

1990

# Kirk T. Nielson v. Shelly H. (Martin) Nielson : Brief of Respondent

Utah Court of Appeals

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A.W. Lauritzen; Attorney for Respondent.

Shelly H. Martin; Attorney for Appellant.

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BRIEF

UTAH  
DISTRICT COURT  
K. J.  
S.  
J.A.

DOCKET NO. 900317-CA IN THE UTAH COURT OF APPEALS

-----  
KIRK T. NIELSON, )  
 )  
Plaintiff-Respondent, ) Case No. 900317-CA  
 )  
vs. ) CASE TYPE: APPEAL  
 )  
SHELLY H. NIELSON (Martin), )  
 )  
Defendant-Appellant. ) PRIORITY NUMBER 7  
 )  
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-----  
BRIEF OF RESPONDENT  
KIRK T. NIELSON  
-----

-----  
Appeal from Order modifying Judgment and Decree  
of divorce in the First District Court, in  
and for the County of Cache, State of Utah  
The Honorable John Wahlquist  
-----

A. W. Lauritzen (1906)  
326 North 100 East  
P. O. Box 171  
Logan, Utah 84321  
Telephone: (801) 753-3391

Attorney for Respondent

Shelly H. Martin  
3366 Emigration Canyon  
Salt Lake City, Utah 84108  
Telephone: (801) 583-8447

Attorney for Appellant

**FILED**

APR 25 1991

Mary T. Noonan  
Clerk of the Court  
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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KIRK T. NIELSON, )  
 )  
 ) Case No. 900317-CA  
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vs. )  
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A. W. Lauritzen (1906)  
326 North 100 East  
P. O. Box 171  
Logan, Utah 84321  
Telephone: (801) 753-3391

Attorney for Respondent

Shelly H. Martin  
3366 Emigration Canyon  
Salt Lake City, Utah 84108  
Telephone: (801) 583-8447

Attorney for Appellant

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#### STATEMENT OF JURISDICTION AND OF NATURE OF PROCEEDING

The court has jurisdiction to hear this appeal pursuant to UCA 78-2a-3(2)(b).

The parties to this action were divorced on the 31st day of March, 1987 and no appeal was taken from the divorce decree.

On May 4th, 1988 the Appellant brought a petition before the trial court seeking custody of two of the minor children, Brandy and Jake, and to obtain associated relief in the nature of child support and visitation. The Appellant also sought to enforce orders in the original decree respecting payment of the Appellants equity in the home and with respect to existing restraining orders pursuant to an order to show cause filed at or near the above date.

The Respondent filed a counterpetition for custody of the minor child Kasey and for associated relief. Appellant brought this appeal from what Appellant visualized as an adverse ruling of the trial court.

#### STATEMENT OF FACTS

1. Respondent and Defendant were divorced on the 31st day of March, 1987 and a copy of said decree is attached hereto and incorporated herein by reference as Exhibit "A".

2. At the time of the original divorce the Respondent was represented by A. W. Lauritzen, attorney at law, which attorney has represented the Respondent throughout all proceedings including this appeal. In the original divorce decree Appellant was not represented by counsel but was represented by various

counsel throughout the proceedings from which this appeal is taken.

3. After considerable post divorce conflict in which neither of the parties accorded much deference the provisions of the decree, the parties reconciled and lived together as husband and wife with all three children of the parties from October 31st, 1987 until May 2nd, 1988.

4. On May 2nd, 1988, without notice to Respondent, the Appellant left the home of the parties in California and traveled to Utah with the three children of the parties and did not advise the Respondent of her whereabouts or of the whereabouts of the children.

5. Through the use of investigators the Respondent was able to determine the whereabouts of the Appellant and contemporaneous therewith the Appellant filed an order to show cause seeking to enforce the existing decree and filed a petition to modify the existing decree which actions formed a basis of the instant litigation.

6. In connection with the hearing on Appellants order to show cause, the trial court granted temporary relief by restoring custody of two of the children to the Respondent and restoring custody of the other child to the Appellant as had been provided for in the original decree. The trial court further reduced the equity payment as required in the original decree to a money judgment in favor of the Appellant and against the Respondent.



7. The Respondent thereupon brought a counterpetition seeking a change in custody of the child then in the custody of the Appellant, and requested certain other specified relief in the nature of attorney fees and costs expended in connection with the Appellants alleged abduction of the minor children.

8. After several interim hearings during which the trial court entered temporary orders restraining the Respondent from contacting or harming the Appellant and from withholding visitation of the minor children from the Appellant; the trial court entered an order requiring that the parties, each of which had since remarried, to submit themselves and their present spouses to a psychological and environmental evaluation and required that all of the parties cooperate in such said evaluation including the evaluation of the minor children of the parties.

9. The evaluation recommended that Respondent should have custody of all three of the party's children.

10. After extensive hearings were had, the court entered findings of fact and conclusions of law in which the court found a substantial change of circumstances and the court did in fact modify the original judgment and decree from which order the Appellant appealed. A copy of the findings of fact and conclusions of law and judgment and decree are attached hereto and incorporated herein as by reference as Exhibit "B".

#### SUMMARY OF ARGUMENT

1. The findings of a trial court will not be overturned on appeal unless the findings are clearly erroneous.

2. There was ample evidence to support each of the findings made by the court in connection with the modification of the original judgment and decree.

3. The judgment and decree as modified, provides a just disposition of all of the issues presented at trial.

4. There was ample evidence to support the trial court's finding of a substantial change of circumstances and, in fact, the Appellant appears to concur in that ultimate conclusion.

5. The Appellant, in stipulating to the value of the home of the parties in open court and in executing various and sundry documents releasing her interest therein, waived any right to appeal from the money judgment entered by the court in modification of the original judgment and decree.

#### ARGUMENT

POINT I: THE TRIAL COURT RELIED ON COMPETENT EVIDENCE IN CHANGING CUSTODY OF THE MINOR CHILD KASEY TO THE RESPONDENT AND AWARDED CUSTODY OF ALL THREE MINOR CHILDREN TO RESPONDENT; EVIDENCE ESTABLISHED THAT DEFENDANT WAS AN UNFIT PARENT WHILE RESIDING WITH HER PRESENT HUSBAND.

Notwithstanding biblical language which is not part of the trial record in this case, it is axiomatic that the findings of the trial court, unless clearly erroneous and against the

manifest weight of the evidence, will not be disturbed. Grayson Roper Ltd. vs. Finlinson, 199 Utah Adv. Rep. 29 (1989)<sup>1</sup>. The law is also well settled that an inference of correctness attaches to the written findings entered by the trial court which inference must prevail if supported by competent evidence Saunders vs. Sharp, 154 Utah Adv. Rep. 5 (1991)<sup>2</sup>. The court found support for the award of custody to the Respondent in the evidence provided by each of the expert witnesses, Dr. Gary Sazama, Dr. Elwin Nielsen, and Dr. Peggy Poe as well as the other professionals who testified at the proceeding generating the rulings appealed from here. Each of the experts called was of the opinion that all three children should be in the custody of Respondent and should reside with him. The court was, no doubt, influenced by the desires of the children as well, each of the children having expressed the desire to reside with the Respondent. As a brooding omnipresence over the entire proceeding we have the

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<sup>1</sup>. The applicable standard of review is based on URCP 52(a) which provides that Findings of Fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses

<sup>2</sup>. In this case the Utah Supreme Court held that "an Appellate court does not lightly disturb .... the findings of fact made by a trial court. If a challenge is made to the findings, an Appellant must marshall all evidence in favor of the facts as found by the trial court and then demonstrate that even viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact. If the Appellant fails to marshall the evidence, the Appellate court assumes the record supports the findings of the trial court .... (at p.6)

present husband of the Appellant. He did not like the children and they did not like him and in fact feared him (see finding number 12, 17). Appellant does not cite to the record and ignores the findings of the trial court in her argument. Respondent, not having the burden to marshal evidence to support the findings of the trial court, will defer to those findings as most expressive of the relationship of Appellant and her spouse to the children, Saunders vs. Sharp (supra). The court in its judgment and based on the facts as he found them, properly awarded custody of all three children to Respondent. See also UCA 30-3-10(2) which provides direction to the court.

**POINT II: THERE WAS AMPLE EVIDENCE TO SUPPORT THE ORDERS OF THE TRIAL COURT WITH RESPECT TO VISITATION RIGHTS.**

The court, in its findings of fact numbers 17 through 20, made orders of visitation tailored around the singular problems created by the presence of Appellants new spouse (see findings 12, 17 and 18). Though the arrangement was not ideal from Appellant's point of view, it was the best the court could do in balancing the rights of the parties against what the court perceived to be the best interest of the children. At page 6 of Dr. Sazamas evaluation, as contained in the addenda filed with Appellants brief, the problems confronting the court (as seen by Dr. Sazama) are readily apparent. At page 6 the evaluation characterizes the Appellants spouse as "demanding, hostile, aggressive and sometimes violent...". At page 13 one of the

children characterizes the spouse as "dangerous" at page 14 the second child is found to have "...fear and resentment..." toward the Appellants spouse. The third child at page 15 mentions that Appellants spouse "scared her".

The court, in interviewing the children, (not on the record) could not having but sensed attitudes in the children that reinforced the expressed concerns contained in the evaluation. What else could the court rely on? Appellant has pointed to no evidence admitted at trial. On the contrary, her exhibit "RR", "S" and "T", relied heavily on by her but which would have been of little assistance to the court, were not admitted at trial and are not found in the trial record.

POINT III: THE FINDINGS OF THE TRIAL COURT WITH RESPECT TO CHILD SUPPORT WERE AMPLY SUPPORTED BY THE EVIDENCE VIEWED WITH REGARD TO EVIDENCE OF CHANGE OF CIRCUMSTANCES.

Upon this issue, the court found as follows;

21. As far as the financial arrangements are concerned, when the parties moved back together in October of 1987, they threw away any previous divorce decrees and any financial obligations.

22. The Defendant reshuffled the family wealth, she presently has neither the capacity nor the ability to make meaningful child support payments. After the expected child is born of her present union, Defendant may go back to work but she will probably be unable to make enough to support her household and make significant contributions to the support of the children of the parties but will have resources after she receives her home equity.

23. The Plaintiff is not entitled to back child support in the light of his use, at no cost to him, of Defendant's equity in the home of the parties. Upon Plaintiff paying to the Defendant the stipulated amount of \$25,000.00 the Plaintiff shall be entitled to \$80.00 per month until the youngest child attains the age of 18 years.

The nominal child support awarded to Respondent (\$80.00 per month for all three children) is certainly warranted by the findings cited hereinabove.

POINT IV: IN VIEW OF EVIDENCE OF CHANGED CIRCUMSTANCES THE TRIAL COURT WAS JUSTIFIED IN AWARDING JUDGMENT IN THE AMOUNTS FOUND AND APPELLANT WAIVED HER RIGHT TO APPEAL FROM THE MONEY JUDGMENT, THE PARTIES HAVING STIPULATED TO THAT ISSUE.

The court found, in finding 23 cited at page 7 above, that the parties had stipulated to the judgment figure, Appellant does not deny her stipulation and cannot but admit that the judgment is now satisfied.

POINT V: THE TRIAL COURT'S FINDING THAT RESPONDENT WAS NOT IN CONTEMPT OF PRIOR COURT ORDERS WAS WARRANTED BY ALL OF THE EVIDENCE.

The only suggestion of contempt not disposed of in earlier proceedings is addressed by the court at finding number 28;

Of the principals, if any party is in contempt of court orders heretofore existing, it is the stepmother. The court has no jurisdiction to make a finding of contempt for the stepmothers actions, which the court finds to not be attributable to Plaintiff.

Appellant is unable to point to facts in the record that would require a different disposition of the issue.

POINT VI: THERE IS NO EVIDENCE THAT THE HONORABLE JOHN WAHLQUIST WAS BIASED AND PREJUDICED WITH RESPECT TO CLAIMS OF THE PARTIES.

There is no suggestion on the record that bias, prejudice or predisposition of the judge was attendant to these proceedings and the disposition of the issues is in no way compelling to that conclusion. The statement in Appellants brief that Respondent had represented to the court that "his (Respondents) parents had gone on a cruise with the judge and that they had everything worked out" finds no support in the record nor is there any truth in that assertion.

POINT VII: THE TRIAL COURT DID NOT ERR IN ITS RULINGS RESPECTING ATTORNEY FEES AND COSTS.

The courts findings that Defendant had "reshuffled the family wealth" (finding number 22); that "the attorneys fees claimed by Defendant (Appellant) are neither justified or reasonable" (finding number 20); that "the Plaintiff (Respondent) ... does not have the present ability to pay attorneys fees" all find considerable support in the record. The ultimate finding that "each party should answer to their own costs and their own obligations they have incurred to respective counsel..." (finding number 22) is manifestly correct and within the evidence.

CONCLUSION

While this court has before it a case containing an unusual and complex factual basis, the disposition of the issue by the trial judge was both thoughtful and judicious and finds overwhelming support in the record; a record only sparsely cited by Appellant and which citation does nothing to support her contentions. This court should affirm the ruling of the trial judge.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of April, 1991.

-----  
A. W. Lauritzen

CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) true and correct copies of the foregoing Brief of Respondent Kirk T. Nielson to Shelly H. Nielson (Martin) 3366 Emigration Canyon, Salt Lake City, Utah 84108 on this \_\_\_\_\_ day of April, 1991.

-----  
A. W. Lauritzen



2-12-90

A. W. Lauritzen (1906)  
Attorney for Plaintiff  
326 North 100 East  
P.O. Box 171  
Logan, Utah 84321  
Telephone: (801) 753-3391

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
COUNTY OF CACHE STATE OF UTAH

-----  
KIRK THOMAS NIELSON, )  
Plaintiff, ) FINDINGS OF FACT AND  
 ) CONCLUSIONS OF LAW  
vs. ) RESPECTING PETITION TO  
 ) MODIFY DECREE AND  
SHELLY H. NIELSON (MARTIN), ) COUNTERPETITION  
 )  
Defendant. ) Civil No.862025336  
 )  
-----

This matter came on for hearing on the 8th day of June 1989 at the hour of 10:00 a.m. before the honorable John Wahlquist in the courtroom at Logan, Utah and proceedings were had on the 8th and 9th days of June and the hearing was adjourned and was finally heard to a conclusion on the 22nd day of June and witnesses having been sworn and having testified and the court having heard the testimony and exhibits having been offered and received and the court having examined the same and being fully advised in the premises the court now makes and enters the following;

FINDINGS OF FACT

1. The parties divorced on March 31, 1987; resumed an extra marital relationship on or about October 31 1987, finally separated on or about May 2nd, 1988.

EXHIBIT "B"

2. Each of the parties has now remarried and the children now reside with Plaintiff. The Plaintiff is married to and resides with Barbara B. Nielson and the Defendant is married to and resides with William K. Martin.

3. This court has appointed an expert and has reviewed the environmental study and has given due weight thereto as the court has as to other expert testimony presented.

4. Brandy Nielson is not noticeably retarded and the court finds her to be prettier than average, but the court is compelled to recognize that although she will probably have her romances, will probably marry and have a family. Brandy will have a ~~difficult time in obtaining and holding employment;~~ it having  
~~been shown to the courts satisfaction that the child has mental~~  
~~deficiencies which probably will persist into her adult years.~~ L20

5. To allow Brandy to reside with the Defendant while the stepfather William K. Martin resides at Defendants home would ~~result in serious problems in Brandy's life.~~ (Didn't say)

6. Jacob Nielson is at least of average intelligence, brave and is self-reliant. Jacob relies heavily on Plaintiff for love and substance and although he is his "daddy's boy" the close relationship and trust he shares with Plaintiff; which is, in some areas, not entirely deserved, may deteriorate if Plaintiff fails to recognize and deal with Plaintiff's own shortcomings.

7. To require Jacob to leave Plaintiff and to reside with Defendant is inconceivable in view of his present allegiances and

~~in light of his marked antipath for the stepfather William K. Martin.~~

8. Kasey Nielson appears to be a bright, well adjusted child, although torn by her parents obvious and persistent conflict. Kasey loves her mother but she does not trust her, ~~she trusts her father and relies on her stepmother for her daily needs and subsistence.~~

9. ~~Kasey relies, not only on her father and stepmother, but upon her siblings for support and reassurance. Kasey should not be separated from her siblings as it will largely destroy her feelings of confidence and security.~~

10. The Plaintiff is a strong willed, hard working man with an ingrained self imposed obligation to support his family. The Plaintiff ~~has matured greatly since the divorce~~ but still has some growing up to do. ~~The children of the parties trust him to provide support and he is worthy of that trust having provided substantially all support since the divorce.~~

11. The Defendant is a complex person who is ambivalent regarding the outcome of these custody proceedings. She has not had a equal chance with the children, ~~but has largely disregarded and ignored her opportunities to reconstruct and advance her relationship with the children.~~ From their experience the children have little trust for Defendant although they love her as any child would love its mother.

12. The stepfather, William K. Martin, wants to win this case, not for concern for the children, but only because he likes to win. He is a selfish, self-centered and violent man who will resort to violence under stress. ~~The children recognized these traits and have no regard or respect for him and they fear him as well.~~

13. ~~The Defendant is unable to control her present husband and has been unable to afford the children adequate protection or support in their past confrontations with the stepfather.~~

14. The stepmother, Barbara B. Nielson, occupies an unusual posture in this case, having ~~become a pillar of support to these children in their otherwise chaotic existence.~~ The children not only rely on the stepmother for daily care and sustenance, but have developed a strong affection for her.

15. ~~The stepmother has, to a large extent, become a mother figure to the parties children,~~ a situation that the court finds unusual in instances such as this where the stepmother has children in the same age group.

16. ~~The Stepchildren also provide a base of support and security for the parties children which would be largely lost if custody were in another than the Plaintiff.~~

17. Brandy should not be required to visit Defendant, the court has no practical way of forcing this particular child to sensibly visit, she does not like her stepfather and her stepfather does not like her. She may visit her mother at her

maternal grandmother's home if Defendant desires but is not required to do so in the presence of the stepfather.

18. Defendant's visitation with Jacob will be set as follows, at his maternal grandmothers home every other weekend, if he desires, but he shall not be required to visit in the presence of the stepfather and need not stay overnight. Such visitation as occurs shall not occur in a location other than Logan, Utah except with his consent.

19. Visitation with Kasey will be set as follows, every other weekend at the maternal grandmother's home at the grandmothers invitation, said visitation to be with the Defendant and her mother, from 6 p.m. Friday to 6 p.m. Sunday.

20. No overnight visitation will be required prior to a 60 day cooling off period from the date of this court's ruling.

21. As far as the financial arrangements are concerned, when the parties moved back together in October of 1987, they threw away any previous divorce <sup>decrees</sup> ~~decrees, and any financial~~ ~~litigations.~~

22. The Defendant reshuffled the family wealth, she presently has neither the capacity nor the ability to make meaningful child support payments. After the expected child is born of her present union, Defendant may go back to work but she will probably be unable to make enough to support her household and make significant contributions to the support of the children.

*Just OK*

of the parties, ~~but will have resources after she receives her home equity.~~

23. The Plaintiff is not entitled to back child support in the light of his use, at no costs to him, of Defendant's equity in the home of the parties, <sup>her</sup> upon Plaintiff paying to the Defendant ~~the stipulated amount of \$25,000.00~~ <sup>equity</sup> the Plaintiff shall be entitled to \$80.00 per month ~~until the youngest child attains the age of 18 years.~~ *C.S.*

24. In light of his own obligations for child support imposed by his prior marriage as well as other pressing debts, it is doubtful whether the stepfather will be able to contribute to his present household in the foreseeable future and it appears that Defendant, for all practical purposes, will be the principal provider for herself and the expected child.

25. The court finds no psychosis in any of the principals whether they be the Plaintiff, the Defendant, the stepfather, the stepmother, or the children of the parties and in this regard does not find that the court ordered evaluation is supported by the evidence. The court does subscribe to the findings in the environmental study regarding present placement of the children.

26. The court finds that the Defendant is not entitled to attorneys fees and finds that the attorneys fees claimed by Defendant are neither justified nor reasonable. The Plaintiff, in light of the circumstances now appearing, does not have the present ability to pay attorneys fees incurred by Defendant in

this action although Plaintiff's claimed attorneys fees are more in line with those justified by the nature and complexity of this proceeding.

27. Each party should answer to their own costs and to their own obligations they have incurred to respective counsel without contribution from the opposing party. The Defendant is not entitled to costs for travel nor for lost wages claimed. *1/89*

However if in fact there was a court appointed expert per se the ~~court makes no ruling on liability.~~ *If it was a court ordered evaluation, the judge would rule on the Hink Page 1/2.*

28. Of the principals, if any party is in contempt of court orders heretofore existing, it is the stepmother. The court has no jurisdiction to make a finding of contempt for the stepmothers actions, which the court finds to not be attributable to Plaintiff.

29. It is unlikely that Defendant will exercise visitation set hereby and will probably disappear as she has done at times previous.

30. There has been no kidnapping proved in this action, any act attributable to Plaintiff was, at best, merely a Sunday afternoon interference, ~~and was largely justified by the circumstances as related to him.~~

31. The myriad of recorded conversation between the parties, alone or involving the present spouses of the parties, have little weight or substance as evidence in this hearing and amount to nothing but pure trickery practiced on the Plaintiff by

Defendant and her present spouse William K. Martin.

32. The attorneys became personally involved in the conflict between the parties; counsel for the Plaintiff was able to extricate himself from this unseemly behavior at an early stage while counsel for the Defendant never has.

From the foregoing Findings of Fact the court now makes and enters the following;

#### CONCLUSIONS OF LAW

1. The Plaintiff is a fit and proper person for the care custody and control of each of the three minor children of the parties; Brandy Nielson, Kirk Jacob Nielson and Kasey Nielson subject only to reasonable visitation in the Defendant and should be awarded custody of Kasey Nielson.

2. All other prior custody orders should remain undisturbed, ~~the Plaintiff should thereby enjoy custody of all three children.~~

3. ~~The Defendant, while residing with her present spouse, William K. Martin, is not a fit person for the care, custody and control of the minor children Brandy Nielson, Kirk Jacob Nielson, and Kasey Nielson and visitation must take into account the undesirability of exposure of the children to the stepfather William K. Martin.~~

4. ~~While Defendant reside with William K. Martin and until further order of this court, Defendant should enjoy limited visitation not to exceed the following;~~



4. Brandy should not be required to visit Defendant unless governed by her own desires. Brandy may visit her mother in her maternal grandmothers home without interference by Plaintiff but not in the presence of the stepfather.

b. Visitation with Jacob should be set as follows, at his maternal grandmothers home every other weekend, if he desires, but should not be required to visit in the presence of the stepfather and need not stay overnight.

c. Visitation with Kasey should be set as follows, every other weekend at the maternal grandmothers home at her invitation and with the Defendant and/or her mother, from 6 p.m. Friday to 6 p.m. Sunday.

5. Plaintiff should provide a.l support for each of the minor children of the parties until the amount of \$25,000.00 is paid by the Plaintiff to Defendant; the Defendant presently having neither the ability nor resources to contribute significant support to the children of the parties.

6. The Defendant, through her actions, has largely dissipated the wealth of the parties, ~~rendering it impossible for Plaintiff to retire the judgment in favor of the Defendant now encumbering the lands jointly owned by the parties which is now occupied by Plaintiff and the children of the parties. The Plaintiff can, however, borrow money on Defendants equity if transferred to him and he should do so within 30 days and pay to Defendant \$25,000.00 upon Defendant quit claiming her interest by~~

December - judge ordered Kuit to pay \$25,000 to the court in 30 days.

~~deed delivered to the court.~~

7. Upon transfer and payment as set forth in paragraph 6 above, Defendant shall, for each month thereafter pay to Plaintiff the sum of \$80.00, ~~for child support said payment to persist until the youngest child attain the age of 18 years or be otherwise emancipated.~~

8. Plaintiff, by his actions, has forgone the right to recover from Defendant any loss or expense incurred as a result of the separation, reconciliation and ultimate violent severing of the family bonds which have precipitated the hearing on the petition and counterpetition now before the court.

9. There should be no contempt adjudged against any party.

10. Each party should pay the attorneys fees and costs necessarily incurred by them in prosecution of this action.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1989.

-----  
DISTRICT JUDGE

APPROVED AS TO FORM

-----  
John Walsh, attorney  
for Defendant

nielson 12/07

assume that the legislature intended a fair result.  
Reversed.

WE CONCUR:

Gordon R. Hall, Chief Justice

I. Daniel Stewart, Justice

Michael D. Zimmerman, Justice

Howe, Associate Chief Justice, concurs in the result.

1. The current version of the statute reflects minor grammatical changes made in 1986.
2. Section 70A-1-104 provides: "This act be a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided."

Cite as

119 Utah Adv. Rep. 29

IN THE SUPREME COURT  
OF THE STATE OF UTAH

GRAYSON ROPER LIMITED  
PARTNERSHIP and Grayson Roper,  
Plaintiffs and Appellees,

v.  
Rich FINLINSON, Jos. T. Finlinson, nc., a  
corporation, Gordon Nielson, and John Doe I,  
Defendants and Appellants.

No. 860171

FILED: October 17, 1989

Fourth District, Millard County  
Honorable George E. Ballif

ATTORNEYS:

Fred W. Finlinson, Salt Lake City, for  
appellants

Eldon A. Eliason, Delta, for appellees

This opinion is subject to revision before  
publication in the Pacific Reporter.

ZIMMERMAN, Justice:

Defendants Rich Finlinson, Jos. T. Finlinson, Inc., a corporation, Gordon Nielson, and John Doe I (hereinafter collectively referred to as "Finlinson") appeal from a trial court decision that quiets title of a strip of land in plaintiffs Grayson Roper Limited Partnership and Grayson Roper (hereinafter collectively referred to as "Roper"). Finlinson claims the court erred in ruling that Roper's quiet title action was not barred by sections 78-12-5 and -6 of the Code and in refusing to find that Finlinson had gained title to the disputed land through boundary by acquiescence. The trial court decision is affirmed.

Roper and Finlinson are adjacent landowners in Millard County, Utah. Roper is the record owner

of an eighty-acre parcel described as the south 1/2 of the southwest 1/4 of section 34, township 15 south, range 4 west, Salt Lake Base and Meridian (SLBM). Roper acquired this property in 1971 and can trace a clear chain of title back to the patentee who acquired the land from the federal government in 1916. The land owned by Finlinson pertinent to this action is a forty-acre parcel immediately to the east of Roper's property. Finlinson acquired this parcel in 1963. It is described as the southwest 1/4 of the southeast 1/4 of section 34, township 15 south, range 4 west, SLBM. Finlinson can trace a clear chain of title back to the patentee who acquired the land from the federal government. The dispute between Roper and Finlinson concerns a strip of land approximately 129 feet wide, lying within the bounds of Roper's property but on its eastern boundary. It is described as the east 129.4 feet of the south 1/2 of the southwest 1/4 of section 34, township 15 south, range 4 west, SLBM.

For many years, a road extended the length of the 129-foot-wide strip in a north/south direction and provided access from the town of Leamington to what is now known as Utah Highway No. 125. Roper and his predecessors in interest used this road and allowed others to do the same. For many years, a fence stood along the west side of the strip. In 1979, Finlinson plowed out the road and began farming the strip of land. Roper asked Finlinson to cease this activity, but Finlinson refused. In May of 1982, the Bureau of Land Management ("the BLM") resurveyed the southern boundary line of section 34, as well as other boundaries in the area. The BLM then placed a survey marker to establish the southeast corner of the southwest 1/4 of section 34. This survey marker was located 129.4 feet to the east of the old fence next to the now-plowed-up road. In September of 1982, Roper erected a partial fence on the section boundary as established by the newly placed BLM marker. Finlinson removed the fence, informed Roper that he owned the land, and warned him to keep off the property or face a trespass action.

In May of 1983, Roper filed a quiet title action against Finlinson, requesting injunctive relief and damages. Finlinson defended by contending that Roper's suit was barred by the statute of limitations in the Utah Code that pertains to actions involving title to real property. See Utah Code Ann. §§78-12-5, -6 (1987). The sections relied on, 78-12-5 and -6, state as a precondition to the bringing of an action concerning title to real property that the plaintiff, counterclaimant, or its predecessor in interest must have been in possession of the property within seven years before the commencement of the action.<sup>1</sup> The plaintiff or counterclaimant need not prove actual possession to satisfy this requirement. Under section 78-12-7 of the Code, a party holding legal title to the property is presumed to be "in possession" within the meaning of sections 78-12-5 and -6. Utah Code Ann. §78-12-7 (1987).<sup>2</sup> However, section 78-12-7 also provides that this presumption can be rebutted if it is shown that "the property has been held and possessed adversely to such legal title for seven years before the

commencement of the action." *Id.*

The trial court heard conflicting evidence and ruled in favor of Roper. It found, *inter alia*, that (i) Roper was the record title owner of the disputed strip of land; (ii) both Roper and Finlinson regularly used the road on the disputed strip and both more recently claimed exclusive possession of the land; (iii) the boundaries of Roper's property were established by three United States survey teams, as well as two Millard County surveyors; (iv) the BLM survey of 1982 confirmed the boundaries of Roper's property; and (v) Roper had paid taxes on the contested strip of land for twelve years and his predecessors in interest had done the same for over fifty years. The court then held that Finlinson had not established the adverse possession claim necessary to rebut the presumption raised by section 78-12-7 in favor of Roper and that the statute of limitations defense asserted by Finlinson failed because Roper was "seized or possessed of the property in question within seven years before the commencement of the action." *Id.* It therefore quieted title in Roper. Finlinson appeals.

Before addressing Finlinson's arguments on appeal, we note the applicable standards of review. A trial court's legal conclusions are accorded no particular deference; we review them for correctness. *City of West Jordan v. Utah State Retirement Bd.*, 767 P.2d 530, 532 (Utah 1988); *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985). On the other hand, a trial court's findings of fact are given deferential review. Utah Rule of Civil Procedure 52(a) provides, "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(a). To successfully attack a trial court's findings of fact, an appellant must first marshal all the evidence in support of the findings and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack under the rule 52(a) standard. *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 899 (Utah 1989); *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989).

Finlinson does not dispute that Roper is the record title owner of the section which includes the disputed strip of land and that that fact raised a presumption of possession in Roper under section 78-12-7. However, Finlinson contends that the trial court erred in finding that the statutory presumption had not been rebutted. In support of this claim, Finlinson asserts that the trial court made a finding that he or his predecessors in interest occupied the strip for over fifty years prior to Roper's bringing the quiet title action. This, he claims, is sufficient to show that "the property has been held and possessed adversely to such legal title for seven years before the commencement of the action." Utah Code Ann. § 78-12-7 (1987).

The factual premise on which Finlinson bases this argument is contrary to the trial court's finding that both Roper and Finlinson used the strip of land over the years before claiming the right to exclusive possession. Finlinson has not

attempted to carry his burden of marshaling the evidence in support of the trial court's finding regarding mutual use of the strip and then demonstrating that that finding is clearly erroneous. See, e.g., *Bartell*, 776 P.2d at 886. Therefore, there is no reason for us to disturb that finding. See *Ashton v. Ashton*, 733 P.2d 147, 150 (Utah 1987).

But even if Finlinson or his predecessors in interest had exclusively possessed the disputed strip for more than seven years before Roper brought his suit, that fact would not operate to rebut the presumption of possession accorded Roper by section 78-12-7. Relying on sections 78-12-9 and -11 of the Code,<sup>3</sup> Finlinson contends that it is enough to "possess adversely" under section 78-12-7 if one merely cultivates crops on the land. This reading of the Code is plainly erroneous. Sections 78-12-9 and -11 only define when "land is deemed to have been possessed and occupied" by a party seeking to establish adverse possession. They specify that cultivation of crops suffices for possession or occupation. But that alone is not enough to establish a claim of adverse possession. Payment of taxes is also required. Section 78-12-12 provides:

In no case shall adverse possession be considered established under the provisions of any section of this code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid all taxes which have been levied and assessed upon such land according to law.

Utah Code Ann. §78-12-12 (1987) (emphasis added). This payment-of-taxes requirement has been long recognized. See, e.g., *Smith v. Nelson*, 14 Utah 51, 56-57, 197 P.2d 132, 135 (1948); *Home Owner's Loan Corp. v. Dudley*, 105 Utah 208, 20-21, 141 P.2d 160, 166-67 (1943); *Huntsman v. Huntsman*, 56 Utah 609, 619-20, 192 P. 368, 372 (1920).

We read the words "possess adversely" in section 78-12-7 as having the same meaning as "adverse possession" in section 78-12-12, thereby importing into section 78-12-7 a requirement that all of the elements of adverse possession be shown to rebut the presumption of possession it raises in a record title owner. To hold otherwise, as Finlinson requests, would be to permit a party to use section 78-12-7 to establish de facto an entitlement to property by adverse possession without showing the payment of taxes. This result would be flatly contrary to the plain intent of the legislature as set out in section 78-12-12 and confirmed in our cases. See *Farrer v. Johnson*, 2 Utah 2d 189, 193-94, 271 P.2d 462, 466 (1954); *Sheppick v. Sheppick*, 44 Utah 3, 136, 138 P. 1169, 1171 (1914). Finlinson's position also contradicts fundamental principles of statutory construction: to wit, separate parts of an act should not be construed in isolation from the rest of the act, *Jensen v. Intermountain Health Care, Inc.*, 679 P.2d 903, 906 (Utah 1984), and the terms of related code provisions should be construed in a harmonious fashion, see *Utah State*

*Road Comm'n v. Friberg*, 687 P.2d 821, 824 (Utah 1984). Because Finlinson has not shown that he had paid taxes on the property for seven years, the trial court correctly ruled that sections 78-12-5 and -6 did not bar Roper's suit.

We next address Finlinson's argument that the trial court erred in failing to find that he acquired title to the disputed strip of land through the doctrine of boundary by acquiescence. Finlinson recognizes that the presence of clear title in Roper and the ready availability of accurate survey information showing the true status of the strip of land would require affirmance of Roper's title under our decision in *Halladay v. Cluff*, 685 P.2d 500 (Utah 1984). Under *Halladay*, there must be "objective uncertainty" as to a boundary's location before boundary by acquiescence can come into play. 685 P.2d at 505-06. Finlinson argues that we should limit *Halladay* to an "urban scenario." When the land is rural, Finlinson suggests, we should adhere to the traditional boundary by acquiescence rule of *Fuoco v. Williams*, 18 Utah 2d 282, 421 P.2d 944 (1966). Under *Fuoco*, the four prerequisites of boundary by acquiescence are (i) occupation up to a visible line marked by monuments, fences, or buildings, (ii) mutual acquiescence in the line as the boundary, (iii) for a long period of years, (iv) by adjoining landowner. *Id.* at 284, 421 P.2d at 946.

Even if we were to so limit *Halladay*, Finlinson would not prevail here because he cannot satisfy all the elements of *Fuoco*. The trial court found that the fence along the west side of the disputed strip was built for stock control and not as a boundary; therefore, it was not acquiesced in as a boundary by both parties. Finlinson has not attempted to carry his burden of overturning that finding on appeal. See *Bartell*, 776 P.2d at 886. We therefore decline to overturn the trial court's finding on that point.

The trial court's decision quieting title in Roper is affirmed.

WE CONCUR:

Gordon R. Hall, Chief Justice

I. Daniel Stewart, Justice

Christine M. Durham, Justice

Richard C. Davidson, Utah Court of Appeals Judge

Howe, Associate Chief Justice, having disqualified himself, does not participate herein; Davidson, Court of Appeals Judge, said:

1. Section 78-12-5 provides:

No action for the recovery of real property or for the possession thereof shall be maintained, unless it appears that the plaintiff, his ancestor, grantor or predecessor was seized or possessed of the property in question within seven years before the commencement of the action.

Utah Code Ann. §78-12-5 (1987). Section 78-12-6 provides:

No cause of action, or defense or counterclaim to an action, founded upon the title to real property or t

rents or profits out of the same, shall be effectual, unless it appears that the person prosecuting the action, or interposing the defense or counterclaim, or under whose title the action is prosecuted or defense or counterclaim is made, or the ancestor, predecessor or grantor of such person was seized or possessed of the property in question within seven years before the committing of the act in respect to which action is prosecuted or defense or counterclaim made.

Utah Code Ann. §78-12-6 (1987).

2. Section 78-12-7 provides:

In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time required by law; and the occupation of the property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that the property has been held and possessed adversely to such legal title for seven years before the commencement of the action.

Utah Code Ann. §78-12-7 (1987).

3. Section 78-12-9 provides:

For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument or judgment or decree, land is deemed to have been possessed and occupied in the following cases:

(1) where it has been usually cultivated or improved.

(2) where it has been protected by a substantial inclosure.

(3) where, although not inclosed, it has been used for the supply of fuel, or of fencing timber, for the purpose of husbandry, or for pasturage or for the ordinary use of the occupant.

(4) where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed according to the usual course and custom of the adjoining county is deemed to have been occupied for the same length of time as the part improved and cultivated.

Utah Code Ann. §78-12-9 (1987). Section 78-12-11 provides:

For the purpose of constituting an adverse possession by any person claiming title not founded upon a written instrument, judgment or decree, land is deemed to have been possessed and occupied in the following cases only:

(1) where it has been protected by a substantial inclosure.

(2) where it has been usually cultivated or improved.

(3) where labor or money has been expended upon dams, canals, embankments, aqueducts or otherwise for the purpose of irrigating such lands amounting to the sum of \$5 per acre.

Cite as  
154 Utah Adv. Rep. 5

IN THE SUPREME COURT  
OF THE STATE OF UTAH

Leon H. SAUNDERS; Robert Felton;  
Saunders Land Investment Corp., a Utah  
corporation; White Pine Ranches, a Utah  
general partnership; White Pine Enterprises, a  
Utah general partnership; and Kenneth R.  
Norton, dba Interstate Rentals, Inc., a Nevada  
corporation,

Plaintiffs and Petitioners,

v.

John C. SHARP and Geraldine Y. Sharp,  
Defendants and Respondents.

No. 900360

FILED: February 12, 1991

Third District, Salt Lake County  
Honorable J. Dennis Frederick

ATTORNEYS:

Robert M. Anderson, Salt Lake City, for  
Leon H. Saunders, Robert Felton, and  
Saunders Land Investment Corp.

Glen D. Watkins, Bruce Wycoff, Salt Lake  
City, for White Pine Ranches and White  
Pine Enterprises John B. Anderson, Salt  
Lake City, for Kenneth R. Norton and  
Interstate Rentals

Donald J. Winder, Kathy A. F. Davis, Salt  
Lake City, for John C. and Geraldine Y.  
Sharp

On Certiorari to the Utah Court of Appeals

This opinion is subject to revision before  
publication in the Pacific Reporter.

PER CURIAM:

This matter is before the court on plaintiffs' petition for a writ of certiorari to review the decision of the court of appeals in *Saunders v. Sharp*, 793 P.2d 927 (Utah Ct. App. 1990). The petition is granted. Further briefing by the parties and oral argument are deemed unnecessary, as the arguments in the petition brief are adequate for our determination. The matter is remanded to the court of appeals for modification of its opinion in accordance with this opinion.

Plaintiffs purchased approximately sixty acres of unimproved real property from defendants under a contract which consisted of several separate memoranda to be interpreted together. Both parties agree that the property was to be developed and resold in residential lots consisting of four or five acres, as a planned unit development ("PUD"). Defendants, as sellers, agreed to release and convey

one PUD lot upon receipt of each \$140,000 paid in principal. Initially, plaintiffs platted only half the property. On December 23, 1983, the plat of phase I of the project was recorded in the office of the Summit County Recorder. Six five-acre lots and a private internal roadway were described on the plat. Defendants executed a deed to lots 1 through 5, as requested by plaintiffs, pursuant to the release clause of the contract.

Plaintiffs breached the contract by making only a partial payment on the real property taxes in November 1984. In addition, they were able to pay only a portion of the 1985 annual payment. Nevertheless, they state that they previously paid sufficient principal to cover the purchase price of the platted lot 6, all of the internal roadway of phase I, and 7.35 acres of the unplatted acreage. Plaintiffs claim that under the release clause of the contract, they are entitled to the release of all property paid for, in spite of their prior breach. By their complaint, plaintiffs sought conveyance of these areas by specific performance of the contract. Defendants counterclaimed for foreclosure.

The trial court found that the contract required plaintiffs to designate the property to be conveyed pursuant to the release clause, and plaintiffs had never requested conveyance of any property except the first five platted lots. In its statements of applicable law, the trial court stated that plaintiffs' breaches were material, significant, and continuing and were uncured when plaintiffs requested release of the roadway, lot 6, and the additional 7.35 acres from the unplatted property. Accordingly, the trial court denied specific performance and granted judgment to defendants. Plaintiffs appealed, and the matter was poured over to the Utah Court of Appeals for review.

On appeal, plaintiffs reiterated their claim that they are entitled, under the contract, to conveyance of all property paid for, in spite of their breach of the contract by nonpayment of the entire purchase price. The court of appeals interpreted the argument as a challenge to the findings of fact made by the trial court. In its opinion, the court of appeals made this statement:

Since buyers have not marshaled the evidence in support of those findings, but merely argue that there is evidence contradicting them, they have failed to demonstrate that the findings are against the clear weight of the evidence. We must therefore accept the findings as valid and affirm the judgment.

793 P.2d at 931 (emphasis added).

As far as its review of plaintiffs' challenges to the findings of fact is concerned, the court of appeals was correct. An appellate court does not lightly disturb the verdict of a jury

nor the findings of fact made by a trial court. If a challenge is made to the findings, an appellant must marshal all evidence in favor of the facts as found by the trial court and then demonstrate that even viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact. If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case. *Grayson Roper Ltd. v. Finlinson*, 782 P.2d 467, 470 (Utah 1989); *Scharf v. EMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985).

However, the court of appeals erred when it then automatically affirmed the judgment based on plaintiffs' failure to show the findings of fact to be unsupported. An appellate court is to review the trial court's conclusions of law for correctness. *Landes v. Capital City Bank*, 795 P.2d 1127, 1129 (Utah 1990). Once the findings of fact (rather than the judgment) were affirmed by the appeals court, it was then incumbent on that court to review the trial court's conclusions of law and its application of the law to the facts as found. The interpretation of a contract is a matter of law for the court to determine unless the contract is ambiguous and evidence of the parties' intent (which is a matter of fact) is necessary to establish the terms of the contract. The court of appeals failed to analyze the law applicable to the case, and the case is therefore remanded to the Utah Court of Appeals for that purpose.

So ordered.

Cite as

154 Utah Adv. Rep. 6

# IN THE SUPREME COURT OF THE STATE OF UTAH

Vernessa REED,  
Plaintiff and Appellee,

v.

Keith REED, Merrill W. Reed, Georga Reed  
and John Does 1 through 15,  
Defendants and Appellant.

No. 890446

FILED: February 14, 1991

Fourth District, Utah County  
Honorable Cullen Y. Christensen

## ATTORNEYS:

Gary J. Anderson, Michael K. Black, Richard  
B. Johnson, Orem, for appellant  
Dien Ellis, Hurricane, for appellee

This opinion is subject to revision before  
publication in the Pacific Reporter.

## HAL L, Chief Justice:

Defendant Keith Reed (hereinafter defendant") appeals the trial court's order and judgment denying a motion to quash service of summons upon him and the default judgment entered against him.

Plaintiff and defendant were granted a divorce on April 15, 1987, in the Fourth Judicial District Court, Utah County. Under the terms of the divorce, plaintiff was awarded items of personal property, including a travel trailer and a four-wheel-drive pickup truck, neither of which was surrendered to plaintiff in a timely manner. The trailer was eventually returned to plaintiff by defendant's parents, Merrill Reed and Georga Reed, also named defendants in this matter.

On May 8, 1988, in an effort to recover the pickup truck, plaintiff caused the sheriff to serve the subject summons upon defendant and his parents at his parents' home in Orem, Utah, where defendant had resided during the pendency of the divorce. At the time of service, the sheriff was informed by the parents that defendant no longer lived at the residence and that they did not know where he was but thought he was out of the state. The sheriff nevertheless left defendant's copy of the summons at the parents' home and completed a return of service.

On May 25, 1988, defendant appeared specially and filed a motion to quash service. He included with the motion affidavits from himself and his parents stating that he did not live with his parents and that the service of process was not made at his usual place of

(2) In awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate. 1988

### 30-3-10.1. Joint legal custody defined.

In this chapter, "joint legal custody":

- (1) means the sharing of the rights, privileges, duties, and powers of a parent by both parents, where specified;
- (2) may include an award of exclusive authority by the court to one parent to make specific decisions;
- (3) does not affect the physical custody of the child except as specified in the order of joint legal custody;
- (4) is not based on awarding equal or nearly equal periods of physical custody of and access to the child to each of the parents, as the best interest of the child often requires that a primary physical residence for the child be designated; and
- (5) does not prohibit the court from specifying one parent as the primary caretaker and the home as the primary residence of the child. 1988

### 30-3-10.2. Joint legal custody order — Factors for court determination — Public assistance.

(1) The court may order joint legal custody if it determines that joint legal custody is in the best interest of the child and:

- (a) both parents agree to an order of joint legal custody; or
- (b) both parents appear capable of implementing joint legal custody.

(2) In determining whether the best interest of a child will be served by ordering joint custody, the court shall consider the following factors:

- (a) whether the physical, psychological, and emotional needs and development of the child will benefit from joint legal custody;
- (b) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;
- (c) whether each parent is capable of encouraging and accepting a positive relationship between the child and the other parent;
- (d) whether both parents participated in raising the child before the divorce;
- (e) the geographical proximity of the homes of the parents;
- (f) the preference of the child if the child is of sufficient age and capacity to reason so as to form an intelligent preference as to joint legal custody;
- (g) the maturity of the parents and their willingness and ability to protect the child from conflict that may arise between the parents; and
- (h) any other factors the court finds relevant.

(3) The determination of the best interest of the child shall be by a preponderance of the evidence.

(4) The court shall inform both parties that an order for joint custody may preclude eligibility for public assistance in the form of aid to families with dependent children, and that if public assistance is required for the support of children of the parties at any time subsequent to an order of joint legal custody, the order may be terminated under Section 30-3-10.4.

(5) The court may order that where possible the parties attempt to settle future disputes by a dispute

resolution method before seeking enforcement or modification of the terms and conditions of the order of joint legal custody through litigation, except in emergency situations requiring ex parte orders to protect the child. 1990

### 30-3-10.3. Terms of joint legal custody order.

(1) An order of joint legal custody shall provide terms the court determines appropriate, which may include specifying:

- (a) either the county of residence of the child, until altered by further order of the court, or the custodian who has the sole legal right to determine the residence of the child;
- (b) that the parents shall exchange information concerning the health, education, and welfare of the child, and where possible, confer before making decisions concerning any of these areas;
- (c) the rights and duties of each parent regarding the child's present and future physical care, support, and education;
- (d) provisions to minimize disruption of the child's attendance at school and other activities, his daily routine, and his association with friends; and
- (e) as necessary the remaining parental rights, privileges, duties, and powers to be exercised by the parents solely, concurrently, or jointly.

(2) The court shall, where possible, include in the order the terms agreed to between the parties.

(3) Any parental rights not specifically addressed by the court order may be exercised by the parent having physical custody of the child the majority of the time.

(4) (a) The appointment of joint legal custodians does not impair or limit the authority of the court to order support of the child, including payments by one custodian to the other.

(b) An order of joint legal custody, in itself, is not grounds for modifying a support order.

(5) The agreement may contain a dispute resolution procedure the parties agree to use before seeking enforcement or modification of the terms and conditions of the order of joint legal custody through litigation, except in emergency situations requiring ex parte orders to protect the child. 1988

### 30-3-10.4. Modification or termination of order.

(1) On the motion of one or both of the joint legal custodians the court may, after a hearing, modify an order that established joint legal custody if:

- (a) the circumstances of the child or one or both custodians have materially and substantially changed since the entry of the order to be modified, or the order has become unworkable or inappropriate under existing circumstances; and
- (b) a modification of the terms and conditions of the decree would be an improvement for and in the best interest of the child.

(2) The order of joint legal custody shall be terminated by order of the court if both parents file a motion for termination. At the time of entry of an order terminating joint legal custody, the court shall enter an order of sole legal custody under Section 30-3-10. All related issues, including visitation and child support, shall also be determined and ordered by the court.

(3) If the court finds that an action under this section is filed or answered frivolously and in a manner designed to harass the other party, the court shall



(d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court. 1988

### **78-2a-3. Court of Appeals jurisdiction.**

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;

- (b) appeals from the district court review of
  - (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
  - (ii) a challenge to agency action under Section 63-46a-12.1;

- (c) appeals from the juvenile courts;

- (d) appeals from the circuit courts, except those from the small claims department of a circuit court;

- (e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

- (f) appeals from district court in criminal cases, except those involving a conviction of a first degree or capital felony;

- (g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

- (h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

- (i) appeals from the Utah Military Court; and

- (j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Chapter 46b, Title 63, in its review of agency adjudicative proceedings. 1988

**78-2a-4. Review of actions by Supreme Court.**  
Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court. 1988

### **78-2a-5. Location of Court of Appeals.**

The Court of Appeals has its principal location in Salt Lake City. The Court of Appeals may perform any of its functions in any location within the state.

## **CHAPTER 3**

### **DISTRICT COURTS**

#### **Section**

78-3-1 to 78-3-2. Repealed.

78-3-3. Term of judges — Vacancy.

78-3-4. Jurisdiction — Transfer of cases to circuit court — Appeals.

78-3-5. Repealed.

78-3-6. Terms — Minimum of once quarterly.

78-3-7 to 78-3-11. Repealed.

78-3-11.5. State District Court Administrative System — Primary and secondary county locations.

78-3-12. Repealed.

78-3-12.5. Costs of system.

78-3-13. Repealed.

78-3-13.4. Counties joining court system — Procedure — Facilities — Salaries.

78-3-13.5, 78-3-14. Repealed.

78-3-14.5. Allocation of district court fees and fines.

78-3-15, 78-3-16. Repealed.

78-3-16.5. Fees for filing and other services or actions.

78-3-17. Repealed.

78-3-17.5. Application of savings accruing to counties.

78-3-18. Judicial Administration Act — Short title.

78-3-19. Purpose of act.

78-3-20. Definitions.

78-3-21. Judicial Council — Creation — Members — Terms and election — Responsibilities — Reports.

78-3-22. Presiding officer — Compensation — Duties.

78-3-23. Administrator of the courts — Appointment — Qualifications — Salary.

78-3-24. Court administrator — Powers, duties, and responsibilities.

78-3-25. Assistants for administrator of the courts — Appointment of trial court executives.

78-3-26. Courts to provide information and statistical data to administrator of the courts.

78-3-27. Annual judicial conference.

78-3-28. Repealed.

78-3-29. Presiding judge — Election — Term — Compensation — Powers — Duties.

78-3-30. Duties of the clerk of the district court.

78-3-31. Court commissioners — Qualifications — Appointment — Functions governed by rule.

78-3-1 to 78-3-2. Repealed.

1971, 1981, 1988

78-3-3. Term of judges — Vacancy.

Judges of the district courts shall be appointed initially until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office for judges of the district courts is six years, and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified. 1988

78-3-4. Jurisdiction — Transfer of cases to circuit court — Appeals.

## **Rule 52. Findings by the court.**

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgments shall be entered pursuant to Rule 58A. In granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

- (1) by default or by failing to appear at the trial;
- (2) by consent in writing, filed in the cause;
- (3) by oral consent in open court, entered in the minutes.

(Amended effective Jan. 1, 1987.)

## **Rule 53. Masters.**

(a) **Appointment and compensation.** Any or all of the issues in an action may be referred by the court to a master upon the written consent of the parties, or the court may appoint a master in an action, in accordance with the provisions of Subdivision (b) of this rule. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent

jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall, in the absence of the written consent of the parties, be made only upon a showing that some exceptional condition requires it.

(c) **Powers.** The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Utah Rules of Evidence for a court sitting without a jury.

### **(d) Proceedings.**

(1) **Meetings.** When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) **Witnesses.** The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) **Statement of accounts.** When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof

submitted  
or in

A. W. Lauritzen (01906)  
Attorney for  
326 North 100 East  
P. O. Box 171  
Logan, Utah 84321  
Telephone: (801) 753-3391

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
COUNTY OF CACHE, STATE OF UTAH

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KIRK THOMAS NIELSON,	)	
Plaintiff,	)	
vs.	)	JUDGMENT AND DECREE
SHELLY H. NIELSON,	)	
Defendant.	)	Civil No. 25336

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This matter came on for hearing on the 30th day of March, 1987, in the Courthouse at 160 North Main, Logan, Utah at the hour of 1:30 o'clock p.m., the Plaintiff being present in person and represented by A. W. Lauritzen and the Defendant was present in person, and not represented by counsel, but it appearing that the parties having entered into a Stipulation and Property Settlement Agreement, the court having read and approved the same and the Defendant having waived her right to answer and waived notice of the hearing and the Plaintiff having moved the court to waive the statutory intervals and the defendant having stipulated to said waiver and the court having found good cause to waive the same and the plaintiff having been sworn and having testified and the court having heard the testimony and being fully advised of

the premises and having heretofore entered its Findings of Fact and Conclusions of Law now makes and enters the following;

# JUDGMENT AND DECREE

1. That Plaintiff be and is hereby awarded a decree of divorce from the defendant the same to become final upon the signing and filing thereof.

2. It be and is hereby ordered that Plaintiff be awarded the custody of Brandy Nielson and Kirk Jacob Nielson.

3. It be and is hereby ordered that Defendant be awarded the custody of Kasey Nielson.

4. It be and is hereby ordered that on account of this division of custody, no child support should be awarded other than as set forth herein; Plaintiff will provide medical and dental insurance for the minor children and pay for uninsured medical and dental expense; provide all reasonable amounts for school expense and school clothing. Plaintiff will finance music and dancing lessons and associated supplies and equipment in a reasonable amount not to exceed \$100 per month.

5. It be and is hereby ordered that visitation is as follows; the Plaintiff will have the children from Monday at 4:00 o'clock p.m. until Friday at 4:00 o'clock p.m. during the school year, every 4th and 24th of July and every other Christmas and Thanksgiving subject to the other parties right of visitation on the eve of Christmas and the eve of Thanksgiving. The Defendant will have the children from Friday at 4:00 o'clock p.m. until Monday at 4:00 o'clock p.m. During the summer Defendant will

have the children from Sunday at 10:00 o'clock p.m. until Friday at 4:30 o'clock p.m. each week while school vacation is in effect.

6. It be and is hereby ordered that Plaintiff be awarded the home of the parties located at 1507 East 1200 North, Logan, Utah more particularly describes as:

Lot 7, Blk 4, HILL CREST HEIGHTS SUBD, as shown by the official plat thereof as filed 3 April 1962 as filing No. 4129 in the office of the Recorder of Cache County, Utah

Plaintiff to hold Defendant harmless for non-payment of all debts, taxes, or any other claims or liens against said property.

6. It be and is ordered that during the Defendant retain possession of the home of the parties up to the 15th day of September, 1987 at which time Defendant is to surrender possession of the home to the Plaintiff and Plaintiff to buy Defendants' half of the equity in the home at appraised value as of April 1st, 1987.

7. It be and is hereby ordered that during the time of Defendants possession the home of the parties, Plaintiff will make all mortgage payments and Plaintiff will do all necessary home repairs. Defendant's not to commit waste on the premises and to pay all utility payments. Upon the of receipt of payment for Defendant's equity in the home at whatever time payment be made, Defendant to execute a Quit Claim Deed and file the same with the County Recorder.

8. It be and is hereby ordered that the Plaintiff be awarded the gray disk and the gray filing cabinet, the 1983 Baja

boat, the master bedroom dresser with mirror, the tan couch, the bedroom ceramic lamp, 1 plane picture, the recliner, the dish washer and the range the refrigerator, all of Brandy's bedroom furniture, all of Kirk Jacob's bedroom furniture, all of Kasey's bedroom furniture save and except for the bed, the washer & dryer, one-half of the cooking and eating utensils and linens, the contents of the garage, and Plaintiff's personal belongings.

9. It be and is hereby ordered that the Defendant be awarded the sewing machine, the 1984 4x4 Jeep VIN. 1JCWJISN9ET050428, the remainder of the furniture, fixtures, vases now in the home and those in Defendant's possession, and her personal belongings.

8. It be and is ordered that the Plaintiff pay to the Defendant the sum of \$2200 for her interest in the 1983 Baja boat on or before the 1st day of April, 1987.

9. It be and is hereby ordered that the savings account be used to pay all debts of the parties and the remainder should be divided equally between the parties.

10. It be and is hereby ordered that neither of the parties be awarded alimony now or in the future.

11. It be and is hereby ordered that each of the parties pay their own attorneys fees and costs.

DATED this 31 day of March, 1987.

VENOY CHRISTOFFERSON

DISTRICT JUDGE

RECEIVED: Clerk of the First District Court of Utah certified this

April

13 1987

will on file in this office.

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