2015

# Autem Jones, Petitioner and Appellee, v . Timothy Keith Jones, Respondent and Appellant.

Utah Court of Appeals

Brent M. Brindley - 7148
**BRINDLEY SULLIVAN**
A PROFESSIONAL LIMITED LIABILITY COMPANY
50 East 100 South, Suite 302
St. George, Utah 84770
Telephone: (435) 673-9220
Facsimile: (435) 673-3401
brentbrindley@infowest.com
Attorneys for Respondent and Appellant

IN THE UTAH COURT OF APPEALS

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| AUTEM JONES,<br><br>Petitioner and Appellee,<br><br>v.<br><br>TIMOTHY KEITH JONES,<br><br>Respondent and Appellant. | **APPELLANT'S REPLY BRIEF**<br><br><br><br><br>Appellate No.: 20140618 |

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## ARGUMENT

### THE TRIAL COURT'S ORDER CANNOT BE UPHELD ON ALTERNATIVE GROUNDS.

The trial court's reliance on 30-3-37 was an abuse of discretion and the order modifying decree cannot be upheld on those grounds. "The trial court's broad discretion in making child custody [and parent time] awards is limited in that it must be exercised within confines of legal standard set by appellate courts." *Schindler v. Schindler*, 776 P.2d 84 (Utah Ct. App. 1989). The trial court in this case disregarded the statutory direction and legal precedent and imposed a parent-time order that is an abuse of discretion.

The trial court abused its discretion in modifying the decree. The trial court failed to take into consideration the impact awarding additional parent time in excess of section 30-3-37 would have on the parties' children. The impact of one parent's relocation, necessitating extensive travel for the exercise of parent time, is among those factors considered by the legislature prior to enacting the relocation statute, section 30-3-37. Section 37 strikes a balance between the needs of children to have a close and meaningful relationship with both parents and the inherent dangers, expenses and burdens created by long distance parenting arrangements. That the legislature chose 150 miles as the limit for allowing parent time under 30-3-35 is telling. Beyond 150 miles, the danger, expense and burden of parent time, as well as the inevitable disruption of the children's lives, becomes increasingly

unreasonable and not in the children's best interest. It is apparent that the legislature considered that within 150 miles, children would be able to maintain some semblance of consistency and participation in their home lives. The burden of the travel within that distance is presumptively outweighed by the benefit of the increased contact with the non-custodial parent. Beyond 150 miles, the danger of travel, the expense of travel, and the interference with the lives of the children outweigh the benefit of parent time under 30-3-35 with the non-custodial parent.

The burden of travel imposed on Appellant in this case is unreasonable. The trial court was well aware of the distance between Monroe, Utah, the children's home, and Moab, Utah, Appellee's place of residence. In addition to the distance, the highway itself is steep, winding, and treacherous. Deer are often hit by cars on parts of the route. Snow is common from fall to spring. Requiring the parties to drive that route two or three times each month is unreasonable. It is not in the children's best interests.

Section 30-3-37 also places the burden of monthly parent time on the non-custodial parent. The trial court disregarded the statute and fashioned an allocation of the travel expenses that places a slightly higher burden on Appellee, but requires Appellant to pay travel expenses beyond those contemplated in section 30-3-37. Neither party is in a financial position to pay the additional expense of long

distance parent time. It is an abuse of the trial court's discretion to impose that burden on Appellant.

Appellant is not suggesting that the children's peer interactions and activities are more important than their relationship with their mother. To the contrary, the children need to have a close and meaningful relationship with both of their parents. However, when parents divorce, the relationships between children and parents are inevitably impacted. When divorcing parents live in close geographic proximity, Utah law dictates that the best interests of the children are served by having, at a minimum, contact with the non-custodial parent on the schedule found in section 30-3-35. When divorcing parent live further apart, the legislature has determined that the best interests of the children are best served by reducing the number of visits with the non-custodial parent, but increasing the duration of those visits. In addition to the risk of travel and the cost as mentioned above, the impact on the children of being removed from their home and community environment also comes into play. Under the current order, the children are completely removed from their home and community every other weekend. Because of this removal, the children lose many of the vital and formative experiences of childhood, including participation in sports, boy scout groups, and so forth. This is not to say that such participation is, in itself, more important than spending time

with Appellee. It is one factor of many the legislature considered in enacting section 30-3-37.

**THERE WAS NO MATERIAL CHANGE OF CIRCUMSTANCES SUFFICIENT TO SUPPORT THE TRIAL COURT'S ORDER.**

Appellee apparently argues that because of the fact that the children would get older was not specifically mentioned in the original decree of divorce, that it was not contemplated at the time the decree was entered, and that a change in their ages was therefore a change not anticipated at the time of trial. This argument lacks merit. Everyone involved in the original trial was well aware that children grow as they age. There was no evidence presented at trial that any of the children had issues that would stunt their growth or limit their development. The trial court plainly took into consideration the children growing up in fashioning its order as all trial courts, often subconsciously, do in making custody orders. The trial court's reliance on the children growing up as a previously unanticipated change of circumstances is in error.

Appellee devotes much of her brief to her argument that a finding of a material change of circumstances is unnecessary and that the court's order modifying the decree should be upheld on alternative grounds. Her admission is that there was no material change of circumstances supports Appellant's arguments as outlined in the his original brief.

## THE APPEAL IS NOT FRIVOLOUS.

Appellant's appeal is well-founded on statute and case law. There is nothing frivolous in the appeal that would support an award of fees to Appellee. Rule 33 of the Utah Rules of Appellate Procedure provides:

> **(b) Definitions.** For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

As outlined in his original brief, and in this reply brief, the trial court has abused its discretion in modifying the decree. Appellant's arguments are made in the plain reading and application of Utah law, particularly section 30-3-37, and the cases interpreting the parent time statues. The appeal is not motivated by a desire to limit Appellee's contact with the children. The appeal is not motivated by a desire to increase Appellee's legal expenses. The purpose of the appeal is to put the children in the situation that meets their best interests under the difficult circumstances created by the parties' divorce.

## CONCLUSION

For the reasons stated in this brief and the original brief of Appellant, this court should reverse the order of the trial court and order that Autem's parent time be consistent with the schedule stated in the relocation statute.

DATED this 12th day of August, 2015.

**BRINDLEY SULLIVAN, PLLC**

Brent M. Brindley
Attorneys for Respondent and Appellant

## CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August, 2015, I served a copy of the foregoing **APPELLANT'S REPLY BRIEF** on each of the following:

Jared L. Peterson
**MATHIE & PETERSON**
635 North Main, Suite 669
Richfield, Utah 84701
(2 copies)

Utah Court of Appeals
450 South State Street, 5th Floor
Post Office Box 140230
Salt Lake City, Utah 84114-0230
(Original plus 7 copies via Federal Express)