

2016

**Greg J. Pope, Appellant, v. Carmen R. Pope, Appellee.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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GREG J. POPE,

Appellant,

v.

CARMEN R. POPE,

Appellee.

Case. No. 20150869-CA

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APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,  
SALT LAKE COUNTY, SALT LAKE CITY, STATE OF UTAH  
THE HON. BARRY G. LAWRENCE, CASE NO. 134904171

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**BRIEF OF THE APPELLANT**

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## **STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction over the matter based on Utah Code section 78A-4-103(2)(h).

## **ISSUES PRESENTED**

**Issue I:** The trial court's findings that Mother was credible and telling the truth when she testified that Father had engaged in prostitution for many years and the trial court's findings that Father lacked credibility for denying the baseless charges was clearly erroneous and should be reversed.

**Standard of review:** "Findings of fact 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 witness." Utah R. Civ. P. 52(a).

**Preservation:** R. 714–15.

**Issue II:** The trial court's findings were insufficient to support its conclusion that Father had put the children at risk by leaving them in the house with their grandmother while he worked at night.

**Standard of review:** "A challenge to the sufficiency of the evidence concerns the trial court's findings of fact. Those findings will not be disturbed unless they are clearly erroneous." *Cummings v. Cummings*, 821 P.2d 472, 476 (Utah App. 1991).

**Preservation:** R. 715–16.

**Issue III:** The trial court erred by expressing a preference for a step-parent household over a multigenerational household without any reasonable basis in evidence.

**Standard of review:** “A challenge to the sufficiency of the evidence concerns the trial court’s findings of fact. Those findings will not be disturbed unless they are clearly erroneous.” *Cummings v. Cummings*, 821 P.2d 472, 476 (Utah App. 1991).

**Preservation:** R. 719–20.

**Issue IV:** The trial court erred by ordering the children to change elementary schools without making a finding that it would be in their best interests.

**Standard of review:** The interpretation of a statute is a question of law that is reviewed for correctness. *See In re B.T.D.*, 2003 UT App 99, ¶ 12, 68 P.3d 1021. A trial court’s findings of fact will not be overturned unless they are clearly erroneous, but “to ensure the court acted within its broad discretion, the facts and reasons for the court’s decision must be set forth fully in appropriate findings and conclusions.” *See Barnes v. Barnes*, 857 P.2d 257, 259 (Utah App. 1993) (citations and internal quotation marks omitted).

**Preservation:** R. 716–17.

**Issue V:** The trial court erred by having Mother’s fiancé testify even though the exclusionary rule had been invoked and he had been present in the courtroom the entire day.

**Standard of review:** A trial court's decision to exempt a witness from exclusion under rule 615 of the Utah Rules of Evidence is reviewed for abuse of discretion. *See State v. Billsie*, 2006 UT 13, ¶ 6, 131 P.3d 239.

**Preservation:** R. 717–18; 1036–37.

**Issue VI:** The cumulative effect of the several errors requires a remand even if some errors, by themselves, are deemed harmless.

**Standard of review:** Under the doctrine of cumulative error, an appellate court will reverse if the several errors undermine the court's confidence that a fair trial was had. *See State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993).

**Preservation:** R. 720.

### **DETERMINATIVE STATUTORY PROVISIONS**

**Utah Code section 30-3-10.2(2)(a), (f).**

In determining whether the best interest of a child will be served by ordering joint legal 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 or physical custody; [and] . . . (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 or physical custody[.]

### **Rule 615 of the Utah Rules of Evidence**

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule



does not authorize excluding . . . a person whose presence a party shows to be essential to presenting the party's claim or defense.

### **STATEMENT OF THE CASE**

Father appeals from the trial court's Memorandum Decision, Order, *Findings of Fact and Conclusions of Law* entered on June 19, 2015. R. 669–701. Father filed a timely motion under rule 52(b) and rule 59 of the Utah Rules of Civil Procedure on July 6 2015. R. 709–10.<sup>1</sup> The trial court issued a Ruling and Order on Pending Motions on September 22, 2015, that denied Father's post-judgment motion. R. 879. Father filed a timely notice of appeal. R. 921.

### **SUMMARY OF ARGUMENT**

The trial court erred when it gave any weight to Mother's baseless claim that Father was a prostitute for several years before their separation. Father denied all the allegation and Mother was unable to produce a single piece of corroborating evidence. In fact, she claims that she deleted all the evidence. Although the trial court did not find sufficient evidence to support a criminal charge or to conclude that Father had endangered the children, the trial court did determine that Mother's testimony was credible, that the prostitution allegations

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<sup>1</sup> This was timely because July 4, 2015, fell on a Saturday, which caused the holiday to be observed in the State of Utah on Friday, July 3, 2015. As a result, the time for filing the post-judgment motion was extended to the following Monday, which was July 6, 2015.

reflected poorly on Father's moral character, and that Father's denial's lacked credibility. This harmful conclusion lacked sufficient basis in evidence.

It was error for the trial court to conclude that Father had put his children at risk by leaving them alone every night while he worked a graveyard shift because it was uncontroverted that Grandmother was at home with the children every night and could hear them if they needed anything.

The trial court also erred in determining that Father's living arrangements were not ideal even though there was no evidence that would suggest it was unstable or unsustainable in any way. In doing so, the trial court expressed an *improper preference for step-parent households over multigenerational households*.

It was error for the trial court to order the children to change elementary schools without considering the children's emotional needs and preference. In determining that an elementary school near Mother was better for the children than the elementary school they had attended for two school years, the trial court only considered standardized test scores and diversity.

Over Father's objections, Mother's fiancé was allowed to testify even though the exclusionary rule had been invoked and he had remained in the courtroom during the whole first day of trial. This error was prejudicial because the fiancé was able to testify about things that Mother had said in her testimony.

Finally, the doctrine of cumulative error requires reversal even if any single issue is deemed to be harmless in isolation.

## STATEMENT OF FACTS

Father and Mother, who have two minor children together, filed for divorce in August of 2013. R. 1–15. After separating, Father moved into the basement apartment of his mother’s home in Salt Lake City, Utah. R. 671. Mother stayed in the marital home and then later moved to a townhouse in Draper, Utah. R. 671. She was later engaged to a man she met the same month that the divorce was filed. R. 1090. They were engaged three months later. R. 1090. On October 8, 2013, a commissioner announced temporary orders for custody and parent time. R. 376. On February 19, 2014, the trial court entered the same temporary orders *maintaining full joint physical and legal custody of the children*. R. 393. Parent time was split evenly between Mother and Father. R. 393. Under this arrangement, the children continued to attend elementary school at an ethnically diverse elementary school in Father’s neighborhood where they had been thriving both socially and academically. R. 672. Father’s schedule revolved around the children’s schedule, and he continued to work nights as a janitor at high school that was ten minutes away. R. 671, 672. By maintaining his night schedule, Father was able to spend much of his time volunteering at the children’s school and was able to eat lunch with his children every day. R. 671, 935; *see also* Petitioner’s Exhibit 1, 10.. By all accounts, Father is a good parent with “genuine love for his children.” T. 671.

While Father was working from 9 p.m. to 2 a.m. at the nearby high school, he would leave the children in the care of his mother (Grandmother) who testified

that she was at home every evening and could hear if the children needed anything. R. 672. By following this schedule, Father was able to continue to be the primary caregiver to the children without using outside daycare services. R. 673. The children shared a room in the two-bedroom basement apartment of the house that had a separate entrance. R. 672. In March 2015, after living in this arrangement for almost two years, a trial was held to establish a permanent arrangement. R. 669.

#### **Father's finances and living arrangements**

During the trial, Father's attorney argued that living in an apartment in his mother's home was "*beneficial for both [Father] and the children as it does allow for better financial assistance at the time. But also it [allows] for [Father] to work at night.*" T. 936. On cross-examination, Father testified that he chose to continue to work part-time at night so that he could care for his children. R. 946. He explained, "[I]f I worked full-time, then I wouldn't be able to take care of the children the way I do. Therefore, it's not an option for me because they would need to go to daycare or have significant changes made to their lives." R. 945.

Grandmother also testified that she only charges Father \$200 a month for the basement apartment. R. 984. She also said that while Father might seek full-time employment in a year or so, she did not anticipate renting out the apartment to anyone else. R. 984. She further testified that she was at home with the children every night and that the separate entrance to the basement apartment was locked.

R. 985. She said if the children needed anything, they could simply come up the stairs. R. 976–77.

Based only on this evidence, the trial concluded that Father left his children “alone each night.” R. 672. The trial court found that this posed a danger to the “safety and well-being of his children,” even though it acknowledged that Grandmother was at home during those times. R. 672. It also found that “[t]o accommodate his part-time earnings, [Father] lives in his mother’s house and foregoes child care while he is at work—which is concerning to the Court because the young children are left unattended during the evening hours.” R. 684. Later, it found again that “continuing the current schedule—i.e., exposing the Minor Children to risk each night by leaving them unattended—is something that should not be permitted to continue in the best interest of the Minor Children.” R. 686.

Despite evidence to the contrary, the trial court found that Father’s living arrangements were unsustainable. R. 686. It stated that “while there was no evidence to suggest that he would not be able to continue to live in his mother’s basement apartment, his current situation is not ideal.” R. 686. The trial court did not explain how it arrived at the conclusion that the multi-generational living arrangement was “not ideal.”

### **Moral character**

The trial court noted that a “large part of the trial focused upon [Father’s] moral character.” T. 673.

During the trial, evidence was presented of a criminal episode from 2008. He had attempted to extort money from a person by threatening to publicize that the person was gay. R. 670. The trial court found it troubling that Father took his then two-year-old son with him to attempt to collect the money. R. 670. The Father ended up serving time in a Maryland jail before moving to Utah and marrying Mother in 2009. R. 670. Despite being troubled by this criminal episode, the trial court noted that the conviction had since been expunged and recognized that it had occurred over seven years before the bench trial. R. 673.

In addition to this, Mother made the shocking allegation in her sworn *testimony that Father was a prostitute*. R. 674. *Initially, Mother only testified that she had saved some allegedly compromising e-mails from Father on a USB drive, but that Father had somehow found it and erased the evidence*. R. 1056. Her attorney then said, “You told me earlier you don’t want to go into too much detail. Is that still the case? Okay. We’ll just leave it at that then.” R. 1056.

The trial court, however, was not comfortable leaving the vague allegations pending. R. 1057. The judge said, “I’ve got to make a decision in this case about what’s in these kids’ best interest. So if there’s some elephant in the room here, I’d like to know about it.” R. 1057. Mother then went on to allege that Father was “offering sexual services” on Craigslist. R. 1057. She claimed that there were “hundreds, thousands” of e-mails for prostitution going back years. R. 1058. She also claimed that he had large quantities of cash from the alleged prostitution. R. 1058. Because of the seriousness of these previously undisclosed allegations of

prostitution, a day was added to the bench trial so that it could be fully addressed.  
R. 669.

On May 14, 2015, Mother had the opportunity to present all the evidence she had that her allegations made under oath were, in fact, true. During her testimony on the extra day of trial, Mother testified about details that she claimed to remember from the e-mails and things she claimed Father had said when she allegedly confronted him. *See* R. 1116–1133. However, she presented no evidence that any of her allegations were true.

To explain why she could not produce e-mail evidence from the couple's desktop computer, she explained that she had deleted the e-mails because she "felt bad for him." T. 1134. She also said that she found prostitution e-mails on Father's cell phone but that she did not make copies of those e-mails because she did not think it was necessary. R. 1137. She did, however, testify that she tried to save a USB drive that she claimed she had found to contain compromising pictures of Father. R. 1139–40. However, she later claimed that she deleted those as well. R. 1146. Or, as she alleged earlier, Father may have found the USB and deleted the evidence before the divorce. R. 1056. At one point, Father's attorney asked, "So we have no way of knowing whether the e-mails actually existed or not, other than your testimony?" R. 1146. Mother replied, "Right." T. 1146.

In regard to the allegations of prostitution, the trial court found that Mother's testimony "lacked sufficient detail and her reasons for destroying [Father's] email was tenuous." R. 674. Inexplicably, however, the trial court also

found that Mother's testimony was credible and that Mother "was telling the truth about finding various materials on the computers and USB drives at home." R. 674. The trial court found that "although there was nothing solidly linking [Father] to criminal behavior, the Court did find [Mother] to be a credible witness. Thus, [Father's] categorical denials of the alleged conduct causes the Court to question his veracity and honesty." R. 683.

#### **Decision on school attendance**

The trial court heard testimony and saw evidence that the children were thriving academically and socially at their current elementary school. R. 672; *see Petitioner's Exhibit 4. Despite this evidence, the trial court considered only test scores compared to diversity in determining which school the children should attend. First it found that Mother's school had better test scores and was therefore "the better option for the Minor Children."* R. 689. It then addressed Father's contention that his school had better diversity. It found that while Father "argued that the ethnic diversity of [Father's school] should be considered, the significant disparity between the schools' academic rankings outweighs any benefits of an ethnically diverse culture." R. 689.

In a post-judgment motion, Father asked the trial court to also consider the children's social and emotional well-being in deciding which school the children should attend. R. 875. In response, the trial court simply restated its position that test scores were better than ethnic diversity, R. 874, and opined that there was no



proof that the children would face hardships by changing elementary schools, R. 875.

### **Fiancé's testimony**

In this case, rule 615 of the Utah Rules of Evidence had been invoked and all witnesses except the fiancé had been excluded. R. 1036. In response to the trial court's inquiry, Mother's attorney said he would call the fiancé to testify. R. 1035. Father's attorney objected, saying, "He's been in the courtroom the entire time, Your Honor. . . . This isn't a surprise witness. It was known. So if he was intending [to testify], I think he should have been in the hall." R. 1036. The trial court replied,

Well, I think so too. But, you know, from where I'm sitting . . . I think I need to hear from him. I'm a little concerned that he was here during—I didn't realize that. But . . . the concern that I have is that I want to hear from him, and that probably outweighs any concerns that I have . . . for evidence.

R. 1036.

The trial court stated that the fiancé probably would not be able to add much, but it still wanted to hear from him. R. 1036. Father's attorney restated his objection and then requested that if the trial court allowed the fiancé to testify that it limit the scope of the testimony. R. 1036. The trial court assured everyone that the fiancé "certainly won't be able to comment on their relationship and the things that he's heard." R. 1037.

The next day, the fiancé testified that he had a "very strong" relationship with the children and that they looked forward to seeing him. R. 1092. He also

stated that his mother was available to care for the children and that he had no concerns about her watching them. R. 1094. As to employment, the fiancé said that he was working for the Salt Lake County Sheriff's Office, but was looking to get a job as a police officer somewhere in the Salt Lake Valley area within a year. R. 1098. Over Father's objection, the fiancé also testified that the children had told him that Father had told the children that they were not supposed to like him and that Father did not like him either. R. 1102. Mother had testified earlier that Father had said mean things about the fiancé and that he did not like him. R. 1048–50.

#### **The trial court's conclusions**

*Both Father and Mother agreed to joint legal and physical custody, and the trial court was asked to decide only who would have ultimate decision-making authority, who would be the primary custodial parent, and which school the children would attend. R. 680. The parties had agreed to a fifty-fifty split of parent-time in the summer. R. 680. To make these decisions, the trial court considered several factors and determined whether each factor favored Father, favored Mother or was neutral. The children's preference was neutral. R. 681. All parties agreed to an arrangement that would keep the siblings together, therefore, that factor was also neutral. R. 680. The relative strength of the children's bond with Father and Mother was neutral. R. 680. The general interest in maintaining the status quo was neutral, but only because the trial court considered Father's living arrangements to be unsustainable. R. 682. Otherwise, this factor would have favored Father.*

On the moral character and emotional stability factor, the trial court considered Father's expunged criminal episode from seven years before and considered the unsupported allegations of prostitution from Mother. R. 683. It found that in "light of all the noted facts and circumstances, and especially the criminal incident . . . , the Court has serious reservations regarding [Father's] ability to make sound decisions in the best interests of the Minor Children. R. 683. As a result, this factor weighed heavily in favor of Mother. R. 683.

The ability to function as a parent factor was neutral. R. 684. The duration and depth of desire for custody factor was neutral. R. 684. The trial court found *that the ability to provide personal rather than surrogate care factor would have* favored Father because he worked nights and had ample time to volunteer at the children's school and spend time with them during the day. R. 684. However, the trial court once again complained that Father was leaving the children "unattended during the evening hours," even though Grandmother was at home with them. R. 684. At the same time, the trial court found that the fiancé would be able to provide surrogate care for the children while Mother was at work. R. 685. It therefore concluded that even though this factor currently favored Father, it would be a neutral factor in the future. R. 685.

The trial court found that the neither parent had a drug or alcohol problem, therefore, this factor was neutral as well. R. 685. Neither parent had relinquished custody in the past, so that was neutral. R. 685. There were no concerns about religious compatibility. R. 686.

On the factor of kinship, the trial court favored Mother's potential step-parent household over Father's multi-generational household. It found that Grandmother had a good relationship with the minor children. R. 686. It then found that the fiancé also had a good relationship with the minor children. R. 686. Inexplicably, the trial court concluded, based on these findings, that this factor favored Mother. R. 686.

Under the financial factor, the trial court once again complained that Father was somehow putting the children at risk by leaving them home at night with the grandmother. R. 686–87. The trial court determined, contrary to the proffered evidence, that Father would not be able to “continue with this arrangement for an indefinite time. While there was no evidence to suggest that he would not be able to continue to live in his mother's basement apartment, his current situation is not ideal.” R. 686. The trial court then considered Mother's income *and* the fiancé's potential income to conclude that the financial factor favored Mother. R. 687.

There was no evidence of abuse or neglect. R. 687. The trial court found that both Mother and Father needed to work better together, but the factor of whether the parents could foster a positive relationship was neutral. R. 687. The factor of communication between the parents was neutral as well. R. 686.

Finally, under a factor that the trial court titled “Other Considerations,” it compared the standardized test scores of Mother's preferred elementary school with the standardized test scores of the children's current school, and determined that this outweighed any benefit from ethnic diversity. R. 689. Based on this alone,

the trial court ordered that the children change elementary schools. R. 689. The trial court also ruled that Mother would have final decision-making authority. R. 690.

On July 6, 2015, Father filed a post-judgment motion asking the trial court to amend its findings to remove all references to the unsupported claim that Father was a prostitute except to indicate that Mother had made baseless allegations of criminal conduct to the detriment of her own credibility. R. 712. Father also asked the trial court to consider the other issues now raised on appeal. R. 712–13. The trial court refused to amend its findings in any way, R. 879, and Father filed a *timely notice of appeal*, R. 921.

## ARGUMENT

### **I. The trial court erred by giving credit to Mother's salacious and entirely unsubstantiated allegation that Father was a prostitute.**

Throughout its decision, the trial court made several references to Mother's unsupported assertion that Father was a prostitute. Because this allegation was salacious, inflammatory, and deeply harming to Father and because there was not a single scintilla of evidence produced to support it, the trial court erred in giving it any credit and, as a result, erred in its credibility determination of the witnesses.

In general, "[f]indings of fact 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 witness." Utah R. Civ. P. 52(a). "It is the province of the trier of fact to assess the credibility of witnesses," and it will not be second-guessed "where there is a reasonable basis to support its findings." *See Reed v. Reed*, 806 P.2d 1182, 1184 (Utah 1991). In general, "a party challenging a factual finding or sufficiency of the evidence to support a verdict will almost certainly fail to carry its burden of persuasion on appeal if it fails to marshal" the evidence. *See State v. Nielsen*, 2014 UT 10, ¶ 42, 326 P.3d 645.

Even granted all the deference that is due to the trial court as the trier of fact, the findings on the prostitution allegations were clearly erroneous. The trial

court made a credibility determination based on the allegation, but that determination also lacks a reasonable basis in fact. The following is a marshaling of all the evidence on the record regarding Mother's claim that Father was a prostitute:

1. Mother first raised only vague allegations of misconduct involving e-mails, and her attorney seemed to discourage her from the topic. R. 1056. Her attorney said, "You told me earlier you don't want to go into too much detail. Is that still the case? Okay. We'll just leave it at that then." R. 1056.
2. Mother, however, went on to allege that Father was "offering sexual services" on Craigslist. R. 1057. She claimed that there were "hundreds, thousands" of e-mails for prostitution going back years. R. 1058. She also claimed that he had large quantities of cash from the alleged prostitution. R. 1058.
3. Mother later testified in a day of trial scheduled specifically for the prostitution charges that she now remembered details from the e-mails and things she claimed Father had said when she allegedly confronted him. *See* R. 1116–1133. Beyond her testimony, however, she presented no evidence.
4. To explain why she could not produce e-mail evidence from the couple's desktop computer, she explained that she had deleted the e-mails because she "felt bad for him." R. 1134.

5. She also said that she found prostitution e-mails on Father's cell phone but that she did not make copies of those e-mails because she did not think it was necessary. R. 1137. She did, however, testify that she tried to save a USB drive that she claimed she had found to contain compromising pictures of Father. R. 1139–40. However, she later claimed that she deleted those as well. R. 1146. Or, as she alleged earlier, Father may have found the USB and deleted the evidence before the divorce. R. 1056.
6. At one point, Father's attorney asked, "So we have no way of knowing whether the e-mails actually existed or not, other than your testimony?" R. 1146. Mother replied, "Right." R. 1146.
7. In contrast, Father's testimony directly refuted all the details of Mother's unsupported allegations. R. 1188–1204.
8. Father provided a screenshot of all of his Craigslist postings from his e-mail address. R. 1198. Besides postings regarding a condo and a car seat, there were no e-mails involving Craigslist. R. 1199.

Based on all of this, the trial court determined that Mother's "testimony lacked sufficient detail and her reasons for destroying [Father's] email was tenuous." R. 674. Inexplicably, the trial court nevertheless found Mother's allegations to be credible and her account to be true. *Id.* The trial court determined that the years of prostitution had not endangered the children, but it also found that the prostitution reflected poorly on Father's moral character. This obviously



inconsistent result seems to indicate that the trial court was aware of the lack of basis for this determination. If Father truly was a prostitute as Mother claimed, committing countless sex acts for money over the course of several years, then there is no way to conclude that this kind of behavior would not endanger the children in any way. If Mother truly believed that Father was a practicing prostitute for years, then she should have taken steps to protect her children from his blatantly criminal and morally reprehensible behavior. It seems the trial court is attempting to find Mother's claims credible while not finding that she allowed her children to be endangered by the alleged criminal activity. It therefore ruled that

although there was nothing solidly linking [Father] to defined criminal behavior, the Court did find [Mother] to be a credible witness. Thus, [Father's] categorical denials of the alleged conduct causes the Court to question his veracity and honesty.

R. 683. As a result, the trial court seems to find that Father *was* a prostitute when it would reflect negatively on his character, but that Father *was not* a prostitute when it would reflect negatively on Mother's lack of effort to protect her children or lack of honesty on the witness stand. As Father argued in his motion to amend the judgment, Mother's testimony cannot be untrue and credible at the same time. R. 767. "[E]ither [Father] is a prostitute and is engaging in immoral and illegal activities, or [Mother's] testimony was not credible." *Id.* The trial court even admitted that "there is insufficient evidence to show that [Father's] actions were illegal or otherwise placed the Minor Children in harm's way." R. 674. Still, it

believed the allegations to be true and relied upon them to make a determination of Father's moral character. R. 682–83.

There was absolutely no evidence presented, beyond Mother's self-serving assertions, that Father had ever prostituted himself in *any* way. The trial court recognized that her story lacked detail and that her reasons for destroying the only evidence were tenuous. It was clearly erroneous, therefore, for the trial court to have given any weight to the allegations. To add insult to injury, the trial court actually discounted Father's credibility for vehemently denying the allegations.

There is an apt Latin proverb on this subject: *Quod gratis asseritur, gratis negatur*—What is asserted without evidence may be denied without evidence.

Mother made a salacious and wholly unsupported claim against Father. The only possible response to such a charge is to deny it, and to deny it categorically. As a result, there is no evidence to support the trial court's findings that Mother's testimony was true and that she was a credible witness.

**A. The prostitution allegations harmed Father's substantial rights in the proceeding.**

The false allegations of prostitution were highly prejudicial in this proceeding even though neither Father nor Mother have an unspotted record on moral issues. If an error "affects the substantial rights of the parties," a court must not disregard it. *See* Utah R. Civ. P. 61.

An error is harmful when “absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant.” *See State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993).

Despite the fact that both Mother and Father have had moral failings in the past, the inflammatory false allegation of prostitution was still prejudicial to Father. It is true that Father had a lapse of judgment seven years before the trial that resulted in a criminal conviction. R. 670, 673. But it is also true that Mother had lapses in moral judgment as well, although none that involved a crime. The trial court found that Mother had “engaged in ‘phone sex’ and sent nude photographs of herself to someone she met online after the parties were separated, but while the Minor Children were living with her.” R. 674.

So while neither party had a spotless moral record, only Father was accused of being a prostitute. This charge is so salacious and inflammatory that it is practically per se prejudicial. How can a trial court conclude that a parent has been a prostitute for years while living in the familial home and then consider that a harmless detail? The outcome would have been better for Father if the trial court had not believed the allegations that Father was a prostitute. Even considering the past criminal episode, it is seemingly untenable to claim that this would not have harmed Father in any way. Instead, it is likely that Father would have had a better outcome absent the unsupported allegations of prostitution. It is also important to note that if the trial court had not believed Mother’s unsupported allegations, this

would have hurt her credibility. Thus, it was even more likely that the trial court would have found a more favorable result for Father.

Considering the mutual history, the inflammatory and salacious nature of the allegation, and the subsequent credibility determination, it is clear that the trial court's clearly erroneous findings prejudiced Father in this case.

**II. The Court's findings are insufficient to support its conclusion that Father endangered the children by leaving them alone a night.**

The trial court found that Father was putting the safety of his children at risk by leaving them alone each night while he went to work, but there is no reasonable basis in evidence to support this conclusion.

In general, "[f]indings of fact 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 witness." Utah R. Civ. P. 52(a). "It is the province of the trier of fact to assess the credibility of witnesses," and it will not be second-guessed "where there is a reasonable basis to support its findings." *See Reed v. Reed*, 806 P.2d 1182, 1184 (Utah 1991). In general, "a party challenging a factual finding or sufficiency of the evidence to support a verdict will almost certainly fail to carry its burden of persuasion on appeal if it fails to marshal" the evidence. *See State v. Nielsen*, 2014 UT 10, ¶ 42, 326 P.3d 645.

The following is a marshaling of all the evidence regarding this issue:

1. Father "lives in the basement of his mother's house." R. 672.
2. The basement apartment is "a separate . . . apartment with two bedrooms." R. 672.
3. "The Minor Children share a bedroom." R. 672.
4. "The basement apartment has its own entrance." R. 672.
5. Father worked at night from 9 p.m. to 2 a.m. R. 672.
6. Both Father and Grandmother "testified that [Grandmother] is upstairs every evening and can hear the children if they need anything." R. 672.
7. The separate entrance to the basement apartment is locked when Father is working at nights and the children have never left the apartment without an adult being aware. R. 985.

Based only on this evidence, the trial court concluded that Father was putting the children at risk each night by leaving them unattended while he worked. R. 672, 684, 686–87. But the uncontroverted testimony is that the children were at home with their Grandmother, who was just up the stairs and could hear them if they needed anything during the night. The trial court is apparently ruling that anyone caring for minor children must sleep on the same level of the house as the children. Otherwise they are leaving their children unattended at night. Such a conclusion is unwarranted and is not supported by any basis in the evidence.

This erroneous conclusion greatly prejudiced Father in the proceeding. The trial court relied on this finding to draw negative inferences against Father in the factors of surrogate care, R. 684, and financial conditions, R. 686–87.

Because the trial court clearly erred in determining that Father put his children at risk at night by leaving them unattended when they were undisputedly at home with Grandmother, and because this error harmed Father, this Court should reverse and remand.

**III. The trial court favored a step-parent household over a multigenerational household without a sufficient basis in the evidence.**

Throughout its decision, the trial court expressed a preference for Mother's potential step-parent household structure over the admittedly stable and functioning multigenerational household structure of Father's family without any reasonable basis in evidence. As noted earlier, a trial court must have a reasonable basis to support its findings. *See Reed v. Reed*, 806 P.2d 1182, 1184 (Utah 1991). In *Marchant v. Marchant*, 743 P.2d 199 (Utah App. 1987), this Court made it clear that it will not condone a finding of fact that penalizes a woman for not adhering to the "traditional role." *Id.* at 203–04. While the rule in *Marchant* was applied to a custody determination that penalized a woman for working outside of the home, the same principle could apply to a man who is the primary caregiver or to a man who lives in a multigenerational household. In any event, a parent's perceived failure to adhere to a judge's traditional view of family life should never be a

factor in a determination of custody. The U.S. Census Bureau defines multigenerational households to include “a household, a child of the householder, and a grandchild of the householder.” Daphne A. Lofquist, *Multigenerational Households: 2009-2011*), [www.Census.gov](http://www.Census.gov) (October 2012), available at <http://www.census.gov/prod/2012pubs/acsbr11-03.pdf>. According to the Pew Research Center, “[a] record 57 million Americans, or 18.1% of the population of the United States, lived in multi-generational family households in 2012, double the number who lived in such households in 1980.” Richard Fry and Jeffrey S. Passel, *In Post-Recession Era, Young Adults Drive Continuing Rise in Multi-Generational Living*, Pew Research Center (July 17, 2014), available at <http://www.pewsocialtrends.org/2014/07/17/in-postrecession-era-young-adults-drive-continuing-rise-in-multi-generational-living/#fn-19695-1>. So, while multigenerational households are increasingly popular because of the financial stability and benefits to family life, they are still a minority family structure in the United States.

In this case, there was no evidence presented and no findings made to explain why a more traditional step-parent household should be treated any differently than a slightly less traditional multigenerational household. The only relevant evidence was that Grandmother testified that she only charges Father \$200 a month for the basement apartment. R. 984. She also said that while Father might seek full-time employment in a year or so, she did not anticipate renting out the apartment to anyone else. R. 984.

The trial court, however, found that Father's multigenerational household was "not ideal." R. 686. While the trial court concluded that Mother's fiancé "will likely be able to be a surrogate caretaker of the Minor Children," *see* R. 685, the trial court at the same time found that Father was "exposing the Minor Children to risk each night" by leaving them in the house with Grandmother, *see* R. 686. There is no evidentiary basis to explain why the fiancé would be an acceptable surrogate care provider while the children's biological grandmother would not.

Under the analysis of financial conditions, the trial court considered the fact that the fiancé's income will be added to Mother's and concluded that Mother's "financial situation is better than [Father's]." R. 687. There is no explanation, however, about why the trial court did not also consider Grandmother's income in Father's favor. In fact, the trial court treated the financial benefits of a multigenerational household as a liability for Father, citing his reduced monthly rent as evidence of instability and unsustainability. *See* R. 686.

Most tellingly, the trial court admitted that there was no basis in the evidence for its conclusions. It wrote, "[W]hile there is *no evidence to suggest* that [Father] would not be able to continue to live in his mother's basement apartment, his current situation is not ideal." R. 686 (emphasis added). Based on this, the trial court concluded that the financial situation factor favored Mother. R. 686–87. It also relied on this assumption to support its conclusion that kinship factor favored Mother, albeit slightly. R. 686. Finally, the trial court relied on this assumption to



determine that the factor of the ability to provide personal rather than surrogate care *currently* favored Father, but that his situation was unsustainable and this factor would ultimately be neutral. R. 685. As a result, Father was prejudiced by the error to assume that multigenerational households are less stable or somehow less desirable than the more traditional step-parent household. Therefore, this Court should reverse and remand.

**IV. The trial court erred in considering only standardized test scores compared to diversity in making a determination about which school the children should attend.**

In determining which school the children should attend, the trial court only considered standardized test scores and diversity, but refused to consider the children's psychological and emotional needs. When considering a change to a joint custody arrangement, a trial court should consider the impact on the best interests of the children as articulated in Utah Code section 30-3-10.2.

This includes the "emotional needs . . . of the child" and "the preference of the child." *See* Utah Code Ann. § 30-3-10.2(2)(a), (f) (LexisNexis 2013). The trial court, however, did not consider the children's preference, their emotional needs, or the general interest of maintaining the status quo when it ordered the children to attend a new elementary school. *See* R. 680–81. Instead the trial court analyzed the school question under "other considerations" as an addendum to the factors in the best-interests analysis. *See* R. 688–89. One of the most traumatic things that can

happen to a young child is to change schools. They lose all their friends and academic support system. It is massive deviation from the status quo. In this case, Father has actually changed jobs to work at the children's elementary school. *See* R. 717. Furthermore, Father presented evidence that showed the children were thriving at their current school and exceeding the standardized-test requirements. The trial court did not consider the fact that the children were in a school where they had friends and were thriving and where one of their parents would see them every day. Instead, the children were transferred to a new school based solely on the school's standardized test scores and the convenience of the parent-time schedule. *See* R. 689. Because this change in school is not in the best interests of the children and because the trial court failed to analyze the impact of such a change within that framework, this Court should reverse and remand.

**V. Mother's fiancé should not have been allowed to testify.**

*Despite Father's objections, Mother's fiancé was allowed to testify even though he was present in the courtroom during the trial and all other witnesses were excluded under rule 615 of the Utah Rules of Evidence. "At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." Utah R. Evid. 615.*

A judge may exempt a party from the operation of rule 615 if the witness is a "person whose presence party shows to be essential to presenting the party's claim or defense." *Id.* R. 615(c). If a party challenges a judge's decision to exempt

a witness from being excluded, the party must show that it was prejudiced by the decision. *State v. Billsie*, 2006 UT 13, ¶ 6, 131 P.3d 239.

In this case, rule 615 had been invoked and all witnesses should have been excluded. Mother's attorney said he could call the fiancé to testify, if it would help the trial court. R. 1035. Father's attorney objected, saying, "He's been in the courtroom the entire time, Your Honor. . . . This isn't a surprise witness. It was known. So if he was intending [to testify], I think he should have been in the hall." R. 1036. The trial court replied,

Well, I think so too. But, you know, from where I'm sitting . . . I think I need to hear from him. I'm a little concerned that he was here during—I didn't realize that. But . . . the concern that I have is that I want to hear from him, and that probably outweighs any concerns that I have . . . for evidence.

R. 1036.

At no point in time did Mother or the trial court attempt to argue that an exception to rule 615 applied to the fiancé. The trial court stated that the fiancé probably would not be able to add much, but it still wanted to hear from him. R. 1036. Father's attorney restated his objection and then requested that if the trial court allowed the fiancé to testify that it limit the scope of the testimony. R. 1036. The trial court assured everyone that the fiancé "certainly won't be able to comment on their relationship and the things that he's heard." R. 1037.

That is exactly what the fiancé testified about during the second day of the trial. The fiancé testified that he had a "very strong" relationship with the children and that they looked forward to seeing him. R. 1092. He also stated that his mother

was available to care for the children and that he had no concerns about her watching them. R. 1094. As to employment, the fiancé said that he was working for the Salt Lake County Sheriff's Office, but was looking to get a job as a police officer somewhere in the Salt Lake Valley area within a year. R. 1098. In his job at the time, he earned around \$35,000. R. 1098. Over Father's objection, the fiancé also testified that the children had told him that Father had told the children that they were not supposed to like him and that Father did not like him either. R. 1102. This was particularly egregious because Mother had testified that Father had said mean things about the fiancé and that he did not like him. R. 1048–50. This is precisely the kind of harm that rule 615 of the Utah Rules of Evidence is intended to avoid.

This error was prejudicial because the trial court found the fiancé to be a credible witness that supported Mother's position. *See* R. 679. Of the fiancé, the Court wrote, "He testified of [Mother's] positive parenting abilities and his good relationship with the Minor Children. Mr. Barnes appeared to be a credible witness and a positive role model." *Id.* In the best-interests analysis, the trial court relied on the fiancé's testimony to conclude that he "will likely be able to be a surrogate caretaker of the Minor Children." R. 685. Under the kinship section of the best-interests analysis, the trial court wrote: "The Court, having observed [the fiancé] testify, believes that he testified credibly, cares for the Minor Children, and will likely act as a capable and caring step-parent." R. 686. The Court concluded that this factor of the analysis favored Mother. *Id.* The trial court also considered the

fiancé's testimony about his income in determining that the financial factor of the best-interests analysis favored Mother. R. 687. Finally, the fiancé was able to bolster Mother's contention that Father would not foster a good relationship with the fiancé. The trial court agreed with Mother and found that Father "may be unable to support a positive relationship" with the fiancé. R. 688.

The fiancé, however, had an unfair advantage. He was able to observe how everyone else testified. He could see which factors the trial court deemed important and adjust his testimony accordingly. As a result, he was able to significantly bolster Mother's case in a way that prejudiced Father. For this error, the Court should reverse and remand.

#### **VI. Cumulative error has prejudiced Father.**

Each one of the errors described above was harmful to Father in shifting the balance of the factors in favor of Mother. However, even if all of the above errors are deemed individually harmless, the cumulative effect of the errors has prejudiced Father. When the cumulative effect of several errors undermines confidence in a decision, the Court should vacate the trial court's decision. *See State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993). In this case, the cumulative effect of the several errors described above requires this Court to reverse and remand.

**CONCLUSION**

For the foregoing reasons, Father respectfully requests this Court to reverse and remand.

RESPECTFULLY SUBMITTED ON \_\_\_\_\_

\_\_\_\_\_  
Marshall Thompson  
Attorney for Appellant

**ADDENDUM**

No addendum is needed.

**CERTIFICATE OF COMPLIANCE**

I, Marshall Thompson, certify that the Appellant's Brief complies fully with the requirements of rule 24(f) of the Utah Rules of Appellate Procedure. It contains 8,620 words and 819 lines of text.

\_\_\_\_\_  
Marshall Thompson  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I, Marshall Thompson, certify that on March 15, 2016, I served two copies of the attached Appellant's Brief on the counsel for appellee by first class mail to the following addresses:

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