

2014

Jared William Fullmer v. Kelli Ann Fullmer : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JARED WILLIAM FULLMER,

Petitioner-Appellant,

v.

KELLI ANN FULLMER,

Respondent-Appellee.

Case no. 20130060-CA

BRIEF OF APPELLEE

Appeal from a Decree of Divorce of the
Second Judicial District Court
in and for Davis County, Farmington Department
The Honorable Michael G. Allphin Presiding
Dist. Ct. Case no. 104701561

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ORAL ARGUMENT REQUESTED

No. 20130060-CA

In the
Utah Court of Appeals

JARED WILLIAM FULLMER,

Petitioner-Appellant,

v.

KELLI ANN FULLMER,

Respondent-Appellee.

All parties to the proceeding in the district court
are listed in the caption of this brief.

QUESTIONS PRESENTED

1. Whether Judge Allphin was required to recuse himself *sua sponte* after indicating that Dr. Malovich had testified in his court previously and stating that she was "a prominent and very credible expert."
2. Whether the trial court was within its discretion in awarding the parties joint legal custody of the minor children, with Mother having final decision-making power, in awarding the parties joint physical custody with Mother's home being designated as the primary residence of the minor children, and in awarding Mother 230 nights of parent time while awarding Father 135 nights.
3. Whether Mother is entitled to an award of attorney fees under Rule 24(k) for Father's failure to follow the briefing requirements.

TABLE OF CONTENTS

Table of Authorities.....	iii
Jurisdictional Statement	1
Issues and Standards of Review	1
Relevant Statutory Provisions.....	19
Statement of the Case	2
Statement of the Facts	5
I. Judge's Remarks Allegedly Constituting Bias.....	5
II. Findings and Judgment	7
Summary of Argument.....	18
Argument	19
I. There are no grounds to reverse the trial court's judgment on the basis that Judge Allphin failed to recuse himself <i>sua</i> <i>sponte</i>	19
A. Father's claim of bias is unreviewable because filing a mo- tion and affidavit under Rule 63(b) is a necessary prereq- uisite to appellate review	20
B. Judge Allphin's failure to recuse himself was not error.....	22
C. As there is no settled law in Utah with respect to recusal based on judicial comments, any error was not plain	26
D. Any error was not harmful, as there is no indication that another judge hearing the same evidence likely would have made findings that would have materially altered the re- sult in Father's favor	27
II. The trial court's order of custody and parent time was well within its broad discretion; a new trial is not warranted	28
A. Father has failed to adequately marshal the evidence in support of the finding that the custody arrangement is in the best interests of the children or for in support of sub- sidiary findings	30

B. The trial court's findings were not clearly erroneous, and the court's final determination of custody and parent time was not an abuse of discretion	33
III. Mother should be awarded her attorney fees for the necessity of defending against this appeal.....	45
Conclusion.....	47
Certificate of Compliance	48
Proof of Service	49

ADDENDUM

Letter of April 19, 2012	A-1
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TABLE OF AUTHORITIES

Cases

<i>A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.</i> , 1999 UT App 87, 977 P.2d 518	29, 31
<i>Barnes v. Barnes</i> , 857 P.2d 257 (Utah App. 1993).....	29
<i>Barnett v. Barnett</i> , 727 So. 2d 311 (Fla. App. 1999)	24
<i>Burton Lumber & Hardware Co. v. Graham</i> , 2008 UT App 207, 186 P.3d 1012	27
<i>Cagatay v. Erturk</i> , 2013 UT App 82, 302 P.3d 137	29
<i>Campbell, Maack & Sessions v. Debry</i> , 2001 UT App 397, 38 P.3d 984	23, 26
<i>Crockett v. Crockett</i> , 836 P.2d 818 (Utah App. 1992)	32
<i>Fitzgerald v. Critchfield</i> , 744 P.2d 301 (Utah App. 1987)	30, 31
<i>In re Estate of Pahl</i> , 2007 UT App 389, 174 P.3d 642	45, 46
<i>In re Estate of Valarce</i> , 2013 UT App 95, 301 P.3d 1031	20, 21
<i>Maack v. IHC Health Servs.</i> , 2007 UT App 244, 166 P.3d 631	34
<i>Madsen v. Prudential Fed. Sav. & Loan Assn.</i> , 767 P.2d 538 (Utah 1988)	22, 24, 26
<i>Martinez v. Media-Paymaster Plus</i> , 2007 UT 42, 164 P.3d 384.....	33
<i>Melvin v. Baker</i> , 2007 UT App 234U (no. 20060643, July 6, 2007).....	21
<i>Oneida/SLIC v. Oneida Cold Storage & Warehouse, Inc.</i> , 872 P.2d 1051 (Utah App. 1994).....	32, 34
<i>Parduhn v. Bennett</i> , 2005 UT 22, 112 P.3d 495.....	30
<i>Pusey v. Pusey</i> , 728 P.2d 117 (Utah 1996)	43
<i>Roberts v. Roberts</i> , 835 P.2d 193 (Utah App. 1992).....	28
<i>Roderick v. Ricks</i> , 2002 UT 84, 54 P.3d 1119	30, 31
<i>Schindler v. Schindler</i> , 776 P.2d 84 (Utah App. 1989).....	2, 28, 29
<i>Spafford v. Granite Credit Union</i> , 2011 UT App 401, 266 P.3d 866	19, 26, 33
<i>State v. Hamilton</i> , 827 P.2d 832 (Utah 1992)	27

<i>Straley v. Halliday</i> , 2000 UT 38, 997 P.2d 338.....	21
<i>Tucker v. Tucker</i> , 910 P.2d 1209 (Utah 1996).....	2, 28, 44
<i>West Jordan City v. Goodman</i> , 2006 UT 27, 135 P.3d 874	22
<i>West Valley City v. Majestic Investment Co.</i> , 818 P.2d 1311 (Utah App. 1991)	30, 31, 33
<i>Whitaker v. State</i> , 742 So.2d 530 (Fla. App. 1999)	24
<i>Williams v. Williams</i> , 2001 UT App 330U (no. 20000013, Nov. 8, 2001).....	11

Statutes

Utah Code Ann. § 30-3-10	11, 28
Utah Code Ann. § 30-3-10.2	11
Utah Code Ann. § 78A-4-103	1

Rules

Utah Code Jud. Admin. 4-903	11
Utah Code Jud. Conduct 2.11	22, 26
Utah R. App. P. 4.....	5
Utah R. App. P. 24.....	30, 45, 46
Utah R. Civ. P. 60.....	21
Utah R. Civ. P. 63.....	19, 20, 21, 46

Other Authorities

Leslie W. Abramson, <i>Judicial Disqualification under Canon 3C of the Code of Judicial Conduct</i> (1986)	24
Annual Update of the HHS Poverty Guidelines, 74 Fed. Reg. 4199 (Jan. 23, 2009)	41
Delayed Update of the HHS Poverty Guidelines for the Remainder of 2010, 75 Fed. Reg. 45628 (Aug. 3, 2010)	41

JURISDICTIONAL STATEMENT

As this appeal is from a district court judgment in a domestic relations case, this Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(h).

ISSUES AND STANDARDS OF REVIEW

Issue One: Whether Judge Allphin was required to recuse himself *sua sponte* after indicating that Dr. Malovich had testified in his court previously and stating that she was “a prominent and very credible expert.”

Standard of Review. For the reasons explained in Part I.A of this brief,¹ this issue is unreviewable.

Issue Two: Whether the trial court was within its discretion in awarding the parties joint legal custody of the minor children, with Mother having final decision-making power, in awarding the parties joint physical custody with Mother’s home being designated as the primary residence of the minor children, and in awarding Mother 230 nights of parent time while awarding Father 135 nights.

Standard of Review. In making child custody awards, the trial court is given broad discretion and its decisions will not be overturned absent an

1. *See infra* at 20–22.

abuse of discretion or manifest injustice.² If the trial court bases its decision on the legal standards set by the appellate courts and sets forth appropriate findings of fact and conclusions of law, the trial court's findings of fact, including its ultimate finding that a custody arrangement is in the best interests of the children, is reviewed for clear error.³

Issue Three: Whether Mother is entitled to an award of attorney fees under Rule 24(k) for Father's failure to follow the briefing requirements.

RELEVANT STATUTORY PROVISIONS

There is no statutory provision whose interpretation is central to this appeal.

STATEMENT OF THE CASE

Appellant Jared William Fullmer ("Father") and Appellee Kelli Ann Fullmer ("Mother") were married in July of 2003.⁴ Two children were born in the course of the marriage: R.D.F. ("Son"), who was born in December of 2003; and J.A.F. ("Daughter"), who was born in November of 2005.⁵ Fa-

2. *Schindler v. Schindler*, 776 P.2d 84, 87 (Utah App. 1989); see *Tucker v. Tucker*, 910 P.2d 1209, 1214 (Utah 1996) ("Only where the trial court's judgment is so flagrantly unjust as to be an abuse of discretion will an appellate court interpose its own judgment.").

3. See *infra* Part II, at 28–30.

4. R. at 3.

5. R. at 5.

ther filed a petition for divorce on September 30, 2010.⁶ Mother filed a counterpetition for divorce on October 8, 2010.⁷

On October 25, 2010, per Commissioner Catherine Conklin's recommendation, the trial court entered temporary orders awarding Father temporary possession of the marital apartment and designating him as the primary custodial parent. Mother was awarded liberal parent time consisting of two of every three weekends from Friday, after school, to Monday, prior to school, along with midweek overnights and shared holidays.⁸

In February of 2011, upon the stipulation of the parties,⁹ the trial court ordered Dr. Natalie Malovich to conduct a custody evaluation.¹⁰ Dr. Malovich completed her evaluation in July of 2011, and a Custody Evaluation Settlement Conference was held on August 30, 2011.¹¹ At the conference, Dr. Malovich recommended joint legal and physical custody, with Mother as the primary custodial parent.¹² She further recommended that, during the school year, Father should be awarded liberal parent time consisting of every other weekend from Friday, after school, to Mon-

6. R. at 3.

7. R. at 27.

8. R. at 126–28.

9. R. at 111–14.

10. R. at 120–22.

11. R. at 178.

12. R. at 336–37.

day, prior to school, along with midweek overnights on Thursdays the week after Father's weekend and on Mondays the week before Father's weekend.¹³ She recommended the parties share holidays per the statute, and that Father be awarded "a number of" non-holiday days off school.¹⁴ The parties should each be awarded an equal amount of the summer break.¹⁵ Father rejected this recommendation, and the parties failed to reach an agreement on custody and parent time at the settlement conference.¹⁶ The parties therefore began to prepare for trial.¹⁷

A bench trial on the issues of custody of the children, the children's primary residence, parent time, and child support was held on September 19–21, 2012 before Judge Michael G. Allphin.¹⁸ After the trial was concluded, Judge Allphin made oral findings of fact, conclusions of law, and final orders on the record on September 25, 2012,¹⁹ which were later memorialized in the district court's Findings of Fact and Conclusions of Law²⁰ and Decree of Divorce,²¹ both entered on December 20, 2012. In the

13. R. at 337.

14. R. at 337.

15. R. at 338.

16. R. at 187.

17. R. at 198, 222–27.

18. R. at 870–872. For ease of reference, the trial transcripts of September 19th (R. at 870), September 20th (R. at 871), and September 21st (R. at 872) will be referred to as Tr.1, Tr.2, and Tr.3, respectively.

19. R. at 868 (hereinafter "Ruling").

20. R. at 780.

Decree, the court ordered joint legal and physical custody, with Mother as the primary custodial parent. Father was awarded liberal parent time consisting of every other weekend from Friday, after school, to Monday, prior to school, along with midweek overnights on Wednesdays during the school year, with the parties sharing holidays per the statute and splitting days off school equally. The parties were awarded an equal amount of the summer break.²²

Father filed a Notice of Appeal on January 17, 2013.²³

STATEMENT OF THE FACTS

I. JUDGE'S REMARKS ALLEGEDLY CONSTITUTING BIAS

Before trial, Father filed a motion in limine to exclude Dr. Malovich's report and to prevent her from testifying at trial, or in the alternative, to prevent her from testifying as to her concerns about Father's use of prescription pain medication.²⁴ As grounds for this motion, Father argued, *inter alia*, that because there had never been a finding that he had "ever had substance abuse issues, . . . further investigation or opinion

21. R. at 811.

22. R. at 814–19.

23. R. at 830. While Father later filed an Amended Notice of Appeal outside of the deadline for filing an appeal, R. at 835, its only purpose was to correct an error in the certificate of service and so does not call into question this Court's jurisdiction under Utah R. App. P. 4(a).

24. R. at 302 & 317; Ruling 6:5–16.

on [his prescription drug use] is irrelevant.”²⁵ In his memorandum in support, Father alleged that even though he gave her a signed release form, Dr. Malovich nonetheless committed two third-degree felonies by obtaining his records from the Controlled Substance Database and by releasing those records to both parties’ counsel in response to a subpoena from Father’s counsel.²⁶

Judge Allphin denied this motion at the beginning of trial, stating as follows:

You filed some interesting motions lately—sending me copies of things that you don’t want me to consider . . . ; arguing about reports that are not generally admitted into evidence anyway; *taking swipes at a prominent and very credible expert*; making argument that *assumes that the Court is either too stupid or lacks experience* in these types of matters. I’ve been on the bench 23 years, hearing these kinds of cases. I know what I’m doing and I know what the most important things are in these cases. *I guess it’s up to you to determine whether or not you think I’m stupid*, but based on what I read in your memoranda, . . . it appears that this drug issue that you’ve been so involved in is an extremely small part of Dr. Malovich’s factual basis for her conclusion and for her recommendation. . . . I don’t accept the petitioner’s premise here that Dr. Malovich should be precluded from testifying to what she found. It’s legitimate. . . . Petitioner and his witnesses can tell me, all day long, that regular controlled substance use . . . [doesn’t] affect the way a person approaches life, relationships, parenting, jobs, etc. I

25. R. at 307–08.

26. R. at 313–16; see Letter of April 19, 2012, *infra* at A-1. Because Father does not challenge the trial court’s denial of his motion to exclude, this letter establishes a background fact that is not strictly material to the questions on appeal. Therefore, Mother has not moved to have it entered into the appellate record but provides it for the Court’s convenience only.

have twenty-three years of experience that tell me otherwise I certainly don't accept the basic premise that drug use of any kind, whether it's legitimate prescribed pain killers, don't have any affect on what we're doing here because I think they probably do. . . . The extent and whether or not it affects his ability to parent, that's what we're here to make a determination on. They may very well not, but are they important? Yes. Is it important that she brings that to the Court's attention? I think absolutely.²⁷

II. FINDINGS AND JUDGMENT

After hearing the evidence at trial, the Court made the following findings of fact with respect to his determination of legal and physical custody, the primary residence of the children, and parent time:

Parental Income and Work History. At the time of their marriage in 2003, the parties were both working at Convergys.²⁸ Mother gave birth to Son shortly after they were married and stopped working at the end of 2003.²⁹ Father worked very little in 2004, and only made about \$7,500 that year.³⁰ Because this was not enough to support their family, Mother went back to work in late 2004.³¹ While Father argued that her motivation in working was to get additional spending money for herself, the trial court rejected this argument and found that Mother had to go back to

27. Tr.1 6:21–8:18 (emphasis added).

28. Ruling 10:6–14.

29. Ruling 10:23–11:2.

30. Ruling 11:2–5.

31. Ruling 11:18–20.

work to support the family because Father was not doing his part.³² Mother has worked full time from 2005 to the time of trial.³³

Meanwhile, Father worked very little in 2005 and did not work at all in 2006.³⁴ While Father characterized this as being a stay-at-home dad and argued that it would cost more to pay for day care for the children than he could make in a minimum-wage job,³⁵ the trial court found that this was not a mutual decision by the parties; rather, because Father refused to work, Mother agreed that he should babysit the children rather than having her pay for daycare out of her salary.³⁶ Although Father stayed at home with the children, he rarely did more than tend them while Mother was at work—Mother made arrangements for the children's breakfast before she left for work, came home at lunch time to see that they were fed, and took care of their baths and other needs after work.³⁷ Father stayed up late playing a lot of video games and slept late into the morning.³⁸

In 2007, the parties separated, and Mother told Father she was no longer willing to put up with a situation where she was the sole provider.

32. Ruling 11:6–20.

33. Ruling 13:2–6, 14:2–3 & 8, 15:6–7 & 24–25.

34. Ruling 11:21–12:2, 13:1–2.

35. Tr.1 35:13–36:13.

36. Ruling 12:3–11.

37. Ruling 12:12–20, 13:8–13.

38. Ruling 12:21–25, 13:14–19.

Father began to work, and they reconciled.³⁹ However, in 2008, Father again decided that he did not want to work any longer, and so babysat the children while gaming and pursuing other interests.⁴⁰ Mother put the children in afternoon preschool and kindergarten because she was concerned that Father would not be awake in time to get them ready for school.⁴¹

Father did not work again until sometime during 2009, when he started a smoking-cessation business with some business partners he met through an online multiplayer video game.⁴² Father worked on this business from home for about 5 to 20 hours per week, and did not take a wage or draw before the parties separated.⁴³ After the parties separated, Father decided that he needed an income, and so he and his partners agreed that in exchange for him storing the product and other business necessities at his home, he would be paid \$1,405.00 per month.⁴⁴ This arrangement was ongoing to the time of trial.⁴⁵

39. Ruling 13:20–14:1.

40. Ruling 14:8–14, 14:24–15:4.

41. Ruling 14:15–23; Tr.1 105:–106:3.

42. Ruling 7:17–19, 31:3–6.

43. Ruling 15:18–23.

44. Ruling 7:13–16, 7:23–8:16, 16:20–17:9.

45. R. at 801 (¶ 47).

Parental Residences. When the parties filed for divorce, they were residing in a two-bedroom apartment that they rented in Bountiful.⁴⁶ After the October 2010 temporary orders hearing, Mother moved out of the marital apartment and into a three-bedroom apartment in the lower floor of her parents' home in Taylorsville.⁴⁷ The apartment occupies the entire lower floor of the home and has its own private amenities.⁴⁸ Mother pays rent to her parents for the apartment.⁴⁹ The children each have their own room and the apartment is appropriately furnished and decorated for the children.⁵⁰ There is a large yard on the property, with play equipment and a trampoline.⁵¹ Several of Mother's relatives live in close proximity, allowing the children easy access to cousins and others to play with on a frequent basis.⁵²

Meanwhile, Father continued to reside in the two-bedroom apartment with the children after the temporary orders hearing.⁵³ The children shared one room and Father slept on the couch so that he could use the

46. Ruling 9:11–15.

47. R. at 783–84 (¶¶ 12–13).

48. Ruling 9:15–18; Tr.2 208:10–23.

49. Tr.2 209:16–18.

50. Ruling 9:18–23.

51. Ruling 9:23–25.

52. Ruling 10:1–5.

53. Ruling 7:6–11.

master bedroom for storing business supplies.⁵⁴ After Dr. Malovich criticized his living arrangements, Father's mother bought him a three-bedroom home and gave him \$13,000 in order to appropriately furnish and decorate it for the children.⁵⁵ The home is in a nice neighborhood, has a nice yard, and is within walking distance to the children's school.⁵⁶ Father has no financial obligations to make mortgage payments or to pay rent to his mother on the home.⁵⁷

The trial court next examined the factors of Rule 4-903 of the Utah Code of Judicial Administration:⁵⁸

Less Important Factors. The trial court found that the following factors named in Rule 4-903 were either of limited relevance under the circumstances of the case or did not substantially favor one parent over the other, and so were not given much weight in its final determination: the children's preferences;⁵⁹ the benefit of keeping siblings together;⁶⁰ the

54. Ruling 7:11–16.

55. Ruling 8:17–24.

56. Ruling 8:25–9:5.

57. Ruling 9:6–10.

58. While the requirement to consider the 4-903 factors only applies to custody evaluators, *see, e.g., Williams v. Williams*, 2001 UT App 330U (no. 20000013, Nov. 8, 2001), these factors include all the factors that trial courts are required to consider under Utah Code Ann. §§ 30-3-10 & -10.2.

59. R. at 790 (¶ 32.a).

60. R. at 790 (¶ 32.b).

relative strength of the children's bond with each parent;⁶¹ reasons for having relinquished custody in the past;⁶² religious compatibility with the children;⁶³ kinship;⁶⁴ and evidence of abuse.⁶⁵

Interest in Continuing Previous Custody Arrangements. The trial court found that the children are doing well and functioning adequately in their custodial arrangement under the temporary order.⁶⁶ The court disagreed with Dr. Malovich's concern regarding the children's grooming while with their father, and found that the children did not appear to be generally unkempt, poorly groomed, or wearing ill-fitting clothes as a regular occurrence while in their father's care.⁶⁷ However, the court also found that the current amount of contact that the parties' youngest daughter has with Mother is not adequate for her needs.⁶⁸ Further, the court rejected the argument of Father's expert witness that the court should not interfere with a custody arrangement if it was working as contrary to the responsibility of the court to act in the best interests of the

61. R. at 790 (¶ 32.c).

62. R. at 792 (¶ 32.e.v).

63. R. at 792–93 (¶ 32.e.vi).

64. R. at 793 (¶ 32.e.vii).

65. R. at 794 (¶ 32.e.ix).

66. Ruling 26:7–12.

67. Ruling 26:25–27:12.

68. Ruling 26:12–14.

children—While the interest in stability is weighty, the court would not grant it determinative effect.⁶⁹

Capacity to Function as Parents. The trial court found that Father genuinely cares about the children, that he displays a strong motivation to be actively involved in their lives, and that he has made some major changes in his life from what he was doing 3–5 years ago to what was doing at the time of trial.⁷⁰ After the parties' separation, Father has had more involvement with the children and started to play a significant role in their lives, becoming a primary caretaker for the children.⁷¹ While the court found Father's efforts to develop his business commendable, it also found that his focus on remaining self-employed appeared to take precedence over meeting his family's more immediate needs.⁷² The court found that Mother genuinely loves the children and has consistently displayed a long-term commitment to their care and well-being even after the parties' separation and temporary order did not allow her to be as involved in the children's lives as she was during the marriage.⁷³ The Court expressed no concerns regarding Mother's parenting style or ability to care for the children.⁷⁴

69. Ruling 35:11–19.

70. Ruling 21:2–10.

71. Ruling 17:5–9.

72. Ruling 21:11–17.

73. Ruling 22:23–23:5.

74. Ruling 23:18–21.

Moral Character and Emotional Stability. The trial court found that both parents possess the moral character and judgment necessary to model appropriate behavior and instill moral values in their children.⁷⁵ However, the court noted that Father struggled emotionally at the beginning of the parties' separation and unnecessarily involved the children in his emotional distress, as well as inappropriately blaming Mother for the divorce in front of the children, which caused some distress in the children's lives.⁷⁶ The Court found no concerns about Ms. Fullmer's emotional stability.⁷⁷

Duration and Depth of Desire for Custody. The trial court found that both parties have had a long-standing commitment to be involved in the children's lives for the last two years since the parties separated.⁷⁸ However, Father did not demonstrate a real depth and desire to be fully involved in the children's lives for the years prior to the parties' separation.⁷⁹

Personal vs. Surrogate Care. The trial court found that Father is not employed outside the home and is able to care for the children on a full-time basis with minimum need for surrogate care.⁸⁰ As Mother is em-

75. Ruling 27:17–20.

76. Ruling 27:21–28:3.

77. Ruling 28:4–6.

78. Ruling 28:8–12, 20–23.

79. Ruling 28:12–20.

80. Ruling 28:25–29:3.

ployed full time outside the home and maintains a traditional work schedule, she would require the use of surrogate care after school hours.⁸¹

Substance Abuse Concerns. The trial court found that there was not sufficient evidence to conclude that Father's use of prescription medications in the last two years since the parties' separation has impaired his parenting, endangered the parties' children, or progressed to the point of addiction or moving on to harder drugs.⁸² There was evidence that he took high quantities of controlled substances for pain prior to the parties' separation that may have contributed to his general lack of interest in caring for the children during the marriage.⁸³

Financial Condition. The trial court noted its concerns about Father's financial stability.⁸⁴ There was no evidence presented at trial as to the revenues or value of the business, the partnership agreement or financial arrangements between the partners, the nature of Father's responsibilities with regard to the business, or the identity of Father's business partners.⁸⁵ Due to the lack of evidence presented about the business's financial condition, the court expressed a lack of confidence that

81. Ruling 29:3–6.

82. Ruling 29:13–30:8.

83. Ruling 30:9–12.

84. Ruling 31:3–17.

85. Ruling 7:17–22, 15:12–18, 21:18–22:4, 31:16–21.

Father could continue to take the \$1,400 per month draw from the business.⁸⁶ The court expressed no concerns over Mother's financial stability.⁸⁷

Ability to Support Relationship with the Other Parent. The trial court found that the parties' two minor children would benefit from an ongoing positive relationship with both their mother and their father, including regular and predictable parent time with both of them.⁸⁸ The court further found that it is extremely important for the children's self-worth and emotional health for each parent to support the children's relationship with the other parent, to encourage the children to love and respect the other parent, to build up the other parent in the minds of the children.⁸⁹

The court further found concerns with Father's ability to play a positive supporting role in the children's relationship with Mother.⁹⁰ In addition to his past issues of blaming her for the divorce in front of the children, Father's position with respect to Mother's parent time was inconsistent: on one hand, Father testified that he wants the children to be able to see Mother as much as possible, but on the other, he believed that the interim parent-time schedule was too disruptive and maintained that minimum parent time was in the best interest of the children.⁹¹ The court

86. Ruling 31:23–32:3.

87. Ruling 32:4–10.

88. Ruling 17:22–18:6.

89. Ruling 18:7–19:12.

90. Ruling 32:17–25.

91. Ruling 33:1–16.

found that Mother demonstrated a good ability to be supportive of the children's relationship with Father despite their personal differences and appeared to support them in special events that occur during Father's parent time.⁹²

Best Interests of the Children. After making the above findings, the trial court determined that it was in the children's best interest to move their primary residence from Father's home to Mother's home.⁹³ The court acknowledged that this change would lead to some disruption of the children's schooling, activities, and domestic situation,⁹⁴ but found that the negative effects of that disruption would be mitigated by the children's young age, the fact that Mother's home is appropriate for the children, she has family members and friends and other appropriate contacts for the children to have, and the school in her area appears appropriate.⁹⁵ Additionally, the court found that the effects of the disruption were outweighed, as Mother has been the most positive and primary influence in the children's lives, the children desire to have more contact with her, she has been the most responsible parent and the financial provider for the household, and she had the ability to provide a loving, nurturing home for

92. Ruling 23:6–9.

93. Ruling 35:20–23.

94. Ruling 33:25–34:5.

95. Ruling 35:1–10.

the children where it was more certain that the relationship with Father would be supported and fostered as well.⁹⁶

SUMMARY OF ARGUMENT

In his brief, Father asks the Court to reverse the trial court's custody and parent-time determination based on the following arguments: First, Father argues that Judge Allphin was biased in favor of Dr. Malovich, the custody evaluator, and so gave her opinion undue weight. However, because Father failed to file a motion to disqualify at the trial court level at any time, this issue is not reviewable. Also, even if the plain-error doctrine did apply, Father did not show any of the required elements of plain error in his brief. Second, Father argues that the trial court's custody and parent-time determination was an abuse of discretion. However, Father fails to marshal the evidence in favor of the decision, and fails to develop a coherent analysis of the findings that would show why the ultimate finding of custody and parent time is unsupportable, he fails to meet his burden. Because Father has failed to meet his burden and failed to properly brief the issues he raises, this Court should affirm and award Mother her attorney fees for the necessity of defending against this appeal.

96. Ruling 34:5–25, 35:11–19.

ARGUMENT

I. THERE ARE NO GROUNDS TO REVERSE THE TRIAL COURT'S JUDGMENT ON THE BASIS THAT JUDGE ALLPHIN FAILED TO RECUSE HIMSELF *SUA SPONTE*.

Father's first claim of error is that Judge Allphin exhibited disqualifying bias and should have recused himself. While Father admits that he made no objection at trial and the record shows that he did not file a motion to disqualify under Rule 63 of the Utah Rules of Civil Procedure, Father nonetheless argues that the Court should apply the plain error doctrine to review the issue. However, as explained in Part I.A, Utah appellate courts have consistently held that filing a motion and affidavit under Rule 63(b) is a prerequisite to appellate review, meaning Father's assignment of error is not reviewable.

Moreover, Father's claim that Judge Allphin's failure to recuse himself *sua sponte* was plain error fails on its merits. A party arguing plain error bears the burden of demonstrating that "(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, *i.e.*, absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined."⁹⁷ As explained below in Parts I.B through I.D, Father fails to prove that there is error, that any error would be plain, or that any error would have been harmful. Because Father fails to

97. *Spafford v. Granite Credit Union*, 2011 UT App 401, ¶ 42, 266 P.3d 866.

show even one of these elements, the Court should reject his argument for reversal on grounds of bias.

A. Father's claim of bias is unreviewable because filing a motion and affidavit under Rule 63(b) is a necessary prerequisite to appellate review.

Father argues that the Court should review his claim that the trial judge should have disqualified himself despite his failure to file a motion and affidavit under Rule 63(b) of the Utah Rules of Civil Procedure. The only excuse he offers for his failure to do so is that “the bias did not show itself until after trial began.”⁹⁸ However, this Court has previously held in its decision of *In re Estate of Valarce*⁹⁹ that failure to file an affidavit under Rule 63(b) precludes appellate review of a disqualification claim. In *Valarce*, the appellant attempted to raise for the first time on appeal the issue of whether the trial judge should have recused himself from the case because he had worked for the same firm where [a key witness] was a partner.”¹⁰⁰ The appellant acknowledged that he had not filed a motion and affidavit under Rule 63(b) below, but argued that the Court “should consider this issue because he was unaware of the trial judge’s alleged employment at Thorne’s law firm until after his appeal was filed.”¹⁰¹ The Court rejected the appellant’s argument and held that a party is not ex-

98. Br. Father 36.

99. *In re Estate of Valarce*, 2013 UT App 95, 301 P.3d 1031.

100. *Id.* at ¶ 38.

101. *Id.* at ¶ 40.

cused from compliance with Rule 63(b) even if it does not discover facts sufficient to show bias, prejudice or conflict of interest until after the judgment is entered. Rather,

when a party discovers facts supporting the disqualification of the trial judge after judgment is entered, the proper procedure is to file a motion for relief from judgment, similar to the relief available under Utah Rule of Civil Procedure 60(b). By pursuing relief from judgment in the trial court, factual issues raised by Appellant can be explored and resolved, including the basis of Appellant's allegations, the time when Appellant knew or should have known of the information, and the trial judge's involvement with Thorne's law firm. Based on that factual record, the trial court can then determine whether the participation of the trial judge warrants a new trial. Furthermore, the rule 60(b) hearing and decision will create a factual record for appellate review Unlike a trial court, we do not find facts, and our review is limited to the factual record developed in the trial court. Therefore, we decline to consider Appellant's claim that the trial judge should have recused himself from serving in this matter.¹⁰²

Like the appellant in *Valcarce*, Father did not file a motion or affidavit under Rule 63(b) at any time before judgment, despite the fact that they learned of Judge Allphin's alleged bias on September 19, 2012 and a final judgment was not entered until three months later on December 20, 2012. Nor did father file a motion to disqualify and affidavit along with a

102. *Id.* at ¶¶ 42–43; see also *Straley v. Halliday*, 2000 UT 38, ¶ 9, 997 P.2d 338 (holding that “a party alleging judicial bias or prejudice must first file an affidavit to that effect in the trial court,” and that failure to do so precludes appeal of the issue); *Melvin v. Baker*, 2007 UT App 234U at 3–4 (no. 20060643, July 6, 2007) (holding that appellant's “failure to timely file a motion to disqualify is fatal to his claim on appeal” notwithstanding his claim of plain error).

motion to set aside at any time in the fifteen months since judgment was entered, even though Father raised this as an issue in his docketing statement of February 7, 2013. Father has squandered every opportunity to ask the trial court to develop a factual record on this issue, and this Court should decline to take up the issue for the first time on appeal.

B. Judge Allphin's failure to recuse himself was not error.

Utah law requires a judge “to disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.”¹⁰³ Whether a judge’s impartiality may reasonably be questioned is determined by viewing the question through the eyes of “a reasonable person, knowing all the circumstances.”¹⁰⁴ This test requires putting isolated remarks in their proper context before determining whether they evince bias.¹⁰⁵

In his brief, Father attempts to characterize Judge Allphin’s remarks at the beginning of trial as defending Dr. Malovich’s credibility and demonstrating bias against any attempt to question that credibility. In so doing, Father completely decontextualizes the comments. As explained in Part I of the Statement of Facts, *supra*, Judge Allphin was addressing Fa-

103. Utah Code Jud. Conduct 2.11.

104. *West Jordan City v. Goodman*, 2006 UT 27, ¶ 22, 135 P.3d 874.

105. *See Madsen v. Prudential Fed. Sav. & Loan Assn.*, 767 P.2d 538, 547 (Utah 1988) (explaining that, when viewed in context, a trial judge’s remark that he had “cussed financial institutions” was “simply a statement about an attitude he had had many years earlier” and not indicative of bias).

ther's motion in limine to exclude her. In this context, it is clear that Judge Allphin's statement about "taking swipes at a prominent and very credible expert" refers not to Father's "motion to exclude [Dr. Malovich's] report"¹⁰⁶ itself, but rather the accusation within that motion that she had committed two third-degree felonies. Likewise, it is clear that Judge Allphin's statement that "I guess it's up to you to determine whether or not you think I'm stupid" refers not to Father's "retaining an expert to contradict [Dr.] Malovich,"¹⁰⁷ but rather Father's argument "that regular controlled substance use . . . [doesn't] affect the way a person approaches life, relationships, parenting, jobs, etc."¹⁰⁸ While this language may have been somewhat harsh, a fact that Judge Allphin acknowledged at the end of trial,¹⁰⁹ "mere expressions of impatience, dissatisfaction, annoyance, and even anger, are insufficient to establish the existence of bias or partiality."¹¹⁰

Moreover, the standard for disqualification based on a judge's comments is very high:

Any judicial comment or ruling gives the appearance of partiality in the broadest sense to the adversely affected party. Suppose a judge who is the trier of fact comments during a hearing that a

106. Br. Father 2 (¶ 2).

107. Br. Father 2 (¶ 3).

108. Tr.1 8:1-5.

109. Tr.3 233:7-25.

110. *Campbell, Maack & Sessions v. Debry*, 2001 UT App 397, ¶ 25, 38 P.3d 984.

parent has had the opportunity to improve himself in order to make a home for his child but has made no effort to do so. Can the judge be disqualified for bias and prejudice? Whenever a judge hears any evidence, he develops an attitude which may change as the evidence develops. As long as the judge decides the case only after all the evidence is submitted, there appears to be no harm in such a comment. Such judicial comments made before a jury would constitute an improper expression of opinion on the evidence, but those statements made out of their hearing do not require recusal.¹¹¹

The two cases from Florida that Father references actually illustrate the two circumstances in which a comment can lead to disqualification. In *Barnett v. Barnett*, the judge's comment made before closing arguments that a party "should attempt to negotiate for more visitation than she would otherwise receive if the trial court made the decision"¹¹² strongly suggested that the court had made its final decision before the submission of evidence. In *Whitaker v. State*, the judge's comment was before a criminal jury and so constituted an improper comment.¹¹³

However, in this case, there was no indication that the trial court had decided any of the issues presented—in fact, immediately after the statements in question, Judge Allphin stated that he did not "come to this

111. *Madsen*, 767 P.2d at 546 (quoting Leslie W. Abramson, *Judicial Disqualification under Canon 3C of the Code of Judicial Conduct* 23 (1986)).

112. *Barnett v. Barnett*, 727 So. 2d 311, 311 (Fla. App. 1999).

113. *Whitaker v. State*, 742 So.2d 530, 530 (Fla. App. 1999). As a side note, Mother observes that the *Whitaker* court does not give the facts behind the motion to recuse, nor indicate whether it involved the judge's comments about the officer.

case with any preconceived ideas about what the outcome may be,”¹¹⁴ and that while he respected Dr. Malovich’s expertise, he did not always agree with her conclusions: “I believe she works hard at providing honest information that will assist the Court. . . . [S]ometimes, it’s information that I find very helpful, and other times, I have a different opinion than she does after I’ve heard all the evidence.”¹¹⁵ Moreover, even if it may have been an improper comment on an expert’s credibility had a jury been present, this was a bench trial.

It could be argued that it was not clear from the record exactly what Judge Allphin was referring to in his remarks or that Judge Allphin’s statements of impartiality should not be taken at face value. However, because these arguments require determinations of credibility and making factual findings, the place to make these arguments was in a motion brought under Rule 63(b), so that an adequate record could be made for appellate review. As it was Father’s job to make sure that record was made, any deficiency in that record must be construed against finding bias.

Finally, the fact that Judge Allphin had heard from Dr. Malovich in previous cases and respected her expertise does not constitute grounds for disqualification. The Utah Supreme Court previously noted that

114. Tr.1 8:19–24.

115. Tr.1 9:8–18.

although litigants are entitled to a judge who will hear both sides and decide an issue on the merits of the law and the evidence presented, they are not entitled to a judge whose mind is a clean slate. Each judge brings to the bench the experiences of life, both personal and professional. A lifetime of experiences that have generated a number of general attitudes cannot be left in chambers when a judge takes the bench.¹¹⁶

Judge Allphin has been a district court judge for 17 years, and was a domestic relations commissioner for six years before that.¹¹⁷ Given that amount of time, one can expect that he has heard from certain custody evaluators multiple times and has developed opinions about their work. In fact, it would be disconcerting if he did not. So long as there is no evidence of “deep-seated favoritism or antagonism that would make fair judgment impossible,”¹¹⁸ there is no basis for recusal based on having previously heard from an expert witness.

C. As there is no settled law in Utah with respect to recusal based on judicial comments, any error was not plain.

Second, even if there were error, it was not plain. “Utah courts have repeatedly held that a trial court’s error is not plain where there is no settled appellate law to guide the trial court.”¹¹⁹ Father admits in his brief that “Utah cases applying [Rule 2.11] do not analyze bias based on a

116. *Madsen*, 767 P.2d at 546.

117. Tr.3 230:22–231:1.

118. *Debry*, 2001 UT App 397 at ¶ 25.

119. *Spafford*, 2011 UT App 401 at ¶ 42.

judge's comments."¹²⁰ Mother concurs that in researching the issue, she has not become aware of any case where a Utah appellate court has decided that a judge's comments gave rise to a reasonable question of his or her impartiality. Without settled appellate law on the issue, any error could not be plain under Utah law. Therefore, Father's claim of plain error fails.

D. Any error was not harmful, as there is no indication that another judge hearing the same evidence likely would have made findings that would have materially altered the result in Father's favor.

An error is harmful only if, by the end of considering the effect of the error, the Court determines that the "likelihood of a different outcome [is] sufficiently high to undermine confidence in the verdict."¹²¹ In his brief, Father does not point to any specific element of the trial court's decision that was likely to have come out differently had the judge recused himself. Instead, he simply asserts: "It is clear the judge's bias may well have had an impact on the final outcome."¹²² This is a one-sentence assertion provided in lieu of an argument, which is not adequate to show harmful error and not in compliance with the appellate briefing rules.¹²³ Fur-

120. Br. Father 37.

121. *State v. Hamilton*, 827 P.2d 832, 840 (Utah 1992).

122. Br. Father 39.

123. *See Burton Lumber & Hardware Co. v. Graham*, 2008 UT App 207, ¶ 17 n.5, 186 P.3d 1012 (noting that an argument consisting of a one-sentence assertion that an action on the part of the other side was improper did "not comply with appellate briefing rules").

ther, as shown below, Father fails to properly marshal the evidence, which would be a prerequisite to showing that the trial court's findings were close questions, and that another judge hearing the same evidence likely would have made findings that would have materially altered the result in Father's favor. Finally, as shown below in Part II.B, the decisions that Father ascribes to bias are supported by a great deal of evidence. Father fails to make his case for harmful error, and his claim of disqualifying bias must be rejected.

II. THE TRIAL COURT'S ORDER OF CUSTODY AND PARENT TIME WAS WELL WITHIN ITS BROAD DISCRETION; A NEW TRIAL IS NOT WARRANTED.

In making child custody awards, the trial court is given broad discretion and its decisions will not be overturned absent an abuse of discretion or manifest injustice.¹²⁴ This discretion is limited by the following threshold requirements: first, the trial court's discretion "must be exercised within the confines of the legal standards set by the appellate courts."¹²⁵ Second, "to ensure the court acted within its broad discretion, the facts and reasons for the court's decision must be set forth in appro-

124. *Schindler*, 776 P.2d at 87; see *Tucker*, 910 P.2d at 1214 ("Only where the trial court's judgment is so flagrantly unjust as to be an abuse of discretion will an appellate court interpose its own judgment.").

125. *Schindler*, 776 P.2d at 87; see *Roberts v. Roberts*, 835 P.2d 193, 196 (Utah App. 1992) (explaining that the legal standards set by the appellate courts are based on Utah Code Ann. § 30-3-10, and noting that "there is no checklist of custody factors, since these factors are highly personal and individual, and do not lend themselves to the means of generalization employed in other areas of the law.").

priate findings of fact and conclusions of law.”¹²⁶ If these threshold requirements are met, the party challenging the court’s determination of custody bears the burden to prove that the court’s ultimate finding that a custody arrangement is in the best interests of the children is “so lacking in support as to be against the clear weight of the evidence.”¹²⁷

While Father argues that the trial court abused its discretion in its determination of custody and parent time, he does not claim that the trial court failed to analyze the custody question within the standards set by appellate courts, nor does he claim that the trial court’s findings were insufficient. Therefore, Father bears the burden of showing that the trial court’s ultimate finding was in clear error. As Father fails to properly marshal the evidence in support of the trial court’s ultimate and subsidiary findings and fails to develop a coherent analysis of the findings that would show why the ultimate finding of custody and parent time is unsupported, he fails to meet his burden. The Court should affirm the trial court’s award of custody and parent time.

126. *Schindler*, 776 P.2d at 87; see *Barnes v. Barnes*, 857 P.2d 257, 259 (Utah App. 1993) (“To ensure that the trial court’s determination, discretionary as it is, is rationally based, it is essential that the court set forth in its findings of fact not only that it finds one parent to be the better person to care for the child, but also the basic facts which show why that ultimate conclusion is justified.”).

127. *A.K.&R. Whipple Plumbing & Heating v. Aspen Constr.*, 1999 UT App 87, ¶ 26, 977 P.2d 518; see *Cagatay v. Erturk*, 2013 UT App 82, ¶ 3, 302 P.3d 137 (holding that a party’s challenge to a trial court’s award of joint custody failed because the party “fail[ed] to demonstrate that the trial court’s findings were clearly erroneous . . .”).

A. Father has failed to adequately marshal the evidence in support of the finding that the custody arrangement is in the best interests of the children or for in support of subsidiary findings.

In order to challenge a trial court's finding that a custody arrangement is in the best interests of the children, a party "must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below."¹²⁸ The marshaling process contains three steps: first, the party must identify the ultimate factual finding it wishes to challenge in the argument section of the brief.¹²⁹ Second, directly after identifying that finding,¹³⁰ the party "must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports" that ultimate finding, including evidence supporting subsidiary findings.¹³¹ Finally, "after constructing this magnificent array of supporting evidence, the challenger must ferret out a

128. *Parduhn v. Bennett*, 2005 UT 22, ¶ 25, 112 P.3d 495.

129. See Utah R. App. P. 24(a)(9) (identifying marshaling requirement as part of the argument section of the brief); *Fitzgerald v. Critchfield*, 744 P.2d 301, 304 (Utah App. 1987) (noting that a party failed to meet his burden to marshal in part because "the requisite presentation of supporting evidence is also not found in the argument portion of appellant's brief.").

130. *Roderick v. Ricks*, 2002 UT 84, ¶ 47 n.11, 54 P.3d 1119 ("To comply with the marshaling requirement, appellants must marshal all of the favorable evidence at the point at which they challenge the factual finding."); see *West Valley City v. Majestic Investment Co.*, 818 P.2d 1311, 1315 (Utah App. 1991) ("What the City has not done is to correlate particular items of evidence with the challenged findings . . .").

131. *Parduhn*, 2005 UT 22 at ¶ 25.

fatal flaw in the evidence” which is “sufficient to convince the appellate court that the court’s finding resting upon the evidence is clearly erroneous.”¹³²

Both this Court and the Utah Supreme Court have pointed out on numerous occasions that a “general catalogue of evidence” that presents evidence favorable to both parties and does not “correlate particular items of evidence with the challenged findings” does not satisfy the marshaling burden.¹³³ Rather, “Counsel must extricate himself or herself from the client’s shoes and fully assume the adversary’s position.”¹³⁴ While some attorneys have balked at this way of describing the marshaling burden, saying it compromises zealous advocacy, this formulation is another way of saying that in order for a party to show that a finding is clearly erroneous, the party must first honestly and objectively represent the finding rather than attacking a caricature or strawman finding. Avoiding strawmen and representing an opponent’s argument objectively is just good argumentation, and the Court should insist on parties’ compliance.

Utah appellate courts have insisted on strict compliance with the marshaling requirement to promote the objectives of efficiency and fairness:

132. *Majestic Inv.*, 818 P.2d at 1315.

133. *Majestic Inv.*, 818 P.2d at 1315; see *Roderick*, 2002 UT 84 at ¶ 47 n.11; *A.K.& R. Whipple*, 1999 UT App 87 at ¶ 26; *Fitzgerald*, 744 P.2d at 304.

134. *Majestic Inv.*, 818 P.2d at 1315.

Efficient resolution of disputes demands that, unless the facts found by the trial court are clearly erroneous, they will be upheld on appeal. . . . Successful challenges to findings of fact thus must demonstrate to appellate courts first how the trial court found the facts from the evidence and second why such findings contradict the weight of the evidence. These demonstrations in appellants' briefs not only avoid retrying the facts but also assist us in our decision-making and opinion-writing, thus increasing our efficiency. . . . Additionally, the deference we afford to trial courts' factual findings is based on and fosters the principle that appellants rather than appellees bear the greater burden on appeal. . . . When appellants challenge findings of fact, fairness requires that they bear the costs of demonstrating how the trial court found those facts from the evidence and why those findings contradict the weight of the evidence.¹³⁵

If a party fails to fulfill the marshaling burden, the appellate court assumes that the record supports the findings of the trial court and accepts the findings as valid.¹³⁶

In this case, while Father acknowledges his burden to marshal the evidence,¹³⁷ his purported marshaling of the evidence is just a general catalogue of evidence summarizing the testimony at trial. As this Court stated in *Majestic Investments* when it rejected a similar catalogue of evidence: "The marshaling concept does not reflect a desire to merely have pertinent excerpts from the record readily available to a reviewing

135. *Oneida/SLIC v. Oneida Cold Storage & Warehouse, Inc.*, 872 P.2d 1051, 1053–54 (Utah App. 1994).

136. *Crockett v. Crockett*, 836 P.2d 818, 820 (Utah App. 1992).

137. Br. Father 1.

court.”¹³⁸ Father fails to correlate evidence to particular findings that he challenges, and fails to put it in the portion of the argument section of his brief where he challenges the trial court’s findings. In so doing, Father fails to uphold his burden to show why the findings contradict the weight of the evidence, shifting the burden of any weighing to this Court. The Court should decline to become the “depository in which the appealing party may dump the burden of argument and research”¹³⁹ and accept the trial court’s findings as valid.

B. The trial court’s findings were not clearly erroneous, and the court’s final determination of custody and parent time was not an abuse of discretion.

But even if this Court were to overlook Father’s failure to properly marshal the evidence and exercise its discretion “to consider independently the whole record and determine if the decision below has adequate factual support,”¹⁴⁰ there is still no cause to conclude that the trial court acted beyond his discretion in making the custody and parent-time determination. Father makes no attempt to analyze whether the trial court’s determination was abuse of discretion in any systematic way—it is unclear whether Father is trying to argue that certain findings were clearly erroneous or that the district court gave improper weight to certain factors. Rather, Father’s argument appears to be a series of general-

138. *Majestic Inv.*, 818 P.2d at 1315.

139. *Spafford*, 2011 UT App 401 at ¶ 25.

140. *Martinez v. Media-Paymaster Plus*, 2007 UT 42, ¶ 20, 164 P.3d 384.

ized grievances with particular findings and an impermissible attempt to reargue evidence.¹⁴¹ As such, it is very difficult for Mother to do more than generally argue in favor of the trial court's discretion. Mother asks the Court to reject any attempts by Father to reform and redraft Point 2 of his Argument in his reply brief, as it would lead to a procedurally unfair situation.¹⁴²

Father's objections to the trial court's custody and parent-time determination seem to be as follows:

- *The court's award of parent time was exactly as proposed by Dr. Malovich, which shows bias.*

The trial court did not adopt Dr. Malovich's suggestion "exactly"—rather, he rejected her plan to alternate midweek days between Monday and Thursday.¹⁴³ The trial court indicates that its choice of schedule is based on its agreement with Father's argument that "regardless of which parent obtains primary custody, . . . it would be in the children's best interest to have a more consistent schedule with fewer transitions."¹⁴⁴ Moreover, it does not appear that there were a whole lot of other options

141. See *Oneida*, 872 P.2d at 1053 (rejecting an appellant's tactic of "re-argu[ing] the case before this court").

142. See *Maak v. IHC Health Servs.*, 2007 UT App 244, ¶ 30, 166 P.3d 631 (declining to address issues raised for the first time in a reply brief in order "to prevent the resulting unfairness to the respondent if an argument or issue was first raised in the reply brief and the respondent had no opportunity to respond").

143. Ruling 36:20–37:15.

144. Ruling 37:5–8.

with respect to parent time. As Dr. Malovich explained, between the time it would take for the non-custodial parent to drop off the children at their school and Mother's traditional 8 to 5 job, there was not a whole lot of flexibility with respect to the schedule during the school year.¹⁴⁵ Finally, the only other proposal explicitly on the table was Father's proposal that Mother get minimum standard time during the school year.¹⁴⁶ The trial court's adoption of most of Dr. Malovich's parent-time recommendation reflects not bias, but rather both the court and custody evaluator's recognition that this was the most workable schedule.

- *The court relied on Dr. Malovich's finding that the amount of time that the children spent with their mother was not adequate for Daughter's needs, even though it was based on information that was out of date.*

The court's finding that Daughter needed more time with Mother was based on the report of Dr. Malovich, who last interviewed the children in August of 2011. Father states that "the glowing report of [Daughter]'s school teacher, [Ms.] Miller, of the scout leader [Ms. Kyes] and the neighbor [Ms. Waite?] are all current information of [Daughter]'s adjustment to the custodial arrangement with their father."¹⁴⁷ Father does not give any citation to the record as to these "glowing reports," but it does

145. Tr.3 142:16–143:8.

146. Tr.1 129:25–130:21.

147. Br. Father 41–42.

not appear that any of these witnesses testified as to their opinions on the question or any observations that they made on the subject.¹⁴⁸

Moreover, Dr. Malovich's conclusion that Daughter needed more contact with Mother was based on her observation that Daughter "displays a sometimes emotionally needy style and some separation anxiety in regard to [Mother] suggesting that the current amount of contact she has with her is not adequate for her needs."¹⁴⁹ None of these witnesses regularly witnessed Mother and Daughter interacting, and so could not testify as to any clinginess daughter had toward Mother. Ms. Kyes was Son's scout leader, and did not deal with Daughter except when she and Father were there together with Son at pack events. Also, if the neighbor Father refers to is Ms. Waites, she never testified about Daughter at all, and any knowledge she had about the children would have been limited to the time she had been Father's neighbor: October 2010 to September 2011—her information would be no more current than Dr. Malovich's information. In fact, if her "glowing report" was based on information from the same timeframe that Dr. Malovich observed Daughter's emotionally needy style, it discounts the conclusion that later "glowing reports" signify a change in Daughter's emotional needs.

148. See Tr.1 218:12–225:24 (Ms. Kyes); 244:2–250:4 (Ms. Waite); 250:11–275:23 (Ms. Miller).

149. Tr.1 134:1–7.

Father cites no record evidence that would contradict Dr. Malovich's conclusion that the children want to spend more time with their mother, and Mother knows of none. Father also gives no reason to believe that Daughter's needs had changed in the time between Dr. Malovich's report and the time of trial. The custody evaluator and the trial court can only work on the information that they have. If a party believes that information does not take into account some significant changes, it is that party's responsibility to present that evidence to the court and/or custody evaluator. General "glowing reports" during and after the time of the custody evaluation is not enough for this Court to conclude that the district court's finding that Daughter's need for more time with Mother persisted from the time of the custody evaluation to the present.

- *The court improperly found concerns with Father's ability to support the children's relationship with Mother.*

Father objects to this because Father's act of blaming Mother for the divorce "was conduct that occurred in 2010, at least two years prior to trial."¹⁵⁰ The trial court found that Father inappropriately blamed Mother for the divorce in front of the children. Father acknowledged

talking to the children about the fact that he didn't want the divorce, that this was their mom's choice. He seemed to feel that that would be a more honest response than to share responsibility for the separation or divorce in talking with the children. So, he was quite open about the fact that he had been open with the children about that issue, that he did not take responsibility for the divorce

150. Br. Father 42.

with the children and, clearly, indicated to them that it was their mom's choice.¹⁵¹

However, rather than being an isolated incident, Dr. Malovich viewed this incident as part of a larger concern that Father “displays little insight into how his communication has impacted the children’s responses and feelings regarding their mother, as well as added to their emotional distress.”¹⁵² Dr. Malovich describes more incidents that validate that concern in her testimony, including the river-rafting event.¹⁵³ The trial court also indicated that its concerns were boosted by his proposed parent-time schedule, which would have cut quite a bit of Mother’s parent time from the temporary order.¹⁵⁴ While Father indicated that he would be flexible to provide Mother with more parent time in addition, Dr. Malovich noted that “if a parent isn’t willing to commit to that time . . . in some sort of more structured way, trying to leave extra time as something that the parties negotiate,” it is cause for concern.¹⁵⁵ In short, the trial court was right to have concerns about Father’s ability to support Mother’s relationship with the children.

151. Tr.3 91:6–15.

152. Tr.3 99:7–11.

153. *See* Tr.3 98:25–103:3.

154. Ruling 32:16–33:16.

155. Tr.3 123:18–124:4.

- *The court improperly found that during the marriage, Father merely “babysat” the children and did not display a real depth of desire to be involved in the children’s lives.*

Father objects to the trial court’s finding, but it is unclear whether his motive is to show that he was a caretaker for the children during the marriage, or just to register his offense at being called a babysitter. Regardless, the trial court’s finding was backed by the trial court’s subsidiary findings that he does not challenge—namely, that Mother made arrangements for the children’s breakfast before she left for work, came home at lunch time to see that they were fed, and took care of their baths and other needs after work, and that Father stayed up late playing a lot of video games, slept late into the morning, and although he stayed at home with the children, he rarely did anything to actually address their needs during that time.¹⁵⁶ Although the trial court indicates that Father has developed a commitment toward the children since the time of the temporary order, the trial court’s conclusion that the commitment was not there before the parties separated is not clearly erroneous.

- *The court improperly found that Father’s prescription drug use may have contributed to his lack of interest in caring for the children.*

Father objects to this finding on grounds that there is “no medical evidence to support” it.¹⁵⁷ However, there was a great deal of evidence that Father was taking large amounts of hydrocodone and other opioid

156. Ruling 12:3–20, 13:18–13, 14:8–15:4.

157 Br. Father 42.

pain relievers.¹⁵⁸ Father's dentist, Dr. Kennington, testified that people who take hydrocodone often become sleepy, dizzy, and nauseated.¹⁵⁹ There does not need to be further evidence to allow the trial court to make a connection between probable side effects of a medicine to behavior that was exhibited. The court's finding was not clearly erroneous.

- *The court's concerns over Father's income and financial stability were improper.*

The court had every right to be concerned about the continuation of Father's income from a business that was less than two years old at the time of trial, as there was no evidence presented at trial as to the revenues or value of the business, the partnership agreement or financial arrangements between the partners, the nature of Father's responsibilities with regard to the business, or the identity of Father's business partners.¹⁶⁰ Without this evidence, there is no way for the court to determine whether Father was getting paid from profits or investment money, and if the latter, how long that reserve of money would last. It was Father's responsibility to put on this evidence.

Father argues that "a mother who remained home with young children would be lauded as a primary caregiver" and implies that the trial

158. Tr.2 37:7–40:1.

159. Tr.2 31:19–32:13.

160. Ruling 7:17–22, 15:12–18, 21:18–22:4, 31:16–21.

court was applying an improper sex-based double standard.¹⁶¹ He adds that the trial court had no rational basis for concern because the evidence showed “that [Father] could live on his income, due to residing in a fully paid home for which he owed no rent.”¹⁶² However, financial stability is not about whether parents can live on income, it is about whether parents can adequately provide for their children. Father has a history of showing an alarming lack of concern for the financial needs of his family, choosing to stay home and play video games while his family skids by at less than 150% of the poverty line.¹⁶³ In such circumstances, being a stay-at-home parent, whether a mother or father, is just not practical. Regardless of whether Father has the house his mother bought him for his rent-free use, the children still need food, clothing and other necessities, not to mention what they will need as they grow up, such as band instruments or sports-team uniforms. Working 5-20 hours a week at a business with no proven track record does not indicate a recognition of the children’s present and future needs, and the trial court was right to be concerned

161. Br. Father 42.

162. Br. Father 42–43.

163. The poverty line for a family of four in 2009 and 2010 was \$22,050. *See* Annual Update of the HHS Poverty Guidelines, 74 Fed. Reg. 4199 (Jan. 23, 2009); Delayed Update of the HHS Poverty Guidelines for the Remainder of 2010, 75 Fed. Reg. 45628 (Aug. 3, 2010). The family’s income for 2009 and 2010 was \$32,387 and \$31,974, respectively. R. at 785.

that Father's focus on remaining self-employed appeared to take precedence over meeting his family's more immediate needs.¹⁶⁴

Finally, Father argues that Dr. Malovich "attacked [him] for residing in a home purchased by his mother, and for doing so after the report," which he claims shows her bias against him.¹⁶⁵ In reality, Dr. Malovich stated that she thought it was good that the children had more space and any positive changes made after the custody evaluation that help the children are commendable, but that she hesitated to give too much weight to him moving into a new house, as he did not resolve the concern by his independent efforts to provide for the children, and as there was always a question about changes subsequent to the custody evaluation as being done in an effort to influence the final custody result rather than out of concern for the best interest of the children.¹⁶⁶ These are legitimate concerns, especially given the pattern of Father being unconcerned about providing for his children's financial needs.

- *The court gave insufficient weight to preserving the custody arrangements made under the temporary orders.*

Finally, Father argues that the trial court ignored or discounted the negative effects that the children would suffer as a result of moving their primary residence, including changing schools, leaving some friends, and

164. Ruling 21:11–17.

165. Br. Father at 43.

166. Tr.3 86:18–87:21, 159:25–163:13.

the change in their everyday domestic situation. He cites the testimony of his expert, Dr. Bursztajn, that as long as the children are doing well where they are, moving them would constitute an unjustified "social experiment."¹⁶⁷ However, the trial court rejected this standard as being contrary to the responsibility of the court to act in the best interests of the children.¹⁶⁸ Case law similarly rejects placing determinative weight on continuing the current custody arrangement. As noted by the supreme court, in deciding custody, the court should consider "the identity of the primary caretaker during the marriage," as well as "identity of the parent with whom the child has spent most of his or her time pending custody determination if that period has been lengthy."¹⁶⁹ In cases such as this where those are two different people, Dr. Bursztajn's standard would contravene the Utah Supreme Court's direction that a district court should give the former factor prominent place in its decision calculus.¹⁷⁰ Moreover, the supreme court warned against giving determinative weight to a custody arrangement based not on evidence and findings, but only on a temporary orders hearing:

A temporary custody order is only that, temporary. It is effective only until a fully informed custody determination can be made at a final hearing. Temporary custody is not to be treated as permanent custody. Permanent custody is modifiable only upon a threshold

167. Br. Father 43.

168. Ruling 35:11-23.

169. *Pusey v. Pusey*, 728 P.2d 117, 120 (Utah 1996).

170. *Id.*

showing of a substantial and material change of circumstances. If a temporary order of custody were to be given permanent status subject to *Hogge's* changed-circumstances test, no party would ever stipulate to a temporary arrangement and every hearing on temporary custody would involve the time-consuming presentation of witnesses, both expert and lay, as well as other types of evidence. In short, a temporary custody hearing would become a permanent custody hearing.¹⁷¹

In conclusion, Mother does not deny that Father has, in the words of the trial court, "made some major changes in his life . . . from where he was three, four, five years ago."¹⁷² The question at trial was whether those changes would stick after the harsh light of the court proceedings was not on Father any longer. As Dr. Malovich put it:

If the changes are because Mr. Fullmer is becoming a healthier individual, if it's because he has gained insight, if it's because he has taken more responsibility for his life and the children and he's . . . functioning better and is able to better meet their needs and be a more consistent parent figure to them, and is getting healthier in resolving his issues toward Ms. Fullmer, then that's very positive and that's very commendable and means something very positive. If the changes that have been made are a reflection of he and his family's motivation to prevail in the current custody litigation, it's not that positive. . . . I think it's very difficult to make at this point which is my hesitation, which is why I'm trying to explain why I'm not saying, oh, that fixes everything. . . . It may be fixed; it may be that there's been a really positive change in his whole lifestyle and approach to life has changed. It's also possible that he's responded to what amounts to some pretty detailed coaching on how to look

171. *Tucker*, 910 P.2d at 1215–16.

172. Ruling 21:2–10.

better for a custody evaluator and how to prevail in Court and I don't know to what degree each of those factors may be at play.¹⁷³

Given this dilemma, the trial court was well within its discretion to choose to give primary custody to the parent who had been the children's primary caretaker for the entirety of the children's lives before the temporary order was entered.

III. MOTHER SHOULD BE AWARDED HER ATTORNEY FEES FOR THE NECESSITY OF DEFENDING AGAINST THIS APPEAL.

Finally, Mother asks for her attorney fees for the necessity of filing this brief under Rule 24(k) of the Utah Rules of Appellate Procedure. Rule 24(k) requires a brief to be "concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters." If a party submits a brief that is not in compliance with this requirement, the Court may impose sanctions on the offending party, including an award of attorney fees.¹⁷⁴ Because failing to adhere to the briefing requirements "increases the costs of litigation for both parties and unduly burdens the judiciary's time and energy,"¹⁷⁵ an award of attorney fees is justified to help compensate the innocent party. This Court has also noted that while sanctions for frivolous appeals

173. Tr.3 161:6–162:12.

174. Utah R. App. P. 24(k).

175. *In re Estate of Pahl*, 2007 UT App 389, ¶ 17, 174 P.3d 642.

“should only be applied in egregious cases,” the court has a lower threshold for awarding sanctions based on Rule 24(k).¹⁷⁶

Earlier in this brief, Mother has already explained that an assignment of error for failure to recuse is not reviewable without first filing a motion and affidavit under Rule 63(b). She has pointed out Father’s failure to marshal the evidence. She has noted the lack of organization and systematic analysis in the argument section of Father’s brief. In other submissions to the Court, Mother has also pointed out the sloppy and deficient nature of Father’s docketing statement,¹⁷⁷ conveyed her concern that Father had filed this appeal for the primary purpose of extracting concessions from her after final judgment,¹⁷⁸ and noted that Father substantially delayed the filing of his brief, flouting the Court’s warnings and directions with respect to timeliness.¹⁷⁹ Finally, Mother notes the utter lack of merit to Father’s grounds for appeal—this is simply an appeal that should not have been brought.

Some, or perhaps even all of these factors could be excused if Father were acting *pro se* or on the advice of an attorney inexperienced in the rules and practices of this Court. However, Father has no such excuse—based on a quick search through the case law, it appears that Father’s

176. *Id.* at ¶ 16.

177. Response to Appellant’s Motion To Refer at 2–4 (filed Feb. 11, 2013).

178. *Id.* at 4–5.

179. Motion To Strike Lodged Brief at 5 (filed Jan. 7, 2014).

appellate counsel has appeared before this Court over 40 times, and before the Utah Supreme Court more than ten times. All of these factors together merit a sanction of attorney fees from this Court.

CONCLUSION

For the foregoing reasons, Mother respectfully requests this court to affirm the trial court's decision in this matter and to award Mother her reasonable attorney fees incurred in defending this appeal.

RESPECTFULLY SUBMITTED this 21st day of March, 2014.

/S/ J.Ed Christiansen
J.Ed Christiansen
DAY SHELL & LILJENQUIST, L.C.
Attorney for Appellee

/S/ Nathan Whittaker
Nathan Whittaker
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Attorney for Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word and uses Century Schoolbook typeface in 13-point font in the main body.¹⁸⁰ According to Microsoft Word's word-count function, this brief contains 11,481 words, excluding the caption, table of contents, table of authorities, certificate of compliance, certificate of service and addendum. This brief is therefore in compliance with the type-volume limitation of Utah R. App. P. 24(f)(1).

DATED this 21st day of March, 2014.

/S/ Nathan Whittaker

Nathan Whittaker

DAY SHELL & LILJENQUIST, L.C.

Attorney for Appellee

180. Century Schoolbook 12-point font was used for block quotations and footnotes, Helvetica Neue Medium 14- and 13-point fonts were used for the headings, and Helvetica Neue Italic 12.5-point font was used for the disputed findings.

PROOF OF SERVICE

I hereby certify that I caused two copies of the foregoing BRIEF OF APPELLEE to be delivered via first-class mail to the following recipients:

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DATED this 21st day of March, 2014.

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ADDENDUM

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4/20
sent
Atwood
Snow

April 19, 2012

Jeremy Atwood, Esq.
Jeremy Atwood Law, LLC
2668 Grant Ave., Ste. 104
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RE: *Fullmer v. Fullmer* Case No. 104701561

Dear Mr. Atwood:

The enclosed records are being provided in response to your recent Subpoena Duces Tecum in the matter of Fullmer v. Fullmer. Per my initial Procedures Agreement, I have not included material regarding my interactions with the minor children in order to maintain their privacy, as well as to avoid any potential input by either party about their conversations with me.

In addition, according to ethical guidelines of the American Psychological Association, psychological test data can only be released to a professional qualified to interpret it.

Sincerely,



Natalie J. Malovich, Ph.D.
Licensed Psychologist

cc: Deborah A. Snow, Esq.