2016

Kirsteen Blocker (Morkel), Petitioner and Appellee, vs. Michael Blocker, Respondent and Appellant.

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

Kirsteen Blocker (Morkel), Petitioner and Appellee,	:	**BRIEF OF APPELLEE**
vs.	:	
Michael Blocker, Respondent and Appellant.	:	Appellate Case No. 20150720

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

JURISDICTION OF THE COURT

This court has jurisdiction of this matter pursuant to Utah Code Ann. § 78A-4-103(2)(h)(2015).

DETERMINATIVE CONSTITUTIONAL OR STATUTORY PROVISIONS

Utah Code Ann. § 30-3-35 (2010), Utah Code Ann. § 78A-4-103(2)(h)(2015), Utah Code Ann. § 30-3-10.9(9), Utah Rules of Civil Procedure 7(j)(2), Utah Rules of Civil Procedure 7(f)(2), Utah Rules of Appellate Procedure Rule 24, (a)(5)(A), Utah Rules of Appellate Procedure Rule 24, (a)(9), Utah Rules of Appellate Procedure 24, (g)(5)(B).

STATEMENT OF THE CASE

The parties in this action were married on August 15, 1997 and divorced on the 8th day of July, 2004. A son, M.P.B., was born as issue of the marriage and he was born on the 20th day of July, 2002.

When the parties divorced, Kirsteen Morkel, Petitioner, M.P.B.'s mother, was awarded custody and statutory parent time was awarded to the father, Respondent, Michael Phillip Blocker.

Following the divorce, multiple filings and pleadings were filed by both parties with a range of allegations primarily related to the appropriate care and parent time of the minor child. Ultimately, Blocker filed a Modification for a change of custody. After a three-day trial in which Morkel, because of limited resources, represented herself, the court transferred custody of the minor child from the mother Morkel to the father Blocker. Although the trial court specifically recognized that Morkel did not have the financial ability to continue paying for supervised parent time, the court order nevertheless immediately burdened Morkel with a condition of unsupervised parent time that required verification of her participation in individual therapy, required joint

therapy with the minor child and the child's therapist, and required her retention of a Special Master. The cost of the Special Master was prohibitive to Morkel, and, at various times, Morkel was deprived of parent time at the direction of the Special Master and, at one point, parent time was terminated altogether, and then subsequently re-instated. On one occasion, the Special Master informed Morkel that her parent time could be increased as soon as she was brought current on her child support obligations. The Special Master facially exceeded the authority of the Order appointing the Special Master, wherein it states that the Special Master did not have the authority to make any orders which substantially decreased or increased a parents time more than eight nights per month. The termination of parent time, albeit temporarily, violated this provision of the Special Master order. Further, conditioning increased parent time upon Morkel bringing child support current obviates Utah Code Ann. § 30-3-10.9(9), which specifically prohibits a denial of parent time because the non-custodial parent is not current on child support.

In addition to the costs above, Morkel ended up having to pay additional costs to Academy for Child Advocacy and Family Support (hereafter "ACAFS"), an agency that was to initially oversee the transition of pick up and delivery of the minor child and then to oversee supervised parent time. This cost was to be divided equally between Morkel and Blocker but Blocker never paid his one-half cost of the exchanges.

As part of the order changing custody, there was a recommendation from the Court that Kelly Peterson not be appointed as Guardian ad Litem. The Guardian ad Litem's office disregarded the recommendation of the court and Kelly Peterson was appointed. Morkel opposed Kelly

Peterson being appointed because of her belief that Mr. Peterson was clearly biased in all of his recommendations, including initiating actions against Morkel that exceeded his authority of representing the best interest of the minor child.

Because of the claimed excesses of the Special Master, the Guardian ad Litem, and the judge in allowing a disregard of his recommendation as to Kelly Peterson, Morkel filed a federal lawsuit against these parties and the opposing counsel. Although the lawsuit ultimately was dismissed by the Tenth Circuit Court of Appeals, it was not dismissed because the claimed actions were non-meritorious, as claimed by Blocker in his Statement of Facts. They were dismissed because the appropriate remedy was a state court action, not an action in federal court, since state court remedies had not been exhausted. The federal case was dismissed without prejudice.

Because of their being defendants in the federal lawsuit, the trial judge recused himself and Peterson, the Special Master and opposing counsel withdrew. The new trial judge, after a slew of motions filed by both parties, ordered a home study, and selected one of three psychologists offered by Morkel because no psychologists were offered, initially, by Blocker. Only after the psychologist was selected by the court did Blocker offer his own.

A home study was completed and submitted to the court. Based on the home study, the court ended supervised parent time. Multiple objections were filed by Blocker, who claimed lack of notice and lack of opportunity to cross examine the preparer of the home study. The court allowed Blocker, at every hearing, to make his arguments, until the court made its decision. Blocker was offered the opportunity to cross examine the preparer of the home study, but declined.

Blocker was given ample opportunity to prepare and argue his case, produce witnesses,

cross examine the court appointed home study evaluator but Blocker declined, claiming, among other things, a denial of due process, the court acted in violation of case precedent, and general unfairness by the court.

STATEMENT OF FACTS

Blocker's Statement of facts is disputed. Further, they are not supported by citations to the record and should be stricken. Morkel moves, in accordance with Ut. R. Appellate Procedure, Rule 24(k) to strike his pleadings because of the failure to make any record citations (Rule 24 (a)(9)), the failure to cite as to where the issue raised by Blocker was preserved in the record (Rule 24(a)(5)(A)), and for the numerous scandalous, irrelevant and immaterial matters threaded throughout his entire brief. Attorney's fees are also requested. Blocker's Statement of Facts are as follows.

Morkel's Statement of Facts are as follows.

Kirsteen Blocker Morkel (hereafter "Morkel"), Petitioner, and Michael P. Blocker (hereafter "Blocker") Respondent, were married on August 15, 1997(Record 7; Record will hereinafter be referred to as "R") and divorced on or about the 8th day of July, 2004.(R. 312). Their marriage resulted in the birth of one child, M.P.B., who was born on the 20th day of July, 2002 (R.7), and is currently 13 years old. Custody was joint, with primary care and residence given to Morkel and statutory parent time awarded to Blocker (R. 312, para. 12, 13). Virtually all of the disputes that have come before the court in the last 13 years relate to the minor child.

A trial for a change of custody, inter alia, was held before the Honorable Lynn W. Davis on the 24th, 25th and 27th day of August, 2009.(R.4389-4397). Close in time to the trial, Plaintiff's

[Morkel's] attorney withdrew from the case, having charged Plaintiff more than $100,000, leaving Plaintiff in the unenviable position of proceeding pro se. (R. 5649, paragraph 18). She soon after retained Grant W. P. ("Bill") Morrison who had a conflict with the trial dates and sought a continuance from Judge Davis. Mr. Morrison argued for a continuance from Judge Davis so that Morkel would not have to appear pro se. (R. 5649). Judge Davis denied Morrison's request for a continuance and Morkel was compelled to go to trial unrepresented (R. 4387, 4389-4397). The trial went forward as scheduled, and Morkel represented herself in the three day trial (R. 4389-4397).

At the conclusion of the trial, the Respondent was ordered to prepare the findings and order of the court. An objection by Morkel was filed citing specific errors by the Respondent in preparing the findings and order (R. 4757-4798). Blocker filed a Reply (R. 4809-4843). The court heard oral argument on December 14, 2009, took the matter under advisement and indicated that the court itself would issue the final order. (R. 4903).

On February 22, 2010 Judge Davis issued Findings of Fact, Order and Judgment (R. 4978). Sole custody was given to Blocker and the court "shall permit Kirsteen Morkel unsupervised parent-time consistent with Utah Code Ann. § 30-3-35, upon verification of her participation in individual therapy, joint therapy with Mackay and Dr. Thorn, and her retention of a Special Master..." (R. 4978, para. 12).

The Court pointed out in its Findings that "Kirsteen Morkel does not have the financial ability to continue paying for supervised parent-time" (R. 4978; paragraph 19 Findings), "...at this time an exclusively supervised recommendation is not practical due to finances and would therefore,

interfere with her relationship with her son...", "the court finds that, at this time, Kirsteen Morkel does not have the financial ability to pay attorney's fees" (R. 4973, para. 31)and, finally, "Because of the parties' inability to pay, the court awards no fees to the Office of the Guardian ad Litem" (R. 4969, para. 57).

Morkel did not have the financial ability to pay for individual therapy, joint therapy with minor son Mackay and Dr. Thorn, nor to pay for the continuing services of the Special Master, but it was ordered nevertheless (R. 4978). She ultimately paid over $10,000 in costs for supervision (R. 5753, para. 17) as well as incur over $100,000 in legal fees immediately prior to trial ®. 5649, para. 18, which were to be paid through a benefactor). Blocker compounded the problem by not paying his one-half of the cost of the exchanges at ACAFS (R. 5753, para. 16).

Although the court had concerns about Morkel's ability to pay, the court subsequently changed the order that Morkel, after paying the entire initial retainer of the Special Master, that "thereafter each party would pay 50%". Upon review of the transcription of the court's hearing setting forth the order of February 22, 2010, the court changed the order to Morkel having to pay the entirety of the fees of the Special Master (R.5391, para. 12). Also, as part of the court order, the Court recommended that Kelly Peterson not be appointed as Guardian ad Litem (R.5388, para. 14). Kelly Peterson objected to the recommendation of the court and assumed the position of Guardian ad Litem. (R. 5385). The court allowed Mr. Peterson to be the Guardian ad Litem, even against its own recommendation.

The Special Master Order of October 1, 2009 set forth the authority and limitation of the Special Master. In particular, paragraph 1(d) stated, "Sandra Dredge shall not have authority to

make any orders which substantially (ordinarily defined as increasing or decreasing a parent's time more than eight nights per month) alter the parties' time-sharing arrangements, alter an award of physical custody, alter an award of legal custody, or substantially interfere with a party's contact with his/her children" (Special Master Order, R. 4699-4708).

There were stretches of time when Morkel was simply denied parent time by the Special Master in direct contravention of the order of the court that specifically denied the Special Master that authority. These "orders" by the Special Master were financially driven or driven by a Special Master Order that, on its face, exceeded the authority of the Special Master. [1]

Ultimately, the Special Master resigned and was released (R. 5687), the Guardian ad Litem withdrew and was released (R. 5682)and Judge Davis recused himself (R. 5662). [2]

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[1] Although paragraph 1 (d) of the Special Master Order of October 1, 2009, provided, as reflected above, that " Sandra N. Dredge shall not have authority to make any orders which substantially (ordinarily defined as increasing or decreasing a parent's time more than eight nights per month) alter the parties' time-sharing arrangements, alter an award of physical custody, alter an award of legal custody, or substantially interfere with a party's contact with his/her children", this occurred on a number of occasions. For example, the Order of the Special Master dated 2-9-10, (R. 5769) stated "Due to the escalating and serious events that have taken place during parent time exchanges, Kirsteen's parent time with Mackay is temporarily suspended until further notice. This means that Kirsteen is not to have any contact with Mackay until further Order of the Special Master and/or Order of the Court". Also, "Again, until parent time is reinstated by the Special Master or the Court, Kirsteen is not to have any contact with Mackay outside of therapy. Therefore, no phone visitation or contact with Mackay at his school, church, etc., is to take place until further ordered". The Special Master's Order, itself, clearly limited the authority of the Special Master so that the Special Master could not alter a parent's time more than eight nights per month. This order ended parent time, albeit "temporarily". Ms. Dredge routinely violated this order, including suspending, at one point, parent time altogether (R. 5769) and in a further draconian action eliminated any contact by phone or school or church.

[2] The withdrawals of the Special Master, the Guardian ad Litem, opposing counsel and the judge were predicated primarily on the filing of a federal lawsuit against them, which was

After a multitude of pleadings, motions, argument and appearances of the parties, the Court, in a hearing on April 16, 2014, reinstated visitation consistent with the statutory guidelines established at Utah Code Ann. § 30-3-35, on a temporary basis for ninety days, on the condition the visitation would be conducted through a mutually agreed upon party. Justin W. Day was selected by the parties. (R. 5949, para. 1). There was also a home study ordered (R. 5949, para. 3). Additionally, it was ordered that the Petitioner's previously filed Motion to Show Cause (actually, Motion to Clarify or Modify Custody Order, R. 5706), seeking a restoration of statutory parent time, would be deemed a Petition to Modify, and the Court waived any filing fees . (R. 5949).

After another flurry of motions were filed by Blocker, including: a Rule 60(a) Motion for Relief from Order, ®. 5973); a Revised Order, ®. 5970); and a Motion Objecting to Petitioner's List of Proposed Evaluators. ®. 5976). The Court, on May 12, 2014, executed the Revised Order submitted by Blocker. (R.5995). With minor expansions (supervised visitation would also include

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ultimately dismissed (without prejudice) because (1) the application of the *Rooker-Feldman* doctrine barred the claims in federal court and, (2) the application of the *Younger* doctrine mandated dismissal. *Rooker-Feldman* prohibits a losing party in state court from seeking what in substance would be a review of the state judgment in federal court based on the losing party's claim that the state judgment itself violates the losing party's federal rights. The court noted that this doctrine has a narrow application and applies only when a state court judgment is final. The court stated the judgment was not final here because the state-court proceedings were ongoing when Morkel brought suit in federal court. The court held that the district court therefore erred when it dismissed the case under this doctrine. The *Younger* doctrine mandates an abstention from exercising jurisdiction when 3 conditions are met: (1)there are ongoing state proceedings, (2) the state court offers an adequate forum to hear the plaintiff's claims and (3) the state proceedings involve important state interests. The court found all conditions were met and upheld the dismissal of Morkel's claims on this ground. (R. 6090-6086). As to the damages claim, the 10th Circuit Court upheld the district court's dismissal for the damages portion because all of the defendants were covered under immunity. (R.6085).

Justin Day's wife if Justin was out for short periods of time, etc.) ®. 5993-5994) the order maintained its basic premise. A status conference was set for August 1, 2014.

In the Minute Entry of June 30, 2014, because the parties were unable to agree on a home study evaluator, the Court selected Vickie D. Burgess, Ph.D. Dr. Burgess submitted a home study evaluation to the court on July 21, 2014. (R. 6010). The report recommended unsupervised visitation with mother Kirsteen Blocker. (R. 6001).

On August 1, 2014, the matter came before the court on a status conference and based on the report of Dr. Burgess, the court struck supervised parent time. An evidentiary hearing on custody evaluation was set for Oct. 14, 2014. (R. 6011, 6035).

The Court signed the order on the August 1, 2014 hearing on August 22, 2014. The order allowed a modification of the Court's February 22, 2010 order and specifically made a "temporary modification to the conditions of parent time....". (R.6033; also, see Minute Entry Regarding the Order for Hearing of August 1, 2014 and Motion of Counsel to Withdraw; R.6011). The modification was a simple restoration of statutory parent time. In other words, the non-custodial parent Morkel could have parent time with her son every other weekend, from 7:00 p.m. Friday night, through Sunday night at 7:00 p.m. as well as every other holiday and an equal division of the summer time and Christmas and Spring breaks (See Utah Code Ann.§ 30-3-35) and the parent time was to be unsupervised.

Although the court struck supervised visitation with this order, it also instructed the parties to "exchange a complete list of witnesses and exhibits three weeks prior to the next hearing" and set a new hearing for October 14, 2014 (R. 6011).

Blocker filed an Objection to Proposed Order and to the Order of the Court made on August 1, 2014 (R. 6025) and proposed a Revised Order for August 1, 2014 Status Conference (R. 6023). The court reviewed both proposed orders "...and is satisfied that the order proposed by the petitioner more accurately reflects the intent of the court on August 1. The Court will, therefore, electronically sign the proposed order" (R. 6036).

Blocker then filed a two hundred eleven page Respondent's Exhibits (R. 6052-6263) in anticipation of the Oct. 14, 2014 hearing. Morkel filed a one page Exhibit designation which referenced only the report of Dr. Victoria Burgess (R. 6051).

Blocker, again, filed several motions, including a Renewed Motion to Strike Petition to Modify Custody Order (R. 6270), and a Motion to Strike Visitation of Victoria Burgess, Ph.D. and to Appoint Dr. Harold Blakelock or Dr. Matthew Davies or Dr. Jay Jensen as New Evaluator (R. 6276). These were opposed by Morkel (R.6282, 6286) and in a motion entitled Opposition to Respondent's Renewed Motion to Strike Petition to Modify Custody Order, (R. 6282) referenced the current state of the law regarding supervised custody. The motion pointed out that the Utah legislature had made it abundantly clear that "supervision is to only be imposed in rare circumstances and when it was established that 'the child would be subject to physical or emotional harm or child abuse..." and cited Utah Code Ann. § 30-3-34.5(1)(2014) (R. 6281).

Meanwhile, an attorney for Blocker, Janet G. Peterson, entered a Limited Appearance for the purpose of continuing the October 14, 2014 hearing (R. 6278). When the hearing was continued without date, she withdrew (R. 6306).

The Court, on April 13, 2015, set oral argument for June 10, 2015 (R. 6303) on all pending

motions.

On June 10, 2015, the Court heard oral argument. The Court ruled that the order made a year before was to be the final order of the court. (R. 6307, Minute Entry Order). The order submitted by Morkel and signed by the Court stated, "It is hereby ordered that the court's provisional ruling, entered on Aug. 22, 2014, which Order granted the Petitioner's Petition to Modify on a temporary basis providing for the Petitioner's right to visitation consistent with the statutory minimum, SHALL BE MADE PERMANENT. Therefore, the Petition to Modify is GRANTED as follows:

1. Petitioner shall have the right to visitation with her minor son in a manner consistent with the guidelines and statutory minimums as established at Utah Code Ann. § 30-3-35.
2. Each party was to bear their own costs and attorney fees."

The order was signed by the Court on July 6, 2015. Blocker objected to the Petitioner's order but rather than waiting for the previously scheduled evidentiary hearing, where he could examine witnesses, have his own witnesses testify, introduce exhibits and argue against Dr. Burgess's report, he asked that this hearing be continued, which was granted. He then, prior to the hearing, filed this appeal.

ARGUMENT I

BLOCKER ARGUES THAT THE TRIAL COURT ERRED WHEN IT FAILED TO STATE ANY FINDINGS THAT THERE HAD BEEN A MATERIAL CHANGE OF CIRCUMSTANCES TO WARRANT CHANGING SUPERVISED VISITATION TO UNSUPERVISED VISITATION BUT DOES NOT INDICATE WHERE IN THE RECORD HIS ISSUE IS PRESERVED NOR DOES HE MARSHAL THE EVIDENCE OR CITE TO THE RECORD. THUS, THIS COURT SHOULD REFUSE TO CONSIDER THE MERITS OF THE ARGUMENTS AND ACCEPT THE COURT'S RULING AS VALID. IN THE ALTERNATIVE, THE RECORD DOES NOT SUPPORT BLOCKER'S ARGUMENT.

1. Blocker's claim of no findings and no material change of circumstances.

In a blanket statement, Blocker's first issue on appeal is that the trial court failed to make any findings that there had been a material change of circumstances to warrant changing supervised parent time to unsupervised parent time. In the substance of the argument, Blocker simply states that the court must make a specific finding in its order showing there had been a material change in circumstances before it granted a Petition to Modify Custody. Blocker fails to cite where his issue is preserved by the record, nor are there any record citations or any attempt at marshaling evidence.

Ut. R. Appellate Procedure 24, Briefs, (a)(7)requires, among other things, that "All statements of fact and reference to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule." Paragraph (e) states, "References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11 (g)." Further, (a)(9) requires, in pertinent part, that the Appellant must, in the argument section of the brief, first marshal all record evidence that supports the challenged finding.

Blocker cites only to the limited and unpaginated documents attached to his addendum. Blocker utterly fails to conform to the requirement of record citations, or where issues were preserved at the trial court level, or to marshal evidence that supports the Court's ruling. An appealing party has a duty to "marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be "against the

clear weight of the evidence, thus making them clearly erroneous". Lefavi v. Bertoch, 994 P.2d 817, 821 (Utah Ct. App. 2000) (quoting Valcarce v. Fitzgerald, 961 P2 305, 312 (Utah 1998) (quoting In re Estate of Bartell, 776 P.2d 885, 886 (Utah Ct. App 1989).

When a party fails to marshal the evidence in support of the challenged findings, this Court "refuse[s] to consider the merits of challenges to the findings and accept[s] the findings as valid." Lefavi, at 821 (citing Oneida/SLIC v. Oneida Cold Storage and Warehouse, 872 P.2d 1051, 1053 (Utah Ct. App. 1994)(quoting Mountain States Broadcasting Co. V. Neale, 783 P.2d 551, 553 (Utah Ct. App. 1989).)

This Court should refuse to consider the merits of Blocker's challenge and accept the Trial Court's Order and decision as valid.

2. **In the alternative, Blocker's arguments are not well taken**. Contrary to Blocker's representation that no findings were made, they in fact were, encompassed within this order and prior orders issued by the court.

Without regurgitating the Statement of Facts encompassing the prior eleven years, suffice it to say that originally custody of the minor child resided with Morkel, as culled from the divorce decree of July 8, 2004. Custody was changed to Blocker by order of Judge Davis on February 22, 2010, and laid out conditions that were to be satisfied for unsupervised parent time. Supervised visitation was subsequently imposed, with attendant motions and hearings but were lifted on August 1, 2014, following a recommendation by a home evaluator.

The order was reduced to writing on August 22, 2014, and the supervised parent time changed to unsupervised. Although the written order did not fully incorporate specific findings,

the trial judge was on the front line with numerous motions initiated by Morkel's Motion for an Order to Show Cause which the Court sua sponte changed to a Petition to Modify. There followed a blizzard of competing motions and arguments that resulted in a period of supervision of Morkel during her parent time, by a party stipulated to by both Blocker and Morkel.

The Court also required a home study evaluator and set deadlines. Based on the home study evaluation the court recommended that Morkel did not need supervision and the court ordered there would be no further supervision. The Court considered the recommendation of the evaluator as reflected in its Minute Status Conference ruling of August 1, 2014, which stated "Based on the report received by the Court, the Court strikes supervised visitation at this time", and also the order of August 22, 2014, further considered "briefing [by the parties], the argument of counsel and otherwise being fully informed in this matter" (which presumably included that there were no problems during the entire period from August 1, 2014 to the execution of the Order Modifying Custody Order of July 6, 2016, a period of almost a year and the current status of the law disfavoring supervised parent time except in rare circumstances (see R. 6281) and issued its order simply restoring unsupervised statutory minimum visitation. This was a material and substantial change of circumstances since it changed the prior requirement of supervision to no supervision. Although not specifically addressing findings per se, nevertheless these were findings incorporated by the trial court in its actions and followed by the parties. Finally, the best interests of the minor child were implicitly found by the Court, and hinged its "no supervision" order on the recommendation of the home study evaluator.

The Utah Supreme Court has accorded broad discretion to the Court in activities of this

nature. In determining permanent physical custody of a minor child, trial judges are accorded broad discretion. See Tucker v. Tucker, 910 P.2d 1209 (referencing Davis v. Davis, 749 P.2d 647, 648 (Utah 1988); Moody v. Moody, 715 P.2d 507, 510 (Utah 1985). "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". Shioji v. Shioji, 712 P.2d 197, 201 (Utah 1985).

In the case at bar, there was a complete failure by Blocker to marshal any type of evidence as to why the trial court's judgment was so flagrantly unjust as to be an abuse of discretion. There was a claim of a purported failure by the trial court to show a material change of circumstances or make findings yet there clearly was a change of supervised parent time to unsupervised parent time, that prevailed for almost a year without impediment or difficulty. If the protection of the children provided by supervised visitation is no longer necessary, either because the allegations that necessitated the supervision are determined to be without 'credible evidence' or because the noncustodial parent had demonstrated a clear ability to control the propensities which necessitated the supervision, the circuit court should gradually diminish the degree of supervision required with the ultimate goal of providing unsupervised visitation. Carter v. Carter, 470 S.E. 2d 193,200(1996).

As to either alternative, i.e., that Blocker has not complied in the least degree with the requirements of marshaling evidence, illustrating preservation of issues at the trial court level or citing to the record or failed, alternatively, to show abuse of discretion, the lower court order should be affirmed and attorney's fees awarded.

ARGUMENT II

BLOCKER'S ARGUMENT THAT THE TRIAL COURT ERRED WHEN IT HELD THAT

MORKEL'S INABILITY TO COMPLY WITH CONDITIONS FOR HER UNSUPERVISED PARENT TIME CONSTITUTED A MATERIAL CHANGE IN CIRCUMSTANCES UPON WHICH TO BASE A MODIFICATION OF A CUSTODY AWARD FAILS FOR WANT OF RECORD CITATION OR CITATION TO PRESERVATION OF THE EVIDENCE MAKING THIS ISSUE IMPOSSIBLE IN WHICH TO RESPOND AND THE LOWER COURT'S ORDER SHOULD BE AFFIRMED

There is no evidence provided by Blocker that shows the Court held that Morkel's inability to comply with conditions for her unsupervised parent time constituted a material change in circumstances upon which to base a modification of a custody award. It is fundamental to Blocker's argument that the judge held, somewhere in the 54 hearings he claims in his brief, that this holding exists. It would have been a simple matter to cite to the record or provide, even, a copy of the purported order in his addendum. There is no record citation or preservation of the record that indicates that the trial judge ever made this ruling. In fact, the only evidence offered by Blocker, attached in his addendum, is the Order Modifying Custody Order which alludes to the court considering briefing, argument of counsel and otherwise being informed in the matter. This order doesn't say what Blocker says it says. However, it does allude to the opposite, i.e., that the provisional order of the court, entered on Aug. 22, 2014, which provided on a temporary basis the Petitioner's (Morkel) right to visitation consistent with the statutory minimum SHALL BE MADE PERMANENT (capitalization the Courts).

The only conclusion that can be drawn was that the unsupervised parent time was successful and thus, the provisional order became permanent. The unsupported statement that the court "decided that Morkel's inability to comply with conditions for her unsupervised parent time constituted a material change in circumstances upon which to base a modification of a custody

award" is a fraud on the court.

In addition to the misrepresentation by Blocker of a purported court order that never existed, the further difficulty in attempting to mount a response to Blocker's claims that "The trial court erred when it decided that Morkel's inability to comply with conditions for her unsupervised parent time constituted a material change in circumstances upon which to base a modification of a custody award" is the complete absence of citations to the record. References to Dr. Kirk Thorn, Dr. Matthew Davies, Special Master Sandra Dredge and Guardian ad Litem Kelly Peterson are nonexistent in record citations. Blocker makes arguments relating to Thorn, Davies, Dredge and Peterson but there are simply no record citations in support of the purported statements of these people. Morkel has made an exhaustive record citation in her Statement of Facts, and Blocker has completely failed in any citations to the record in support of his arguments. Morkel is entitled to rely on the recommendation of the home study evaluator who stated there was no further need of supervised parent time. She is entitled to rely on the Court's order accepting the recommendation. Both the report and the orders of the court are specifically cited to the record by Morkel. Part of that record citation was that the prior recommendations of other evaluators were essentially, stale dated, in that they were over 5 years old and no longer pertinent. Yet, Blocker continues to refer to them in this argument without any type of record citation.

This Court should refuse to consider the merits of the claims set forth in Blocker's second argument and award attorneys fees and costs to Morkel for the misrepresentation of a court order and failing to abide by the requirements set forth in the Utah Rules of Appellate Procedure.

ARGUMENT III

BLOCKER'S ARGUMENT THAT THE TRIAL COURT ERRED WHEN IT SIGNED THE ORDER DRAFTED BY MORKEL'S COUNSEL A MERE THREE DAYS AFTER IT WAS SUBMITTED (WHEN THOSE DAYS INCLUDED A LEGAL HOLIDAY AND A WEEKEND) WHEN MORKEL'S COUNSEL HAD NOT SERVED IT ON BLOCKER AND WHEN BLOCKER WAS NOT GIVEN THE PROPER TIME TO FILE AN OBJECTION BUT DID FILE A TIMELY OBJECTION ONCE HE, ON HIS OWN, FOUND OUT ABOUT THE EXISTENCE OF THE ORDER FAILS FOR WANT OF RECORD CITATION AND CITE THAT THE ISSUE WAS PRESERVED AT TRIAL; IT ALSO FAILS AS A MATTER OF LAW

Again, there is no record citation and no indication this issue was preserved at the trial level. Irrespective of the failure of Blocker to follow the rules of appellate procedure, he is also incorrect as a matter of law. Assuming arguendo that the trial judge did sign the order "a mere three days after it was submitted", the trial judge is not bound by the Rules of Civil Procedure. Although Blocker references Utah Rule of Civil Procedure 7(j)(2), that rule used to be Rule 7(f)(2).[3] That rule contemplates that within 14 days of being directed by the court to prepare a proposed order confirming the court's decision, a party must serve the proposed order on the other parties for review and approval as to form. Rule 7(f)(2) (now 7(j)(2)) does not limit the district court's discretion to enter judgments and orders. See Henshaw v. Estate of King, 2007 UT App 378, § 25, 173 P.3d 876. "To the contrary, Utah case law indicates that the rules pertaining to the entry of proposed judgments and orders are binding only on the litigants and not on the trial court." In particular, rule 7(f)(2) "places no restrictions on when a trial court may sign a proposed judgment or order". *Id.* The new rule 7(j)(2), which is the old 7(f)(2), governs the actions of litigants and not those of the district court. Thus, the election of the district court to execute the order three days

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[3] Rule 7 Advisory Committee Notes references the 2015 changes to Rule 7. *See* http://www.utcourts.gov/resources/rules.urcp/urcp007.note.html

after it being submitted does not violate the requirements of that rule. This applies equally to the other subsections of Rule 7 referenced by Blocker because the argument, supra, is the same.

Blocker claims he did not receive any notice of the Order (presumed to be Order Modifying Custody Order, since that is the only order attached to his addendum). That order clearly has a Certificate of Service, electronically executed by attorney Wesley D. Felix, that on the 25th day of June, 2015 he "caused a true and correct copy of the foregoing [PROPOSED] ORDER TEMPORARILY MODIFYING CUSTODY ORDER AND SETTING ADDITIONAL MATTERS FOR HEARING WITHIN 90 DAYS to be served via the Court's electronic filing system upon all of counsel of record and by mail to the Respondent Michael P. Blocker. This is certified to by the signing attorney Wesley D. Felix.

Oddly, although Blocker complains he never received service of the order, the second document attached to Blocker's addendum, Motion Objecting to Petitioner's Order of June 10, 2015, is unsigned by Blocker and has a proposed date that is blank but states "DATED this ____ day of May, 2014." Further, he has a Certificate of Service that includes this statement: "I certify that on this _____ day of May, 2014, I have mailed first-class postage prepaid a copy of this motion to Petitioner's attorney" and lists Wesley D. Felix, but both the Motion and Certificate are unsigned. The date of May, 2014 cannot possibly be the month that Blocker purportedly filed his Motion since the first sentence of the first page states, MICHAEL BLOCKER RESPONDS TO PETITIONER'S PROPOSED "ORDER MODIFYING CUSTODY" of June 10, 2015 AS FOLLOWS:" Irrespective, this is the evidence submitted by Blocker.

Blocker's argument on Argument III three fails for three reasons. First, there is no citation

to the record or any proof this issue was preserved at trial. Second, even the evidence submitted by Blocker that is not a record citation but an attachment to his addendum, indicates a Certificate of Mailing was signed by Morkel's trial attorney certifying he sent Blocker a copy of the proposed order. He also submits what is apparently a phony Motion since the dates do not match. Third, it fails as a matter of law.

The decision of the trial court should be affirmed and attorney's fees and costs awarded to Morkel.

ARGUMENT IV

BLOCKER'S ARGUMENT THAT THE TRIAL COURT ERRED WHEN IT DEPRIVED BLOCKER OF HIS RIGHT TO DUE PROCESS BY REFUSING TO ALLOW HIM TO ARGUE HIS MOTION TO DISMISS PETITIONER'S PETITION TO MODIFY DURING THE HEARING AND INSTEAD MERELY STATED THAT HE HAD MADE HIS DECISION AND WAS GOING TO GRANT THE PETITION, THE JUDGE SIGNED THE ORDER WITHOUT NOTIFYING BLOCKER AND NEVER SENT A COPY OF THE ORDER TO BLOCKER, FAILED TO ACT ON TWO PROPERLY NOTICED AND SUBMITTED MOTIONS THAT WERE NOT OBJECTED TO FOR A PERIOD OF SIX MONTHS, AND WHEN THE JUDGE CHANGED A STATUS CONFERENCE INTO AN EVIDENTIARY HEARING WITHOUT NOTICE AND DID NOT GIVE BLOCKER AN OPPORTUNITY TO PREPARE OR REBUT MORKEL'S WITNESSES IS COMPOUND, TENUOUS AND UNSUPPORTED BY ANY RECORD CITATIONS OR REFERENCES TO WHERE THE ISSUES WERE PRESERVED AT TRIAL; FURTHER, THE RECORD IN THE ADDENDUMS DOES NOT SUPPORT BLOCKER'S ALLEGATIONS

There are no record citations nor references to the record to show where the issues alleged above were preserved at the trial level. The only evidence provided by Blocker is the addendum, annexed to his Brief. Morkel will address that evidence, even though it is not cited to the record.

1. Due process denial

First, as to Blocker's claim that he was denied due process because he claims the court denied him the right to argue his motion to dismiss Petitioner's modify during the hearing and

instead merely stated he was going to grant the Petition.

Blocker misrepresents what occurred. He has attached a copy of the transcript and it belies his arguments he was denied due process because the court denied him the right to argue his motion to dismiss. The transcript states, in pertinent part relating to Blocker:

THE COURT: Mr. Blocker, why don't you go first. (Page 2, line 25).

THE COURT: You can speak from there. (Page 3, lines 6-11).

THE COURT: Mr. Blocker, what is it that you seek? (Page 5, lines 20-21)

THE COURT: I want to hear you tell me why I should make a change. Why is the present status quo not best for your child?

(Page 6, lines 11-13).

MR. BLOCKER: Your honor, with all due respect, we were called in for a certain reason. I was prepared for that. If you want me to address that, I will...

THE COURT: I do.

The colloquy between Blocker and the court goes from the top of page 6 through line 23, page 7 through page 9. The court makes a finding, though, on page 8, lines 17 through 21 which states "What we've got is a 12, soon to be 13 year old young man. His dad has sole legal and physical custody right now. Temporary, permanent, whatever, that's what he has. Mom has statutory visitation without supervision. That has been in place since I ordered that about a year ago"...." I think I'm inclined, as far as I'm concerned to treat that as a permanent state of affairs right now"..Now, if either wants to petition to change things, then I'm going to require a renewed petition to modify. We will litigate that in the normal and ordinary course....that's what I'm

inclined to do, Mr. Blocker".

Mr. BLOCKER: Yes, I would like to express on the record that I strenuously object with that for the following– (Page 9, lines 8-9).

THE COURT: That's fine. (Page 9, line 10)

The rest of the colloquy is from page 9, lines 11 through 22.

Mr. BlOCKER:–for the following reasons.

THE COURT: Overruled. That's what I'm doing.

Mr. BLOCKER: Okay, may I state the law regarding this?

THE COURT: No, I'm familiar with the law. That's my ruling.

MR. BLOCKER: Hogue v. Hogue, you're familiar with that?

THE COURT: Mr. Blocker, that's my ruling. I have wide discretion in these matters, and I act from what I perceive to be in the best interest of the child.

MR. BLOCKER: But the law says that we can't...

THE COURT: Mr. Blocker, I don't intend to argue with you. That's my ruling.

There was another tete a tete between the Court and Blocker at 11, line 6 through line 24.

Although Blocker didn't like it, the Court provided ample opportunity for Blocker to argue his case.

2. Failure by the court to send Blocker a copy of the Order or to notify Blocker that the court had signed the order.

Nowhere does Blocker cite law that the Court is required to send Blocker a copy of the order or to notify Blocker that the court had executed an order. (See Morkel's response to Blocker's third

argument).

3. The Court failed to act on two motions for a period of over six months.

Blocker does not cite any law that the court is required to act on a motion within a certain period of time. Indeed, the record reflects that the judge prior to Judge Taylor never responded, at all, to the motion to remove the Guardian ad Litem, Kelly Peterson.

4. The judge changed the status conference into an evidentiary hearing without notice and did not give Blocker an opportunity to prepare or rebut Morkel's witness.

There is no reference to the record or even at which hearing the court changed the status conference into an evidentiary hearing but it is supposed that this claim by Blocker references the August 1, 2014 transcript attached to his addendum.

The hearing set for August 1, 2014 was set as a status conference.(T. Page 2, line 5). However, Blocker, at the hearing, stated he was going to enter a motion to strike the visitation report by Dr. Burgess and ask to appoint another evaluator. (T. Page 2 lines 15-18). He was given the chance by the court, because of his motion, to examine Dr. Burgess at the hearing. (T. Page 3, line 15). As soon as he objected and wanted a hearing to address the entire valuation (T. Page 3, lines 21-24) the Court stated "Well, we can go that way if you want." (T. Page 3, line 25). The Court also commented that Blocker had the opportunity to provide a counter expert, but didn't.(T. Page 4, lines 2-3).

A fair reading of this transcript is that the Court set the matter for hearing to allow further testimony (T. Page 4, lines 18-19) and set a hearing date for October 14, 2014, at 9:00 a.m. (T. Page 5, line 22).

Blocker had the opportunity at the August 1, 2014 hearing to examine Dr. Burgess, who had prepared the home study evaluation, but declined. The Court did not deprive Blocker the opportunity to have a hearing on that very issue, but set one that day to allow Blocker the time he said he needed. Blocker again misrepresents that he was denied due process and not given the opportunity to call his own witnesses or present his case. The court clearly granted him that opportunity as reflected by his own addendum record.

These multiple issues are without merit and the lower court decision should be affirmed and attorneys fees and costs awarded to Morkel.

ARGUMENT V

THE TRIAL COURT ERRED WHEN IT CONVERTED MORKEL'S ORDER TO SHOW CAUSE INTO A PETITION TO MODIFY WHEN MORKEL HERSELF STATED ON THE RECORD THAT SHE WAS NOT SEEKING A PETITION TO MODIFY BUT ONLY TO HAVE THE COURT RULE ON WHO WAS IN COMPLIANCE WITH THE EXISTING ORDER

Once again, Blocker does not cite to the record or to a preservation of this issue and the lower court order should be affirmed on that basis alone. However, Blocker is also wrong as a matter of law.

In a case similar to the current case, in a mother's petition to modify custody, the trial court had the discretion under this rule to modify the parties' child support obligations despite mother's failure to request such relief in her petition. Doyle v. Doyle, 2009 UT App. 221 P.3d 888. Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. Mabey v. Kay Peterson Constr. Co., 682 P.2d 287 (Utah 1984). See also Combe v. Warren's Family Drive-Inns, Inc., 680 P.2d 733 (Utah

1984): Farr v. Brinkerhoff, 829 P.2d 117 (Utah Ct. App. 1992).

There are no record citations, nor preservation citations, and the lack thereof is sufficient to warrant this Court affirming the lower courts order. With respect to this issue, it is also incorrect as a matter of law.

The lower court holding should be affirmed and attorney's fees and costs awarded to Morkel.

CONCLUSION

Blocker raises five arguments, with additional arguments within some of the five arguments. None are supported by any record citation or a citation of what issues may or may not have been preserved, and where, at the trial level. There was no marshaling of evidence. None of the requirements for filing an appeal have been adhered to by Blocker.

Blocker has made misrepresentations to the Court in support of his appeal. His appeal contains multitudinous ad hominem arguments not worthy of a response and designed solely to destroy the character of Morkel. Blocker attacks witnesses of Morkel but has no evidence in any record citations. The only record provided by Blocker is his own addendum, which is not designed to supplant the Rules of Appellate Procedure. Nevertheless, Morkel utilized these very records to show that Blocker's arguments are lacking in merit and non-supportive of his allegations.

Judge Taylor recognized the need of allowing what appeared to be working, in the way of unsupervised parent time with the minor child's mother, to be in the best interest of the minor child. It appeared to the Court that this arrangement had worked for the prior year, and it worked without any apparent problems.

His order recognized the best interest of the minor child in maintaining the status quo.

The order of the lower court should be affirmed and attorney's fees and costs awarded to Morkel.

DATED this 22th day of February, 2016.

MORRISON & MORRISON, L.C.

/S/ Grant W. P. Morrison
Grant W. P. Morrison
Matthew G. Morrison

Certificate of Service

On February 22, 2016 I caused to be mailed, first class postage prepaid, two true and correct copies of Appellee's Brief, to:

Michael P. Blocker
Pro Se Appellant
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/S/Grant W. P. Morrison
Grant W. P. Morrison

Word Count Certification

I, Grant W. P. Morrison, hereby certify that I prepared the foregoing brief and that the word count for this brief is 8,559 (inclusive of the Brief for Appellee, Table of Contents, Table of Authorities, Jurisdiction of the Court and Determinative Constitutional or Statutory Provisions. I certify that I prepared this document in Word Perfect X6 and this is the word count Word Perfect generated for this document.

February 22, 2016

/S/ Grant W. P. Morrison
Grant W. P. Morrison