

2000

# Lesley Birsa nka Faulds v. Dennis Carl Birsa : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

**LESLEY BIRSA, nka FAULDS,**

Petitioner/Appellee,

**V.**

**DENNIS CARL BIRSA,**

**Respondent/Appellant,**

Civil No. 20000177CA

Priority 4

## BRIEF OF APPELLANT

Appeal from Judgment of the  
Third Judicial District Court of Summit County,  
State of Utah  
The Honorable Pat B. Brian  
Third District Court Judge

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**FILED**

Utah Court of Appeals

MAY 16 2000

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## **JURISDICTION**

Jurisdiction of this matter is vested in this Court pursuant to the provisions of § 78-2a-3(2)(h) of the Utah Code.

## **ISSUE PRESENTED ON APPEAL**

Do the trial courts of the State of Utah have the authority to prevent relocation of a minor child by a custodial parent where the evidence demonstrates that it is in the best interest of the minor children that no relocation occur and, if so, is it an abuse of discretion not to prevent relocation?

## **STANDARD OF REVIEW**

As the trial judge in this case ruled that he did not have the power to prevent relocation, the issue is a question of law which is reviewed for correctness. Childs v. Callahan, 1999 UT App. ¶ 8, 993 P.2d 244; Krambule v. Krambule, 1999 UT App, ¶ 10, 994 P. 2d 210. In the alternative, if this Court were to determine that the language of the trial judge in his oral ruling is simply a decision to permit relocation rather than a finding that he did not have the authority to prohibit the move, this Court would review his decision under the abuse of discretion standard. Bradford v. Bradford, 1999 UT App ¶ 12, 993 P.2d 887.

## **PRESERVATION OF ISSUE FOR APPEAL**

The issues presented in this matter were preserved for appeal as they were all raised before the trial court in Respondent's Motion on Temporary Issues (R. 2182-2183)

and “Respondent’s Affidavit in Response to Petitioner’s Verified Motion for Approval to Relocate...” (R. 2185-2214) and were addressed by Judge Brian in the hearing held on December 22, 1999 (R. 2270).

### **DETERMINATIVE STATUTES**

The statutes and decisions which are determinative of this issue are:

§ 30-3-5(3) of the Utah Code, which provides in relevant language:

- (3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children . . . as is reasonable and necessary.

Section 30-3-10.4(1)(b) of the Utah Code, which provides in relevant part:

- (b) [A] modification of the terms and conditions of the decree would be an improvement for and in the best interest of the child.

And Section 30-3-37 of the Utah Code, which provides:

- (1) When either parent decides to move from the state of Utah or 150 miles or more from the residence specified in the court’s decree, that parent shall provide reasonable advance written notice of the intended relocation to the other parent.
- (2) The court may, upon motion of any party or upon the court’s own motion, schedule a hearing with notice to review the visitation schedule as provided in Section 30-3-35 and make appropriate orders regarding the visitation and costs for visitation transportation.
- (3) In determining the visitation schedule and allocating the transportation costs, the court shall consider:
  - (a) the reason for the parent’s relocation;
  - (b) the additional costs or difficulty to both parents in exercising visitation;
  - (c) the economic resources of both parents; and
  - (d) other factors the court considers necessary and relevant.

- (4) Upon the motion of any party, the court may order the parent intending to move to pay the costs of transportation for:
  - (a) at least one visit per year with the other parent; and
  - (b) any number of additional visits as determined equitable by the court.
- (5) Upon the motion of any party, the court may order uninterrupted visitation with the noncustodial parent for a minimum of 30 days during extended visitation, except if the court finds it is not in the best interests of the child.

### **STATEMENT OF THE CASE**

At the time this case came to trial, on Monday, January 27, 1997, the Court suggested that the parties attempt to discuss and see if they could resolve the outstanding issues. With the assistance of Judge Brian, a Stipulation was reached resolving all issues. The Decree of Divorce was entered February 19, 1997. (R. 1910-1919). In paragraph 5 of the Decree both of the parties were enjoined from moving from Salt Lake County, State of Utah or Summit County, State of Utah for sixteen (16) months in order to facilitate a continuation of visitation. (R. 1911). Paragraph 5 then went on to provide that if either party desired to move from the designated geographical areas after sixteen (16) months, a motion to do so had to be filed and placed on the Court's law and motion calendar. This compromise was based on the Appellant's desire to co-parent his children, the custody evaluator's recommendation against relocation (R. 1533) and the desire of Appellee to relocate.

On October 13, 1999, Appellee filed a Verified Motion for Approval to Relocate (R. 2107-2123). Appellant objected to the granting of that Motion (R. 2182-2214). At a



hearing held on November 17, 1999, the trial court indicated that it was willing to grant the Motion to Relocate, but ordered a renewed evaluation to determine whether that would be in the best interests of the children. Dr. Jill Sanders, the original custody evaluator in this matter, was appointed to conduct the evaluation (R. 2240-2242). Dr. Sanders filed her report recommending that relocation not occur because relocation was not in the best interests of the children. (R. 2263).

The trial court ruled that the relocation could occur after July 1, 2000. (R. 2244, 2250-51). Judge Brian stated:

Court is not going to prevent the custodial parent, the mother, from moving any place she wants in the United States, and the Court is not going to take custody away from the mother because she elects to move.

(Transcript 36 lines 21-25). [R. 2270].

He also stated:

That's the Court's take on this. It's not a question of whether or not a move is appropriate, whether or not a move is provided by law, whether or not there is any intent whatever on the custodial parent's right to move, the Court does not believe that the law enables or entitles or authorizes this Court to compel a custodial parent either to stay put or move at the risk of giving up custody.

(Transcript pps. 34 [lines 22-25] and 35 [lines 1-4], R. 2270).

If this Court were to find that the trial court determined it did not have the power to prohibit a relocation, that determination was an error of law because the trial court does

possess the power to enter such orders as are appropriate to effect the best interests of the children under the provisions of Section 30-3-5(3) and 30-3-10.4(1)(b) of the Utah Code. In the alternative, if this Court were to find that Judge Brian had determined that the move should be permitted, that decision was an abuse of discretion as the evidence was clear that relocation was contrary to the best interests of the children.

### **STATEMENT OF FACTS**

This action was initiated September 13, 1994 (R. 1-9). After having filed this action in Utah, Appellee advised the Court that the parties were reconciling on September 26, 1994 (R. 21) and moved with the minor children to Las Vegas, Nevada.

Approximately one (1) month later, on October 7, 1994, after the reconciliation failed, Appellant filed a divorce action in Nevada. Appellee then moved the trial court to order that she be allowed to reside in the parties' Nevada residence where she had moved and require the Appellant to live in the parties Summit County, Utah home (R. 22-27). She informed the Court that there was a divorce action also pending in Nevada and requested that the Third Judicial District Court for Summit County, State of Utah take jurisdiction over the action and stay the Nevada proceedings (R. 28-50). Appellant moved the Third Judicial District Court for Summit County, State of Utah, to dismiss or stay the Utah proceedings and allow them to proceed in Nevada on November 14, 1994 (R. 107-109).

While the matter was pending in both Utah and Nevada, the Appellee again moved the children, returning to Utah (R. 179) and into the family's home in Summit County,

Utah. Appellant also came back to Utah to be near his children and took up residence in a home owned by the parties as a residence for ranch hands across the highway from the family home (R. 179-204). The Appellee continued to reside in the marital home until she again determined to move the children and herself to Salt Lake County in 1996. (R. 1069). The matter was scheduled for trial on January 27, 1997 (R.1891). The parties negotiated with the assistance of the court for the full day, after which they entered into an agreement upon which the court entered a Decree of Divorce. That Decree (Addendum "1") (R.1910-1919) was entered on February 19, 1997. Paragraph 5 of the Decree provides (R. 1911):

Both Plaintiff and Defendant are enjoined from moving out of 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 desiring 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 the 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.

On October 13, 1999, Appellee filed a verified motion for approval to relocate (R. 2107-2123). She stated the following as her reasons for requesting relocation (R. 2108 &

2109 Paragraph 3 A through E and Paragraph 4):

3. Petitioner requests that the Court approve Petitioner's relocation to Las Vegas, Nevada for the following reasons:
  - a. Petitioner has previously resided in Las Vegas for eighteen (18) years and much of Petitioner's family lives in the Las Vegas area, including her parents, two of her sisters, her brother-in-law, and a nephew. In addition, Petitioner's brother, his wife, and their two children live about four and one-half hours outside of Las Vegas in Orange County, California.
  - b. Petitioner's parents have health concerns, including heart problems and Alzheimer's and Petitioner wants to be able to spend as much time as she is able with them and assist her siblings in caring for her parents. Petitioner also wants her children to be able to visit with their grandparents.
  - c. Petitioner is a registered nurse. Registered nurse positions in Las Vegas pay substantially more than comparable jobs in Salt Lake County. Petitioner already has networking in place to secure a position. The registered nurse positions in Las Vegas pay between \$24 and \$26 per hour. This employment opportunity would benefit both parties' minor children.
  - d. Petitioner has had a real estate business set up in Las Vegas in a partnership with her sister Sonia for two years. This business opportunity shows promise and Petitioner wants to pursue this endeavor. This business opportunity will benefit both parties and the parties' minor children.
  - e. In addition, Respondent continues to operate a CB Display Service as a business in Las Vegas. This will provide ample opportunity for Respondent and the parties' minor children to continue to have as much contact as possible.
4. Petitioner believes that her relocation to Las Vegas is in the best interests of the parties and the parties' minor children.

Appellant objected to that petition (R. 2182-2183) asserting that it was not in the best interest of the children and it would interfere with the children's relationship with him. He requested an update in the evaluation by Dr. Jill Sanders (R. 2263). Appellant

supported this with an affidavit pointing out to the Court that all of the reasons stated by Appellee for her requested move were to promote her asserted interests and that Appellant offered only the bare assertion that the move would be in the best interest of the children with no supporting facts. (R. 2185-2198).

The matter came before the trial court on November 17, 1999 for a hearing at which time an updated custody evaluation was ordered and the relocation was tentatively approved. (R. 2240-2242). At the hearing, held before the Court on December 22, 1999, the Court indicated that it had reread the evaluation of Dr. Sanders, who, Judge Brian recognized had been extensively involved as an evaluator in this case and was highly qualified (Tr. 22) [R. 2270], considered her recommendation that the relocation not occur as it was not in the best interest of the children. (Tr. 38, 45, 50-51) [R. 2270], yet granted the petition to relocate effective July 1, 2000 (R. 2244, 2250-2251).

Respondent thereafter filed this appeal on February 22, 2000 after learning that the order approving relocation had been formally executed on the 9<sup>th</sup> of February, 2000. Respondent also requested a stay of the order and an injunction requiring the Appellee to remain in Utah pending the resolution of this appeal. (R. 2271).

### **ARGUMENT**

#### **RELOCATION OF THE MINOR CHILDREN SHOULD NOT BE PERMITTED.**

The law of the State of Utah as contained within Section 30-3-5(3) and 30-3-10.4(1)(b) of the Utah Code gives trial courts in Utah authority to prevent relocation

where such a decision is in the best interest of the children, particularly in a case such as this one where there is joint legal custody and modification of the decree to allow relocation must be permitted only when it:

“Would be an improvement for and in the best interest of the child.”

Utah Code Ann. § 30-3-10.4(1)(b).

This question has been explored by this court on two occasions. See Myers v. Myers, 1989 UT App. \_\_\_\_ 768 P.2d 979 and Larson v. Larson, 1994 UT App \_\_\_\_, 888 P.2d 719. In both of these cases, this Court reviewed a trial court’s decision regarding relocation in terms of what would be in the best interest of the minor children of the parties. The ruling by Judge Brian, that he did not have the power to prevent relocation, is clearly contrary to both statutes and the decisions of this court governing this issue. Judgment should be reversed by this Court.

On the other hand, if the trial court reached its determination that relocation should be permitted based on the affidavits of the parties and the recommendation presented by Dr. Jill Sanders, it clearly abused its discretion because the evidence was overwhelming that only reasons stated for the move by Appellee were to promote her interests. Nothing was presented by Appellee which would promote the best interests of the children. This was not a new development, Appellee has historically, placed her interests ahead of the children’s. The trial court’s permitting her to do so is not only an error of law, it is an abuse of discretion which this court should reverse.

Joint legal custody was established in the Decree of Divorce by stipulation between the parties after a custody evaluation had been performed by Dr. Jill Sanders (R. 1533). In her evaluation, Dr. Sanders recommended that the parties share joint legal custody and split physical custody of the children. She recommended that no relocation from Salt Lake or Summit Counties be permitted because of the involvement of each of the parents with both of the children and the necessity for that continued involvement because of the particular problems of Sebastian, the older of the two children, and the development of Kelsey, the younger child (R. 1533). When Dr. Sanders did her update after the petition for relocation (Addendum "2") had been filed (R. 2269), she again recommended that no relocation be permitted as the best interests of the children required both parents to be within the same physical proximity as she had originally recommended. Dr. Sanders evaluated the request by Appellee to relocate in terms of:

- 1) the risk of continued sexual of Kelsey by Sebastian;
- 2) developmental issues;
- 3) the impact on the relationship between the children and their father;
- 4) the preference of the children;
- 5) physical abuse of Sebastian by Appellant;
- 6) reasons for Relocation; and
- 7) timing

After evaluating the requested relocation and in view of these factors, Dr. Sanders stated: "It is recommended that Lesley not be allowed to relocate."

Dr. Sanders advised the Court that while the Appellee's desire to relocate to Las Vegas,

was in her best interest:

There is little to suggest that it would be in the children's best interests. There are no relationships that are more important to children than those they have with their parents. Kelsey and Sebastian would likely benefit from more contact with Lesley's extended family and Sebastian would likely benefit from more contact with Lesley's extended family, but not at the expense of the primary relationship with their father. While Lesley's business reasons for relocation are understandable, to date she has managed those obligations from Utah. Additionally, Lesley reported that her ultimate employment goal is to establish Internet business from her home - a goal that could be accomplished in any location. The move would require the children to travel excessively. They would be required to make yet another major change in academic and social environment(s). Adequate visitation to maintain their relationship with their father would encroach on their activities and social lives. Eventually, the children would be forced to spend less time with their father in order to develop normal peer relationships. In short, the considerable costs to the children in terms of their relationship with their father, and social and academic stability overshadow the benefits of relocation. It is recommended that Lesley not be allowed to relocate.

(R.2269 P. 4).

Dr. Sanders findings and recommendations to the court are consistent with the statement set out in Appellee's petition to relocate wherein she related reasons why she should move but made no representation about why it was good for the children to relocate except, simply, they should go with her. Evaluation of the Appellee's Motion for Approval to Relocate shows a clear explanation of her reasons for moving. All of them are for her benefit; none are for the benefit of the children. (R. 2109).

In contrast, the Appellant asserted that a relocation to Las Vegas, Nevada would be detrimental to the children because it would interfere with his ability to co-parent them



and deal with the particular problems Sebastian was experiencing. (R. 2187, 2191). Dr. Sanders validated his concerns.

The trial court read Dr. Sanders' findings and recommendation into the record (Tr. 38, 45, 50-51) [R.2270] after acknowledging her extensive involvement with this case (Tr. 22) [R. 2270]. Consequently the evidence, whether it is considered a simple burden of proof or proof by clear and convincing evidence, clearly established that the best interest of the children would be effected by remaining in their present residences in Salt Lake and Summit County, Utah.

**A. THE TRIAL COURT ERRED IN DETERMINING IT DID NOT HAVE THE POWER TO PREVENT RELOCATION**

The Utah legislature enacted Section 30-3-5(3) of the Utah Code which provides that:

- (3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children . . . as is reasonable and necessary.

and Section 30-3-10.4(1)(b) of the Utah Code which provides:

- 1) On the motion of one or both of the joint legal custodians, the court may, after hearing, modify an order that established joint legal custody if:  
\*\*\*
  - b. A modification of the terms and conditions of the decree  
**would be an improvement for and in the best interests of the child.**

(Emphasis added). These statutes clearly provide the trial court with the power to effect a

modification of a decree when, but only when it improves and is in the best interests of the children. As a matter of law this gives the trial court the statutory authorization to prevent relocation if that effects the best interest of the children.

This court, in considering a challenge to a relocation decision by a trial court in Myers, stated:

“Although the court did not specifically state that it was in the children’s best interest to move to Washington, it is reasonable to infer that the court’s determination of the children’s best interest included consideration of this move.”

Myers, 1989 Ut App \_\_\_\_, 769 P.2d at 984. By examining the best interest of the children, while not addressing it directly, this court has ruled by implication that trial courts do have the power to prohibit or permit relocation when that is in the best interest of the children. Judge Brian’s decision is contrary to this ruling.

A relocation decision was also considered by this court in Larson v. Larson, 1994 UT. App \_\_\_\_, 888 P.2d, 719, In considering the best interests of the children, id. at 725, 726, this court did not rule that the trial court had no power to prohibit or permit relocation. This court reviewed the determination of the trial court evaluating the factors involved in determining the best interests of the children. If no power to permit evaluation of a relocation decision existed, there would have been no need for this section of the opinion.

**B. THE TRIAL COURT ABUSED ITS DISCRETION BY RULING IT COULD  
NOT PREVENT THE RELOCATION AND ENTERING AN ORDER  
PERMITTING IT**

When 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. In 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. (R. 2109). The protests of the Appellant that the relocation will be damaging to the children by interfering with his ability to co-parent the children and effect the benefits of joint legal custody are fully supported by the opinion of Dr. Sanders. This evidence stands un rebutted. Consequently the evidence before the trial court was clearly that it was in the best interests of the children that relocation be prohibited. Nonetheless, the trial court, after discussing this evidence in the hearing, ruled that the relocation could occur.

This court in both Myers v. Myers, supra, and Larson v. Larson, supra, reviewed the court's determinations as to the best interests of the minor children. In Myers, this court determined that the trial court must have found that it was in the children's best interest to relocate. See Myers, 768 P.2d at 984, and in Larson, this court reviewed the trial court's determination's as to the best interests of the children and found they were not supported by the evidence and therefore reversed the trial court. See Larson, 888 P.2d at 725-726. Based on those decisions, it is clear that in a case such as this, where the

overwhelming, un rebutted evidence demonstrated that relocation is contrary to the best interest of the minor children, the trial court abused its discretion in permitting relocation to occur.

Examination of the transcript of the hearing before Judge Brian on December 22, 1999, reveals no analysis of the issue or findings in regard to the best interest of the children to support relocation. The court simply declared that he could not and would not prevent relocation. That was clear abuse of discretion which should be reversed by this court.

This court has not discussed § 30-3-37 of the Utah Code. This statute neither states relocation can be prohibited or must be permitted. It simply describes what must be arranged by a trial court when relocation occurs.

In the trial court, Appellee cited a number of cases which permitted relocation and asserted that she has a constitutional right to travel based on Shapiro v. Thompson, 394 U.S. 618 (1969). There are two problems with her approach. The first is relocation of the children is a separate matter from her constitutional right to travel. If it is in the best interest of the children that they remain in Utah, Salt Lake County and Summit County, and she elects to leave, the court has the power to say that she may do so but the children may not be relocated as that is contrary to their best interests. It is then her choice to either effect the best interest of her children or place her own interests ahead of the children and move. Her right to relocate is not improperly restricted if she chooses to

exercise it.

The second problem is that none of the cases that she cited has a fact situation similar to the instant one where the evidence is so clear that relocation is detrimental to the children nor was there a recommendation by a psychologist who did the initial custody evaluation and the follow-up evaluation that the move would be detrimental to the children. Therefore, those decisions are factually and legally distinguishable, thus inapplicable to this case.

In considering this question, Appellant refers this court to two (2) articles from the Journal of the American Academy of Matrimonial Lawyers, Vol. 15, No. 1 Pub. 1998.

The first article is “A Children’s Rights Approach to Relocation: A Meaningful Best Interests Standard” by Gary A. Debele (Vol. 15, 1998, pp. 75-118). Analyzing the relocation issue, Mr. Debele notes that the rights of children are ignored, overlooked or forgotten. He carefully explores the history and issues involved in relocation, then points out that the children have a right to have their best interests determined. He observes that relocation deprives children of significant input from the parent who is left and recommends that a court considering a relocation request be required to make a detailed analysis of what is in the best interest of each child, something that was not done in this case. In fact, no factual consideration was performed by Judge Brian as the record before this court demonstrates.

The second article is “The Psychological Effects of Relocation for Children of

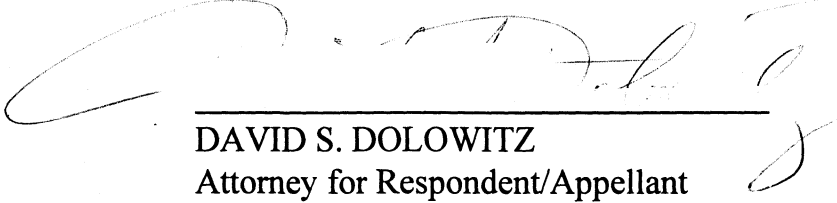
Divorce.” by Marion G. Gindes, Ph.D., (Vol. 15, 1998, pp. 119-148). Dr. Gindes points out the highly traumatic impact that relocation will have on a child and discusses the losses that children suffer as a result of relocation as well as the impact on their relationship with the “left” parent. As she observes, “The wish to relocate is an example of parental and child needs conflicting with each other.” Gindes, at p. 145.

The considerations raised in both these articles are particularly relevant to this case where the overwhelmingly evidence is that Appellee is placing her interests ahead of the children in seeking to relocate. There is no interest of the children promoted by relocation. While Appellee asserts that the children want to live with her and its best that at this point they physically stay with her, this does not support relocation where she seeks only to promote her interests by relocation and relocation can be effected only at the expense of the children. As was pointed out by Dr. Sanders in her evaluation: “In short, the considerable costs to the children in terms of their relationship with their father, and social and academic stability overshadow the benefits of relocation.” If Appellee desires ultimately to run an internet business from her home, there is no need whatsoever to relocate. She has successfully managed all of her business interests from Utah in the past. It was only after Sebastian moved to her home to avoid accepting structure of his father’s home, that Appellee sought, exploiting the children and what had occurred, to promote her interests in once again seeking to relocate the children despite the cost to them.

### CONCLUSION

This court should reverse the trial court and order that the children continue to reside in Salt Lake and Summit Counties so that the parties may continue to co-parent both children. The evidence and law require this ruling to effect the best interests of the children.

DATED this 15<sup>th</sup> day of May, 2000.



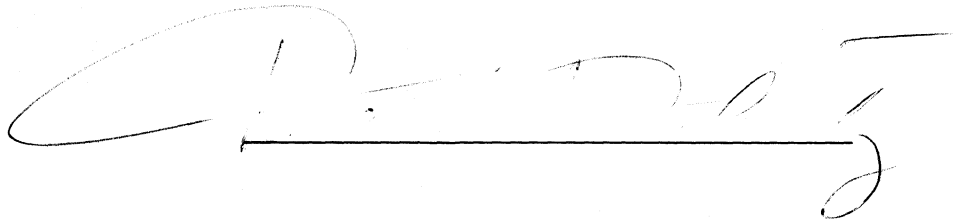
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DAVID S. DOLOWITZ  
Attorney for Respondent/Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that I am a member of and/or employed by the law firm of  
COHNE, RAPPAPORT & SEGAL, P.C., 525 East 100 South, Suite 500, Salt Lake City,  
Utah 84102, and that on the 15 day of May, 2000, I caused a true and correct copy  
of the foregoing **BRIEF OF APPELLANT** to be hand-delivered to:

Kellie F. Williams  
**Corporon & Williams, P.C.**  
808 East South Temple  
Salt Lake City, Utah 84102

A handwritten signature in dark ink, appearing to read "Kellie F. Williams", is written over a horizontal line.



### **ADDENDUM**

- a. Decree of Divorce dated February 19, 1997**
- b. Dr. Jill Sanders Updated Report**

DAVID S. DOLOWITZ (Bar No. 0899)  
of and for  
COHNE, RAPPAPORT & SEGAL, P.C.  
525 East First South, Fifth Floor  
P.O. Box 11008  
Salt Lake City, Utah 84147-0008  
Telephone (801) 532-2666  
Attorney for Defendant

No. \_\_\_\_\_

FEB 19 1997 11:54

DB

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

—oooOooo—

LESLEY BIRSA,	)	DECREE OF DIVORCE
	)	
Plaintiff,	)	
	)	
vs.	)	Civil No. 944300120DA
	)	
DENNIS CARL BIRSA,	)	Judge Pat B. Brian
	)	
Defendant	)	

—oooOooo—

The above entitled matter came before the court for trial on Monday, January 27, 1997. The plaintiff was present in person and represented by Kellie F. Williams. The defendant was present in person and represented by David S. Dolowitz. The court assisted the parties in entering into settlement negotiations at the end of which the parties announced to the court they had reached a settlement agreement. The court heard and considered the settlement agreement, determined that it was fair and equitable and provided for the support of the parties and their children and payment of their debts. The plaintiff was then sworn and testified. The court, being fully advised in the premises, having determined to accept the stipulation of the parties and entered its Findings of Fact, enters the following judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. This court has jurisdiction over the parties, the subject matter of this action and the minor children of the parties.

2. The plaintiff is awarded a decree of divorce which shall become final upon entry.

3. The plaintiff and defendant are each awarded joint legal custody of their children, Sebastian and Kelsey. Each parent shall refrain from discussing the conduct of the other parent in the presence of the child except in a laudatory or complimentary way and shall not denigrate the other parent at any time in any way.

4. Physical custody of Sebastian is awarded to the defendant. Physical custody of Kelsey is awarded to the plaintiff.

5. 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.

6. The visitation schedule between each of the parties and the minor children shall continue as has been in place since January, 1995 as follows:

a. Regular visitation. On alternating weeks, the children shall visit with the other parent from Thursday after school until the following Monday morning for Kelsey Ann when she is visiting the Defendant and for Sebastian, the following Sunday evening at 9:00 p.m. so that both children are together with the parties on an alternate week basis. This will continue the pattern that has existed during the pendency of this case and it will effect the children being together in one home or the other from Thursday afternoon through the following weekend for Sebastian or Monday morning for Kelsey.

b. Time with Non-Custodial Parent. The parties will arrange a time each month when each child can spend some time with his or her non-custodial parent.

c. Holidays. The parties shall alternate visitation for holiday visits at Thanksgiving and Spring Break vacation from school and each shall be entitled to half of the Christmas vacation from school with one having the children for the first half of the Christmas vacation and the other having the second half, which will be reversed in the following year. As the children are in different school districts and have different school holidays, school holidays, federal and state holidays shall not change the visitation schedule between the parties. These holidays will fall within the visitation set forth above with no special consideration as these will average out over time.

d. In order to effectuate visitation, the parties are ordered to prepare an annual visitation schedule by working through a calendar and adhering precisely to the visitation schedule agreed to and as outlined above. This should occur immediately.

e. Summer Visitation. Each parent should have the first week after school with the child residing with him/her and, then, one (1) three-week period with Sebastian and Kelsey at the same time for the purpose of extended visitation. Each party should have one (1) week with the child of whom he/she does not have custody. Each party shall have one two-week with Sebastian and Kelsey. The last week of the summer before the start of school, each child should spend with his or her custodial parent in order to permit the parent and child to get ready for the start of school. Summer visitation shall start when the second child commences summer vacation from school and shall end when the first child starts school in the fall.

f. Should the parties not be able to work out jointly a calendar or they should have other questions regarding the children which they are unable to resolve themselves, they should jointly select a child psychologist or other mediator who can appropriately help them resolve the difficulty which has been encountered. The parties have selected Dr. Matthew Davies to assist them.

g. The parties are urged to be flexible and cooperative with each other for the children's sakes. Unexpected events and problems will arise and the parties should work with each other to try to resolve those problems.

h. The court admonishes each of the parents to cooperate with each other and select a therapist/mediator as quickly as possible if problems arise, as future disagreements regarding visitation will cause suffering to Kelsey and Sebastian if disagreements are not addressed quickly and outside of the court context.

i. The court admonishes each of the parties that when the children ride bicycles, ATV's, snowmobiles or motorcycles, they shall wear appropriate protecting devices and the children should not be allowed to view inappropriate video programming.

j. The parties shall each keep the other advised as to where they will be and advise the other as to the phone number at which they can be reached.

7. Because the income of the parents exceeds the guidelines, the court accepted the stipulation of the parties that the defendant shall pay one thousand five hundred dollars (\$1,500.00) per month as child support for Kelsey and said support shall continue until she both graduates from high school with her regularly scheduled class and attains majority. This payment encompasses the fiscal responsibility of the plaintiff to provide support for Sebastian. The payment shall be made by direct bank transfer from the defendant's account to the plaintiff's account, one-half on or before the 5th of each month and one-half on or before the 20th of each month. It is in the best interest of the children that the payment be made by automatic bank transfer and not by income withholding as long as defendant is current in his support payments. Time is of the essence and defendant must make the payments on the dates set forth above.

8. The defendant shall keep medical insurance coverage for both minor children, paid by the defendant through his employment and each of the parties shall pay one-half of any medical, dental, orthodontic, eye care or counseling expenses incurred by or on behalf of the children if the parties have consulted jointly about the need for and agreed to incur that expense provided that either parent may incur emergency medical expense in emergency situations without prior consultation and agreement. Proof of payment of any uninsured

expense shall be submitted to the other party within thirty (30) days of a bill being received or that claim shall be deemed waived. Once a bill is submitted, payment of the one-half that is due by the other parent shall be made within ten days. All uninsured medical or dental bills have been reconciled as of January 27, 1997.

9. In order to settle the claim for alimony of the plaintiff, the defendant shall pay to her two hundred twelve thousand five hundred dollars (\$212,500.00) which shall be considered a §1041 payment under the Internal Revenue Code and shall be paid in the following fashion:

a. By no later than February 5, 1997, the defendant shall pay to the plaintiff fifty thousand dollars (\$50,000.00); and

b. No later than May 1, 1997, the defendant shall pay to the plaintiff one hundred sixty-two thousand five hundred dollars (\$162,500.00) plus interest at 7.48% (simple interest) on said sum from the date of the entry of this Decree. Upon payment of these amounts, all claim that the plaintiff has for alimony at present or in the future is fully and completely resolved and terminated. The defendant shall pay the interest on or before May 1, 1997, that is, at the same time that he makes the principal payment, and both payments shall be considered a payment governed by §1041 of the Internal Revenue Code.

10. The parties determined to divide their marital estate in the following fashion:

a. The defendant's profit sharing/401(k) plan with a balance of two hundred sixteen thousand dollars (\$216,000.00) is divided with one hundred eight thousand dollars (\$108,000.00) going to each party. In addition, when the earnings are calculated for the plan for the period running October 1, 1996 to September 30, 1997, one-half (½) of five-twelfths

(5/12) of the earnings before inclusion of the annual contribution by C.B. Display, shall be awarded to the Plaintiff and the other one-half ( $\frac{1}{2}$ ) of five-twelfths (5/12), the remaining seven-twelfths (7/12) and the annual contribution by the company shall be awarded to the Defendant. To the defendant's share shall be added \$2,653.00 to equalize the IRA division and a similar amount shall be subtracted from the plaintiff's profit sharing/401(k) division. Accordingly, the plaintiff is awarded one hundred and five thousand three hundred forty-seven dollars (\$105,347.00) from defendant's profit sharing/401(k) plan and the defendant is awarded the balance of his profit sharing/401(k) account. The parties shall cooperate in preparation, presentation and processing of an appropriate qualified domestic relations order to permit the tax free transfer of this asset.

b. The plaintiff's IRA of thirty-seven thousand four hundred eighty-nine dollars (\$37,489.00) is awarded to her.

c. The defendant's IRA of thirty-two thousand one hundred eighty-three dollars (\$32,183.00) is awarded to him.

d. The First Security Bank escrow account of twenty-seven thousand two hundred four dollars (\$27,204.00) plus any additional accrued interest is divided equally between the parties.

e. The North American Insurance policy for three hundred thousand dollars (\$300,000.00), cash value of ten thousand eight hundred ninety-three dollars (\$10,893.00), is awarded to the plaintiff and each of the parties shall cooperate in all action that is necessary to effect that transfer and to insure that plaintiff can receive the cash value from that policy as soon as practical.



f. The Defendant shall pay to the Plaintiff \$30,000 for her equity in the home located at 2904 La Mesa Drive, Henderson, Nevada within thirty (30) days from the date of this decree of divorce. This transaction shall be governed by § 1041 of the Internal Revenue Code.

g. The home of the parties in Woodland, Utah, located at 3415 South Highway 35 is awarded to the defendant. The equity of the parties in the home is five hundred thirty-seven thousand eighty-three dollars (\$537,083.00). The defendant shall buy out the interest of the plaintiff in this home as well as to compensate her for the transfer of claimed funds that were in bank accounts at the time of their separation by the payment to her of three hundred twenty-one thousand nine hundred seventy dollars (\$321,970.00) as and for a property settlement under §1041 of the Internal Revenue Service Code which shall be paid to her within one hundred twenty (120) days, that is, on or before June 1, 1997. The defendant also shall pay to the plaintiff simple interest at 7.48% on this sum from the date of entry of this Decree until it is paid.

h. The marital portion of the annuity valued at seven thousand dollars (\$7,000.00) is awarded to the defendant.

i. The personal property of the parties has been divided and is awarded as they have presently divided it and each is awarded that property within his/her possession.


11. In order to assist the plaintiff in the payment of her attorney's fees and appraisal costs, the defendant is ordered to pay to the plaintiff eighty thousand dollars (\$80,000.00) by February 1, 1998. No interest shall be due on this sum.

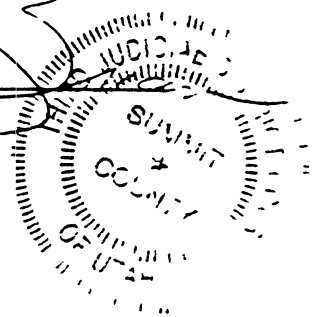
12. The parties are permanently enjoined from harassing each other and from entering the property or business of the other except to implement the Decree or visit the children.

13. Plaintiff is restored her former name of Faulds.

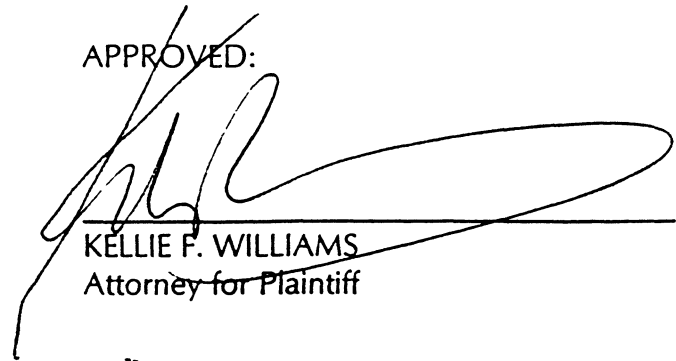
14. Each of the parties is ordered to take all actions necessary and sign all deeds or other documents and transfer deeds and documents as are necessary in order to effect the provisions of this Decree and if either party is found not to have done so, that party shall be liable for any attorney's fees and costs incurred in securing the actions necessary to implement or enforce this Decree.

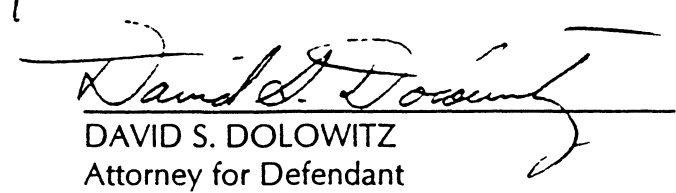
DATED this 18 day of February, 1997.

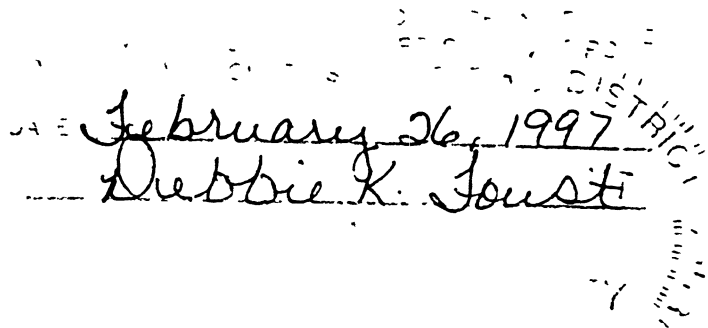
  
PAT B. BRIAN  
District Court Judge

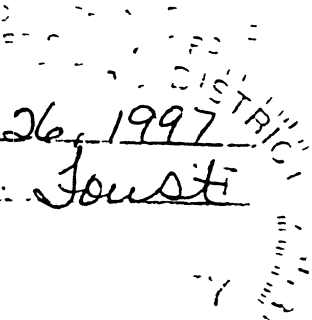


APPROVED:

  
KELLIE F. WILLIAMS  
Attorney for Plaintiff

  
DAVID S. DOLOWITZ  
Attorney for Defendant

  
February 26, 1997  
Debbie K. Joust



## **CUSTODY EVALUATION: SECOND UPDATE**

**FILED**

**DEC 13 1999**

**Third District Court**

**Deputy Clerk, Summit County**

### **IDENTIFYING INFORMATION:**

Lesley Birsa (nka Faulds) vs. Dennis Carl Birsa  
Civil No. 944300120DA  
Judge Pat B. Brian  
Third Judicial District Court, Summit County, State of Utah  
Attorneys: Kellie F. Williams (Petitioner) and David S. Dolowitz (Respondent)

Evaluator: Jill D. Sanders, Ph.D.

Date of Second Update: December 9, 1999

Date of Original Report: February 1996

Date of First Update: January 1997

### **REASON FOR UPDATE AND METHODS:**

Lesley Birsa (Faulds) recently announced her desire to relocate to Las Vegas with both children as soon as possible. Interviews were conducted with Lesley Faulds, Dennis Birsa, Sebastian Birsa and Kelsey Birsa. Collateral interviews were conducted with Denzel Grimshaw, LCSW (Sebastian's therapist) and Jay Thomas, Ph.D. who performed a clinical evaluation of Sebastian.

### **CASE SUMMARY:**

The Birsa family resided in Las Vegas, Nevada, for approximately seven years prior to moving to Woodland, Utah in the summer of 1993. Lesley and Dennis separated in September 1994 and Lesley moved the children back to Las Vegas. Dennis followed, renting a home close to the children. In November 1994, Lesley returned to Utah with the children and Dennis followed. For the past five years the Birsa children have adjusted to a variety of custody and visitation arrangements. Prior to the divorce decree Lesley was awarded temporary sole custody and Dennis exercised standard visitation. In January 1995 Dennis was awarded extended visitation with both children. In April 1996 Lesley voluntarily relinquished physical custody of Sebastian to Dennis. Lesley exercised visitation with Sebastian and Dennis continued to exercise visitation with Kelsey. At the time of the divorce decree in 1997, the Court awarded joint legal custody of both children to both parents, physical custody of Sebastian to Dennis and physical custody of Kelsey to Lesley. In August 1999 Dennis voluntarily relinquished physical custody of Sebastian to Lesley and Sebastian has refused visitation with Dennis since that time. In November 1999 Lesley announced her intention to return to Las Vegas with both children.

Jill D. Sanders, Ph.D.  
Clinical Psychologist

**FACTORS CONSIDERED:**

1. Risk of Continued Sexual Abuse by Sebastian toward Kelsey. Sebastian began sexually molesting Kelsey when he was approximately seven years old. At the time of the original evaluation this was thought to have been an isolated event which had not recurred. Later, Kelsey revealed that ongoing sexual contact had occurred between herself and Sebastian including fondling, an attempt at penetration and some oral sexual contact. Subsequently, Kelsey entered counseling and Sebastian completed an eighteen-month sexual perpetrator program with Denzel Grimshaw, LCSW, of Primary Children's Medical Center. Shortly after Sebastian's June 1999 graduation from treatment, he was discovered outside late at night, wearing dark clothing, observing Kelsey and her girlfriend with a zoom lens. In hindsight, Dennis believes this voyeuristic behavior had been occurring for some months.

According to Denzel Grimshaw, LCSW, the fact that Sebastian did not divulge this behavior during treatment creates a "moderate to severe" risk for Kelsey or others. Obviously such behavior, if recurrent, presents a significant legal risk to Sebastian as well.

*Prosecution  
- Children  
- Parents*

2. Developmental Issues. Sebastian is now fifteen years old. He has struggled socially, emotionally and academically in both Lesley's and Dennis' custody. He attended a new school this fall and is failing most classes, though he reported liking his current school. He has endured six school changes during the past five years. Whether these multiple academic and residential changes hindered his adjustment, or whether he would be floundering under any circumstance, is impossible to know. Clearly, Sebastian has not enjoyed any degree of social or academic stability over the past five years. While it could be argued that Sebastian will not developmentally suffer from another move since he has never stabilized, it is difficult to contend that yet another change could be beneficial.

Kelsey, on the other hand, has exhibited very positive social and academic adjustment. She is currently in seventh grade, is an excellent student and has many friends. She made five school changes during her elementary education. Kelsey's mature and easy-going temperament facilitates her positive adjustment to changes in circumstance. She is, however, entering the developmental phase when a positive and active relationship with her father is crucial to the development of her feminine identity. Consequently, her contact with Dennis is becoming more, not less, important.

In general, junior high and high school years are the worst possible years to uproot children. In Kelsey's case the difficulties associated with a move at this time may be tempered to some degree by her resiliency, but she will undoubtedly experience stress and sadness at levels which she can not imagine for herself. Because Sebastian is generally interested in "escaping" the difficulties of his current situation, he will likely experience some initial sense of relief but later feel the significant stress associated with attending yet another school and developing a new social network. In short, the developmental cost of relocation for both children is high.

3 Impact on the relationship between the children and their father. Lesley's proposed return to Las Vegas will inherently change and limit the children's relationship with their father. Though Dennis and Sebastian are currently estranged, both children have benefited substantially from living in close proximity to their father. Though it is possible that the amount of time Dennis currently spends with the children could be achieved through long holiday visits and entire summers spent in Utah, this type of contact is not preferable and becomes less and less realistic as the children age. In a very short amount of time, Kelsey and Sebastian's social development will be hampered by extended amounts of time away from their primary residence. The frequency, duration and spontaneity of contact between Dennis, Sebastian and Kelsey would be seriously disrupted if Lesley moves to Las Vegas.

Lesley and Sebastian were estranged in 1996 when Lesley sent Sebastian to live with his father. Their ability to reconcile to the point that Sebastian now lives with Lesley, is due in large part to the fact that they were able to spend gradually increasing amounts of time together because Lesley and Dennis lived in close proximity to each other. Now that Dennis and Sebastian are estranged the same gradual reconciliation needs to occur. This will be severely hampered if Lesley relocates.

4. Child Preference. Both Kelsey and Sebastian have expressed a desire to continue their primary residence with Lesley. For Kelsey this preference is the logical outcome of her historical situation, her strong attachment to her mother, and gender and developmental issues. Though Kelsey did not voice strong opposition to a move to Las Vegas, and cited a number of positive factors associated with the move, she is very concerned about losing time with her father, with whom she enjoys an excellent relationship. Sebastian's preference is more likely based on convenience. Sebastian and his mother have a long history of conflict. The current amicable relationship is likely transitory. These children's desire to relocate with Lesley is not tempered by a mature understanding of the immediate and long term effects of such a move on their relationship with their father, or their social and academic development.

*in June, 2000*

5. Physical abuse of Sebastian by Dennis. Sebastian reported, and Dennis admitted, that on two occasions Dennis used inappropriate physical measures to control Sebastian's behavior. Dennis has no prior history of abusing Sebastian and no history of abusing Kelsey.

6. Reasons for relocation. Lesley reported two primary reasons for moving to Las Vegas. First, her extended family resides in Las Vegas including her elderly, recently widowed mother. Second, she and her sister have embarked on a real estate venture in Las Vegas that, according to Lesley, is becoming difficult to manage long distance. Additionally, Lesley is currently romantically involved with a Las Vegas resident.

7. Timing. Lesley has proposed moving to Las Vegas as soon as possible. This means that both children will be disrupted mid-year. If the Court decides to allow Lesley to move, a more natural and easier transition could occur at the end of the school year. Delayed relocation would also allow Sebastian to re-enter treatment with Denzel Grimshaw, LCSW, to address his voyeuristic behavior. Finally, delay of the move would allow Dennis and Sebastian some period of time to begin a gradual reconciliation and renewed visitation.

#### **RECOMMENDATIONS:**

1. Though Lesley's relocation to Las Vegas is in her best interests there is little to suggest that it would be in the children's best interests. There are no relationships that are more important to children than those they have with their parents. Kelsey and Sebastian would likely benefit from more contact with Lesley's extended family, but not at the expense of the primary relationship with their father. While Lesley's business reasons for relocation are understandable, to date she has managed those obligations from Utah. Additionally, Lesley reported that her ultimate employment goal is to establish an Internet business from home – a goal that could be accomplished in any location. The move would require the children to travel excessively. They would be required to make yet another major change in academic and social environments. Adequate visitation to maintain their relationship with their father would encroach on their activities and social lives. Eventually, the children would be forced to spend less time with their father in order to develop normal peer relationships. In short, the considerable costs to the children in terms of their relationship with their father, and social and academic stability overshadow the benefits of relocation. It is recommended that Lesley not be allowed to relocate.

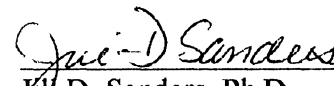
2. If the Court decides to allow Lesley to relocate, the timing of the move should be (delayed) until the end of the current school year. This would allow the following to occur:
  - Sebastian could re-enter treatment with Denzel Grimshaw, LCSW, to address his voyeuristic behavior. Sebastian reported having an exceptionally positive relationship with Mr Grimshaw. It is important that Sebastian re-address his predatory sexual behavior with a therapist who knows him well and whom he trusts.
  - Sebastian and Dennis could have gradually increasing contact with each other to facilitate their reconciliation. Delayed relocation would allow Dennis and Sebastian to attend conjoint counseling sessions if needed.
  - Kelsey could complete her seventh grade year; Sebastian could complete the ninth grade.
  - Lesley could further investigate her ultimate business goals and be in a better position to determine whether relocation would help or hinder her achievement of those goals.
  - Dennis and the children could have ample time to discuss changes in the visitation schedule and develop plans for visits that accommodate the children's needs and desires.
3. If the Court allows Lesley to relocate, I recommend the following visitation schedule:
  - Every other weekend from the earliest flight to Salt Lake following the end of school on Friday returning on a Sunday flight so that the children arrive in Las Vegas before 9:00 PM.
  - All school vacations of three days or longer duration except the Christmas or Winter Recess, which should be split equally between parents. The children would take the earliest available flight after school and return to Las Vegas by 9:00PM the day prior to the beginning of school.
  - The entire summer vacation period with the exception of the seven days immediately following the end of the school year and the fourteen days immediately preceding the beginning of the new school year. Lesley could exercise one four-day period of visitation in approximately the middle of this period.



- Dennis could exercise visitation according to the existing visitation schedule if he is in the Las Vegas area.

**Please note:** This is the only visitation plan I can currently envision that could accomplish the most important goal of maintaining the strong relationships between Dennis and his children. However, this schedule actually penalizes the children's normal existence to accomplish that goal. This visitation plan involves excessive travel, disruption of social relationships and demands lengthy amounts of time away from both parents. This plan would violate Kelsey's strongly reported desire that she not be separated from her father or her mother for long periods of time. (Kelsey reported that one on occasion she did not see her father for a month and she "hated it".) Eventually both children will likely resist the visitation plan because it disrupts their activities and social relationships, placing them in the tortuous position of having to choose between their father and their friends.

4 Travel costs associated with visitation will be considerable and should be born primarily by the moving party.

  
\_\_\_\_\_  
Jill D. Sanders, Ph.D.  
Clinical Psychologist