

2002

# Kimberly and Kenneth Scott v. Susan and Garth Hardinger : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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STATE OF UTAH, in the interest of

B. B.,

A person under 18 years of age.

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KIMBERLY and KENNETH SCOTT,

Respondents on Certiorari  
(Appellants in Court of  
Appeals),

vs.

SUSAN and GARTH HARDINGER,

Petitioners on Certiorari  
(Appellees in Court of  
Appeals).

Case No. 20020404-SC

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HARDINGERS' REPLY BRIEF  
ON CERTIORARI TO THE UTAH COURT OF APPEALS

---

APPEAL FROM A VISITATION ORDER  
OF THE FOURTH DISTRICT JUVENILE COURT  
HONORABLE JERIL B. WILSON, PRESIDING

---

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## TABLE OF CONTENTS

REPLY TO STATEMENT OF ISSUES PRESENTED .....	1
REPLY TO STATEMENT OF FACTS .....	2
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	5
POINT I	
THE BEST INTERESTS OF B.B. FAVOR VISITATION. ....	5
POINT II	
<i>TROXEL v. GRANVILLE</i> DOES NOT PREVENT THE ENFORCEMENT OF VISITATION AGREEMENTS. ....	6
POINT III	
UTAH STATUTES AND CASES DO NOT PRECLUDE THE ENFORCEMENT OF AN AGREEMENT FOR POST-ADOPTION VISITATION WITH NON-RELATIVES. ....	8
POINT IV	
THE VISITATION AGREEMENT DOES NOT VIOLATE PUBLIC POLICY. ....	10
POINT V	
THE JUVENILE COURT RETAINED JURISDICTION TO ENFORCE ITS OWN ORDER. ....	11
POINT VI	
THERE WAS NO FINAL ORDER TO APPEAL. ....	13

POINT VII

THERE WAS NO VALID APPEAL FROM THE ATTORNEY FEE ORDER. ....	13
A. <u>The Notice of Appeal Did Not Include the Attorney Fee Order.</u> ..	13
B. <u>There Was No Violation of Due Process.</u> .....	14

POINT VIII

THERE HAS BEEN NO CHANGE OF CIRCUMSTANCES TO MAKE PROSPECTIVE VISITATION INEQUITABLE. ....	18
---	----

POINT IX

SCOTTS ARE NOT ENTITLED TO THEIR ATTORNEY FEES. ....	20
---	----

CONCLUSION .....	21
------------------	----

## TABLE OF AUTHORITIES

### Cases Cited:

<u>Anderson v. Doms</u> , 1999 UT App 207, 984 P.2d 392 .....	15
<u>Ashton v. Ashton</u> , 733 P.2d 147 (Utah 1987) .....	18
<u>Currey v. Currey</u> , 650 N.W.2d 273 (S.D. 2002) .....	7, 11
<u>Ex parte D.W. (In re J.S. v. D.W.)</u> , 835 So.2d 186 (Ala. 2002) .....	9, 13
<u>In re Adoption of A.B.</u> , 1999 UT App 315, 991 P.2d 70 .....	1, 12
<u>In re Adoption of Halloway</u> , 732 P.2d 962 (Utah 1986) .....	8
<u>In re T.J.K.</u> , 62 S.W.3d 830 (Tex. Ct. App. 2001) .....	19
<u>J.S. v. D.W.</u> , 835 So.2d 174 (Civ. App. 2001), <u>reversed sub nom Ex parte D.W. (In re J.S. v. D.W.)</u> , 835 So.2d 186 (Ala. 2002) .....	9
<u>Jensen v. Intermountain Power Agency</u> , 1999 UT 10, 977 P.2d 474 .....	13, 14
<u>Kasper v. Nordfelt</u> , 815 P.2d 747 (Utah Ct. App.1991) .....	12
<u>Little v. Mitchell</u> , 604 P.2d 918 (Utah 1979) .....	13
<u>MacKay v. Hardy</u> , 973 P.2d 941 (Utah 1998) .....	15
<u>Prince v. Bear River Mutual Insurance Co.</u> , 2002 UT 68, 56 P.3d 524 .....	20
<u>Quagliana v. Exquisite Home Builders, Inc.</u> , 538 P.2d 301 (Utah 1975) .....	15
<u>Roberson v. Draney</u> , 54 Utah 525, 182 P. 212 (1919) .....	14
<u>State v. Leatherbury</u> , 2003 UT 2 .....	19
<u>State v. Rammel</u> , 721 P.2d 498 (Utah 1986) .....	17
<u>T.S. v. L.F.</u> , 2001 UT App 183 .....	2
<u>Troxel v. Granville</u> , 530 U.S. 57 (2000) .....	6-10, 18

<u>Utah Department of Social Services v. Adams</u> , 806 P.2d 1193 (Utah Ct. App. 1991) . .	20
<u>Valcarce v. Fitzgerald</u> , 961 P.2d 305 (Utah 1998) . . . . .	21
<u>Wilson v. Family Services Division</u> , 554 P.2d 227 (Utah 1976) . . . . .	1

Statutes and Rules Cited:

Utah Code Ann. § 78-32-11 (2002) . . . . .	20
Utah R. App. P. 11(c) . . . . .	2
Utah R. App. P. 11(e)(2) . . . . .	2
Utah R. App. P. 11(g) . . . . .	3, 14
Utah R. Evid. 103 . . . . .	17

IN THE UTAH SUPREME COURT

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HARDINGERS' REPLY BRIEF  
ON CERTIORARI TO THE UTAH COURT OF APPEALS

REPLY TO STATEMENT OF ISSUES PRESENTED

Hardingers dispute the correctness of the third question presented for review in the Scotts' brief. Scotts assert this Court must determine whether a decree of adoption terminates the visitation rights of former relatives. That question is not presented by this appeal. The parental rights of the biological parents were terminated November 23, 1999. (R. 528.) With that termination, the status of Hardingers as relatives of B.B. ended, In re Adoption of A.B., 1999 UT App 315, ¶ 21, 991 P.2d 70, 76, leaving them only "some dormant or inchoate right or interest in the custody and welfare" of B.B. Wilson v. Family



Services Division, 554 P.2d 227, 231 (Utah 1976). It was half a year later, on May 19, 2000, that Hardingers and Scotts, as parties interested in the welfare of B.B. but no longer related to her, resolved their competing petitions for guardianship and custody by agreeing that Scotts could adopt B.B. in exchange for Hardingers having specified visitation rights. (R. 338-343.)

On a similar vein, this appeal does not really involve "open adoptions" as commonly understood, where a biological parent consents to adoption only in exchange for receiving contact or visitation rights. The enforceability of such agreements with the biological parents presents far different public policy and statutory questions than those presented in this appeal. E.g., T.S. v. L.F., 2001 UT App 183, ¶ 20, 27 P.3d 583 (In home placement cases there is no need for the state to cut off rights of natural parent to ensure bonding of child to its new adoptive parents.). Hardingers do not in this appeal seek any rights by virtue of the biological relationship. Although that biological relationship is what led Hardingers to be the primary caretakers of B.B. for the first nearly three years of her life, those biology-based rights were essentially terminated with the parental rights of the biological parents. Hardingers' rights in this appeal arise from the court order entered by the juvenile court upon the stipulation and urging of the Scotts.

### **REPLY TO STATEMENT OF FACTS**

There was no transcript of the hearing before the juvenile court, apparently because the recording equipment malfunctioned. (Scotts' brief 10.) It was Scotts' duty to provide an adequate record. Utah R. App. P. 11(c); Utah R. App. P. 11(e)(2). Scotts nevertheless did

not avail themselves of the procedures available to provide a substitute record. Utah R. App. P. 11(g). Scotts' appeal must, therefore, be determined based on the trial court's Findings of Fact Conclusions of Law and Order (R. 528-533), a copy of which were attached to their initial brief.

Scotts fail to give record citations for any of the statements in the "Course of Proceedings and Disposition Below" section of their brief. Many of the statements, particularly those concerning the biological parents, find no support whatsoever in the record for this appeal.

Particularly troubling is Scotts' unsupported claim, found on page 6 of their brief, that B.B. disclosed potential sexual abuse by Mr. Hardinger. Although the record does reflect that some sort of suspicion existed,<sup>1</sup> the record does not support the inference that B.B. volunteered the information, as opposed to Scotts having a more active role in creating the suspicion. The suspicion of abuse is not relevant to any issue on appeal, except that Scotts' improper reaction to the suspicion is what resulted in Scotts being held in contempt of court. Scotts claim that a child protective services investigator and a family therapist directed Scotts to refuse visitation as a result of those allegations. The juvenile court specifically found that Scotts' continued refusal to allow visitation based on those unsupported allegations was not justified. (R. 530, ¶ 23.) That unjustified refusal to allow visitation was one of the primary

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<sup>1</sup>Subsequent proceedings in the juvenile court demonstrated that the claim was completely unfounded and raised concerns about the involvement of Scotts in seeking the "disclosures" from B.B. These subsequent proceedings are not part of this record because the appeal was taken from an interlocutory order, and the juvenile court continued with proceedings to determine whether visitation should be modified.

reasons Scotts were held in contempt of court. Scotts have not challenged the factual predicates underlying the contempt citation.

Scotts also make the unsupported and irrelevant allegation that "Nick and Jenifer Blundell were spending more time in jail than out of jail." (Scotts' brief, p. 25.) This claim has no support in the record. It may be true as to Nick Blundell, but is not true as to Jenifer Blundell.

Scotts assert that Jenifer Blundell signed an agreement to transfer physical custody of B.B. to the Scotts. (Scotts' brief at p. 8.) Scotts fail to note, however, that Jenifer rescinded that agreement and asserted that it had been fraudulently induced by the Scotts. (R. 96-99.)

### **SUMMARY OF ARGUMENT**

Scotts characterize this case as implicating the constitutional right of parents to raise their child. No such constitutional issues need be decided by this Court. Rather, the questions presented are whether a juvenile court has authority to enforce its own order, and whether parents may on their own whim abrogate agreements embodied in court orders.

No statutes, court decisions, or public policy concerns preclude enforcement of the visitation order. The best interests of B.B. would be fostered by the visitation. Scotts agreed to the visitation.

The juvenile court retained jurisdiction to enforce its own orders. Scotts do not respond to the arguments of Hardingers' initial brief on this issue, and must be deemed to have acquiesced in those arguments.

## **ARGUMENT**

### **POINT I**

#### **THE BEST INTERESTS OF B.B. FAVOR VISITATION.**

Scotts assert: "This case is about a child and a child's best interests." (Scotts' brief, p. 14.) Hardingers agree. The best interests of B.B. mandate that she have visitation with Hardingers.

Both of the expert witnesses who evaluated B.B. concluded that visitation with Hardingers was in B.B.'s best interest. (R. 531, ¶ 29.) Scotts agreed and stipulated that Hardingers be granted visitation rights. The court order reflecting the stipulation was drafted by Scotts' counsel. (R. 330-337.) The juvenile court specifically found that visitation with Hardingers was in the best interest of B.B. (R. 531, ¶¶ 29, 4.) Scotts' agreement to allow visitation was the reason the juvenile court was willing to allow the adoption. (R. 531 ¶ 2.)

Scotts have never challenged the "best interest" findings and conclusions of the juvenile court. Even now, they give lip service to the concept that B.B. should have visitation with the Hardingers. (Scotts' brief, p. 25, 26 n.5.) Although they claim Hardingers should have visitation with B.B., Scotts have not allowed any visitation since the opinion of the Court of Appeals. Even when Hardingers delivered a holiday gift, Scotts refused to allow a brief visit at the door.

The findings of the juvenile court reflect a similar failure by Scotts to act in B.B.'s best interest. Scotts raised a claim of possible sexual abuse, which was later proved completely unfounded. Although procedures were proposed to protect B.B. from any abuse,

Scotts persisted in denying B.B. any visits with Hardingers. The trial court found this was unreasonable and found that visits with Hardingers were in B.B.'s best interest. Scotts have not questioned those findings on appeal.

This Court should, therefore, reject any claim by Scotts that they are acting in the best interest of B.B. Such claims are contrary to the undisputed findings of the juvenile court. Such claims are also contrary to the Scotts' own stipulation. This Court should recognize Scotts' claim for what it is: an attempt to avoid the burdens of an agreement after having received all the benefits of that agreement. Scotts do not seek B.B.'s best interest, but rather seek their own self interest.

## **POINT II**

### ***TROXEL v. GRANVILLE DOES NOT PREVENT THE ENFORCEMENT OF VISITATION AGREEMENTS.***

In point III.A. of their brief, Scotts claim that the United States Supreme Court opinion in Troxel v. Granville, 530 U.S. 57 (2000), controls the outcome of this case. Troxel recognized that parents have a fundamental liberty interest in making decisions concerning the best interest of their children without interference from the state or others. That fundamental right of parents is well recognized and not challenged in this appeal. This appeal does not challenge the right of parents to make decisions concerning their children, but rather addresses whether parents are bound by the consequences of their choices.

If an advertising agency sought child models to appear in breakfast cereal commercials, no one could compel parents to agree to such a contract. If, however, parents agreed

to such a contract and received \$1,000,000.00 as an advance, the parents could not then reject the contract and keep the money on the ground that the contract interfered with their fundamental parental rights. Such parents would not be forced to enter the agreement, but once the agreement was made, it could be enforced.

In the instant case, no one forced Scotts to make a visitation agreement with Hardingers. The juvenile court did not force the agreement. The Guardian ad Litem's office did not force the agreement. Hardingers did not force the agreement. Scotts made the agreement voluntarily. Once they voluntarily made the agreement, however, they became bound by it.

This principle, that rights may be created by agreement even where the courts could not impose those rights, is illustrated in the recent case of Currey v. Currey, 650 N.W.2d 273 (S.D. 2002). The parents divorced while the father was incarcerated, and the mother was given legal and physical custody of the children. The paternal grandparents sought visitation rights and the mother agreed to those rights. Later, after the mother moved, the grandparents sought a modification of the visitation schedule. The mother then claimed that the grandparent visitation was unconstitutional under Troxel v. Granville and sought termination of the visitation rights. The trial court terminated the visitation rights based on Troxel. The South Dakota Supreme Court reversed and court held that the South Dakota grandparent visitation statute was constitutional. The Court further concluded the parties' agreement created rights beyond the statute: "Even if [the statute] were unconstitutional, that would not necessarily determine Grandparents' visitation rights because those rights arose by agreement." 650 N.W.2d at 278.

The principles of Troxel v. Granville were not violated in this case. Neither the state nor anyone else forced Scotts to agree that Hardingers receive visitation. The autonomy of Scotts to make decisions concerning their child was fully recognized. Once the Scotts made a decision, however, and received a benefit for that decision, they were bound by their own decision. Nothing in Troxel or its progeny permits parents to avoid the legal consequences of their voluntary decisions.

### **POINT III**

#### **UTAH STATUTES AND CASES DO NOT PRECLUDE THE ENFORCEMENT OF AN AGREEMENT FOR POST-ADOPTION VISITATION WITH NON-RELATIVES.**

In their initial brief, Hardingers cited several Utah cases to show that the concept of a conditional adoption is not contrary to existing Utah decisions or public policy. In response, Scotts assert that Utah does not have open adoptions, but give no citation to support this claim. The fact is that no statutes in Utah preclude the visitation agreement between Scotts and Hardingers.

Hardingers cited to the case of In re Adoption of Halloway, 732 P.2d 962, 972 n.11 (Utah 1986), as reflecting a favorable judicial attitude toward open adoptions. In response, Scotts quote the last sentence of the cited footnote, which states: "We make this statement as an observation only, recognizing that the matter is not ours to decide." Scotts apparently read this as stating that only the legislature can authorize conditional adoptions. In fact, the sentence recognizes that the Utah courts did not have jurisdiction to decide the matter in that

case, but were required to defer to the tribal courts of the Navajo Nation. Nothing in the opinion hints that such open adoptions must be preauthorized by the legislature.

Scotts also cite several decisions which they claim have invalidated grandparent visitation statutes. (Scotts' brief, p. 39.) In each of the cases cited by Scotts, however, the issue was whether the court could force visitation. None of the cases involved the situation where the parents had agreed to visitation, received a benefit in return, and later attempted to renege on their agreement.

One of the cases cited by Scotts is J.S. v. D.W., 835 So.2d 174 (Ala. Civ. App. 2001). That decision was reversed by the Alabama Supreme Court in February, 2002, nearly a year before Scotts filed their brief. Ex parte D.W. (In re J.S. v. D.W.), 835 So.2d 186 (Ala. 2002). The Alabama Supreme Court upheld the constitutionality of the Alabama statute which authorized post-adoption visitation rights in the limited context of intrafamily adoptions. In affirming the statute, the court distinguished Troxel v. Granville: "However, *Troxel* involved the rights of a natural mother, while this case involves the rights of adopting parents in the limited context of intrafamily adoptions. In our opinion, the Court of Civil Appeals erred in overlooking this significant distinction." 835 So.2d at 189.

Similarly, in the instant case the Court must remember the narrow issue presented by this appeal. The Court need not decide the enforceability of an open adoption agreement between a biological parent and an adoptive parent. Such cases present policy considerations which are not applicable in the instant case involving two sets of former relatives each of whom already had a significant relationship with the child and who had competing petitions for guardianship of the child. Most importantly, this case does not involve a mere private



agreement between the parties; rather, the visitation provisions here were embodied in a court order entered, by stipulation, substantially contemporaneously with the adoption decree.

Scotts have cited to no cases or statutes precluding the post-adoption enforcement of an agreement and order for visitation entered substantially contemporaneously with the adoption order. This Court should hold that the visitation order is enforceable.

#### **POINT IV**

#### **THE VISITATION AGREEMENT DOES NOT VIOLATE PUBLIC POLICY.**

In Point III.C. of their brief, Scotts again assert that this is not a contract case. Yet, Scotts' voluntary agreement is exactly what makes this case different from Troxel v. Granville and the many other cases cited by Scotts in support of their supposed sovereign right to determine with whom B.B. shall visit.

B.B. is not a chattel that can be bought and sold. Hardingers agree with that. But, where B.B.'s prospective parents agreed to specified visitation, where the undisputed extensive evidence showed that such visitation was in B.B.'s best interest, and where Scotts received valuable consideration for their agreement, all the elements of an enforceable contract exist.

Scotts argue the agreement was void ab initio as contrary to public policy. Scotts provide absolutely no relevant authority for this proposition, but cite only to cases involving gambling debts. Scotts do not rebut nor attempt to distinguish the cases cited on pages 11

and 12 of Hardingers' initial brief which establish that parties may, by agreement, create rights beyond those that the court could impose. Currey v. Currey, 650 N.W.2d 273, 278 (S.D. 2002), discussed above at page 7, confirms this principle.

It must also be remembered that Scotts themselves would have had no rights as adoptive parents but for the agreement. This is not a case, therefore, where Scotts were deprived of any rights. Their rights as adoptive parents always were, by their own agreement, subject to visitation rights in Hardingers. They agreed to that condition because they acknowledged that it was in the best interest of B.B.

Public policy does not prohibit a parent from agreeing to visitation that is in the child's best interest. When the agreement forms a contract and is embodied in a court order, public policy demands that the agreement be enforced.

## **POINT V**

### **THE JUVENILE COURT RETAINED JURISDICTION TO ENFORCE ITS OWN ORDER.**

In Point II of their initial brief, Hardingers analyzed the Court of Appeals's holding that the juvenile court lacked jurisdiction to enforce its own order. Hardingers noted that had they sought enforcement of such an order in district court, there would have been no question that the district court had jurisdiction to enforce the order and there was no valid reason for a different rule in juvenile court. Hardingers explained that the holding that the juvenile court jurisdiction terminated upon entry of the adoption could not withstand logic, because the same logic used by the court (jurisdiction terminates upon entry of an order that resolves

the initial basis for jurisdiction) compelled the conclusion that jurisdiction terminated upon entry of the Order of Custody and Decree Guardianship entered before the adoption. Under the Court of Appeals's own logic, therefore, the court lacked jurisdiction to even enter the adoption order. Hardingers cited to the statute that grants the juvenile court jurisdiction to enforce its own orders through the contempt power.

Scotts did not directly respond to any of these arguments related to the jurisdictional analysis of the Court of Appeals. Instead, Scotts merely quoted at length from the opinion of the Court of Appeals. (Scotts' brief at pp. 27-28.) Scotts must, therefore, be deemed to have acquiesced in the validity of Hardingers' arguments.

Scotts cite In re Adoption of A.B. (L.S.C. v. State), 1999 UT App 315, ¶ 21, 991 P.2d 70, 76 (Utah App. 1999), and Kasper v. Nordfelt, 815 P.2d 747, 750 (Utah Ct. App. 1991), as showing that the visitation rights of grandparents terminate upon the entry of an order of adoption. Neither of those cases involved the situation present here where the adoptive parents agreed to the visitation.

Scotts also argue, on page 32 of their brief, that B.B. has been ordered by the court to maintain a relationship with her biological mother. That statement is completely false.

Scotts complained that the visitation schedule interferes with their rights as adoptive parents. When Scotts undertook to become adoptive parents, however, they understood and agreed that there would be ongoing visitation with Hardingers. In fact, but for that agreement regarding ongoing visitation, there would have been no adoption and Scotts would not be the adoptive parents. Scotts should not be heard to complain their rights are somehow limited, because they received exactly what they bargained for. Their rights as adoptive

parents, by their own agreement, always were subject to the visitation rights of Hardingers, so they have not been deprived of any rights.<sup>2</sup>

## **POINT VI**

### **THERE WAS NO FINAL ORDER TO APPEAL.**

Scotts argue: "The granting of the motion to quash certainly would be a final order." (Scotts' brief at 15.) Scotts further assert: "By affirming the Court of Appeals' reversal of the juvenile court's assertion of jurisdiction this case will be resolved." (Scotts' brief at 18.) That the Court might have jurisdiction over the order Scotts sought but did not receive does not give the Court jurisdiction over the order actually entered. As recognized by this Court in Little v. Mitchell, 604 P.2d 918, 919 (Utah 1979), the denial of a potentially dispositive motion does not create a final order. The order from which Scotts appealed only denied their motion to quash. It was not a final order and the appellate courts lack jurisdiction.

## **POINT VII**

### **THERE WAS NO VALID APPEAL FROM THE ATTORNEY FEE ORDER.**

#### **A. The Notice of Appeal Did Not Include the Attorney Fee Order.**

Hardingers' initial brief asserted that the Court of Appeals departed from this Court's holding in Jensen v. Intermountain Power Agency, 1999 UT 10, 977 P.2d 474, in allowing

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<sup>2</sup>Although it arises under a different statutory scheme, the concept in Ex parte D.W. (In re J.S. v. D.W.), 835 So.2d 186, 191 (Ala. 2002), applies here. The court there held that although adoptive parents were granted all of the rights of a natural parent, those rights as adoptive parents still differed from those of natural parents in that rights of adoptive parents were subject to court ordered grandparent visitation.

the appeal from the award of attorney fees. In response, Scotts do not address the arguments related to Jensen and must be deemed to have acknowledged their validity. Instead, Scotts cite to a 1919 Utah case which merely holds that notices of appeal should be liberally construed. Roberson v. Draney, 54 Utah 525, 182 P. 212, 213 (1919). As explained in Jensen, however, even with liberal construction the notice must still identify the judgment from which the appeal is taken. In the instant case there were two orders, and the notice of appeal only mentioned one of them. Even liberal construction cannot cure that error.

Scotts also argue: "Notice had been given to the Hardingers in open court, before the entry of the judgment for attorney's fees." (Scotts brief at 22.) Scotts give no record citation for this claim, because no record exists and Scotts did not avail themselves of the procedures available to create a substitute record. Utah R. App. P. 11(g). The undersigned was not present at the hearing and does not know what was said. It seems likely, however, that at most Scotts gave notice that they intended to appeal the ruling on jurisdictional issues.

In any event, it is difficult to understand how an unrecorded verbal statement in court, made before entry of the subject ruling, can confer jurisdiction on an appellate court. As noted in Hardingers' initial brief, the Notice of Appeal was quite specific in identifying the order appealed from as "the ruling of the Court on the Motion to Quash." The Court of Appeals erred in expanding that to include an order on a different subject.

**B. There Was No Violation of Due Process.**

Scotts challenge the award of attorney fees to Hardingers. The Court of Appeals did not reach the merits of the attorney fee issue because it held the juvenile court lacked jurisdiction to enter the award. On certiorari, Hardingers assert the Court of Appeals lacked

jurisdiction over the attorney fee award, as explained in Point VII.A. above. The following arguments are provided in the event the Court determines to reach the merits of the attorney fee award.

Scotts apparently claim (1) the attorney fee award is not supported by adequate findings and (2) they were not allowed to present evidence regarding the fees. These claims will be addressed in order.

Scotts offer no legal authority and almost no argument in support of their claim (Scotts' brief p. 23) that the juvenile court failed to make adequate findings. This Court should refuse to consider the claim for this reason alone. MacKay v. Hardy, 973 P.2d 941, 947-48 (Utah 1998).

"The sufficiency of a trial court's findings supporting an award of attorney fees is also reviewed under a correction-of-error standard." Anderson v. Doms, 1999 UT App 207, ¶ 9, 984 P.2d 392, 396 (citation omitted). The findings supporting the attorney fee award consist of both the findings in the Order of Attorney Fees and Judgment itself, and the findings in the Findings of Fact Conclusions of Law and Order entered the same day.

In considering whether the findings are adequate, it is also important to consider what were the contested issues. "It is the duty of a trial court to make findings of fact with respect to all contested issues in a case." Quagliana v. Exquisite Home Builders, Inc., 538 P.2d 301, 305 (Utah 1975).

Scotts did not contest the reasonableness of the amount of attorney fees; in fact, their attorney fees appear to be greater overall. (R. 501-508.) Because Scotts did not challenge the reasonableness of the fee, the trial court should not have been expected to make detailed

findings concerning reasonableness. The simple finding that the fees were reasonable is sufficient.

The only objections raised by Scotts with respect to the attorney fees were (1) Scotts reasonably believed the juvenile court lacked jurisdiction and (2) Scotts were acting on the advice of others. (R. 497-500.) The findings addressing these issues include the following:

5. Through the efforts of court ordered mediation the Hardingers withdrew their petition for custody and supported adoption by the Scotts. In return, the Scotts agreed to allow future visitation to the Hardingers. (R. 529)

7. The visitation order of May 19, 2000 appointed a Special Master to help the parties implement the visitation. (R. 529.)

8. The Decree of Adoption entered on June 5, 2000 granted the Scott's Petition to adopt Baylie. The Decree changes Baylie Blundell's name to Baylie Scott. The Decree of Adoption does not address visitation. (R. 529.)

22. The court finds that after June 24, 2000 the Scotts have not allowed visitation to the Hardingers as required by the Order. (R. 530.)

23. Initially such refusal may have been justified because of allegations of sexual abuse, however, continued refusal of visitation after safeguards were suggested was not justified. (R. 530.)

24. The Court finds the Scotts have not followed the continuing recommendation of the Special Master for visitation. (R. 530.)

1. The attorney's fees incurred by Garth and Susan Hardinger were reasonable and necessary under the circumstances. (R. 525.)

2. The fees were incurred in large part because of the Scott's [sic] failure to comply with the recommendations of the

Special Master, Elizabeth Dalton, which necessitated the Order to Show Cause hearing. (R. 525.)

These findings show that Scotts ignored the recommendations of the court-appointed Special Master, and continued to deny visitation even after safeguards had been suggested to eliminate any concerns about ongoing sexual abuse. Scotts contemptuously viewed the juvenile court and its special master as having no authority, and therefore ignored its orders. These findings are sufficient under any legal standard.

Scotts also claim the juvenile court refused to allow them to present evidence. The record does not appear to support this claim. On page 12 of their brief, Scotts cite to a "Clerk's Minute Sheet" supposedly appearing at pages 467-468 of the Juvenile Court Record. The version of the juvenile court record reviewed by the undersigned counsel, however, shows that those pages are part of the Affidavit of the Scotts in Response to the Order to Show Cause in Re: Contempt (R. 461-473.) Counsel has been unable to locate in the record a copy of the juvenile court's minutes for the described hearing.

Even on appeal Scotts do not state what evidence they would have submitted, nor do they present any arguments to show how that evidence might have changed the result. "[W]e will not set aside a verdict because of the erroneous exclusion of evidence unless a proffer of evidence appears of record, and we believe that the excluded evidence would probably have had a substantial influence in bringing about a different verdict." State v. Rammel, 721 P.2d 498, 499-500 (Utah 1986). Accord Utah R. Evid. 103. Scotts do not claim to have proffered in the juvenile court the evidence they wanted to present, and they have similarly failed to advise this Court what evidence they wanted to present. These failures alone are



sufficient to require rejection of Scotts' challenge to the attorney fee award. Absent such a proffer, this Court cannot determine whether the rejected evidence was material.

In any event, it appears from Scotts' objection to the attorney fees (R. 497-505) that the only evidence they would have submitted concerned their belief that the juvenile court lacked jurisdiction and that others had advised them to not allow visitation. Evidence concerning the legal issue of jurisdiction would have been inadmissible. "[I]t is a basic maxim of law that testimonial opinion on the state of the law is to be excluded." Ashton v. Ashton, 733 P.2d 147, 153 (Utah 1987). The advice of others also would not have been persuasive. The juvenile court properly held that Scotts should have followed the directives of the Special Master. Evidence concerning the advice of others was, therefore, irrelevant.

## **POINT VIII**

### **THERE HAS BEEN NO CHANGE OF CIRCUMSTANCES TO MAKE PROSPECTIVE VISITATION INEQUITABLE.**

On pages 46-47 of their brief, Scotts argue that this Court should exercise its powers in equity to modify the visitation order because its prospective application is now contrary to law. Troxel v. Granville did not, however, modify existing law. The Troxel court observed: "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." 530 U.S. at 65. Indeed, the United State Supreme Court decision in Troxel merely affirmed the decision of the Washington Supreme Court. The law now is no different than when the visitation order was entered.

Even if Troxel represented a change from prior law, it would not justify reevaluating the visitation agreement in this case. Scotts rely on In re T.J.K., 62 S.W.3d 830 (Tex. Ct. App. 2001). The opinion in that case repeatedly emphasized that the visitation arrangement was not based on contract (i.e., although the father agreed to it, he did not receive anything of value in exchange for his agreement). The court stated: "Though parties may enter into a separate binding contract, that is not what happened in this case." 62 S.W.3d at 833. The court further noted: "In this case, we only have an agreed court order granting the grandmother access. There is no contractual agreement." Id.

The father in T.J.K. agreed that the maternal grandmother receive visitation, but there is no indication that the father received anything in return. The court therefore held that the father had not waived his right to challenge the constitutionality of the grandparent visitation statute. The court emphasized, however, that a "party cannot seek to obtain benefits of an act and attack its constitutionality." 62 S.W.3d at 832. T.J.K. represented a much different situation than the instant one where Scotts received valuable rights in exchange for their agreement to visitation. Under these circumstances, the supposed change in law would not justify reevaluating the visitation.

In addition, this change in circumstances argument is raised for the first time on certiorari. On certiorari, the Court only reviews the decision of the Court of Appeals. It is well established that the function of a writ of certiorari is to review the decision of the Court of Appeals. State v. Leatherbury, 2003 UT 2, ¶ 7. Certiorari is not an appropriate forum in which to raise new arguments.

## POINT IX

### SCOTTS ARE NOT ENTITLED TO THEIR ATTORNEY FEES.

Scotts request attorney fees but cite no legal basis for such an award. The case cited by Scotts, Utah Department of Social Services v. Adams, 806 P.2d 1193 (Utah Ct. App. 1991), involved the issue of whether a party awarded attorney fees below is also entitled to attorney fees for successfully defending an appeal. The case provides no support for the situation advocated by Scotts, where a party not awarded any attorney fees below seeks a new award on appeal. The arguments and authorities cited by Scotts do not support such a result.

The arguments advanced by Scotts do not, in any event, justify an award of fees. Scotts argue that the legal fees they have paid attempting to get out of their agreement could have been better spent to provide for B.B. Hardingers agree that Scotts have made an unwise allocation of resources, but that does not justify requiring Hardingers to pay Scotts' attorney fees. The rule in Utah is that attorney fees are not allowed unless authorized by statute or contract. Prince v. Bear River Mutual Insurance Co., 2002 UT 68, ¶ 52, 56 P.3d 524, 539. There is no statute or contract here which allows attorney fees, and Scotts are therefore not entitled to an award of fees even if they were to prevail on appeal.


Hardingers, on the other hand, were awarded attorney fees below based on Scotts' contempt. Such awards are authorized by statute. Utah Code Ann. § 78-32-11 (2002). Because they were awarded fees below, Hardingers are entitled to recover their attorney fees

on appeal if they prevail on the appeal. Valcarce v. Fitzgerald, 961 P.2d 305, 319 (Utah 1998).

### CONCLUSION

This case does not present a constitutional issue. Hardingers do not contest the right of parents to make decisions concerning their children. Once the parents make a decision which becomes a valid contract and is embodied in a court order, however, the order is enforceable even if the parents later change their minds. The decision of the Court of Appeals should be reversed, and the decision of the trial court affirmed.

DATED this 20<sup>th</sup> day of March, 2003.



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**MAILING CERTIFICATE**

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 20<sup>th</sup> day of March, 2003.

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A handwritten signature in black ink, appearing to read "Mark Staley", is written over a horizontal line.