

2000

Lesley Birsa nka Faulds v. Dennis Carl Birsa : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LESLEY BIRSA, nka FAULDS,

:

:

Petitioner/Appellee,

:

vs.

:

DENNIS CARL BIRSA,

Case No. 20000177CA

:

Priority #~~15~~ 4

Respondent/Appellee.

BRIEF OF APPELLEE

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH,
HONORABLE PAT B. BRIAN, PRESIDING

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Court of Appeals

JUL 12 2000

Julia D'Alessandro
Clerk of the Court

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STATEMENT OF JURISDICTION

Jurisdiction is conferred upon the Court of Appeals pursuant to Utah Code Annotated, §78-2a-3(2)(h), and the provisions of Rules 3 and 4 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

Whether the trial court correctly allowed Appellee (hereinafter “Mother”) to relocate to Nevada with her children when Mother had physical custody of the children and the Appellant (hereinafter “Father”) has not sought to change this custodial arrangement.

STANDARD OF REVIEW

Questions of law and constitutionality are reviewed for correctness. Salt Lake City v. Lopez, 935 P.2d 1259, 1262 (Utah App. 1997) (citations omitted).

If this Court determines that the action at the lower court amounts to a petition to modify custody on behalf of the Father, the trial court’s decision to maintain the custodial relationship with the Mother will be reviewed under the abuse of discretion standard. Larson v. Larson, 888 P.2d 719, 722 (Utah App. 1994) (citing Crouse v. Crouse, 817 P.2d 836, 838 (Utah App. 1991)). In Larson this Court clarified the standard required to change custody on the basis of a relocation by stating that “unless there were compelling evidence that residing in Summit County, Utah, would be better for the children than allowing them to continue to reside with their life-long primary caregiver [the relocating parent], we would conclude that the trial court exceeded the exercise of sound discretion

in entering the order before us.” Id. at 723 (reversing the trial court’s order changing the custodial relationship if the primary caregiver relocated out of Summit County).

DETERMINATIVE PROVISIONS

There are no statutes or provisions which are wholly dispositive of the issues presented in this appeal.

STATEMENT OF THE CASE

A. NATURE OF THE PROCEEDINGS

This appeal is from a final order of the Third Judicial District Court in and for Summit County, State of Utah. In particular, Father has appealed the lower court’s order denying Father’s request that Mother be restrained from relocating to Nevada.

B. COURSE OF PROCEEDINGS BELOW

This matter came before the lower on Mother’s Verified Motion for Approval to Relocate which was filed on or about October 11, 1999. Father then filed a Motion on Temporary Issues on or about November 10, 1999, in part requesting that Mother’s request to relocate be denied. Both parties filed supporting pleadings and documentation and the matter originally came before the lower court on November 17, 1999.

At this hearing, the lower court stated that Mother’s relocation was appropriate and should be permitted during the 1999/2000 Christmas Holiday. In addition, the lower court granted Father’s request that the matter be reviewed by the custody evaluator, and that the matter be set for further hearing.

The matter came on for further hearing on December 22, 1999, and upon hearing arguments and proffers of counsel, the lower court granted Mother's request to relocate to Las Vegas with the children, and, specifically, ordered that the relocation take place on or after July 1, 2000, to allow the children to complete their school year, to facilitate therapy, and allow Father to improve his relationship with Sebastian.

Father filed his Notice of Appeal of this Order on or about February 18, 2000.

C. STATEMENT OF THE FACTS

The parties were divorced by a Decree of Divorce dated February 18, 1997. (R. 1910-1920). The Decree stemmed from a trial setting on January 27, 1997. (R. 1910). At that time, the parties, with the encouragement of Judge Pat B. Brian, negotiated a settlement of the issues attendant to the marital estate and custody of their children. (R. 1910-1920). The settlement was reached over many hours with the input and recommendations of Judge Brian. (R. 1910-1920).

The parties have two children, Kelsey, whose date of birth is January 22, 1987, and who is now 13 years of age, and Sebastian, whose date of birth is October 23, 1984, and who is 15 years of age. (R. 2). The parties had previously separated in January of 1995 and, originally, the Mother had custody of both children on a temporary basis. (R. 2274). The Decree, however, awarded physical custody of Kelsey to Mother and physical custody of Sebastian to Father and joint legal custody to both parents. (R. 1910-1920).

At the time of the settlement, Mother expressed to the court and Father her desire to move from the Salt Lake area and return to Nevada. (R. 2274). Father expressed his desire that this not occur. (R. 2274). After substantial discussion with the lower court, the court suggested what was thought to be a reasonable resolution and that became the stipulation and order of the court. (R. 1910-1920). That language is contained in paragraph 5 of the Decree and that language is as follows:

“Both plaintiff and defendant are enjoined from moving out of the Salt Lake County, Utah or Summit County, Utah for the next sixteen (16) months in order to facilitate a continuation of visitation as hereinafter set out. Should either party desire to move from the designated geographical area after sixteen (16) months, the party desiring to move shall file a motion and place it on the court’s law and motion calendar, requesting that the move be approved by the court and specifying the reasons why the party desires to make the move. If the request is opposed by the other party, the court will hear the motion. The court has indicated it will be inclined to grant the motion if there is any good reason for the move. At the time of hearing, the court shall determine whether to grant the move or whether any further evaluation or information is needed. In order to implement this provision, the Honorable Pat B. Brian shall retain jurisdiction over the case as to any motion involving a requested move.” (R. 1911) (emphasis added).

During a substantial portion of the parties’ marriage and relationship, they resided in Las Vegas, Nevada, and, indeed, at the date of divorce the parties still owned a residence together in Las Vegas. (R. 2275). The Father currently owns a business and real estate in Las Vegas. (R. 2275). Mother owns real estate in Las Vegas. (R. 2275). Mother’s family continues to reside in Las Vegas, though Mother’s father recently passed away. (R. 2275).

Mother filed a Petition for Modification of the Decree of Divorce on or about September 1, 1999, within which petition she requested physical custody of Sebastian. (R. 2099-2104). Sebastian had been residing in Mother's home since, approximately, August 23, 1999. (R. 2100). The move to Mother's home occurred after an altercation between Father and Sebastian as a result of which Father kicked Sebastian down a set of stairs and continued to kick him the buttocks and stomach until he kicked him out of the house. (R. 2276, Update Evaluation, Aplt. Apndx. pg. 4). There were bruises on the child and an 8 centimeter skin abrasion on his right knee and photographs were taken by DCFS. (R. 2276). Mother was advised by the DCFS worker at that time that there should be no visitation between Father and Sebastian. (R. 2276). Sebastian has shown no interest in visiting with his Father, and is not visiting with his Father. (R. 2276).

Mother has acknowledged that Sebastian requires substantial time commitment and supervision. (R. 2276). Sebastian has been volatile and has acted out physically. (R. 2276). Mother has refused to engage the child physically. (R. 2276). Unfortunately, Father has historically disciplined the child by physically grabbing his hair and neck and throwing him against the walls and onto the ground. (R. 2276, Update Evaluation, Aplt. Apndx. pg. 4). Sebastian's earlier residence with Father was due to the need to keep the children separate because of an abuse incident between the children, Sebastian and Kelsey, approximately three and one-half years ago. (R. 2276). Since that time, both children have matured, and Sebastian, who has been under the jurisdiction of the juvenile court, has received treatment for his behavioral problems and Mother has taken

appropriate steps to provide appropriate structure for Sebastian and appropriate structure and protection for Kelsey. (R. 2276-2277). The children's relationship is very good and the relationship continues to be consistently monitored by Mother. (R. 2277). It is important to note that Mother will have extended family available in Las Vegas to assist her in this supervision. (R. 2277, Update Evaluation, Aplt. Apndx. pg. 4). There is no extended family on either side in Salt Lake City. (R. 2277, R. 2270 Transcript pg. 8-9).

Mother filed a Verified Motion for Approval to Relocate on or about October 12, 1999. (R. 2107-2123). Mother set forth in that motion that she desired to move to Las Vegas because she had lived there for 18 years and for the reasons that her parents, two sisters, brother-in-law and nephew resided in Las Vegas. (R. 2108-2109, Update Evaluation, Aplt. Apndx. pg. 4). Her father has since passed away but was also Mother's intention to reside close to her mother and sister. (R. 2108). Within the motion, Mother also indicated that she could receive a higher paying salary in Las Vegas. (R. 2109). She had also commenced a business in Las Vegas with her sister, Sonja, which involves real estate investment and sale. (R. 2109, Update Evaluation, Aplt. Apndx. pg. 4). This business can be performed substantially at home to allow greater flexibility of time with the children. (R. 2277). Indeed, subsequent to the lower court's orders in regard to the relocation having been entered, Mother terminated her employment in as a nurse anticipation of new employment in Las Vegas, sold her residence, and moved to Las Vegas. (R. 2277-2278).

Father continues to operate his business, CB Display as a business in Las Vegas, and owns real property in Las Vegas. (R. 2278). The proximity of Las Vegas to Salt Lake is reasonable. The flight time is, approximately, 1 hour. (R. 2278, R. 2270 Transcript pg. 14). Further, Father's income is substantial as he had earned \$16,250.00 per month at the time of the Decree. (R. 2132). This makes ease of travel somewhat less onerous.

Father has historically not exercised mid-week or "surprise visits" with the children and the parties have resided some distance from one another for several years. Mother has resided in Holladay and Father in Woodland, Utah. (R. 2278, R. 2270 Transcript pg. 14, lines 9-17). On this issue, the evidence before the trial court was that "[t]here is no spontaneity of contact . . . Mr. Birsa has not taken the opportunities, although offered, to pick up the children for lunch or to pick up the children and take them to gymnastics or do any of those things that he could. He's simply not done it. He's done the standard visitation. That's all he's done." (R. 2270 Transcript pg. 14, lines 9-17). There have not been "spontaneous" visits by Father with Kelsey and there are currently no visits occurring between Sebastian and Father. (R. 2278).

Sebastian has not been thriving in his educational process and so a change or move from one school to another is likely to not have substantial impact. (R. 2278, R. 2270 Transcript pg. 30-31). Also, Kelsey has had to change schools, in any event, after the end of the 1999/2000 school year, due to the fact that her junior high closed at the end of this school year and the children were divided between other schools. (R. 2278, R. 2270

Transcript pg. 11). Therefore, she was faced with the disruption of a change in school and classmates in any event. (R. 2278). The lower court carefully weighed the effects of the relocation on the best interests of the children and the timing of such a relocation and specifically stated that the July 1 move “would give the children the summer to make some friends, find out where the school is, do what needs to be done for another move in their lives. It may provide some meaningful help to this very troubled 15-year-old-boy.” (R. 2270 Transcript pg. 39). The trial court also reiterated Jill Sanders reasoning why the relocation should take place on July 1, stating that “I believe that she’s right on.” (R. 2270 Transcript pg. 39).

Both children very much want to reside with Mother. (R. 2279, Update Evaluation, Applt. Apndx. pg. 3). Kelsey has resided in Mother’s custody since the parties’ separation. (R. 2270 Transcript pg. 16, 18). Father has offered to take back custody of Sebastian, but he has indicated twice in open court that if he does, the child will not live with him and suggested that the child would be placed in a military school in Colorado. (R. 2279, R. 2270 Transcript pg. 14, 31). This is an even greater distance from Woodland, Utah and makes for even greater difficulty in repairing the damage between Sebastian and Father than the child’s residence in Las Vegas with Mother and sister. (R. 2279). Both children are comfortable with and supportive of the move. (R. 2279, Custody Evaluation, Applt. Apndx. pg. 3).

Mother’s motion for approval to relocate initially came on for hearing on November 17, 1999 before Judge Brian. (R. 2215). At that time, after argument, the

lower court issued an order indicating its intention that Mother be permitted to move at the Christmas holidays, but that Father could have the matter reviewed by Dr. Jill Sanders, the custody evaluator, and that upon the receipt of that report, the court would address the issue further. (R. 2240-2243).

Dr. Sanders was the original custody evaluator. (R. 2279). She met with the children and the parties and issued her recommendations. (R. 2279). Her *primary* recommendation was that Mother not be permitted to relocate. (Update Evaluation, Aplt. Apndx. pg. 4). Counsel for Mother had previously informed the lower court at the date of the hearing on November 17, 1999 that it was counsel's belief that Dr. Sanders would, indeed, recommend that the move not occur. (R. 2279-2280). Dr. Sanders is typically opposed to custodial parents relocating and has openly expressed this opinion in this case, other cases, and in seminars; including one very recent seminar hosted by counsel for Father.¹ (R. 2280). Dr. Sanders recommended, however, that if the lower court did allow Mother to relocate that it should occur at the end of the current school year. (Update Evaluation, Aplt. Apndx. pg. 5). Dr. Sanders did not recommend that Father be awarded custody of either child. (Update Evaluation, Aplt. Apndx.). Dr. Sanders did not recommend that Sebastian be sent to military school in Colorado. (Update Evaluation, Aplt. Apndx.). No petition is pending requesting custody of the children by Respondent.

¹ Dr. Sanders spoke December 4, 1999 in Salt Lake City a seminar sponsored by the American Academy of Matrimonial Lawyers and hosted by Mr. Dolowitz at which time she opined she was generally not in favor of relocation for custodial parents.

After receipt of Dr. Sanders' report, this matter was heard by Judge Brian on December 22, 1999 and at that time the lower court heard the proffers and arguments of counsel and reviewed the law and entered an order. (R. 2244, R. 2250-2252, Transcript at R. 2270). The lower court specifically ordered that the Mother's motion to relocate be granted, but that it should take place July 1 or later to allow for completion of the school year, therapeutic treatment of Sebastian and the healing process between Father and Sebastian. (R. 2250-2251). Sebastian has been in therapy with Barbara Dobbs. (R. 2280). There continues to be no visitation being exercised between Father and Sebastian, though the child was asked by Father to accompany him on a two week European vacation in June. (R. 2280).

Father previously filed a motion to prevent the relocation and for a stay of the trial court's order which proceeded to hearing on April 21, 2000 before the Honorable Robert Hilder. (R. 2263-2265). Judge Hilder denied the motion. (Minute Entry dated 4/21/2000, Volume 6 of Record, not numbered). Father filed a motion with this Court to prevent relocation and for a stay of the lower court's order and this motion was argued and denied on May 17, 2000.

SUMMARY OF THE ARGUMENT

The lower court's denial of the Father's request to restrain the Mother from relocating to Nevada was appropriate in this action. The Father has not petitioned for a change of custody. The Father did not request custody at the lower level and did not offer any evidence as to whether a change in custody would be in the children's best

interests. The decree of divorce contemplated a relocation and the lower court established how and when such a relocation could occur. The Mother complied with these requirements. The updated evaluation, while primarily recommending against relocation, also clearly established that it would be against the best interests of the children to disrupt the custodial relationship between Mother and the children.

In this case, the Father, while failing to request a change in custody, also failed to establish any of the necessary legal requirements to even allow the lower court to consider such a change in custody. To be able to modify a physical custodial relationship, the lower court must establish that since the time of the previous decree, circumstances upon the which the earlier award was based have changed; and these changed circumstances are sufficiently substantial and material to justify reopening the question of custody. Only after such a finding, the lower court must then determine that the change in custody is in the children's best interests. These required findings were neither made by the lower court, nor were they supported by any of the evidence. This being the case, the lower court correctly maintained the custodial relationship.

Furthermore, if Father's argument is interpreted to state that, the trial court could modify the previous order to restrain Mother from ever relocating as long as the children were minors, such a determination would violate a number of Mother's constitutional rights under both the Utah Constitution and the Constitution of the United States of America. In effect, Father would be requesting that this Court simply change physical custody based only on the Mother's relocation and thereby ignore the children's best

interests all together or unilaterally restrain Mother and the children from ever relocating in violation of their constitutional rights to travel and associate.

ARGUMENT

THE LOWER COURT CORRECTLY DENIED FATHER'S REQUEST TO RESTRAIN MOTHER FROM RELOCATING TO NEVADA.

I. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DENYING FATHER'S REQUEST TO RESTRAIN MOTHER FROM RELOCATING TO NEVADA.

A. FATHER'S FAILURE TO MARSHALL THE EVIDENCE.

Father acknowledges that “[w]hen attacking the exercise of discretion by a trial court, it is the responsibility of Appellant to search the record and marshal the evidence that supports the decision of the trial court.” (Aplt. Brf. pg 15); See Bailey-Allen Co., Inc. v. Kurzet, 945 P.2d 180, 186 (Utah. App. 1997) (holding that an appellant must first marshal all of the evidence supporting the lower court’s findings, and then demonstrate that, even if viewed in a light most favorable to the trial court, the evidence is legally insufficient to support the findings). Rather than following this rule, Father simply states that “[i]n this case, there is none. The only evidence of the best interests of the children that has been presented to the trial court is the bare assertion to that effect in the motion of the Appellee.” (Aplt. Brf. pg. 15).

However, the lower court clearly stated in its order that it based it’s order on the entire file, pleadings, Dr. Sanders report, the arguments and proffers of counsel. Some of

the facts which should have been marshaled by Father which were included as the basis for the lower court's order include:

1. Mother had physical custody of both of the children. Father has not requested physical custody of the children. In fact, Father has stated at least twice in open court that if he had physical custody of Sebastian, he would send him to military school in Colorado.

2. As found by Dr. Sanders, both children "have expressed a desire to continue their primary residence with [Mother]". Dr. Sanders also found this to be "logical outcome" for Kelsey based upon her historical custodial relationship with Mother, Kelsey's "strong attachment to her mother," and gender and developmental issues.

3. As found by Dr. Sanders, Father voluntarily relinquished physical custody of Sebastian to Mother in August of 1999. Sebastian has refused to participate in visitation with Father. As found by Dr. Sanders, this rift was a result of physical abuse to Sebastian by Father.

4. As found by Dr. Sanders and stated by Mother, Mother's desire to relocate was based upon many reasons including a desire to live closer to her extended family in Nevada, including her recently widowed mother. Neither party has extended family in Utah. Such access to extended family will be a positive influence for the children. In addition, Mother has embarked on a real estate venture in Las Vegas which has become difficult to manage from Utah and requires her ongoing attention. By improving her

business and finances, Mother will be more able to provide emotional and financial support for the children.

5. Although Dr. Sanders did recommend that her first choice was that Mother not be allowed to relocate, Dr. Sanders then spent over one quarter of her report recommending the timing and possible visitation once the relocation is granted. Dr. Sanders did not recommend that Father be awarded custody. This clearly evidences Dr. Sanders' acknowledgment that the custodial relationship between Mother and the children should not be disrupted regardless of the relocation.

Dr. Sanders clearly did not address the legal issues attendant to this case, and based her report solely on interviews with the parties, the children, and her personal opinions and biases. "[T]he trial court is free to accept or reject an expert's testimony, and may accord it whatever weight it deems appropriate in light of all the other evidence in the case." Myers v. Myers, 768 P.2d 979, 984 (Utah App. 1989) (citing State v. Skickles, 760 P.2d 291, 302 (Utah 1988); Pukey v. Pukey, 728 P.2d 117, 120 (Utah 1986)). Based upon all of the information available to the lower court and the lower court's familiarity with the parties and the case in general and the legal issues, the lower court did not abuse its discretion in providing different weight to the different recommendations of Dr. Sander's report.

None of these facts which provided the basis of the lower court's order were marshaled by Father. When these facts are viewed in a light most favorable to the lower

court, it is obvious that the trial court did not abuse its discretion in denying Father's request to restrain Mother from relocating to Nevada.

B. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DENYING FATHER'S REQUEST TO RESTRAIN MOTHER FROM RELOCATING TO NEVADA.

Father relies on this Court's decisions in Myers v. Myers and Larson v. Larson to support his contention that even in light of all of the evidence supporting Mother's relocation with the children, the trial court abused its discretion in denying Father's request to restrain Mother from relocating. Father states that "[i]n Myers, this court determined that the trial court must have found that it was in the children's best interest to relocate." (Aplt. Brf. pg. 15). However, in Myers, the trial court allowed a relocation of a custodial parent, even though the trial court did not specifically find that the relocation was in the children's best interests, and this Court affirmed. 768 P.2d 979, 983-84 (Utah App. 1989).

In Myers, the trial court did find that the relocating parent was the primary care giver, she had remarried and appropriately filed a motion to relocate based upon her husband's employment, that the custody evaluator supported continuing the custodial relationship based upon the non-custodial parent's conduct, the trauma involved in changing custody, and the bond between the custodial parent and the children. Id. Although the trial court did not specifically find the relocation to be in the children's best interest, this Court stated that "it is reasonable to infer that the court's determination of the children's best interests included consideration of this move." Id. at 984.

In the Myers case, the non-custodial parent had petitioned to modify the custodial arrangement and was seeking physical custody of the children. In addition, in Myers, the decree awarded custody to the mother, so long as remained in or within fifty miles of Salt Lake County. In the present case, Father has not requested physical custody of the children. Dr. Sanders never recommended any change in custody, and in fact specifically stated her recommendations for the timing of the relocation and the specifics of visitation after the relocation. It is also interesting to note that Dr. Sanders also opined that if the lower court permitted the move, then Mother should be responsible for any and all costs of transportation for visitation. (See Aplt. Apndx. Second Update pg. 6).

Further, in this case, unlike Myers, at the time of the decree, the issue of relocation was specifically addressed. This decree specifically addressed the issue of relocation as follows:

“Both plaintiff and defendant are enjoined from moving out of the Salt Lake County, Utah or Summit County, Utah for the next sixteen (16) months in order to facilitate a continuation of visitation as hereinafter set out. Should either party desire to move from the designated geographical area after sixteen (16) months, the party desiring to move shall file a motion and place it on the court’s law and motion calendar, requesting that the move be approved by the court and specifying the reasons why the party desires to make the move. If the request is opposed by the other party, the court will hear the motion. The court has indicated it will be inclined to grant the motion if there is any good reason for the move. At the time of hearing, the court shall determine whether to grant the move or whether any further evaluation or information is needed. In order to implement this provision, the Honorable Pat B. Brian shall retain jurisdiction over the case as to any motion involving a requested move.” (emphasis added).

Each of the conditions precedent in the decree took place in this matter. The initial sixteen months had passed, a motion for relocation was filed, and a further evaluation was performed.

As in Myers, in the present case, the relocating parent, Mother, is the physical custodial parent. Her motion to relocate was based upon her desire to facilitate her business opportunities, and to be close to her recently widowed mother and other extended family. The lower court relied on Dr. Sander's report, as well as all of the other evidence showing the strength of the bond between the children and Mother, the physical abuse of Sebastian by Father, and the importance of maintaining the custodial relationship between the children and Mother. From all of this evidence, and in light of the differences between Myers and the present case (Father has not requested custody and the decree favorably addressed the issue of relocation), even where the lower court did not specifically state that the relocation was in the children's best interest, it is reasonable to infer that the court's determination of the children's best interests included consideration of this move.

The lower court was aware that Mother intended to move, she had sold her residence in Utah, quit her employment, and her business interests in Nevada required a greater physical presence in Nevada. Father acknowledges in his Brief (pg. 16) that Mother has a constitutional right to travel² (addressed further below) and that "the court

² Along with constitutional rights to personhood, privacy, autonomy, home and community, right to association that includes family and marriage. See Relocation Standards

has the power to say she may [relocate] but the children may not be relocated as that is contrary to their best interests.”³ This argument, however, is illogical as it would require that Father be awarded physical custody, or that the State of Utah be awarded guardianship. In light of all of the unrebutted evidence from the pleadings and Dr. Sanders’ report, it is clear that the children’s best interests were best served by maintaining the custodial relationship with Mother, rather than putting them in foster care in Utah or awarding Father physical custody which would disrupt the custodial relationship with Mother and the children which is contrary to the children’s wishes and Dr. Sanders’ evaluation. A change in custody would also force Sebastian to live with his Father who has undisputedly physically abused him at least twice, and allow Father to unilaterally move Sebastian out to Colorado to military school regardless of the child’s best interests.

and Constitutional Considerations, Journal of the American Academy of Matrimonial Lawyers, Vol. 15, 229, 237, 1998, Comment.

³This argument that the lower court can simply change custody if Mother chooses to relocate is contrary to the Utah Supreme Court’s holding in Hogge v. Hogge, 649 P.2d 51 (Utah 1982) which established the two-step test to determine whether or not a change in custody is warranted prior to determining the question of what is in the children’s best interests. Hogge holds that prior to a determination of best interests, the lower court must establish that “ (1) since the time of the previous decree, circumstances upon the which the earlier award was based have changed; and (2) these changed circumstances are sufficiently substantial and material to justify reopening the question of custody.” Id. at 54. Only after such a finding, the lower court must then determine that the change in custody is in the children’s best interests, again a finding which the lower court and Dr. Sanders did not make.

As with the case of Myers, in Larson, the non-custodial parent petitioned to modify the physical custody order. 888 P.2d 719 (Utah App. 1994). This petition was premised by the custodial parent's intention to move to Oregon to live with her fiancé. Id. at 721. The non-custodial parent stated that the relocation would interfere with his relationship with the children, disrupt their religious training, and remove them from their friends and relatives. Id. The trial court did not award custody to the non-custodial parent, but ordered that if the custodial parent moved from Summit County, physical custody would be transferred as it was in the children's best interests to remain in the Park City area. Id.

On appeal, this Court determined that the lower court's order could only be interpreted as meaning that "the children's domicile in Summit County is so essential to their well-being that removal from that community would be more detrimental to them than separating them from their custodial parent- the person who has been primarily responsible for their day-to-day care for the entirety of their lives." Id. at 722. This Court went on to state that "[w]hile such a conclusion is not inherently impossible, a factor of considerable importance in determining the best interest of children is the maintenance of continuity in their lives, and removing children from their existing custodial placement undercuts that policy." Id. at 722-23 (citations omitted). This Court determined that the lower court erred in modifying the custodial relationship if the custodial parent ever moved from Summit County. Id. at 727.

The lower court in the present case was faced with a similar issue. Contrary to the Larson case, in the present case at the trial level, Father did not request custody of the children and simply requested that Mother be restrained from moving. For the first time now at the appellate level, Father has argued in his Brief that Mother could move, but the trial court should then simply transfer custody to him, regardless of the two-step Hogge test and the children's best interests irrespective of the fact that he has filed no petition or motion for custody. (See Note 3 above). In light of the facts of this case, the lower court herein did not abuse its discretion in maintaining the very important continuity of the custodial relationship between the children and Mother. See Larson, 888 P.2d at 722, 23; Hirsch v. Hirsch, 725 P.2d 1320, 1323 (Utah 1986) (Zimmerman, J. Concurring); Hutchison v. Hutchison, 649 P.2d 38, 41 (Utah 1982); Nielsen v. Nielsen, 620 P.2d 511, 512 (Utah 1980); In re Cooper, 410 P.2d 475, 476 (Utah 1966); In re Application of Conde, 347 P.2d 859, 861 (Utah 1959); Rosendahl v. Rosendahl, 876 P.2d 870, 873 (Utah App.) *cert. denied*, 883 P.2d 1359 (Utah 1994); Cummings v. Cummings, 821 P.2d 472, 478-79 (Utah App. 1991); Moon v. Moon, 790 P.2d 52, 54 (Utah App. 1990).

A similar case, with similar reasoning to the Larson decision, is In Re: Marriage of Burgess. 913 P.2d 473 (Cal. 1996). In Burgess, the court overruled the California Court of Appeals decision that the relocating parent had the burden of establishing the "necessity" of the relocation. Id. at 479. The Supreme Court of California declined to impose a burden on a relocating parent to establish the necessity for the move and reiterated the paramount importance of continuity of custody over continuity of location

and made note that in a “move away” case, a change of custody is not justified simply because the custodial parent has chosen to reside in a different location. Id. at 484. The court cited statistics that 20% of Americans change residences each year, usually for economic or marital reasons. Id. at 480. In addition, the court, in discussing custody and relocation, noted that “relocating frequently has little, if any, substantive bearing on the suitability of a parent to retain the role of a custodial parent. A parent who has been the primary caregiver for minor children is ordinarily no less capable of maintaining the responsibilities and obligations of parenting simply by virtue of a reasonable decision to change his or her geographic location.” Id. at 481.

In addition to the Myers and Larson cases discussed above, Father relies on two articles to support his contention that the lower court abused its discretion by maintaining the custodial relationship and allowing Mother’s relocation to Nevada. The first article cited by Father is “A Children’s Rights Approach to Relocation: A Meaningful Best Interests Standard” by Gary A. Debele. Journal of the American Academy of Matrimonial Lawyers, Vol. 15, 1998, pp. 75-118. Mr. Debele’s article is specifically concerned with the issue of the child’s rights during a relocation proceeding. Mr. Debele states that “[t]he best interests of the child cannot be effected without a consideration of the child’s feelings.” Id. at 106. As applied to the facts of the present case, Dr. Sanders found that the children both expressed their desire to continue to reside with Mother and had a strong attachment to Mother, and Kelsey “cited a number of positive factors associated with the move.”

Mr. Debele goes on to state that “[w]hen courts intervene in ways that disrupt the child’s relationship with the custodial parent, serious psychological harm may occur to the child as well as to the parent.” Id. at 108. As applied to the facts of this case, the lower court’s action herein maintained and supported the children’s relationship with the custodial parent, Mother. In addition, Mr. Debele also cites psychological studies and articles which state that:

“The cumulative body of social science research on custody does not support the presumption that frequent and continuing access to both parents lies at the core of the child’s best interests. While the psychological adjustment of the custodial parent has consistently been found to be related to the child’s adjustment, that of the non-custodial parent has not. Neither is the amount of visiting of the non-custodial parent consistently related to the child’s adjustment. There is no evidence that frequency of visiting or amount of time spent with the non-custodial parent over the child’s entire growing up years is significantly related to good outcome in the child or adolescent. Rather, research indicates that it is the substance and character of the parent/child relationship, and not the particular form, that is critical.” Id. at 109.

In further discussing the psychological effects a relocation can have on the children and parents, Mr. Debele states that “[p]rohibiting a move by the custodial parent may force that parent to choose between custody of his or her child and opportunities that may benefit the family unit. Imposing this choice . . . has the potential of burdening the parent/child relationship for many years . . . [t]he child’s knowledge that he or she has been the cause of the parent’s profound disappointment and losing a central goal in life can be a terrible burden for the child to bear.” Id. at 110.

The second article cited by Father is “The Psychological Effects of Relocation for Children of Divorce,” by Marion G. Gindes, Ph. D. Journal of the American Academy of Matrimonial Lawyers, Vol. 15, 1998, pp. 119-148). Dr. Gindes discusses the impact on children and parents during a post-divorce relocation of the custodial parent. While Dr. Gindes does discuss the possibility of stress and trauma caused by a relocation, Dr. Gindes agrees with Mr. Debele and acknowledges that the factors which have been consistently related to positive child adjustment are (1) positive custodial parent adjustment, (2) positive relationship between custodial parent and child, and (3) low level of conflict between parents. Id. at 144-45. Dr. Gindes also acknowledges the studies that show that “[f]requency of contact with the noncustodial parent does not seem to be related to child well-being but the nature of the contact does.” Id. at 145. As applied to the facts of the present case, the trial court’s order denying Father’s request to restrain Mother from relocating will promote the custodial relationship between Mother and the children and lower the level of conflict between the parents.

Based upon the enormous body of case law and the psychological studies as applied to the evidence and facts of this case, maintaining the custodial relationship between Mother and the children is the most important factor in determining what is in the best interests of these children and the trial court did not abuse its discretion in denying Father’s request to restrain Mother from moving to Nevada.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT IT DID NOT HAVE THE POWER TO PREVENT RELOCATION OR MODIFY CUSTODY UNDER THE FACTS OF THIS CASE.

Father argues that under the Myers and Larson rulings of this Court, the trial court had the power to prohibit the relocation of Mother. Father bases this interpretation of these decisions on the fact that in each case this Court addressed the best interests of the children prior to affirming the lower court in allowing relocation, and overruling the lower court where it conditioned a relocation on a change in custody. Specifically, Father argues that “[i]f no power to permit evaluation of a relocation decision existed, there would have been no need for this section of the opinion,” referring to the section of the opinion which discussed the best interests of the children. (Aplt. Brf. pg 14). However, in each of these cases, there was a petition to modify custody in addition to the relocation issues. When faced with a request for a modification of physical custody, it is black letter law⁴ that the trial court **must** make a determination of what is in the best interests of the children. At the trial level herein, Father did not seek custody of the children, only restraint of Mother from relocating.

Father also cites Section 30-3-10.4(1)(b) of the Utah Code to support his allegation that the trial court could have prevented Mother’s relocation. However, the provision Father cites to states in relevant part:

⁴ Section 30-3-10 of the Utah Code states that “[i]n determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties.”

“On the motion of one or both of the joint legal custodians **the court may, after a hearing, modify an order establishing joint legal custody if . . . a modification of the terms and conditions of the decree would be an improvement for and in the best interest of the child.**” (emphasis added).

However, the issue here is relocation. This appeal is not concerned with the modification of the joint legal custody order. This argument is nonsensical.

Father also cites Section 30-3-5(3) of the Utah Code to support his position that the trial court could have prevented Mother’s relocation. However, this provision states, in its entirety:

“The court has continuing jurisdiction to make subsequent changes or new orders for the **custody of the children** and their support, maintenance, health, and dental care, and distribution of the property and obligations for debts as is reasonable and necessary.” (emphasis added).

Again, here the issue is relocation, not custody. Mother does not dispute that the trial court has continuing jurisdiction to modify custody, but only after the two-part Hogge test is established,⁵ and then only after the determination that the change in custody is in the children’s best interests, a finding which the neither the lower court nor Dr. Sanders made. Father’s attempt to circumvent the statutory and case law requirements for a change in physical custody is without merit.

Father is arguing that the trial court had discretion to change custody without a pending petition to modify custody, or a finding of a substantial and material change in

⁵ (1) Since the time of the previous decree, circumstances upon the which the earlier award was based have changed; and (2) these changed circumstances are sufficiently substantial and material to justify reopening the question of custody. (See Note 3 above).

circumstances, or a finding that such a custodial change was in the best interests of the children. This position is in clear violation of the statutory law and the case law of this Court and the Supreme Court of Utah. Alternatively, Father argues that the trial court had the discretion to order that Mother never leave the geographic area, or if she does, she would lose custody of the children, again without any evidence or finding that such a change was in the children's best interests, again in violation of the statutory law and case law. While the trial court clearly has continuing jurisdiction to modify custodial arrangements, such a modification still must comply with the statutory requirements, and the requirements as stated by the appellate courts of Utah.

Furthermore, if Father's argument is interpreted to state that, under the cited statutes, the trial court could modify the previous order to restrain Mother from ever relocating as long as the children were minors, such a determination would violate a number of Mother's constitutional rights under both the Utah Constitution and the Constitution of the United States of America.⁶

While this issue has not yet been addressed in Utah, some other jurisdictions have addressed the constitutional issues in relocation cases. In New Mexico, the preeminent case is Jaramillo v. Jaramillo, in which the State Supreme Court of New Mexico stated that placing a burden on the relocating parent to show that relocation is in the best interest

⁶ Father seems to acknowledge at least one of Mother's constitutional rights on page 16 of his Brief by stating that she could move and the children could stay, however, this again would require a change in custody which was neither supported by any evidence at the lower level, nor did Father even request custody at the lower level.

of the child impairs the relocating parent's constitutional right to travel. 823 P.2d 299 (N.M. 1991). In that case, the mother had primary physical custody in a joint custody decree. The court stated that placing the burden on the party seeking to relocate to show that the relocation is in the best interests of the child unconstitutionally impairs the relocating parent's right to travel. *Id.* at 305 (citing Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969)⁷; see also Watt v. Watt, 971 P.2d 608 (Wy. Sup. Ct. 1999) (holding that a clause automatically transferring custody to the father because the mother wanted to move from the State was violative of the right to travel)). The court indicated that there are personal rights which a parent has that protects them from governmental infringement, which includes the custodial parent's right to have the children move with that parent. The relocating custodial parent in Jaramillo argued that placing the burden on the relocating parent to prove that the relocation is in the best interests of the child impairs the relocating parent's right to travel. *Id.* at 304. The Supreme Court of New Mexico agreed and remanded the case to the trial court to reinstate its order allowing the custodial parent to relocate with the child.

In the Watt case cited above, the mother was awarded the primary physical custody of the parties' minor children by the decree, which also allowed for the automatic

⁷ Stating that "[e]ven before the ratification of the Constitution of the United States, the Articles of Confederation provided that 'the people of each State shall have free ingress and egress to and from any other state' This principle encompasses the right of individuals 'to migrate, resettle, find a new job, and start a new life'" 394 U.S. at 629 (quoting Articles of Confederation, Art. IV, §1 (1777)).

transfer of custody to the father in the event that the mother moved more than 50 miles from the parties' hometown. 971 P.2d 608. When the mother sought to modify the decree so that she could relocate, the father objected and sought custody. The trial court awarded custody to the father. The Wyoming Supreme Court reversed the decision based upon the mother's constitutional right to travel. Id. at 612 (citing Shapiro, 395 U.S. at 629). The Wyoming Supreme Court went on to say that a citizen has the right to travel, and this right includes the right of a custodial parent to have the children move with that parent, and therefore, the mother was allowed to have her minor children join her in her new community. Id. at 616.

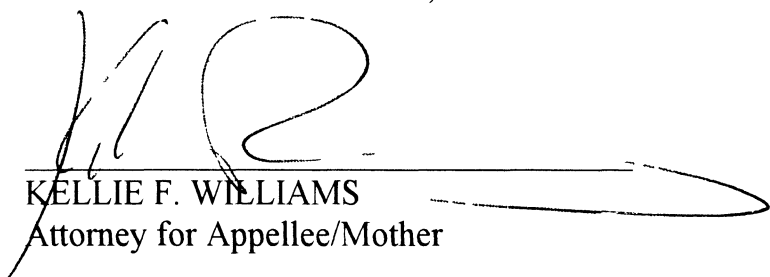
Father's apparent argument that, under the cited statutes, the trial court could modify the previous order to restrain Mother from ever relocating as long as the children were minors, is without merit as such an order would clearly violate Mother's constitutional rights under both the Utah Constitution and the Constitution of the United States of America

CONCLUSION

Based upon the foregoing, the Mother respectfully requests that this Court affirm the lower court's denial of the Father's request to restrain the Mother from relocating to Nevada with the children and for an award of costs pursuant to Rule 34 of the Utah Rules of Appellate Procedure. Mother respectfully requests that this Court award her attorney's fees and costs incurred in Father's appeal from this order, which order arose from a hearing on the lower court's law and motion calendar.

Respectfully submitted this 11th day of July, 2000.

CORPORON & WILLIAMS, P.C.



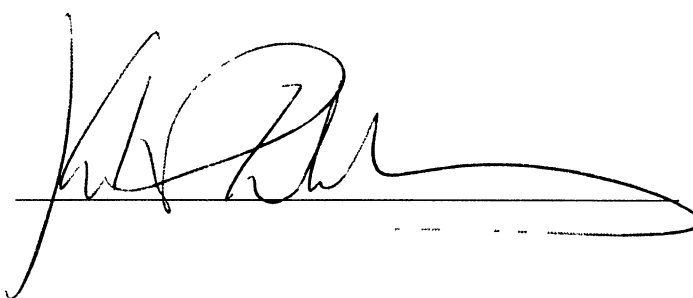
KELLIE F. WILLIAMS
Attorney for Appellee/Mother

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLEE were mailed, first class, postage prepaid, to:

DAVID S. DOLOWITZ
525 East First South, Fifth Floor
P.O. Box 11008
Salt Lake City, UT 84147-0008

on this 12th day of July, 2000.

A handwritten signature in black ink, appearing to read "David S. Dolowitz", written over a horizontal line.