 3(a) of the Rules of the Utah Court of Appeals.

NATURE OF THE PROCEEDINGS

The Defendant petitioned the Third Judicial District Court to modify the Decree of Divorce and to change custody to him based upon his perceived lack of visitation with the minor children and premised upon his perception that his former spouse had wrongfully vitiated a verbal understanding that the parties' two minor sons would reside with him for a complete calendar year. The Honorable Michael Murphy, after a hearing which lasted

approximately one day and two hours denied the Petition to Modify the Decree of Divorce brought by the Defendant.

#### STATEMENT OF THE ISSUES

1. The trial Court did not err in its finding at the Petition for Modification hearing that there was no substantial change of circumstances which would justify a consideration of a change in custody.

2. The trial Court did not err in failing to make sufficiently detailed Findings of Fact with regard to its analysis of whether there was a substantial change of circumstances.

3. The trial Court did not err in its finding that even if there was a substantial change in circumstances, it would not be in the best interest of the minor children of the parties to change custody from their mother to their father.

4. The trial Court did not err in failing to sustain counsel's objection to hearsay evidence being presented.

5. The trial court did not err in denying the Defendant's Motion for Amendment of Findings of Fact.

### STATEMENT OF THE CASE

The Plaintiff has been the legal custodial parent since the parties' Decree of Divorce was granted on September 4, 1981. Subsequent to the entry of the Decree of Divorce the Defendant has initiated several Petitions to Modify the Decree of Divorce and has relentlessly pursued a quest to transfer custody of the parties' minor sons to him. This Petition to Modify the Decree of Divorce, which is the subject of this appeal, was promulgated when the Defendant perceived he was having difficulty in obtaining visitation with his minor sons and when he perceived that his former wife had wrongfully violated an informal arrangement wherein it had been agreed that the parties' minor sons would reside with the Defendant and his current spouse for an extended period of time. Judge Michael Murphy found not only was there no change of circumstances which would sufficiently meet a legal threshold to warrant a change of custody, he also found that even if there were a significant change of circumstances, it would not be in the best interest of the children to have custody transferred to their father from their mother.

Counsel for the Defendant has identified what she calls several relevant facts. It should be noted that the Plaintiff takes issue with several of the stated facts. A discussion of those facts which are in issue follows here. In fact number 4 the Defendant states, "The Plaintiff and children lived in Utah until January of 1985, at which time she moved to Reno, Nevada

without prior notice to the Defendant, and without revealing her or the children's whereabouts to the Defendant..." This contention is erroneous and was disputed. In discovery materials and in letters authored by counsel for the Plaintiff, the Plaintiff asserted that she did indeed move in January of 1986. However, the Defendant did know where she and the boys were living. Counsel for the Plaintiff would further indicate that the relocation out of state had already been a subject of a prior Petition to Modify the Decree of Divorce. This previous matter which was litigated was found not sufficient to warrant a change of custody. This matter was and is res adjudicata.

In fact number 6 the Defendant states, "In May of 1986, the Plaintiff requested the older boy, Isaac, come to live with the Defendant who had since remarried his present wife, Letha Pierce..." Again this is a misstatement of the facts. The Plaintiff testified that Isaac requested he be allowed to live with his father for a period of time shortly after his maternal grandmother died. Isaac was concerned that his father would die and that they would not have been able to establish a viable relationship. The Plaintiff acquiesced in this request. (T143, T144). The Defendant also testified that he knew the arrangements for Isaac to live with him would be temporary and was for a one year period only. (T206). The Plaintiff also disagrees with the statement made by the Defendant that Isaac lived with him from May, 1986 until November, 1987 save the summer visit in the summer of 1987. Rather, it is the

recollection of the Plaintiff and the testimony of the Plaintiff that Isaac resided with his father from June, 1986, at the commencement of summer visitation, until June of 1987. He then returned to his father's domicile in August, 1987 where he resided until November, 1987. (T143, T144, T145).

The Plaintiff disagrees with the statements in fact number 7 that "...the Plaintiff signed a stipulation agreeing to change physical custody of both boys from herself to the Defendant from July 1987 until July 1988." It is was the Plaintiff's testimony that she refused to sign the stipulation changing custody. Her testimony indicated that she agreed to allow the boys to have a year of extended visitation with their father but would not change custody. The Court also clarified this matter and indicated that there had been a rejection of any petition to change custody and the Plaintiff specifically had rejected the stipulation to change custody. (T146).

The statement of facts, number 8, authored by the Defendant and his attorney is also erroneous. Both parties did not petition the Court for an order changing custody. In July, 1987 the Defendant petitioned the Court for an order changing custody and hoped that the Plaintiff would be coerced into signing the stipulation. The Plaintiff refused to sign the stipulation and Judge Murphy granted extended visitation to the Defendant. (T146).

Counsel and the Plaintiff also take issue with the inference in fact number 10 that there was an extended period of time when

the Plaintiff's phone number was unknown to the Defendant. The Plaintiff testified that in January, 1988 the Defendant was made aware of her then current home telephone number. (T171). The Plaintiff also testified and presented documented evidence that subsequent to the removal in November 1987 the boys were able to telephone their father on a regular and frequent basis. (T170).

Counsel for the Plaintiff and her client realize that each case should be addressed and examined upon its individual merits. However, each feels very strongly that this Court should take notice of the numerous, previous litigations, all of which were instigated by the Defendant, attempting to change custody for reasons just as specious as those presented on appeal. The Court should also take judicial notice that the Defendant failed to return the boys to the Plaintiff at the end of the summer 1989 visitation. Instead, he initiated another Petition to Modify the Decree of Divorce. An interim hearing was held on the pending petition. Judge Murphy, in the fall of 1989, did order the children to be returned to the Plaintiff. The petition for modification which was filed in the summer of 1989 has not been fully adjudicated and is still pending.

#### SUMMARY OF THE ARGUMENT

The synopsis provided by the Defendant and his counsel is inaccurate and should not be sustained. Certainly there was no change of circumstances which rose to a legally cognizable level which would even permit, much less justify, transferring custody

of the parties' minor sons from the Plaintiff to the Defendant. If indeed there were any errors made by the Court, it was simply that the Court, in its exercise of discretion, allowed the Defendant to attempt to relitigate matters which had been previously adjudicated in several other litigations promulgated by him. Never at any time was the Plaintiff's relinquishment of physical custody ever intended to be a permanent change of legal custody or a permanent change of physical custody. The parties understood and the Court did agree that the Defendant would have an extended visitation with the parties' minor children from July, 1987 through June of 1988. Unforeseen and compelling circumstances did require the Plaintiff to regain physical custody of the parties' minor children in November, 1987.

The Defendant has indicated that the Plaintiff has demonstrated instability in numerous moves. It is conceded that the Plaintiff has relocated from Utah to Nevada then to California and is currently a resident of Reno, Nevada. However, there is no indication that there was any instability during any of these moves. At all times, the boys were well cared for and enrolled in school. The school records, which were introduced into Court, demonstrate that both boys were achieving more than satisfactory results in their academic pursuits. Nor did the custody evaluator indicate that the boys were unstable, insecure, or maladapted.

The Defendant also maintains that the refusal to provide a home telephone number is indicative of instability. On the

contrary, this is not an indication of any type of instability but is indicative of an attempt to restore stability to her family. As the Plaintiff testified at trial, she had received several threatening and harassing phone calls from the Defendant's current spouse. In order to gain control over who was contacting her at her current residence, she had her telephone number changed. This number remained undisclosed to the Defendant for a very, very short period of time. (T202).

The Defendant and his attorney argue that merely because a custody evaluator made a determination it was egregious error not to follow the same. However, the evaluation that was performed did not sufficiently meet the criteria of whether or not there was a substantial change of circumstances in events subsequent to the entry of the Decree of Divorce which would warrant a change of circumstances. The Court heard testimony from several witnesses and also interviewed the minor children in camera. After fully considering all matters, not just the report of the evaluator, it was the Court's finding and ruling that even if there was a change of circumstances, it would not be in the best interest of the children to change custody from the Plaintiff to the Defendant.

Counsel for the Defendant and the Defendant also maintain that the Court erred in allowing prejudicial hearsay evidence to be admitted. Arguably, the testimony of the Plaintiff which related the motivation and necessity to remove the children from the Defendant's domicile may have been hearsay. However, it was



properly admitted as a known and acceptable exception to the hearsay rule. Arguably, even if not an exception to the hearsay rule, the testimony that was allowed was not prejudicial and did not erroneously impact the decision of the trial Court. There was no admission of hearsay which was so erroneous and detrimental to the Defendant that a reversal of the trial Court's decision would be warranted.

The Defendant and his counsel also argue that the Court prejudicially erred in denying the Defendant's motion to amend the Findings of Fact. The material he wished to be incorporated into the Court's findings were not relevant to a final determination of custody. The matters the Defendant wished to be incorporated dealt with the abuse of the Defendant's stepdaughter Amy and a foster child, Steven Slater, who had been residing in the Defendant's home. However, the issue of whether or not there had been any abuse of any minor children by either the Defendant or his current spouse was an irrelevant, tangential issue. Whether or not there had been any abuse by the Defendant or his current spouse was not relevant to whether or not (a) there had been a legally supportable change of circumstances which would warrant a change of custody or (b) it would be in the best interest of the children to transfer custody as prayed for by the Defendant. Failure to include totally irrelevant findings is not erroneous and should not be a successful ground to reverse a proper decision.

## REBUTTAL OF THE ARGUMENT

### I.

THE TRIAL COURT DID NOT ERR AS A MATTER OF FINDINGS THERE WAS NO SUBSTANTIAL CHANGE IN CIRCUMSTANCES.

The Defendant and his attorney seem to argue that this Court has been adopting and proliferating inconsistent standards of review for modification of custody awards. This allegation and conclusion is erroneous. A review of the historical chronology of modification cases is absolutely telling. In 1982 the Utah Supreme Court adopted the legal requirement that a court must bifurcate its analysis whenever presented with change of custody issues. Hogge v. Hogge, Utah, 649 P.2d 51 (1982). As stated and articulated in Williams v. Williams, 655 P.2d 651 (Utah 1982) at 652:

Under the two-step procedure established by this Court in that case, a trial court's decision to modify a divorce decree by transferring custody of a minor child must involve two separate steps. Hence, the first issue in this case is whether the proponent of any change (appellant in this case) has demonstrated "(1) that since the time of the previous decree, there have been changes in the circumstances upon which the previous award was based; and (2) that those changes are sufficiently substantial and material to justify reopening the question of custody.

Not in any subsequent case has the two-prong test established in Hogge, infra, ever been abandoned nor have the original

directives of Hogge ever been abandoned. Specifically, trial courts and appellate courts have been directed not to change custody unless there are very compelling legal reasons which would justify the same as stable custody arrangements are critically important.

Arguably, in Maughan v. Maughan, 770 P.2d 156 (Utah App. 1989) the Court did indicate that a greater variety of evidence may be introduced to satisfy the initial prong of the Hogge, supra, bifurcated standard. No case subsequent to Hogge, supra, has ever deviated from the conclusions which must be sustained by the evidence presented to successfully transfer custody. A clear articulation of what the evidence must conclusively prove is found in Shioji v. Shioji, 712 P.2d 197 (Utah 1985). In Shioji, at page 200 the Court stated:

In Becker v. Becker, we stated that to meet the threshold showing of a change in circumstances,

A party (seeking a transfer of custody) must show, in addition to the existence and extent of the change, that the change is significant in relation to the modification sought. The asserted change must, therefore, have some material relationship to and substantial effect on parenting ability or the functioning of the presently existing custodial relationship.

Irregardless of whether this Court makes a determination that the standard established in Kramer v. Kramer, 738 P.2d 624 (Utah 1987), or the standard established in Maughan, supra, is the appropriate standard to apply, the Defendant failed miserably to document that there had been any substantial change in

circumstances which had any substantial effect on the parenting ability of the Plaintiff or the functioning of the presently existing custodial relationship. Applying either standard or both standards, it is unequivocally clear that there had been no change of circumstances which would warrant a transfer of custody.

Counsel for the Defendant and the Defendant argue that it would be appropriate for this Court to apply the standard set forth in Maughan v. Maughan, supra. Their rationale is that the parties' minor children had been subjected to "ping-pong" custody arrangements. It is absolutely a deliberate, inappropriate misstatement of facts to represent that the parties' minor children had been involved in a "ping-pong" custody arrangement. When the Court granted the Defendant extended visitation with Isaac and Isaiah, it was known by all parties that this extended visitation was for a period of one calendar year only. (T144, T145, T146, T206, T84). The Defendant at no time subsequent to the entry of the Decree of Divorce in 1981 has ever been the legal custodial parent of either child. For the year that was the subject of this Petition to Modify Custody, the Defendant was only a physical custodian of his sons. They were to be domiciled in his home with the consent of the Plaintiff and the Court for a period of one year. This temporary change occurred primarily because the Plaintiff wished to foster and encourage a relationship between the minor children and their father. (T180, T181). The Defendant attempts to damn the Plaintiff precisely

for doing a charitable and difficult act which she believed was in the best interests of both her former spouse and their minor sons. It is inconceivable that anyone would attempt to distort the facts so badly to achieve their purposes.

The Defendant makes an inference that the Plaintiff acted wrongfully and improperly in removing both boys from his home in November, 1987. Considerable amount of testimony was taken at trial wherein the Plaintiff explained the very objective, rational, proper reasons for her actions as a concerned mother and as the legal custodian of these children. The Plaintiff testified that she had been informed by the children's teachers in Eureka, Utah that Isaiah was withdrawn and had been missing a significant amount of school. Isaiah also confirmed that he did get in trouble in school frequently and was not making many friends. In addition to the information regarding the boys' welfare at school, the Plaintiff learned of suspected abuse by the Defendant and his current spouse which was alleged to have been perpetrated upon the Defendant's stepdaughter and a foster child residing in the home. Before taking any initiative to come to Utah, the Plaintiff contacted a Mr. Scofield, an individual employed by the Department of Family Services in Juab County, Utah. The Plaintiff was told that it was very likely, if not certain, that Isaac and Isaiah were going to be placed in foster care if they were not removed from the Pierce household as the Juab County Department of Family Services believed there may be endangerment to the children's welfare. Premised upon these

multiple conversations with multiple individuals, the Plaintiff came to Utah and met with a County Attorney who not only indicated it was proper for the Plaintiff to take physical custody of her children but that she and her current spouse should accompany the Sheriff when the children were picked up. (T153 through 169, inclusive). The Plaintiff peaceably regained physical control of her minor children. Moreover, she did inform the Defendant prior to the time that she and the children boarded the plane to return to Nevada exactly why she was having the children return with her. (T169). The Defendant indeed acquiesced in these actions by replying to her explanations, "Fine." (T169). Only after realizing that the children no longer were with him and only after having a sufficient period of time to fuel his anger and disappointment did the Defendant file a Petition to Modify the Decree of Divorce.

The Defendant and his attorney on page 12 of the Appellant's Brief make an argument for application of the Maughan, supra, standard. It is uncertain as to which prior court case reference is made. The Defendant has been extremely litigious. Although he has brought several post divorce Petitions to Modify the Decree of Divorce, he has always failed to prevail. It is the Plaintiff's proffer and absolute recollection that each and every time she came to Court there was extensive discussion, proffers of evidence, and direct testimony given which facilitated a review of what would be in the children's best interests. Never at any time has the trial Court sustained a transfer of custody.

Moreover, it is the position of the Plaintiff and her attorney that because there have been so many prior litigations and so much scrutiny made of every little incident which occurred subsequent to 1981 that the trial Court should have been barred from considering anything which had been previously adjudicated. In essence, the trial Court should not have considered anything which was the subject of previous attempts to change custody and should only have examined events which occurred subsequent to June, 1987. It is extremely telling and compelling that although the Defendant was allowed to reintroduce and relitigate previously adjudicated matters in order to attempt to establish an alleged pattern of interference with his visitation rights he still failed to prove the alleged pattern of interference, to prove that there had been any legally cognizable change of circumstances which directly impacted and impaired the functioning of the parenting relationship between the Plaintiff and the children, and once again failed to prevail on a petition presented for a record seventh or eighth time.

For nearly three pages of his brief, pages 12, 13, and 14, the Defendant and his attorney assert a third reason for applying the standard of the Maughan case. Counsel does not disagree with the fact that there can be legitimate post divorce problems experienced by noncustodial parents in exercising their visitation rights. However, the situations referred to by the appellant and his attorney in this brief and the inferences made in this third argument are absolutely not applicable to the case

at bar. This Plaintiff never did anything to attempt to restrict visitation or to attempt to restrict the boys' contact with their father. As she testified at trial, in the early stages of their post divorce arrangements, she and the Defendant were able to amicably work with one another to be flexible in visitation. (T141, T142, T143). Even after the Plaintiff and the minor children relocated to Reno so the Plaintiff could reestablish a relationship and care for a dying parent, the boys were granted extended visitation with their father. Their father also travelled to Nevada to see them. In deference to the oldest son's fear that he would not be able to have a relationship with his father or that his father would die, the Plaintiff allowed him to reside with his father for nearly one year. In order to be fair to the younger child and to also foster a relationship between the boys and their father and to sustain the close sibling relationship, the Plaintiff agreed to allow the boys to reside with their father from June, 1987 through June, 1988. Never has there been any sustainable finding that the Plaintiff has ever done anything over an extended time span to interfere with or hamper the relationship between the minor children and their father. In fact, the antithetical conclusion is accurate and appropriate. The Plaintiff has done everything in her power, including encouraging the boys to call their father on a regular and frequent basis and allowing them to reside with him for an extended period of time, to foster and nurture their relationship.



The same commitment to foster a relationship between the other biological parent is not evident on behalf of the Defendant. The Plaintiff testified that on both occasions when the Defendant had extended time with the children there was a severe lack of communication between herself and her sons. The Defendant did nothing to assure that the boys would contact the Plaintiff on a regular basis. Neither did he nor his current spouse do anything to encourage informative telephone conversations between the Plaintiff and her sons. (T146, T147, T148, T149, T151, T172, T173). The Court should take judicial notice of the affidavits and other evidence that has been presented to the Court in other matters which are previous to and subsequent to this Petition to Modify the Decree of Divorce. As an example, numerous people have submitted affidavits indicating that for many, many months the Defendant withheld contact between the Plaintiff and her sons in 1989. If there is any indication that there has been a willful refusal to allow visitation or contact the testimony always sustains the sad truth that it is the Defendant who interferes with and tries to diminish the relationship between the Plaintiff and the minor children. If there is any activity which has been undertaken which jeopardizes the best interest of the minor children, it has always been found that it is the Defendant who has initiated, acted upon, and attempted to justify his unconscionable behavior.

The Defendant and his attorney argue that the removal of the children from the Defendant's domicile in November, 1987

destabilized them. This simply is not true. The evaluator, Dr. Louis Morse testified that he could not conclude that there was any clinical finding of instability as a result of the boys' return to the Plaintiff's physical custody. (T43). If indeed the removal might have had an unstabilizing effect, the same was not evident when Dr. Morse saw the children.

The Defendant and his attorney argue that the case of Hirsch v. Hirsch, 725 P.2d 1320 (Utah 1986) is on point. This is simply not true. In Hirsch, infra, the original custodial parent was found to have evidenced a significant amount of instability as she had moved several times. In addition to the multiple moves, the original noncustodial parent had assumed care and responsibility for the parties' child during a majority of the time subsequent to the parties' divorce. One of the relocations now complained about by the Defendant and his counsel occurred when Isaac and later Isaiah were allowed to reside in their father's home for an extended period of time. To say that fostering and actively promoting a healthy parent child relationship is tantamount to instability is absurd. Moreover, as testified at trial, these children were very young when their father and mother were divorced. The Plaintiff was the primary caretaker for each child during the duration of the marriage. Moreover, from 1981 until this date, she has been the parent who has had at all times legal custody of both children and she has had physical custody of both children except for a very minute amount of time.

On page 17 of the Defendant's brief, the Defendant and his attorney erroneously characterize the purported lack of contact between the Defendant and the minor children as an intentional plot instigated by the Plaintiff to deprive the Pierces of her phone number from November of 1987 until June, 1988. The documents introduced into evidence demonstrate that from November, 1987 until June, 1988 the children had a significant amount of telephone contact with their father. These telephone calls were placed with the Plaintiff's encouragement and permission from the children at their home to the Defendant at his home. Moreover, the Plaintiff testified that as of January 12, 1988 the Defendant did indeed have her current home phone number. It was only shortly after the boys' return to California, in the latter part of November, 1987, that the Plaintiff did change her telephone number. She had good reason to do so. While taking steps to ensure her privacy, she never undertook any action which would terminate or interfere with the boys' contact and communication with their father or stepmother.

The Defendant and his counsel argue that merely because an 11 year old child expresses a desire to live with his father or has a preference as to whom shall be his custodial parent the trial Court must abide by the wishes of a minor. If this were so, trial Court's would be deprived of their discretion and their better judgment in determining custody issues. Moreover, it is a sad matter to contemplate a legal system wherein children can dictate to adults, irregardless of whether or not they are

manipulated to form their stated preferences. The Defendant and his counsel conveniently ignore the fact that the youngest child had an equally strong preference to reside with his mother. Moreover, the youngest child expressed both to the evaluator, Dr. Morse, and to Judge Murphy that he had some genuine fear about living with his stepmother, Letha Pierce. (T15, T16, T17, T26, T27, T28, T38, T41, and T3, T4 of the proceedings held on January 12, 1989). In Utah, there are a plethora of cases which have held that the preferences of a child or children as to with whom they should reside is not controlling upon the Court. Wiese v. Wiese, 469 P.2d 504 (Utah 1970). Likewise, there are controlling cases which establish valid case law that the opinions of a custody evaluator do not have to be adopted automatically by the trial Court. Martinez v. Martinez, 652 P.2d 934 (Utah 1982).

Isaiah, the parties' youngest son, has a fear of being with his stepmother. He unequivocally and repeatedly expressed this fear of his stepmother and his dislike of her parenting style and her disciplinary style to Dr. Morse and to Judge Murphy. At trial, Dr. Morse testified that the stepmother, Letha Pierce, has more contact with both boys than does their father when they are residing in the Pierce household. (T38). The amount of interaction between the stepmother and the boys was a continuing concern to the Plaintiff. The Defendant testified at trial that the boys' mother expressed a concern about the relationship between Isaiah and his stepmother. It is evident that the Plaintiff was trying to minimize Isaiah's fears yet permit a

relationship between the child, his father, and his stepmother. (T85, T86).

Isaiah also had a stated preference. Specifically, his preference has been to reside with his mother, the custodial parent. It was Dr. Morse's finding that both families are capable of adequately providing for the children. (T15, T39). It was also the finding of Dr. Morse and the Court that the boys should not be separated. (T16, T40, T183). It was also the finding of the trial Court that Isaac would better adjust to remaining with his mother than Isaiah would adapt to having custody transferred to his father. (T3 of the proceedings on January 12, 1989). It is absolutely preposterous to presume and demand that because a child is the oldest and/or is the most vocal that his preferences should be given greater deference than a younger sibling. It is also preposterous and frightening to accept the proposition that an older sibling who is more vocal or more articulate should be able to make decisions which could be harmful or detrimental to a younger sibling.

The Court in Kramer v. Kramer, supra, clearly articulated a thoughtful analysis of the very compelling evidence which must be presented to demonstrate a legally cognizable change of circumstances which would justify a change of custody. The Court in Kramer stated at pages 625 and 626:

...Under Hogge and Becker, the trial court was correct in focusing only on changes in circumstances affecting the custodial parent in deciding whether to reopen the custody decree.

Hogge established a two-prong test for considering requests to change custody awards, imposing the burden of proof on the party seeking change of custody. Under the first prong, the party seeking modification must show that there has been a change in the circumstances upon which the original custody award was based which substantially and materially affects the custodial parent's parenting ability or the functioning of the custodial relationship and which justifies reopening the custody question. Once a substantial change of circumstances has been established, the petitioner must show under the second prong that the requested change in custody is in the best interest of the child. See Hogge 649 P.2d at 53-54. The "change of circumstances" threshold is high to discourage frequent petitions for modification of custody decrees. The test was designed to "protect the custodial parent from harassment by repeated litigation and (to) protect the child from 'ping-pong' custody awards." Id. This policy has been adhered to and elaborated upon in our subsequent cases dealing with change of custody matters.

A central premise of our recent child custody cases is the view that stable custody arrangements are of critical importance to the child's proper development. See, e.g., Fontenot v. Fontenot, 714 P.2d 1131, 1132 (Utah 1986); Shioji v. Shioji, 712 P.2d 197, 203 (Utah 1985) (Zimmerman, J., dissenting); Becker v. Becker 694 P.2d 608, 610 (Utah 1984); Hogge v. Hogge, 649 P.2d 51, 55 (Utah 1982); B. Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy-Balancing the Individual and Social Interest, 81 Mich.L.Rev. 463, 473-74 (1983). The two-part Hogge test is founded upon that premise. Hogge v. Hogge, 649 P.2d at 54. No matter how well intentioned, changes in custody can do more harm than good. See Hafen, supra, at 474. For this reason, when a trial court is asked to determine whether there has been a change of circumstances sufficient to warrant reopening a custody decree, ordinarily it must focus exclusively on the parenting ability of the custodial parent and the functioning of the established custodial

relationship. This was recognized in Becker v. Becker, 694 P.2d 608, 610 (Utah 1984) where, in interpreting Hogge, we held that the first step of the Hogge standard required that "(t)he asserted change (in circumstances)...have some material relationship to and substantial effect on parenting ability or the functioning of the presently existing custodial relationship" Id. at 610 (emphasis added).

There was not one iota of credible evidence given by any witness at the modification hearing which gave any indication that the Plaintiff had become incapable of adequately parenting her children. In fact, the custody evaluator found just the opposite. (T15, T39, T45). Nor was there any testimony or any evidence that the custodial arrangement wherein the Plaintiff is the legal custodian and has the physical custody of the children has become nonfunctioning, unhealthy, or in any way detrimental to the children. Absolutely unequivocally, given the fact that there was nothing produced at the hearing which gave any indication of any adverse impact to the Plaintiff's parenting ability or to the functioning of the relationship between she and her children, the Defendant failed to meet the first prong of the bifurcated Hogge, supra, test. The Court was absolutely correct in its finding that there had been no substantial change of circumstances which would mandate or even allow a transfer of custody from the Plaintiff to the Defendant. In this instance, and in every instance litigated by the Defendant subsequent to the entry of the Decree of Divorce, he has sought to obtain custody of his sons while being able to identify only the most minimal of facts and justification.

The Defendant and his attorney argue that the proper standard for review at the trial Court level and now is the less rigid standard adopted in Maughan v. Maughan, supra. The rationale for Maughan as stated by the Court at page 160 was:

If, on the other hand, the initial custody award is premised on a temporary condition, a choice between marginal custody arrangements, a default decree, or similar exceptional criteria, the trial court may properly focus its "inquiry into the effects on the child of the established custodial relationship as it has developed over time." Id. at 627 n.5. This inquiry is necessarily less rigid because the trial court has not previously had an opportunity to make a thorough examination of the child's best interest, or, if so, has been compelled to make a choice between the lesser of two evils. Under those circumstances, the Court may accept a greater range of evidence under Hogge's first prong regarding the initial custody arrangement, the events that have since transpired, and the resulting effects on the child.

The less rigid standard of Maughan, supra, should not be applied and are not applicable in this instance. Admittedly, the Defendant did not challenge the initial award of custody to the Plaintiff. However, it was certainly known by the trial Court that both children were very young when their parents divorced and that it was in the children's best interest for them to remain with their mother, particularly as she had been the primary caretaker since their birth. Moreover, in numerous litigations instituted subsequent to the entry of the Decree of Divorce, the Third Judicial District Court has had ample opportunity to examine the relationship between the Plaintiff and her children. At no hearing and certainly not at the hearing



held on January 11, 1989 and January 12, 1989 was there any indication that there was anything detrimental, harmful, inappropriate, or unhealthy in the relationship between the Plaintiff and either child. Dr. Morse did note that the children were bonded with the Plaintiff and that both loved the Plaintiff.

At no time was any Court required to make a choice between marginal custody arrangements or to choose the lesser of two evils to best suit the future interests of the minor children. The Plaintiff has been flexible in her arrangements with the Defendant wherein she has even allowed him extended physical custody of the children. She has, with minimal exceptions which span a course of several years, been consistent in encouraging and allowing the boys communication and contact with their father. There may have been one or two insignificant instances of miscommunication which resulted in a lack of visitation by the Defendant. Although these may be censurable, they have never risen to the level of warranting a transfer of custody.

The trial Court gave considerable latitude to the evidence which the Defendant was allowed to present. Not only was he allowed to introduce evidence of issues which had been previously litigated in post divorce proceedings, he was granted an opportunity, which he could not sustain, to establish that there had been a concerted effort on the part of the Plaintiff to thwart his visitation and that the efforts allegedly put forth by the Plaintiff had been successful. This Plaintiff has time and time again demonstrated her ability to properly care for the

children and to put forth their best interest. It certainly was not easy for her to allow the children to reside with their father for any extended period of time. However, she did so without complaint. She even allowed a second opportunity for extended visitation when she agreed to allow Isaiah to have an entire year with his father although she had been denied access and contact with Isaac when he was with his father for the initial extended period of visitation.

The Court's primary focus is properly the effect of the present custodial arrangements upon the minor children. No one who was heard at trial was able to give any reason, concrete or intangible that the present custodial arrangement had negatively or detrimentally impacted the children. These boys were seen by Judge Murphy to be well adjusted. Although the boys were aware of the ongoing litigation, the custody evaluator did not find any clinical evidence that the possible manipulation by both sets of parents or the knowledge of the litigations had any adverse effect upon the children. Nor was there any indication that even though experiencing and being subjected to numerous battles over their custody the boys had been adversely impacted. (T32, T33). It is certainly commendable that any resentment that the Plaintiff may have had over being engaged in numerous litigations between she and her former husband did not become apparent to either child. Nor did the Plaintiff's strong reservations about relinquishing physical custody or having either child reside with their father on a temporary basis negatively impact the strong

emotional bonds and ties between the Plaintiff and her children. It is absolutely uncontroverted that whether applying the test formulated in Kramer, supra, or Maughan, supra, the Defendant could not and did not demonstrate any legally cognizable change of circumstances which would justify transferring custody. Having failed to meet his burden of proof, there is no rational reason or legally meritorious reason why he should prevail and be awarded custody of the boys.

Moreover, it is compelling to realize that the Defendant and his counsel are patently mistaken when they assert that the standard of review should be either the standard promulgated in Kramer, supra, or in Maughan, supra. Those determinations were within the discretion of the trial Court. It is the proper focus of the appellate Court to determine only if the findings and rulings of the trial Court were so patently erroneous that they warrant reversal. The evidence presented at the hearing fully supported the refusal of the trial Court to change custody. There is no rationale which has been articulated by the Defendant upon which he should have prevailed at trial or upon which he should now prevail.

## II.

THE COURT DID NOT ERR IN FINDING THAT IT WAS  
IN THE BEST INTEREST TO REMAIN WITH THEIR  
MOTHER BECAUSE OF ISAIAH'S FEAR OF HIS  
STEPMOTHER.

The fear that Isaiah expressed of his stepmother is not the only reason articulated by the Court in its finding that a

transfer of custody from the Plaintiff to the Defendant would not be in the best interest of the minor children. The trial Court felt that not only should the boys not be separated, but that Isaac would adjust to not residing with his father better than Isaiah would adjust to a transfer of custody. There is no doubt that a transfer of custody is traumatic as has been noted in cases previously cited. Transfers of custody can do more harm than good.

The Defendant and his attorney argue and assert that Isaiah's fear of his stepmother was the result of programming by his family in Chico, California and was not premised upon any reality. Not only is this a mischaracterization of Dr. Morse's testimony, this argument totally ignores other evidence which was presented at the modification hearing. Upon cross examination by counsel for the Plaintiff, Dr. Morse specifically stated, "I think that Isaiah believes that he is afraid of his step-mother. Yes." (T26). Dr. Morse's findings that Isaiah stated he was afraid of his stepmother were examined when the evaluator was questioned by counsel for both parties. Dr. Morse did state that a problem that he foresaw in a transferring of custody of both boys to the Defendant would be the fact that Isaiah is afraid of his stepmother and that she had engaged in conduct which made him uncomfortable and fearful. (T16, T17, T26, T28).

It is extremely telling and convincing that other parties recognized Isaiah's fears long before this Petition to Modify was

filed with the Court and long before Dr. Morse evaluated either child. Peggy Rogers, a close friend of the Plaintiff and a formerly close friend of the Defendant, testified that her sons and the parties' sons were very close. Ms. Rogers did testify that she had had opportunity to watch Isaiah and his stepmother interact. It was her perception that Isaiah is uneasy with his stepmother. (T133, T134).

The Plaintiff also testified that Isaiah's fears of his stepmother were not recent. In her testimony she indicated that Isaiah had articulated for some time specific reasons why he was afraid of his stepmother and why he did not want to go to his father's home. (T179, T180). These fears were also articulated to Judge Murphy who found that it was the perception of both boys that Isaiah was treated differently than Isaac in his father's home. (T3, T4 of the proceedings held on January 12, 1989).

In her testimony, Ms. Peggy Rogers also identified a very real reason why Isaiah should feel fearful when in the custody of his father and stepmother. The incidents related by Ms. Rogers were not discussed by Dr. Morse. It is arguable that if the custody evaluator had known of these, he would have put more credence in the fears expressed by Isaiah. Ms. Rogers did testify that the planned week long visit between her children and the Pierce children were unexpectedly interrupted by Letha Pierce's removal of the children from her home. Ms. Rogers further testified that Letha Pierce had given her specific instructions that neither child was to have any telephonic

communication or personal contact with their mother while they were at her home. (T131, T132, T133).

The testimony given by Dr. Harold J. Shaw, Jr. at the modification hearing was testimony that preceded the incidents related by Isaiah wherein he felt that he was unfairly disciplined by his stepmother, wherein he believed that his stepmother spanked him much too frequently and much too long, prior to the time the children were in the Rogers' home and were specifically prohibited by Mrs. Pierce from having any contact with their mother, and prior to the time that Mrs. Pierce did abruptly remove the children from the Rogers' home. Specifically, Dr. Shaw testified that his observations of the interactions between the Pierce's and the Defendant and the parties' minor sons occurred several years ago. (T102). These occasions when Dr. Shaw had opportunity to view the interaction between the minor children and their father and stepmother also primarily occurred during religiously oriented activities. (T102). It is arguable that not only would the Defendant and his spouse be displaying exemplary behavior while attending church or religious functions, but that their relationships with the children would have deteriorated after several frightening experiences were imposed upon Isaiah and his brother.

The Plaintiff was accompanied by several friends who had known both she and her former husband for several years. Each of these witnesses would have testified to Isaiah's fears of his stepmother and other related matters which would compel not

tampering with custody. However, these witnesses were not put on the witness stand as the time allocated for the hearing was nearly up. There had been an indication from the Court that the trial Judge hoped the other witnesses were not necessary. (T203).

Every witness who presented testimony at trial clearly substantiated that there was a very strong bond between Isaiah and his mother. Nearly every witness indicated that Isaiah had articulated and stated that he was fearful of his stepmother. It was and is important that a child's fears should not be discounted for any reason. The clear and convincing evidence presented at trial amply documented that Isaiah had a long standing fear of his stepmother. To perpetuate these fears and to possibly intensify them by transferring custody of the children to the Defendant would clearly be improper and clearly would be antithetical to the best interest of the children.

The Defendant and his attorney make much of the fact that the trial Court failed to follow the recommendations of the custody evaluator. This is neither surprising nor erroneous. Although it is true that Dr. Morse did recommend that custody of Isaac and Isaiah be transferred to their father he did so in recognition of Isaac's stated preferences. It is not erroneous for the Court to have concluded that Isaiah's preferences not to change custody should have been of paramount concern. This is especially true considering the fact that it was apparent that Isaiah was strongly bonded to his mother, was immature, and would

not have adapted easily to being separated from his mother. The trial Court had several witnesses in addition to Dr. Morse who clearly testified that Isaiah was afraid of his stepmother. Moreover, these witnesses gave compelling reasons why Isaiah should logically be fearful of residing with his father and of potentially losing contact with his mother.

The Defendant and his attorney fail to acknowledge that Dr. Morse's primary rationale for his decision was not that Isaac preferred to live with his father but his perception and professional recommendation that the boys should not be separated. Dr. Morse testified that a child's preference need not be controlling upon the Court but should be considered. He further stated that "The most important part of my recommendation is that the boys should be kept together, and that they would suffer psychological damage if they were separated." (T40).

In making his recommendation to the Court and in doing the initial interviews and evaluation, Dr. Morse failed to identify any single factor much less a combination of factors which would rise to the level of a substantial change of circumstances since either the implementation of the original custody award or the denial of the Defendant's subsequent Petitions to Modify the Decree of Divorce. It was certainly within the prerogative and the discretion of the trial Court to give minimum weight to an evaluation that approached the situation as if this were an initial custody determination and not a post divorce Petition to Change Custody. (T38, T39, T40).



It is fallacious for the Defendant or his attorney to maintain that the trial Court did not make adequate findings as to why the Defendant's Petition to Modify Custody was denied. Judge Murphy articulated both findings and conclusions which were clearly supported by a definite preponderance of the evidence that neither was there a substantial change of circumstances which would warrant a change of custody but that the best interest of the children would not be served by transferring custody. Specifically, Judge Murphy found that the alleged difficulties with visitation did not rise to a level of a substantial change of circumstances. (T2 of the proceedings held January 12, 1989). Judge Murphy also found that it would not be in the best interest of the minor children to transfer custody to the Defendant both because of Isaiah's perceptions of his stepmother and because he would be less likely to adapt well to a change of circumstances than Isaac would be able to adapt to continuing to reside with the Plaintiff. (T3 of the proceedings held January 12, 1989).

The trial Court was extremely articulate in its findings and conclusions. It appears that the Defendant's real objections is not that there were inadequate findings but simply that there were not multiple findings articulated by the Court for its rulings. However, the initial question of whether or not the alleged interferences with the visitation constituted a substantial change of circumstances and whether the same mandated a change of custody were relatively straight forward and easily

analyzed. This issue which prompted the Defendant to file this particular Petition to Change Custody was not complex and did not require multiple findings by the trial Court.

As noted previously, the proper standard for review are neither those established by Kramer, supra, or Maughan, supra. As in all appellate decisions, this Court must not second guess what has previously occurred at trial or hearing. Rather, the primary focus and analysis of the appellate Court is to determine whether or not the decision of the lower Court is substantiated by record evidence. As noted in Kramer, supra at page 628:

It is the trial court's prerogative to hear and weigh conflicting evidence and to make findings of fact. We will not upset such findings when they are supported by substantiated record evidence. Fontenot v. Fontenot, 714 P.2d 1131, 1132 (Utah 1986); Shioji v. Shioji, 712 P.2d 197, 201 (Utah 1985); Mineer v. Mineer, 706 P.2d 1060, 1062 (Utah 1985); Nilson v. Nilson, 652 P.2d 1323, 1324-25 (Utah 1982); Turner v. Turner, 649 P.2d 6, 8 (Utah 1982); Fletcher v. Fletcher, 615 P.2d 1218, 1222 (Utah 1980); Jorgensen v. Jorgensen, 599 P.2d 510, 511-12 (Utah 1979); Hunsaker v. Fake, 563 P.2d 784, 786 (Utah 1977); Carter v. Carter, 563 P.2d 177, 179 (Utah 1977).

Moreover, as stated in Fullmer, supra at page 945:

After viewing the evidence in this light, the trial court's decision will not be disturbed absent a showing of an abuse of discretion or manifest injustice. See Kramer v. Kramer, 738 P.2d 624, 628 (Utah 1987); Fontenot v. Fontenot, 714 P.2d 1131, 1132-33 (Utah 1986) (per curiam).

The Defendant has failed to identify any situation or make any argument which was not rebutted by clear and compelling evidence. He has further failed to establish other criteria enunciated by

Hogge and adapted in numerous subsequent cases. Lastly, the Defendant has failed to demonstrate that the trial Court abused its discretion or that the ruling of the trial Court not to alter the custodial status quo was a manifest injustice. The extreme deference given to the findings of the trial Court was recently reiterated in the case of Riche v. Riche, Case Number 890090-CA (Utah App. December 18, 1989). Not only did the Defendant fail to meet his burden of proof at trial, he has again failed upon appeal to meet his burden of proof. There is no legally cognizable theory upon which custody should have then or should now be awarded to the Defendant.

### III.

THE COURT DID NOT ERR IN ADMITTING HEARSAY  
EVIDENCE WHICH WAS PREJUDICIAL TO THE  
DEFENDANT.

The Court did allow the Plaintiff to testify regarding her conversations with numerous people. All of these conversations were investigations conducted by the Plaintiff prior to making the determination that it was in the best interest of Isaac and Isaiah to remove them from their father's home. The conversations that were related by the Plaintiff were valid exceptions to the hearsay rule. Specifically, these conversations were exceptions noted in Rule 803(3) of the Utah Rules of Evidence. The child protective worker in Juab County indicated that it was his opinion (or his then present state of mind) that there needed to be an investigation of the alleged abuse of Amy and Steven Slater and more compellingly that it was

almost certain that while the investigation was being conducted. Isaac and Isaiah would be placed in foster care. However, each and every time that the trial Court overruled an objection as to the possible hearsay of the matters being related by the Plaintiff, the Court very carefully explained that the statements were being allowed not as proof of the truth of the matter being asserted but rather to show the effect that the statements communicated to the Plaintiff had upon her. (T154, T159). The very limited purpose for which this testimony was admitted was not prejudicial to the Defendant. The Court absolutely needed to know what impact external events were having on the Plaintiff and what motivated her to act as she did.

No one requested that Plaintiff or counsel make a showing at trial that the actual witnesses could not testify. This is probably, upon retrospection, because the testimony was admitted for very limited purposes and because the time allocated for this hearing was very short. Plaintiff did not have ample opportunity to have all of her witnesses who were present in Court testify. To now argue that the Plaintiff should have called additional parties to Court is specious. Not only was there no time for any additional witnesses it is preposterous to now argue that the Plaintiff should have had to bear the additional expense of calling several more witnesses, all of whom would have had to travel great distances to attend trial and to further utilize the Court's time to resolve the issues.

It is unnecessary and absurd to request that this case be remanded for further hearing as the Defendant has requested. To do so would require the Plaintiff to expend much more time, energy, and money in bringing forth several witnesses who would verify their conversations with her. Moreover, to require a relitigation of these issues would unwisely appropriate time which the trial Court could better expend resolving other matters. There is no indication to believe that calling any of the parties to whom the Plaintiff spoke prior to her removal of the boys from the Defendant's home in November, 1987 would result in any new evidence being put forth. Nor is there any indication that any of these witnesses would not affirm precisely what was related to the Court by the Plaintiff. Absent any indication that there is even the minutest possibility that the findings of the trial Court would be reversed, it is unnecessary and unwise to require the additional rehearing of these issues. Again, note the Defendant's assertion that it was the Plaintiff who subjected the parties' children to "ping-pong" custody issues by returning the boys to her in November, 1987 is unwarranted and erroneous. To fault the Plaintiff for acting as a concerned parent, both in being flexible with the visitation given the Defendant and in exercising her prerogative as a concerned parent (much less concerned custodial parent), is ironic but not subject to any credibility.

The Defendant and his attorney have failed to advance any compelling arguments that the trial Court committed prejudicial

error even if the testimony of the Plaintiff relating her conversations with numerous people prior to her arrival in Utah in November, 1987 was hearsay. Absent any argument or finding that the Defendant had been prejudiced by the admission of this evidence and any finding that the refusal to allow the alleged hearsay evidence into the record would have altered the outcome of the case, the Defendant is not entitled to having this matter remanded for further hearing or to having the custody of the parties' minor children given to him. As noted in Clausen vs. Clausen, 675 P.2d 562 (Utah 1983) at 565:

Since it appears that none of the exceptions set forth in the statute apply in this case, it was error for the Court to admit the testimony of Mrs. Powell concerning the Defendant's feelings and emotional condition at the time of their interview. It is clear that the counsellor's knowledge could have come only from communications covered by the statute. However, it appears that the error was harmless in that it did not alter the outcome of the case.

Everyone of the persons to whom the Plaintiff spoke, whether in Utah or California, would document that there were serious reasons to believe that two young people in the Pierce household had been abused. Moreover, it was confirmed that an investigation was going to be forthcoming by the Juab County Division of Family Services. It was also confirmed that Isaac and Isaiah would most likely be removed and placed in foster care until the Social Services investigation was completed. Every thing that the Plaintiff learned heightened her apprehension for the well being of her sons. The Plaintiff did not immediately or

rashly act to remove Isaac and Isaiah from their father's home. She did as much investigation of the allegations as possible. Only after learning that foster care placement was probable and imminent did she come to Utah and regain physical custody of both boys. The statements made by the Plaintiff, if indeed deemed to be hearsay, were not prejudicial and did not impact the final determination of the trial Court. Consequently, their admission was harmless.

#### IV.

THE COURT DID NOT ERR IN FAILING TO AMEND THE FINDINGS AS PER THE DEFENDANT'S MOTION TO AMEND FINDINGS.

Certainly, the Defendant and his attorney were upset that there had been no written Findings of Fact or Conclusions of Law that neither Amy nor Steven Slater were abused. However, the issue of whether or not these individuals were actually abused was not a central issue to this case. The central issue was whether or not there had been interference with the Defendant's visitation which (a) constituted a substantial change of circumstances and (b) would warrant, for the best interests of the minor children, transferring their legal and physical custody from the Plaintiff to the Defendant. The matters that the Defendant sought to have included in the Findings of Fact and Conclusions of Law were irrelevant and extraneous. Certainly, neither this trial Court nor any trial Court should ever be required to obfuscate its rationale or rulings with nonmaterial, unimportant, trivial, or extraneous matters.

Counsel for the Defendant and the Defendant argue that the findings articulated in Paragraphs 1, 2, 3, 4, and 5 of the Findings of Fact and Conclusions of Law as drafted by counsel by the Plaintiff were not discussed. Argument contained previously in this brief documents very clearly that these issues were discussed at the hearing and were considered by the Court. Moreover, when issuing his ruling, Judge Murphy did indicate that his statements to the parties and his pronouncement of his decision was not a substitute for Findings of Fact and Conclusions of Law. He did instruct counsel for the prevailing party to prepare Findings of Fact and Conclusions of Law. (T1, T2 of the proceedings held January 12, 1989).

It is merely extraneous semantics to argue that the Court did not find that Isaiah's fears were concrete, real and pervasive. These fears were identified and articulated by Isaiah on more than one occasion to several people. Moreover, as with Ms. Peggy Rogers, even though Isaiah did not specifically articulate his fear of his stepmother, she too was able to notice the same. The Court's indication that although Isaiah's feelings may not be justified, those were truly his feelings. These feelings and this perception of fear compelled Isaiah to attempt to minimize the contact with his mother so she would not have any indication that there were any difficulties and did cause him to unequivocally state that he wished to remain in his mother's care and custody. To argue a semantic issue and premise one's hope for reversal of a well founded decision upon the same is nothing



more than a desperate grasp at illusory, nonexistent legal straws.

V.

THE COURT SHOULD AWARD JUDGMENT AGAINST THE DEFENDANT FOR ALL COSTS AND ATTORNEY'S FEES INCURRED BY THE PLAINTIFF AT TRIAL AND UPON APPEAL.

The Defendant once again initiated a nonmeritorious action to gain custody of his minor sons. There simply was no adequate foundation or rationale for this action. This was clearly demonstrated by the Court's finding that the Defendant failed to meet either prong of the test promulgated in Hogge, supra. Additionally, the Defendant has subjected the Plaintiff to additional costs and attorney's fees for defending against a frivolous appeal. The Court in Riche, supra, at page 7 has defined a frivolous appeal as follows:

A frivolous appeal has been defined as one without reasonable legal or factual basis as defined in Rules of the Utah Court of Appeals 40(a). Backstrom Family Ltd. Partnership v. Hall, 751 P.2d 1157, 1160 (Utah Ct. App. 1988); O'Brien v. Rush, 744 P.2d 306, 310 (Utah Ct. App. 1987). Sanction for bringing a frivolous appeal "should only be applied in egregious cases less there be an improper chilling of the right to appeal erroneous lower court decisions." Porco v. Porco, 752 P.2d 365, 369 (Utah Ct. App. 1988). The Porco court categorized egregious cases as those obviously without merit, with no reasonable likelihood of prevailing and which result in delaying and implementing a judgment. Id.; See also Arvin Harpswell Ass'n v. Day, 438 A.2d 234, 239 (Me. 1981) (per curiam). Husband's appeal, while unsuccessful, was not frivolous on the issue of visitation and should not be subjected to

Rules of the Utah Court of Appeals 33(a)  
sanctions.

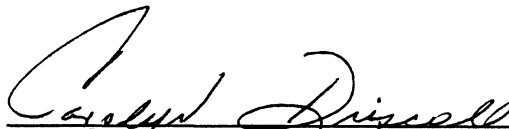
It has been clearly demonstrated that there was no factual reason for initiating this litigation other than the Defendant's disappointment that the children no longer were with him. There was no factual or legal reason to believe that the Plaintiff had ever violated the Defendant's right to have visitation with his children, had interfered unreasonably with any visitation, that the parenting ability had diminished or ceased to exist, that the relationship between the Plaintiff and her sons was non-functional, or that she had done anything which would jeopardize the well being of her children. Mere anger or disappointment or mere desire not to give up until one reaches a stated objective is insufficient reason to keep subjecting other parties to ongoing litigation. Counsel and the Plaintiff would respectfully request that appropriate sanctions be awarded against the Defendant.

CONCLUSION

A most appropriate synopsis of this appeal and the underlying litigation is an analogy. The Defendant is just like an individual who enters a bakery and is given a cookie when there. Not gratified or satisfied, he decides that he must be given the entire contents of the store. The Plaintiff, in a very flexible and generous action, granted the Defendant temporary, physical custody of the parties' minor sons. This was done to allay fears that Isaac had regarding the possible loss of

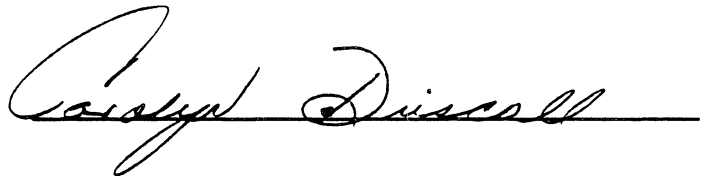
his father and to treat both boys fairly. The Plaintiff was doing nothing other than attempting to further nurture, and foster the relationship between the Defendant and his sons. Unforeseen circumstances absolutely mandated the boys' removal from their father's home. However, once the Defendant had been granted extended visitation with his minor sons, he was not satisfied with a small cookie, rather he wanted the entire bakery and once again brought a specious action to gain custody of his sons and to be given absolutely everything that he desired. It is irrelevant and immaterial to the Defendant that transferring custody would have been harmful to one of his sons. His desires not the best interest of his children motivated this action and every action that he has initiated subsequent to the entry of the initial Decree of Divorce. Counsel for the Plaintiff and her client respectfully request that this Court reject the Defendant's arguments on appeal.

RESPECTFULLY SUBMITTED this 20th day of February, 1990.

  
Carolyn Driscoll  
Attorney for Plaintiff/Respondent

MAILING CERTIFICATE

I hereby certify that four copies of the foregoing Brief of Respondent, were mailed postage prepaid on the 20th day of February, 1990 to Tamara J. Hauge, the attorney for the Defendant, 311 South State Street, Suite 240, Salt Lake City, Utah 84111.

A handwritten signature in cursive script, reading "Carolyn Discol", is written over a horizontal line.