

1999

Michael L. Van Orden v. Lisa M. Van Orden : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL L. VAN ORDEN,

Petitioner/Appellee,

vs.

LISA M. VAN ORDEN,

Respondent/Appellant.

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Case No. 990545 CA

Priority No. 15

BRIEF OF APPELLEE

On Appeal from Decree of Divorce
Entered in the Third Judicial District Court
of Salt Lake County, Utah
Judge Anthony B. Quinn

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FILED

Utah Court of Appeals

MAY 24 2000

Julia D'Alesandro
Clerk of the Court

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VS.

LISA M. VAN ORDEN,

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TABLE OF CONTENTS

JURISDICTION	1
STATEMENT OF ISSUES	1
STATUTORY AND CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	2
1. Nature of the Case and Disposition Below	2
2. Factual Background	3
SUMMARY OF ARGUMENTS	8
ARGUMENT	9
1. Lisa has not made any effort to marshal the evidence which supported the Court's findings	9
2. The Court did not abuse its discretion in awarding Michael sole custody of Cortney, or in making visitation orders	10
3. The Court's partial award of attorney's fees was within the Court's discretion	15
4. Michael is entitled to his attorney's fees on appeal	16
CONCLUSION	17

TABLE OF AUTHORITIES

Cases	<u>Page</u>
Bolliger v. Bolliger, 2000 Utah Ct. App 47, 389 Utah Adv. Rep. 11..	17
Crouse v. Crouse, 817 P.2d 836 (Utah App. 1991)	9,15
Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988).	16
Martinez v. Martinez, 728 P.2d 994 (Utah 1986)	13
Nilson v. Nilson, 652 P.2d 1323 (Utah 1982)	10
Rasband v. Rasband, 752 P.2d 1331 (Utah App. 1988)	15
Rudman v. Rudman, 812 P.2d 73 (Utah App. 1991)	8
Shioji v. Shioji, 712 P.2d 197 (Utah 1985).	1
Sukin v. Sukin, 842 P.2d 922 (Utah App. 1992)	13
Sweeney v. Happy Valley, Inc., 417 P.2d 126 (Utah 1966)	15
Yelderman v. Yelderman, 669 P.2d 406 (Utah 1983)	13
 Statutes	
Utah Code Ann. § 30-3-3	2
Utah Code Ann. § 30-3-5	2
Utah Code Ann. § 78-2a-3(2)(i)	1

JURISDICTION

The Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann., Sec. 78-2a-3(2)(i).

STATEMENT OF ISSUES

The issues presented to the Court for review are (1) whether the trial Court abused its discretion in awarding petitioner ("Michael") primary legal and physical custody of the parties' minor child, and in ordering appellant ("Lisa") not to undermine Michael's authority as custodial parent or involve a third party in visitation, and (2) whether the trial Court abused its discretion at a post trial hearing in awarding Lisa \$5,000 in attorney's fees.

Lisa is challenging the adequacy of the Findings of Fact on these points. Findings of Fact are subject to the clearly erroneous standard of review. Jense v. Jense, 784 P.2d 1249, 1251 (Utah App. 1989). A finding is clearly erroneous if it is against the great weight of the evidence or if the Court is otherwise definitely and firmly convinced that a mistake has been made. Johnson v. Johnson, 721 P.2d 696, 697 (Utah App. 1989). When physical custody of a child is in dispute, trial judges are accorded broad discretion. Davis v. Davis, 749 P.2d 647, 648 (Utah 1988). "Only where the trial court's judgment is so flagrantly unjust as to be an abuse of discretion will [an appellate court] interpose its own judgment." Shioji v. Shioji, 712 P.2d 197, 201 (Utah 1985).

STATUTORY AND CONSTITUTIONAL PROVISIONS

A. Section 30-3-5, Utah Code Ann.: "When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties."

B. Section 30-3-3, Utah Code Ann.: "In any action filed under Title 30, Chapter 3, 4, or 6 ... the court may order a party to pay the costs,

attorney's fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action."

STATEMENT OF THE CASE

1. Nature of the Case and Disposition Below. This was a divorce proceeding. Following a three-day trial on April 6, 7, and 8, 1999, Judge Anthony B. Quinn awarded Michael sole legal and physical custody of the parties' daughter, Cortney Lee Van Orden, born January 16, 1993. (Tr. pp. 560- 563, 566-67; Findings No. 15 and 20, R, 954, 956). During the entire course of the three-day trial, the only mention of attorney fees was during the closing arguments of Michael's attorney (Tr. pg. 531), where he asked the court that each side be ordered to pay their own fees. Additionally, there was no testimony, evidence, or proffer from Lisa concerning any financial need or hardship. Indeed, there was testimony, which will be discussed herein, indicating that Lisa lived a very comfortable lifestyle. Nevertheless, Judge Quinn, in his findings, ordered that Michael pay Lisa's attorney fees without specifying an amount (Tr. pg. 570, 571; Finding of Fact 44 - R. 963).

Lisa then requested judgment for over \$26,000 (R. 978-980; 1005-06). Michael filed a Request for Reconsideration (R. 941-43) and an Objection (R. 1005-06) on April 15, 1999, questioning the time and expenses billed by Lisa's attorneys, and asserting that the award of attorney's fees was unsupported by the evidence. Judge Quinn heard the matter on June 11, 1999 and fixed the award of attorney's fees at \$5,000.

2. Factual Background.

The parties were married on September 10, 1993 (Tr. pp. 12, 143; R. 1, 9, 951). At the time of the marriage, Lisa also had two sons, Brett and Brandon Podgorski, from a previous marriage (Finding 10). The parties separated in April 1996 (Finding of

Fact 5 - R. 951; Custody Evaluation (Exhibit 1), p. 1). Michael has had primary custody of Cortney since obtaining an ex parte custody order on April 29, 1996 (Finding 8 - R. 952; R. 36-37; Custody Evaluation (Exhibit 1)). The ex parte order initially awarding custody to Michael was obtained in good faith (R.27-35, 59-63, 73; Tr. pg. 167, 225-226). One week after the initial custody award, Lisa's Motion for Order Setting Aside Temporary Restraining Order was heard by Judge Peuler on May 6, 1996. Judge Peuler set aside the order, but did not find that it had been obtained improperly. Until the matter could be fully heard by the Commissioner, Michael was again awarded custody of the parties' minor child (R. 72-73).

On June 5, 1996, Commissioner Arnett received proffers of testimony and argument from counsel, and after reviewing the pleadings on file, which included approximately sixteen affidavits, once again awarded temporary custody of Cortney to Michael. In her Brief of Appellant, Lisa states that, "Mike obtained custody under false pretenses and retained custody for the three years that the divorce matter was pending before the trial court" (Brief of Appellant, pg. 8-9). Lisa therefore argues on appeal that, "the court's initial award to Mike of temporary custody operated as a prejudice against Lisa when the trial court made its award of permanent custody" (Brief of Appellant, pg 9). However, Commissioner Arnett did not "keep the Restraining Order in place" as Lisa alleges (pg. 2 of Brief of Appellant), as Judge Peuler, while leaving intact the award of temporary custody to Michael, had already set aside the TRO at the hearing on May 6, 1996 (although not because the court had found the allegations to be unsubstantiated), which was well before the matter came before Commissioner Arnett on June 5, 1996. Commissioner Arnett made altogether independent findings to support the award of temporary custody to Michael. The record reflects that the temporary custody Order

issued by Commissioner Arnett was not based on any allegations contained in the (dissolved) TRO, but was based on at least six factors which weighed in favor of Michael, as well as the Commissioner's finding that Lisa's credibility was damaged by her "documented dishonesty," her forging of credit cards, and the fact that four of Lisa's siblings filed affidavits referring to Lisa's instability and offering their opinion that Michael would be the better person to be awarded Cortney's custody. R. 211-17.

At trial, Judge Quinn concluded that Michael was a caring and competent parent, that he had been actively involved in caring for Cortney from the time of her birth, that he shared parenting duties and responsibilities with Lisa (R. 211, 212), that he had always been at least a joint caretaker, and that he was closely bonded with Cortney. There was ample evidence to support this conclusion. Exhibit 1; testimony of Dr. McManemin at pp. 7-140; testimony of Michael Van Orden at pp. 140-251; R. 12-13; Affidavit of Richard Lucking at R. 22-23; Affidavit of Tony Lucking at R. 24-25; R. 28-29, 60-60a; Affidavit of Tony Lucking at R. 76-77; Affidavit of Richard Lucking at R. 79-80; R. 92; Affidavit of Julie Van Orden at R. 106-108; Affidavit of Noelle Van Orden at R. 110-113; Affidavit of Dennis Nordfelt at R. 168-169; Affidavit of Robert Lucking at R. 181-182; Affidavit of Linda Madsen at R. 185-186, R. 224; Affidavit of Rick Lucking at R. 471-474; testimony of Tony Lucking (Tr. 256-288), testimony of Linda Madsen (Tr. 288-305), testimony of Richard Lucking (Tr. 305-310); testimony of Noelle Van Orden (Tr. 312-318), and testimony of Julie Van Orden (Tr. 504-511); also Tr. 42, 117, 145, 149-150, 171, 181-183, 271-272, 561.

The Court further found that "Michael is more likely than Lisa to allow Cortney frequent and continuing contact with the other parent" (Tr. pp. 565; Finding 18 - R. 955; see also Exhibit 1 and Tr. pp. 53, 197). Judge Quinn stated that this finding was

based "upon Lisa's dealings with her first husband that resulted in interference with visitation, and the way she conducted the relationship between her sons and her extended family and Michael during the course of the marriage." (Tr. 565; Finding 18 - R. 955). This was supported by the testimony of Dr. McManemin (Tr. 7-140); testimony of Michael Van Orden (Tr. 140-251); testimony of Tony Lucking (Tr. 256-288); testimony of Linda Madsen (T. 288-305); testimony of Richard Lucking (Tr. 305-310); testimony of Noelle Van Orden (Tr. 312-318); testimony of Patrick King (T. 499-503); and the testimony of Julie Van Orden (Tr. 504-511); R. 95; Affidavit of Tony Lucking at R. 24-25; Affidavit of Tony Lucking at R. 76-77; Affidavit of Richard Lucking at R. 79-80; Affidavit of Robert Lucking at R. 181-182; Affidavit of Linda Madsen at R. 185-186; Affidavit of Rick Lucking at R. 471-474; Affidavit of Timothy Podgorski at R. 103-104, as well as the testimony of Lisa (R. 427).

While Lisa seemed to be defensive and self-absorbed on many parenting issues (Exhibit 1; testimony of Dr. McManemin (Tr. 7-140); testimony of Michael Van Orden (Tr. 140-251); testimony of Tony Lucking (Tr. 256 -288); testimony of Linda Madsen (Tr. 288-305); testimony of Richard Lucking (Tr. 305-310); testimony of Noelle Van Orden (Tr. 312-318); testimony of Patrick King (Tr. 499-503); and the testimony of Julie Van Orden (Tr. 504-511), the Court found that Michael is "committed to spending time with Cortney," that "he has shown a great interest in her educational development," and that "his parental duties are the number one priority in his life." (Tr. 563; Finding 14 - R. 954).

Dr. McManemin described Michael as being stable and able to function on his own with no concerns regarding his relationships with family, friends, or in the work place (Tr. 49; see also Exhibit 1). Michael testified that he has a "tremendous amount of

flexibility (at work), and I can leave any time to take Cortney." (Tr. 186). After reviewing all of the evidence, "it appeared to the Court and to the custody evaluator that Cortney has thrived under the current arrangement." (Tr. 563; Finding 14 - R. 953). The Court then concluded that "in considering Cortney's best interests, the Court finds that, in considering all these factors, Cortney's interests are best served by Michael retaining sole legal and physical custody." (Tr. 563; Finding 15 - R. 954).

This was based on a number of critical factors, including the three year custody arrangement (with Michael) where Cortney thrived (Tr. 563; Finding 14 - R. 953), the Court's finding that Michael was more emotionally stable and capable of providing a stable home for Cortney than was Lisa, and the Court's concerns whether Lisa had sufficient emotional maturity and moral direction to be an appropriate role model for Cortney, as indicated by the fact that she was convicted of theft from her employer, her admitted forging of family members' signatures on checks and credit cards during the marriage, and her demonstrated lack of stability in her past employment situations. (Tr. 564; Finding 15 - R. 954). Lisa's own mother testified that "at times" Lisa has a problem telling the truth (Tr. 337).

Lisa's lack of insight into her own behavior was also evidenced by her conduct during the parties' separation. She sought a protective order to prevent Michael from enrolling Cortney in preschool (R. 554-558). She filed a Bar Complaint against Michael's attorney (Exhibit 1). She filed a notary public complaint against Michael's sister (Exhibit 1). She filed an ethics complaint against the custody evaluator, Dr. McManemin. (Tr. 955 - Finding 19). She filed a child abuse report with the Division of Child and Family Services which implied that Michael was not supervising Cortney. (Exhibit 1). She filed a complaint against her brother, with Animal Control after Cortney

received a scratch from his Cocker Spaniel (see Affidavit of Tony Lucking at R. 448-451). None of these complaints were found to have merit.

Lisa also applied for welfare benefits for Cortney to which, as the noncustodial parent, she was not eligible (Tr. 17), listing Michael as an "absent parent." (Testimony of Lisa at p. 427; Petitioner's Exhibit 23). Finally, she obtained an unwarranted protective order against Michael (Testimony of Lisa at 357-358; R.774-778) which was vacated at trial (Finding 47).

In the face of all of this evidence, Lisa refused to accept personal responsibility for any of her actions. She testified that she was "told" to seek the protective order (Tr. 357, 425). She testified that she was "told" to file the complaint with Animal Control (Tr. 394). She testified that she was "told" by the welfare supervisor to falsely claim that Cortney lived with her on her welfare application (Tr. 424, 427), and that she was "told" to make the DCFS referral. When Lisa instructed InstaCare not to release medical records or information concerning Cortney to Michael (Affidavit of Patrick King - Petitioner's Exhibit 33; testimony of Patrick King at 499-503; testimony of Michael at p. 187, testimony of Lisa at p. 428), Lisa testified that InstaCare "told" her to do so (Tr. 428).

The Court was also "moved by the testimony of Lisa's siblings that Lisa has lacked honesty, good judgment, and maturity in her dealings with them." Finding 15, testimony of Tony Lucking (Tr. 256-288), Linda Madsen (Tr. 288-305), and Richard Lucking (Tr. 305-310). The Court made detailed Findings concerning Cortney's best interest, taking into consideration past conduct demonstrating moral standards, which parent would be more likely to permit the other parent frequent and meaningful contact, and which parent did (or in Lisa's case did not) learn from past parenting mistakes. The

Court was especially concerned about an incident, which Judge Quinn found to be supported by the evidence, that “Lisa went to a hair appointment and left three children alone at home, knowing that Michael was stranded without car keys” (Tr. 564; Finding 16 - R. 954; see also the testimony of Julie Van Orden at pp. 504-511 and the Affidavit of Julie Van Orden, R. 106-108). The evidence presented indicated this was only one of many such incidents, and therefore the Court was “concerned that may be a reflection on her lack of judgment as a parent” (Tr. 564; Finding 16 - R. 954).

SUMMARY OF ARGUMENTS

1. Lisa failed to marshal the evidence which supported the Court's findings and then demonstrate that such evidence was insufficient to support the findings. If the party challenging the findings fails to marshal the supporting evidence, the trial court's findings will not be disturbed on appeal. Rudman v. Rudman, 812 P.2d 73, 79 (Utah App. 1991). Lisa made no effort to marshal the evidence, and there is no basis to even consider disturbing the trial court's findings.

2. The trial court did not abuse its discretion in awarding Michael sole custody of Cortney, nor did it abuse its discretion in making the visitation orders. The Court made detailed findings, both on the record and in its formal Findings, which support the award of Cortney's custody to Michael. Additionally, Lisa's visitation was not restricted (as she alleges in her Brief, pg. 11) by ruling that Mr. Robert Kropf, a criminal and convicted felon (Tr. pg. 20, 34, 126), should not be involved in picking up or dropping off Cortney, or be left alone with Cortney during Lisa's visitation. There is ample evidence to support these findings. There was no abuse of discretion, and the trial court's decision must be affirmed.

3. The trial court's partial award of attorney's fees was within the Court's discretion. Lisa's has failed to state why this award constitutes an abuse of discretion. Her objection on this point is meritless.

4. Michael should be awarded the attorney's fees he has incurred on appeal. Lisa's appeal is frivolous. Having made no effort to marshal the evidence in support of the findings with which she disagreed, Lisa should not be permitted to cause further expense and inconvenience for Michael. It is reasonable and appropriate that she be ordered to pay the attorney's fees and costs Michael has incurred in this appeal.

ARGUMENT

1. Lisa failed to marshal the evidence which supported the Court's findings and then demonstrate that such evidence was insufficient to support the findings.

In Crouse v. Crouse, 817 P.2d 836 (1991 Utah App.), this Court set forth the standard an appellant must meet in challenging the sufficiency of evidence on appeal:

Appellate review of the sufficiency of the evidence focuses on the trial court's findings of fact. We will not disturb such findings unless they are clearly erroneous. Hagan v. Hagan, 810 P.2d 478, 481 (Utah App. 1991) (citing Jense v. Jense, 784 P.2d 1249, 1251 (Utah App. 1989)); see also Utah R. Civ. P. 52(a). The party seeking to overturn the trial court's findings has the burden of marshalling the evidence in support of the findings and then demonstrating that, despite such evidence, the findings are so lacking in support as to be against the clear weight of the evidence and, therefore, clearly erroneous. If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case. Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991) (per curiam) (citations omitted). In the case at bar, Mr. Crouse has neither marshalled the evidence in support of the trial court's findings nor demonstrated that such findings are clearly erroneous, citing instead only the evidence that supports the outcome he desires. Thus, we assume the correctness of the trial court's findings and proceed to review its conclusions of law.

Crouse v. Crouse, 817 P.2d 836 (1991 Utah App.).

Lisa's "Statement of Facts" (pg. 3-8 of her Brief of Appellant) are not facts at all, but her version of events, which she argued at trial. She disingenuously and erroneously alleges that in 1996, Commissioner Arnett upheld the *ex parte* Temporary Restraining Order obtained by Michael (pg. 2 of Brief of Appellant). Lisa further states, "Commissioner Arnett ordered that the Temporary Restraining Order be kept in place. . ." (Brief of Appellant, pg. 5). These assertions are clearly misleading and are unquestionably false. Further, Lisa makes no effort to marshal or present the evidence that supported the Court's findings. The marshaling rule was adopted to ensure that the Appellate Court would not be put in the position of retrying the case without seeing or hearing the witnesses. See Nilson v. Nilson, 652 P.2d 1323, 1324 (Utah 1982) ("This court is reluctant to reconsider evidence that a trial court is in an advantaged position to weigh. Our removal from the participants in a trial puts us in the disadvantaged position of reviewing testimony from a cold record.")

Lisa has attempted to retry and re-argue the matter to this court. By arguing the evidence that was not accepted by the trial court, she asks this Court to reject the findings of the trial court without marshaling the evidence which supports those findings. She has failed to properly present her appeal, and this Court should assume that the record supports the findings of the trial court.

2. The trial court did not abuse its discretion in awarding Michael sole custody of Cortney, nor did it abuse its discretion in making the visitation orders.

Even if Lisa had properly marshaled the evidence in support of the findings, which she failed to do, she must show some abuse by the Court in making this determination. The trial court took testimony over three days, and it had the opportunity to weigh the credibility and demeanor of the parties, their witnesses, and the experts. Lisa may

disagree with the decision, but there was nothing about it that would permit the appellate court interpose its own judgment in this matter.

In her Argument (“Point I”), Lisa asserts that the trial court “abused its discretion in not giving adequate weight to the desirability of keeping the siblings together in its award of permanent custody.” (Brief of Appellant, pg. 9). Lisa does not, however, cite to any evidence which supports her challenge. She simply presents her criticism and relies solely on case law which requires that the court consider the issue of keeping siblings together. The fact is that the trial court did indeed consider this factor. There was abundant testimony concerning the issue of keeping siblings together (including Tr. pg. 47, 105), and the trial court gave weight to this issue when making its findings (Finding 10). Still, the Court awarded a schedule of expanded visitation to Lisa specifically for the purpose of allowing additional time for Cortney and her half-siblings to be together (Findings 21 and 23), evidencing the fact that the trial court indeed gave weight to the issue and thoroughly considered the desirability of keeping the siblings together in its award of permanent custody.

The records shows that the findings are rationally based on the evidence presented. All of the criteria of Rule 4-903 of the Utah Code of Judicial Administration were considered by Dr. McManemin. Findings 8 through 30 demonstrate the trial court’s determinations followed the statutory and appellate court directives. Each factor on which evidence was available was examined and an appropriate findings was made (R. 950-967; Tr. 560-576). Some of these findings have been challenged by Lisa, but a review of the evidence and law demonstrates that the trial court acted properly in this case.

The trial court also imposed appropriate limits on Lisa. The Court found (Finding 13; Tr. 563), in part, "that the temporary custody arrangement has been difficult for Lisa to accept. As a result, she has attempted to exclude Michael from medical information, unilaterally enrolled Cortney in kindergarten, and has made custody transitions difficult..."

There were many instances when Lisa either overstepped the boundaries of the non-custodial parent or attempted to exclude Michael from Cortney's activities (R. 779-781) and kept from Michael information concerning Cortney. For example, even after numerous court hearings on the issue of Cortney's school attendance, Lisa unilaterally enrolled Cortney in kindergarten in her area (Tr. 17, 36, 63-64, 184-185; Finding 13), falsely indicating to the school that she was Cortney's custodial parent (Finding 13; Tr. 563). Although Michael has been (and remains) the custodial parent, it is clearly documented that during the pendency of this action, Lisa specifically instructed InstaCare personnel not to release any medical records or information to Michael (Affidavit of Patrick King - Petitioner's Exhibit 33; testimony of Patrick King at 499-503; testimony of Michael at p. 187). Lisa testified that InstaCare "told" her to do so (Tr. 428). Lisa has also harmed her other children during these proceedings, prohibiting contact between her sons (Brett and Brandon Podgorski) and anyone in her family who supported Michael. This includes her brother Tony Lucking (who supports Michael) (see the October 1996 deposition of Lisa; Tr. 33, 108-109, 111, 133-134, 168-170, 268-269, 286-287, 336, 556), and even the boys' own father, Timothy Podgorski (Affidavit of Timothy Podgorski, R. 103-104; Tr. 554).

The Court weighed the evidence and concluded that Michael was the more credible party, and that he was the most competent, caring, and stable parent. That is

precisely what the trial court is to do. Sukin v. Sukin, 842 P.2d 922, 924 (Utah App. 1992), Martinez v. Martinez, 728 P.2d 994 (Utah 1986). No abuse of discretion is demonstrated by the trial court's accepting the evidence which supports its finding, and rejecting the evidence which it does not. Yelderman v. Yelderman, 669 P.2d. 406 (Utah 1983). Lisa does not present any conflicting evidence, but assumes that this Court should infer that the trial court failed to consider the appropriate evidence. Apparently, Lisa believes that anything she said or presented had to be believed, while that offered by Michael had to be rejected if they conflicted. That is not the rule by which either this Court or the trial court functions.

With respect “Point II” of Lisa’s brief, her assertion that the trial court “abused its discretion in restricting Lisa’s visitation with the minor child of the parties when it ruled that Mr. Robert Kropf should not be involved in picking Courtney (sic) up for visitation or in dropping Courtney (sic) off after visitation, and that Courtney (sic) should not be left alone with Mr. Kropf during visitation” (pg. 11-12 of Brief of Appellant) is completely without merit. Mr. Kropf is a criminal and a convicted felon (Tr. pg. 20, 34, 126). It is clear that Mr. Kropf has been the catalyst in promoting or furthering arguments between the parties (Tr. pg. 20, 34, 62, 74, 125, 137, 190-195, 399-400), he threatened to sue (which may be construed as witness-tampering) one of the witnesses in this matter (Linda Madsen, Lisa’s own sister); see the testimony of Linda Madsen at pg. 294. Robert Kropf admitted assaulting Michael (Tr. pg. 20, 34, 125), and for which he was charged with assault (Tr. pg. 34, 193, 356, 401). There is no explanation as to how this finding was an abuse of discretion, nor any explanation by Lisa as to how limiting Cortney’s contact with this felon somehow “restricts” Lisa’s visitation. Again, Lisa protests the trial court’s findings, but fails to marshal any evidence, or cite to any

evidence supporting her criticism, and she offers no evidence as to why this was an abuse of discretion. The Court accepted and incorporated all of the evidence, and apparently found it to be in Cortney's best interest, when ordering that Mr. Kropf was not to participate in the pick up or drop off of visitation, nor was he to be left alone with Cortney.

With respect to "Point III" of Lisa's Brief of Appellant, Lisa argues that, "The trial court did not make adequate findings to support the order of custody and visitation" (pg. 12). Lisa again fails to make any citations to the record to support her assertion. She is again merely trying to reargue her case before this Court. Lisa simply presents her criticism without examining or marshaling any of the evidence presented. Instead, Lisa relies solely on citing to case law which requires that the court consider certain factors in weighing a custody decision.

As with her other challenges, Lisa again protests the findings, but fails to cite to the evidence which supports it and presents only her criticism without first examining any of the evidence presented.

Lisa fails to recognize that simply because she offered evidence which is not accepted, does not mean the trial court has abused its discretion in not accepting or finding credible her evidence as opposed to Michael's evidence. While Lisa implies that the evidence was somehow conflicting with her references to the testimony that she would like this Court to believe, she fails to set forth any basis on which the trial court abused its discretion in choosing to accept the testimony of Michael Van Orden (Tr. 140-251), Tony Lucking (Tr. 256-288), Linda Madsen (Tr. 288-305), Richard Lucking (Tr. 305-310); Noelle Van Orden (Tr. 312-318), Patrick King (Tr. 499-503), and Julie Van Orden (Tr. 504-511) in support of the findings. The Utah Supreme Court has made it

clear that "it is the prerogative of the court to choose which testimony it would believe." Sweeney v. Happy Valley, Inc., 417 P.2d 126, 130 (Utah 1966). Lisa's challenge on appeal ignores the trial court's decision to believe testimony contrary to her position. Abuse of discretion is not demonstrated by believing one witness instead of another.

3. The trial court's partial award of attorney's fees was within the Court's discretion. With respect to Lisa's "Point IV" (Brief of Appellant pg. 12), an award of attorney fees requires consideration of the ability of the requesting party to pay his or her own fees, the ability of the other party to pay, and the reasonableness and necessity of the fees incurred. Rasband v. Rasband, 752 P.2d 1331, 1337 (Utah App. 1988). Alternatively, fees may be awarded to a party who substantially prevails in a matter. This is a discretionary function of the trial court. Crouse v. Crouse, 817 P.2d 836, 839 (Utah App. 1991). There was no testimony, evidence, or proffer from Lisa concerning any financial need or hardship. Indeed, there was testimony that Lisa lived a very comfortable lifestyle. Lisa acknowledged that she did not work, and that she was voluntarily unemployed because her boyfriend (with whom she had been residing) was providing for all her financial needs (Tr. 33-34, 72-73, 189, 272, 396 -397, 415-417).

Michael testified that Lisa had at least three vehicles available to her (an Expedition, a minivan, and a Jaguar), and that she vacationed regularly (Tr. 351, 395, 398, 405). There was no evidence that Lisa was suffering financially in any way, or that she lacked the resources to pay her own fees.

While Michael feels that the trial Court's order that he pay any part of Lisa's fees was not supported by the evidence, Lisa's claim that the award was insufficient is without merit.

Lisa claims that the trial court abused its discretion in reducing the open-ended award of attorney's fees awarded at trial (Brief of Appellant, pg. 12-14), again without marshaling the evidence. Lisa (again) merely re-argues the same issues presented to Judge Quinn at the post-trial hearing on June 11, 1999. The trial court, however, is clearly allowed to reduce the amount asserted by one party in determining a reasonable fee:

Part of the trial court's discretion involves evaluation of the evidence presented. In Beckstrom v. Beckstrom, 578 P.2d 520 (Utah 1978), the attorney testified that the fees were appropriately \$ 800, but the trial court awarded only \$ 500. On appeal, we upheld the award and explained: "Even though that evidence is undisputed, the trial judge was not necessarily compelled to accept such self-interested testimony whole cloth and make such an award; and in the absence of patent error or clear abuse of discretion, this court will not disturb his findings and judgment." *Id.* at 523-24. In addition, the trial court is allowed to reduce the amount asserted by one party in determining a reasonable fee. See, e.g., Appliance & Heating Supply, Inc. v. Telaroli, 682 P.2d 867, 868 (Utah 1984); Sears v. Riemersma, 655 P.2d 1105, 1110 (Utah 1982).

Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988).

There has been no abuse of discretion in reducing the open-ended attorney fee award.

4. Michael should be awarded the attorney's fees he has incurred on appeal. Lisa's appeal is frivolous. She made no effort to marshal the evidence. The fact that she appealed this matter forced Michael to incur significant attorneys fees responding. Rule 33(a) of the Utah Rules of Appellate Procedure provides that "if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party."

Lisa's objections to the trial court's findings are completely unsupported by the evidence, and are wholly without merit. Given the lack of evidence marshaled in support of the claims made by the Appellant in this matter, it is not conceivable that Lisa would have any reasonable likelihood of prevailing. Michael respectfully moves this Court for an award of attorney fees and costs incurred in this appeal, either under Rule 33(a) of the Utah Rules of Appellate Procedure, or as the prevailing party on appeal, pursuant to Bolliger v. Bolliger, 2000 Utah Ct. App 47, ¶¶ 26-28, 389 Utah Adv. Rep. 11.

CONCLUSION

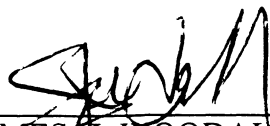
The trial court properly exercised its discretion in weighing conflicting evidence. It entered Findings of Fact which show a careful, thorough examination of the factors it should consider in reaching a decision in a contested custody case. Lisa challenges these findings but fails to marshal any evidence supporting them in presenting her challenge. This failure alone precludes the Court from granting the relief she requests in her appeal. Lisa also fails to demonstrate any abuse of discretion.

Judge Quinn considered the testimony and credibility of all of the witnesses (including the testimony of three of Lisa's own siblings, who testified that Michael is the better parent and that Lisa has problems with honesty and moral integrity), and along with the pleadings on file, found that it would be in Cortney's best interest for sole legal and physical custody to remain with Michael, and entered appropriate visitation orders.

The evidence marshaled by appellee herein reveals that the trial court appropriately exercised its fact finding discretion. The trial court made detailed findings which fully support the award of custody to Michael, the visitation orders, and the clarification of the open-ended award of attorney fees. In doing so, the trial court followed and applied the criteria as articulated by the legislature, judicial council, and

Appellate Courts of this state. Lisa's appeal is without merit. The trial court's decision should be affirmed, and Michael should be awarded the costs and attorney's fees he has incurred in defending this appeal.

DATED this 24 day of May 2000.



JAMES H. WOODALL
Attorney for appellee

CERTIFICATE OF DELIVERY

I certify that I caused two copies of the foregoing **BRIEF OF APPELLEE** to be delivered to the following on May 24, 2000:

Alan R. Stewart
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