

1999

# Van Orden v. Van Orden : Brief of Appellant

Utah Court of Appeals

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## Recommended Citation

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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MICHAEL L. VAN ORDEN, :  
 : Appellate Case No. 990545CA  
Petitioner and Appellee, :  
 : Trial Court No. 96-4901689  
Vs. :  
 :  
LISA M. VAN ORDEN, :  
 : Priority No. 4  
Respondent and Appellant. :  
 :

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BRIEF OF APPELLANT

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APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF  
SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE ANTHONY B. QUINN

---

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**FILED**  
Utah Court of Appeals  
MAR 24 2000  
Julia D'Alessandro  
Clerk of the Court

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## **TABLE OF CONTENTS**

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
JURISDICTION	1
ISSUES PRESENTED FOR REVIEW	1
STANDARD OF REVIEW	1
DETERMINATIVE AUTHORITY	2
STATEMENT OF THE CASE	2
A. Nature of the Case	2
B. Course of the Proceedings	2
C. Disposition In Trial Court	3
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	9
<u>POINT I</u>	
THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING CUSTODY TO MIKE VAN ORDEN	9
<u>POINT II</u>	
THE TRIAL COURT ABUSED ITS DISCRETION IN RESTRICTING LISA’S VISITATION WITH COURTNEY	11

POINT III

THE TRIAL COURT DID NOT MAKE ADEQUATE FINDINGS TO SUPPORT THE ORDER OF CUSTODY AND VISITATION	12
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POINT IV

THE TRIAL COURT ABUSED ITS DISCRETION IN REDUCING THE AWARD OF ATTORNEY'S FEES TO LISA VAN ORDEN	12
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CONCLUSION	14
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MAILING CERTIFICATE	15
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## **TABLE OF AUTHORITIES**

### **A. CASES**

<i>Cummings v. Cummings</i> , 871 P.2d 472 (Utah App. 1991)	9
<i>Davis v. Davis</i> , 749 P.2d 387 (Utah 1988)	9, 10
<i>Ebert v. Ebert</i> , 744 P.2d 1019 (Utah App. 1987)	11, 12
<i>Merriam v. Merriam</i> , 799 P.2d 1172 (Utah App. 1990)	10
<i>Roberts v. Roberts</i> , 835 P.2d 193 (Utah App. 1992)	10, 12
<i>Thorpe v. Jensen</i> , 817 P.2d 387 (Utah App. 1991)	9, 12
<i>Wright v. Wright</i> , 941 P.2d (Utah App. 1997)	10

### **B. STATUTES AND OTHER AUTHORITIES**

Utah Code Annotated § 30-3-3(1)	2, 13
Utah Code Annotated § 30-3-10	1, 9
Utah Code Annotated § 30-3-32	2
Utah Code Annotated § 30-3-33	11
Utah Code Annotated § 30-3-34	11
Utah Code of Judicial Administration, Rule 4-903	2, 10

Appellant, Lisa Van Orden, pursuant to Rule 24 of the Utah Rules of Appellate Procedure, submits this Appeal Brief.

### **JURISDICTIONAL STATEMENT**

The Utah Court Of Appeals has jurisdiction pursuant to Utah Code Annotated § 78-2a-3(2)(i). The orders appealed from are final orders disposing of all claims of all parties.

### **ISSUES PRESENTED ON APPEAL**

Did the trial court abuse its discretion by awarding custody of the minor child to Appellee, Mike Van Orden?

Did the trial court abuse its discretion by placing numerous restrictions on Appellant's visitation rights with the child ?

Did the trial court make adequate findings to support the order of custody and visitation?

Did the trial court abuse its discretion in reducing the award of attorney's fees to Appellant following the post trial hearing?

### **STANDARD OF APPELLATE REVIEW**

The trial court is given broad discretion in awarding custody, establishing visitation rights and granting attorney's fees in a domestic relations matter. The trial court's award of custody, visitation rights and attorney's fees can be overturned by the appellate court if the trial court is found to have abused its discretion in making its findings. Utah Code Annotated Section 30-3-10.

### **DETERMINATIVE AUTHORITY**

The determinative authority for this appeal are Utah Code Annotated § 30-3-3(1), Utah Code Annotated § 30-3-10, Utah Code Annotated § 30-3-32, Utah Code Annotated § 30-3-33, Utah Code Annotated § 30-3-34 and Utah Code of Judicial Administration, Rule 4-903.

### **STATEMENT OF THE CASE**

#### **1. Nature of Case**

This appeal is from a final order of the Third District Court, Honorable Anthony B. Quinn presiding, granting custody of the minor child of the parties to Appellee, Michael Van Orden (herein “Mike”) with visitation rights to Appellant, Lisa Van Orden (herein “Lisa”) following a three day trial held in April, 1999. In addition, Lisa appeals the trial court’s post judgment ruling reducing attorney’s fees that were awarded to her at trial.

#### **2. Course of Proceedings**

Mike filed for divorce in April, 1996. Upon filing for divorce, Mike obtained an *ex parte* Temporary Restraining Order giving him possession of the marital residence and temporary custody of the parties’ then three year old daughter. A hearing was held before Commissioner Thomas Arnett, in which Commissioner Arnett upheld the *ex parte* Temporary Restraining Order obtained by Mike. Commissioner Arnett also ordered a custody evaluation be performed. The custody evaluation was filed in October 1998. A three day trial was held in April, 1999.



### **3. Disposition In The Trial Court**

At the conclusion of the trial, Judge Quinn awarded permanent custody of the child (then six years old) to Mike. Judge Quinn also awarded attorney's fees to Lisa. Mike filed a post judgment Motion To Reconsider Attorney's Fees contesting the award of attorney's fees to Lisa. At the hearing on Mike's post judgment Motion To Reconsider Judge Quinn reduced the award of attorney's fees to Lisa.

### **STATEMENT OF FACTS**

1. The parties were married on September 10, 1993. (Findings of Fact and Conclusions of Law, (hereinafter referred to as "Findings") paragraph 2.
2. There is one child born as issue of the marriage, Courtney Van Orden, born January 16, 1993. (Findings Paragraph 3).
3. Lisa has two children from a previous marriage, Brett Podgorski, and Brandon Podgorski. (Findings Paragraph 4).
4. Lisa would prefer to be a stay at home mother. During the marriage and during the time that the divorce was pending, except for brief periods of employment, Lisa has been a stay at home mother. (Findings Paragraph 11).
5. On April 17, 1996, Mike filed for divorce and obtained an *ex parte* Temporary Restraining Order evicting Lisa from the marital residence and obtaining temporary custody of Courtney. (Findings Paragraph 6).

6. The *ex parte* Temporary Restraining Order obtained by Mike was granted upon the grounds of Lisa's alleged "medical neglect" of Courtney. (Trial Transcript Vol. I, pg. 167 lines 5-25).

7. Prior to obtaining the Temporary Restraining Order, Mike had taken Courtney to an InstaCare clinic for a possible ear infection. The doctor at InstaCare gave the diagnosis that Courtney did, indeed, have an ear infection, and prescribed antibiotics for the ear infection. (Trial Transcript Vol. I, pg. 164 lines 24-25; pg. 165 lines 1-6, 23-25).

8. Lisa had an appointment the next day with the parties' pediatrician for her son, Brett. During the appointment, she asked the pediatrician to look at Courtney's ears. The pediatrician did so, and gave Lisa the opinion that there was not an ear infection. Lisa informed Mike of this when Mike arrived home from work that evening. (Trial Transcript Vol. II, pg. 343 lines 23-25; pgs. 344, 345; pg. 165 lines 23-25; pg. 166 lines 1-7).

9. The next day, Mike telephoned the pediatrician's office and inquired about the diagnosis. The receptionist pulled the records from the previous day, and informed Mike that Courtney did not have an appointment, only Brett. Mike obtained a letter from the secretary as to this fact, and used the letter to obtain an *ex parte* Temporary Restraining Order against Lisa granting Mike temporary custody of Courtney on the grounds of Lisa's "medical neglect" of Courtney. (Trial Transcript Vol. I, pg. 166 lines 1-20; pg. 348).

10. Lisa later was able to obtain a letter from the pediatrician himself, stating that he had seen Courtney, but because it was informal, Courtney's name was not noted on the schedule for that day. (Trial Transcript Vol. I, pg. 167 lines 20-25; pgs. 349-350).

11. Mike's Temporary Restraining Order, along with the Complaint for Divorce, was served upon Lisa, giving Lisa just twenty-four hours to gather her possessions and move out of the marital residence. (Trial Transcript Vol. II, pg. 339 lines 22-25).

12. A hearing was held on Mike's Temporary Restraining Order on April 29, 1996, before Commissioner Thomas Arnett. At the conclusion of the hearing, Commissioner Arnett ordered that the Temporary Restraining Order be kept in place, and granted temporary custody of Courtney to Mike. Commissioner Arnett also ordered that a custody evaluation be performed.

13. Dr. Johanna McManemin was appointed to conduct the custody evaluation. During the course of the evaluation, Dr. McManemin interviewed Mike, Lisa, Courtney, Brett Podgorski, Brandon Podgorski, both Mike and Lisa's parents and numerous siblings of both Mike and Lisa.

14. The custody evaluation took two years to complete. During this time, Mike and Lisa had numerous battles over Courtney's preschool, kindergarten, summer visitation, etc., resulting in numerous hearings before Commissioner Arnett. (Findings Paragraph 12).

15. Dr. McManemin originally was going to propose that the parties share joint physical custody of Courtney. (Trial Transcript Vol. I, pg. 59, lines 21-25; pg. 60, lines 1-25; pg. 61, lines 1-12; pg. 77, lines 12-25; pg. 78, lines 1-5; pg. 98, lines 3-12; pg. 122, lines 6-10; pg. 374, lines 17-25; pg. 375, lines 1-8).

16. In her custody evaluation, Dr. McManemin proposed that Mike have sole custody of Lisa. (Trial Transcript Vol. I, pg. 52, line 25; pg. 53, lines 1-2).

17. Dr. McManemin did not meet with the parties between her initial proposal of joint physical custody and her final recommendation that Mike have sole custody of Courtney. (Trial Transcript Vol. I, pg. 63, lines 16-19).

18. Lisa filed a complaint against Dr. McManemin with the State Of Utah Division Of Occupational and Professional Licensing in September 1998, based upon the length of time Dr. McManemin had taken to complete the custody evaluation. (Trial Transcript Vol. I pg. 65, lines 11-25; pg. 375, lines 21-25; pg. 376, lines 1-25; pg. 377, lines 1-15).

19. At trial, Dr. Donald Strassberg testified as an expert witness on behalf of Lisa. Dr. Strassberg testified that the custody evaluation was biased against Lisa. (Trial Transcript Vol. II, pg. 450, line 10; pg. 456, lines 18-19; pg. 460, lines 18-25; pg. 461, lines 1-9; pg. 469, lines 4-11).

20. Judge Quinn, in making his findings at the conclusion of the trial, declined to give the custody evaluation much weight, based upon the fact that with Lisa's complaint against Dr. McManemin, the custody evaluation may have been biased against Lisa. (Trial Transcript Vol. III, pg. 565, lines 9-22).

21. During the three years between the filing of the divorce action and trial, the parties kept a custody and visitation schedule that was virtually joint custody. Courtney slept at Mike's and Mike would deliver Courtney to preschool or kindergarten. Mike or Lisa picked Courtney up from school. Lisa would then provide daycare for Courtney, with Courtney staying at Lisa's house during the afternoon and early evening until Mike picked Courtney up at 6:00 or 7:00 p.m. after getting off of work. Every other weekend Courtney stayed at Lisa's house from

Thursday evening until Monday morning. The Court found that Courtney had done well under this arrangement. (Findings Paragraph 8).

22. “Prior to separation, both parents were actively involved in caring for Courtney. Both parents had responsibility at various times for feeding her, bathing her, and transporting her to her activities and doctor visits. Both parents were actively involved in providing other care to Courtney during their relationship. Courtney has a close relationship with both parents. Both parents wish to be custodial parents.” (Findings Paragraph 9).

23. “Courtney has two half-siblings from Lisa’s prior marriage. It would be in Courtney’s interest to maintain her relationship with those siblings. Because Lisa has custody of the two half-siblings, that relationship would be easier to facilitate if Lisa had custody.” (Findings Paragraph 10).

24. The Court specifically found that Courtney had thrived under the arrangements specified in Paragraph 21 above. (Findings Paragraph 4).

25. A three day trial was held April 6-8, 1999. At the conclusion of trial, Judge Quinn awarded custody to Mike, granting Lisa the same visitation rights she had exercised during the three years before trial, (Findings Paragraph 21) but placing numerous restrictions upon Lisa’s visitation rights (Findings Paragraph 30).

26. At the conclusion of the trial, Judge Quinn awarded Lisa attorney’s fees and costs, noting that the divorce had been lengthy and expensive because of the way Mike had initiated the divorce action, and that Mike’s conduct indicated that he was going to play “hardball” during the divorce action. Judge Quinn noted that the Temporary Restraining Order

that Mike had obtained was obtained upon grounds that were “clearly not justified”. (Findings Paragraph 44).

27. “The Court finds that Michael bears a lot of responsibility for the way that this case has gone. This case has been much more expensive than it needed to be. The reason for that is because the case got started badly, due to the fact that Michael got a Temporary Restraining Order that put him in possession of the house and in custody of Courtney on grounds that were clearly not justified, not even based upon what he believed at the time. After having done that Michael in essence announced that the rules of divorce were going to be hardball, leaving Lisa in a difficult position without power. The Court believes that it was foreseeable at that time that Lisa would dig in her heels on every issue, as a result of the way that she had been treated at the outset.” (Findings Paragraph 44.b).

28. The Court also awarded attorneys fees and costs to Lisa on its finding that “Michael is much more able than Lisa to pay the attorneys fees”. (Findings Paragraph 44a.) The Court found Mike earns \$4,417 per month and Lisa’s income was imputed for child support purposes to be \$1,243 per month. ( Findings Paragraphs 31 and 32.)

29. Mike’s attorney filed a post-judgment Motion For Reconsideration of Attorney’s Fees. At the hearing held on the Motion To Reconsider, Judge Quinn reduced the amount of attorney’s fees awarded to Lisa on the grounds that a third party had paid most of the attorney’s fees that Lisa had incurred during the divorce action. (Judgment For Attorney’s Fees Paragraph 1).

30. Since the divorce Lisa remarried to Robert Kropf.

## **SUMMARY OF ARGUMENT**

The trial court is granted substantial discretion is awarding custody, visitation rights and attorney fees. However, the appellate court can overturn the rulings of the trial court if the trial court is found to have abused its discretion and the rulings of the trial court are clearly erroneous. In this matter the trial court abused it's discretion in awarding custody, setting visitation rights and in reducing the award of attorney fees to Lisa.

## **ARGUMENT**

### **POINT I**

#### **THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING CUSTODY TO MIKE VAN ORDEN**

The trial court is granted broad discretion in awarding custody. Utah Code Annotated § 30-3-10. However, the court's discretion must be within parameters established by the appellate court. *Cummings v. Cummings*, 871 P.2d 472, 474 (Utah App. 1991); *Thorpe v. Jensen*, 817 P. 2d 387, 389 (Utah App. 1991). The appellate court can overturn the rulings of the trial court if the trial court's rulings are "clearly erroneous". *Davis v. Davis*, 749 P.2d 647, 648 (Utah 1988). In awarding custody, the court must consider the best interests of the child. Utah Code Annotated § 30-3-10(1). "The overriding consideration in child custody determinations is the child's best interests." *Cummings v. Cummings*, 821 P. 2d 472, 478 (Utah App. 1991). Lisa appeals from the trial court's award of custody to Mike on the grounds that the trial court did not give adequate weight to the desirability of keeping siblings together, and 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.

The appellate court has repeatedly held that a trial court must consider, among other things, the desirability of keeping siblings or half-siblings together. “The desirability of keeping siblings together is a legitimate factor to consider in deciding custody.” *Merriam v. Merriam*, 799 P.2d 1172, 1178 (Utah App. 1990); *Roberts v. Roberts*, 835 P. 2d 193 (Utah App. 1992). In this matter, Courtney lived with her half sibling brothers from the time she was born. During the years the matter was pending before the trial court, the children were together virtually every day. Courtney had grown up with Brett and Brandon as her brothers. 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.

The court also abused its discretion in failing to consider that Lisa had been the primary care giver prior to the initiation of the divorce action, and had been virtually the primary care giver during the three years that the divorce action was pending. The fact that Lisa is at home during the days means she provides personal, rather surrogate care for Courtney.

Trial courts operate under a presumption that favors existing custody arrangements. Utah Code of Judicial Administration Rule 4-903(3)(D). *Wright v. Wright*, 941 P.2d (Utah App. 1997). However, the Utah Supreme Court has ruled that “if the primary care giver gained that status wrongfully, the court should be careful not to reward such conduct by giving the wrongdoer a consequential advantage in evaluating a custody question”. *Davis v. Davis*, 749 P.2d 647, 649 (Utah 1988). The Temporary Restraining Order obtained by Mike at the beginning of the divorce matter was, in the trial court’s own words “clearly not justified”. Mike obtained custody under false pretenses and retained custody for the three years that the



divorce matter was pending before the trial court. This operated as a prejudice against Lisa when the trial court considered the award of permanent custody.

Lisa was further prejudiced by the extreme length of time that Dr. McManemin took to complete the custody evaluation. The case hung in limbo for two years while the parties waited for Dr. McManemin to complete the custody evaluation. Therefore Lisa was prejudiced initially by Mike gaining custody under circumstances that were “clearly not justified” and prejudiced again by Mike retaining custody during the three years that the case was pending before the Court.

## **POINT II**

### **THE TRIAL COURT ABUSED ITS DISCRETION IN RESTRICTING LISA’S VISITATION WITH COURTNEY**

The trial court is empowered to set visitation in accordance with the best interests of the child. Utah Code Annotated § 30-3-33 and § 30-3-34. These sections set forth guidelines that a court should consider in establishing visitation rights. “The visitation schedule should be realistic and reasonable and provide an adequate basis for preserving and fostering the child’s relationship with the non-custodial parent.” *Ebert v. Ebert*, 744 P.2d 1019, 1022 (Utah App. 1987). In this instance, 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 up for visitation or in dropping Courtney off after visitation, and that Courtney should not be left alone with Mr. Kropf during visitation. These restrictions are not supported by any findings of fact that Mr. Kropf is any threat to Courtney. In addition, Lisa is now married to Mr. Kropf. Therefore, it is inevitable that Mr. Kropf have contact with Courtney, and

should not be restricted from participating in picking her up before, and dropping her off after visitation.

### **POINT III**

#### **THE TRIAL COURT DID NOT MAKE ADEQUATE FINDINGS TO SUPPORT THE ORDER OF CUSTODY AND VISITATION**

A trial court must make detailed findings of fact in order to support an order of custody and visitation. “If our review of custody determinations is to be anything more than a superficial exercise of judicial power, the record on review must contain written findings of fact and conclusions of law by the trial judge which specifically set forth the reasons, based on those numerous factors which must be weighed in determining the “best interests of the child,” and which support the custody decision.” *Ebert v. Ebert*, 744 P.2d 1019, 1021 (Utah App. 1987); *Thorpe v. Jensen*, 817 P.2d 387 (Utah App. 1991); *Roberts v. Roberts*, 835 P. 2d 193 (Utah App. 1992). In this matter, the trial court failed to make detailed findings of fact in order to support its orders regarding custody and visitation. The failure of the trial court to make detailed findings of fact and conclusions of law amounts to an abuse of discretion by the trial court.

### **POINT IV**

#### **THE TRIAL COURT ABUSED ITS DISCRETION IN REDUCING THE AWARD OF ATTORNEY’S FEES TO LISA VAN ORDEN**

A trial court has broad discretion in granting attorney’s fees in a domestic relations matters. “In any action filed under Title 30, Chapter 3, 4, or 6, and in any action to establish an order of custody, visitation, child support, alimony, or division of property in a domestic case,

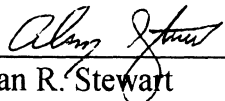
the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.” Utah Code Annotated § 30-3-3(1). In this matter, the court initially exercised that discretion by awarding attorney’s fees to Lisa. The award of attorney’s fees to Lisa was based upon specific findings by the court that the attorney’s fees incurred by Lisa during the course of the divorce proceedings had been a result of the way Mike initiated the divorce proceeding, and by Mike’s conduct in the way that he initiated the divorce proceedings, that he was going to play “hardball” in the divorce proceedings.

At the hearing held on Mike’s post judgment Motion to Reconsider Attorney’s Fees, the Court stated that it was reducing the award of attorney’s fees awarded to Lisa, because Lisa had managed, with the help of a third party, to pay a great portion of the attorney’s fees that she had incurred in this matter. This ruling is clearly erroneous. The initial award of attorney’s fees was based upon Mike’s conduct throughout the course of the proceedings, not on whether Lisa had been able to pay the attorney’s fees that she had incurred, and certainly not upon whether a third party had assisted her in payment of those fees. As the attorney for Lisa pointed out during the hearing on Mike’s Motion To Reconsider, it is not realistic to expect that someone could go through a divorce matter that is pending for three years, with numerous court appearances, and a three day divorce trial, without paying a substantial portion of the attorney’s fees that they incurred during the course of the proceedings.

### CONCLUSION

The trial court abused its' discretion in awarding custody of the minor child to Mike, by restricting Lisa's visitation with the Courtney, by not making sufficient findings of fact and by reducing the amount of attorney's fees awarded to Lisa. The orders of the trial court should be reversed.

Respectfully submitted this 23<sup>d</sup> day of March, 2000.

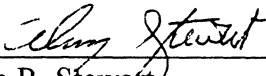
  
\_\_\_\_\_  
Alan R. Stewart  
Attorney for Appellant, Lisa Van Orden

### **CERTIFICATE OF SERVICE OF BRIEF**

I do hereby certify that I mailed two copies of the foregoing Brief of Appellant, postage prepaid, sealed and addressed to the following:

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DATED this 23 day of March, 2000.

  
\_\_\_\_\_  
Alan R. Stewart