

2001

Geri Pasquin v. Candic M. Switter : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

Geri Pasquin,

APPELLANTS BRIEF

**Petitioner/Appellant,
vs.**

Civil No. 20010717-CA

CANDICE M. SUITTER,

Respondent/ Appellee.

**Nature of Proceeding:
Appeal from the Third District Court,
Salt Lake County, State of Utah
Honorable Ronald E. Nehring, Presiding
Argument Priority Classification: 15**

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Petitioner/Appellant requests oral argument and a Published Opinion

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COURT OF APPEALS

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TABLE OF CONTENTS

JURISDICTIONAL STATEMENT	4
STATEMENT OF ISSUES AND STANDARD OF REVIEW	4-5
STATEMENT OF THE CASE	5-7
STATEMENT OF FACTS	8-10
SUMMARY OF ARGUMENTS	11
ARGUMENT	11-17
I. <u>Geri Pasquin was never given a valid reason for why visitation was stopped; in her deposition Sutter admitted the reason was due to other familial disputes about which she did not care, and that Geri Pasquin's fitness was not the issue-further, Sutter said visitation of Torri Lynn by Geri Pasquin would be ok and would be beneficial . .</u>	11-14
II. <u>Geri Pasquin made all reasonable efforts to see Torri Lynn</u>	14-15
III. <u>The Guardian ad Litem (GAL) at the time of the May 31, 2001 hearing did not do a sufficient job of advocating the interests of her client, Torri Lynn, in this case- The GAL did not ever talk to Torri Lynn, to Sutter, or to Geri Pasquin, and she did not attend the May 31, 2001 hearing</u>	15-16
CONCLUSION	17-18

TABLE OF AUTHORITIES

CASES

<i>Campbell v. Campbell</i> , 896 P.2d 635, 638 (Utah App. 1995)	4,11,12,13
<i>McKay v. Hardy</i> , 973 P.2d 941 (Utah 1998).	5
<i>State of Utah v. Harrison</i> , 2001 UT 33	15
<i>State v. Irizarry</i> , 945 P.2d 676 (Utah 1997)	4,5
U.S. Supreme Court case <i>Troxel v. Granville</i> , (Case No, 99-138, June 5, 2000)	7

STATUTES

U.C. A. 30-5-2	6,11
U.C.A. 78-3-4(1)	4
U.C.A. 78-2-2(3)(j)	4
Article VIII, Section 5 of the Constitution of the State of Utah	4

RULES

Rule 3 (a) of the Utah Rules of Appellate Procedure	4
Rule 54 (B) of the Utah Rules of Civil Procedure	7

JURISDICTIONAL STATEMENT

Jurisdiction of the Third Judicial District Court, Salt Lake County, Utah from which this appeal arises, is based on U.C.A. 78-3-4(1)(1953, as amended). Jurisdiction to hear this appeal is conferred upon the Utah Supreme Court pursuant to Article VIII, Section 5 of the Constitution of the State of Utah, U.C.A. 78-2-2(3)(j)(1995 Supp.) and Rule 3(a) of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

1. Was it reversible error for the District Court to rule that visitation by Geri Pasquin with her granddaughter Torri Lynn Pasquin would not be in the child's best interests where the decision of the child's mother, Candace Suitter, to refuse visitation was not reasonable, where Geri Pasquin showed that it was not reasonable, where Candace Suitter had expressed that visitation by Geri Pasquin would be appropriate, and where Geri Pasquin did all she could do to visit with the child?

Standard of Review: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon...to successfully challenge the findings, the appellant must ordinarily demonstrate they are clearly erroneous. To make such a finding, appellant is required to marshal all the evidence supporting the findings and then demonstrate that the findings are not supported by legally sufficient evidence." *Campbell v. Campbell*, 896 P.2d 635, 638 (Utah App. 1995).

"We review the trial court's legal conclusion for correctness and its factual findings for clear error." *State v. Irizarry*, 945 P.2d 676 (Utah 1997).

"The court will review the lower court's findings of fact under the clearly erroneous

standard and its conclusions of law under a correctness standard. With respect to mixed questions of law and fact, we will review the underlying facts under the deferential clear error standard; however, the legal effect of those facts is within the province of the appellate court, and no deference need be given a [lower] court's resolution of such questions of law. *McKay v. Hardy*, 973 P.2d 941 (Utah 1998).

2. Was it reversible error for the District Court to rely upon and give deference to the report and recommendation of the Guardian Ad Litem's ("GAL") office, where the GAL at the time of trial did not ever meet with the minor child Torri Lynn Pasquin nor did she attend the trial and where the GAL based its report and recommendation on an interview done, by the former GAL, of the minor child over a year earlier?

Standard of Review: "We review the trial court's legal conclusion for correctness." *State v. Irizarry*, 945 P.2d 676 (Utah 1997).

STATEMENT OF THE CASE

Tori Lynn Pasquin ("Torri Lynn") was born in February, 1994 to Respondent Appellee Candice Suitter ("Suitter"), her mother, and Kory Pasquin, her father. Petitioner/Appellant Geri Pasquin ("Geri Pasquin"), the mother of Kory Pasquin, was present at Tori Lynn's birth and in Tori Lynn's early years she and Geri Pasquin had a very close relationship. Almost daily, Suitter would bring the child to Quality Auto Parts, where Geri Pasquin worked. Geri Pasquin and Torri Lynn would visit and/or have lunch together. In addition, Geri Pasquin would babysit Tori Lynn often, and the two would visit with each other at Geri Pasquin's house, at Geri Pasquin's daughter Julie Flarity's house (where Torri Lynn had a room) and at family gatherings. It was a close relationship that Candace Suitter endorsed. Geri Pasquin and Candace Suitter also had a very

close relationship.

However, when Kory Pasquin passed away in October, 2000, resulting legal battles over his estate and over Geri Pasquin's employment status with Quality Auto Parts caused the various family members to take sides and become adversaries. Geri Pasquin continued to have a relationship with Torri Lynn and with Candice Switter until approximately May, 1997, which was the last time Torri Lynn and Geri Pasquin saw each other.

Subsequent attempts to see Torri Lynn failed. Unable to contact Candace Switter or Torri Lynn, and with no other options available, Geri Pasquin brought her district court action, from which this appeal is taken, in December, 1997, for grandparent visitation, pursuant to Utah Code 30-5-2. That statute provides, at part (2), "the district court may grant grandparents reasonable rights of visitation, if it is in the best interests of the grandchildren, in cases where a grandparent's child has died or has become a noncustodial parent through divorce or legal separation."

At various times throughout these proceedings Switter has indicated that she would allow Geri Pasquin to visit with Torri Lynn. However, no agreement for such visitation could be worked out. In January, 2000, a guardian ad litem ("GAL"), Penny Breiman, was appointed to the case. Much of the year 2000 in the case was filled with Switter filing various motions- for summary judgment, to dismiss- to put an end to the case. Such motions were all denied. A hearing to determine visitation was scheduled for June 26, 2000, but was bumped by other Court matters. In preparation for that hearing, GAL Breiman submitted a report and recommendation in which she recommended that mediation be attempted and that, failing that, visitation could be considered assuming the other roadblocks between Geri Pasquin and Switter- the estate fight

namely- were resolved.

Following the bumping of the June 26, 2000 date, Suttter filed more motions to dismiss, challenging the Utah grandparent visitation statute on its face and also arguing that the U.S. Supreme Court case *Troxel v. Granville*, (Case No, 99-138, June 5, 2000) operated to render Utah's grandparent visitation statute unconstitutional. Again, such motions were denied, and the new date for a hearing to determine visitation was set for May 31, 2001. By the time of said hearing, GAL Breiman had been replaced, by the current GAL, Robin L. Ravert. Ms. Ravert submitted a report and recommendation the day before the May 31, 2001 hearing in which she recommended no visitation. However, Ms. Ravert herself did not personally visit with Torri Lynn, Geri Pasquin or Suttter. Neither Ms. Ravert, citing a recent Utah Supreme Court decision limiting the role of GAL's, nor Ms. Suttter appeared at the May 31, 2000 hearing.

At said hearing, Ms. Pasquin and one of her daughters, Julie Flarity, testified concerning the close relationship that Geri Pasquin and Torri Lynn had, and how that relationship had been cut off. Counsel for Ms. Pasquin also read passages from Suttter's deposition into the record. Judge Nehring took the matter under advisement, then issued its July 8, 2001 memorandum decision in which it found that visitation by Geri Pasquin was not in the best interests of Torri Lynn.

On August 6, 2001, Geri Pasquin filed her notice of appeal. On August 27, 2001, Pasquin filed her docketing statement. On August 31, 2001, Suttter filed a motion for disposition based on the absence of any final order or any URCP 54 (b) certification and lack of subject matter jurisdiction. On October 17, 2001, this Court denied said motion.

STATEMENT OF FACTS

1. Almost daily from the time Torri Lynn was born in February 1994 until Spring, 1997, Suitter would bring Tori Lynn to Quality Auto Parts, where Geri Pasquin worked. Geri Pasquin and Torri Lynn would visit and/or have lunch together. In addition, Geri Pasquin would babysit Tori Lynn often, and the two would visit with each other at Geri Pasquin's house, at Geri Pasquin's daughter Julie Flarity's house (where Torri Lynn had a room) and at family gatherings. (Testimony of Geri Pasquin at May 31, 2001 hearing, at the Transcript of Hearings (record on appeal index page 555), page 63, lines 1-12, and at exhibit B to Geri Pasquin's memorandum in support of motion for summary judgment, record on appeal index, pages 370 and 371).

2. This arrangement lasted until May, 1997, which was the last time Torri Lynn and Geri Pasquin saw each other (Testimony of Geri Pasquin at May 31, 2001 hearing, at the Transcript of Hearings (record on appeal index page 555), page 63, lines 19-22, and at exhibit B to Geri Pasquin's memorandum in support of motion for summary judgment, record on appeal index, page 370).

3. Geri Pasquin was never told by Suitter or anyone else that there was any question about her fitness to be around and take care of Torri Lynn (Testimony of Geri Pasquin at May 31, 2001 hearing, at the Transcript of Hearings (record on appeal index page 555), page 63, lines 15-18, and at deposition of Suitter (record on appeal index page 556), page 12, lines 10-25; in addition, these deposition lines were read into the record at the May 31, 2001 hearing, at the Transcript of Hearings (record on appeal index page 555), Page 96, lines 18-25, and page 97, lines 1-4).

4. Geri Pasquin was never told a reason for why visitation with Torri Lynn was terminated (Testimony of Geri Pasquin at May 31, 2001 hearing, at the Transcript of Hearings,

(record on appeal index page 555) page 64, lines 13-22).

5. Within this litigation Switter admitted that the reason visitation was terminated was due not to any problems with Geri Pasquin but friction from other disputes between family members, disputes that Switter testified she didn't care about (Deposition of Switter (record on appeal index page 556), at page 33, lines 15-24, which is also found at Exhibit B to Geri Pasquin's memorandum in support of motion for summary judgment, record on appeal index. page 369).

6. Geri Pasquin attempted, within reason, to see Torri Lynn after visitation was cut-off in May, 1997 (Testimony of Geri Pasquin at May 31, 2001 hearing, at the Transcript of Hearings, (record on appeal index page 555), Page 64, lines 14-18).

7. In her attempts to visit Torri Lynn, Geri Pasquin tried calling Switter, but to no avail, and Geri Pasquin had no other way of reaching Switter and Torri Lynn (Testimony of Geri Pasquin at May 31, 2001 hearing, at Transcript of Hearings (record on appeal index page 555), page 66, lines 7-9, page 68, lines 16-25, page 69, lines 1-13, page 75, lines 10-15, page 76, lines 14-25, and page 77, line 1).

8. In her deposition Switter indicated that visitation of Torri Lynn by Geri Pasquin would be okay (Deposition of Switter (record on appeal index page 556), at page 20, lines 23-25, page 21, lines 1-4 and 18-25, and page 22, lines 8-13; in addition, these lines were read into the record at the hearing of May 31, 2001, as seen at the Transcript of Hearings (record on appeal index page 555), page 97, lines 21-25, page 98, lines 1-25, and page 99, lines 1-17).

9. In her deposition Switter indicated that visitation of Torri Lynn by Geri Pasquin would be beneficial to Torri Lynn (Deposition of Switter (record on appeal index page 556), at page 28, lines 13-17; in addition these lines were read into the record at hearing of May 31, 2001, at the

Transcript of Hearings (record on appeal index page 555), page 101, lines 15-25, and page 102, lines 1-5).

10. Suttter did not ever change or amend her statements in facts 8 and 9 above, and did not attend the May 31, 2001 hearing on visitation (At Transcript of Hearings (record on appeal index page 555), from the May 31, 2001 hearing, at page 92, lines 22-25).

11. The Guardian ad Litem (GAL) for Torri Lynn submitted a report on May 30, 2001, one day before the visitation hearing, which report relied on the impressions of a visit- and report- by another GAL with Torri Lynn from a year before, and which report contained no new investigation. (The two reports of the GAL's, entered as Exhibits at the May 31, 2001 hearing, at pages 526-538 in the record on appeal index).

12. The GAL at the time of the May 31, 2001 hearing, Robin Ravert, did not attend said hearing, and thus did not hear the evidence presented and argue for the interests of her client, the minor child Torri Lynn (At Transcript of Hearings (record on appeal index page 555), from the May 31, 2001 hearing, at page 55, lines 1-25, and page 56, lines 1-4).

13. Given that the GAL at the time of the May 31, 2001 hearing did virtually nothing in pursuing the interests of her client, and given that she didn't submit her incomplete report until the day before the hearing, Geri Pasquin's counsel asked that Judge Nehring interview the minor child Torri Lynn to get a better impression of her views. Such request was denied.(At the Transcript of Hearings (record on appeal index page 555), from the May 31, 2001 hearing, at page 104, lines 17-25, and page 106, lines 17-20).

SUMMARY OF ARGUMENTS

As a result of the errors set forth below, this matter should be remanded to the trial court for further adjudication. Judge Nehring failed to make a finding that Switter's reason for withholding visitation of her minor child Torri Lynn was reasonable. Instead, Geri Pasquin showed that the reasoning was defective, and deposition testimony was introduced of Switter stating that visitation by Geri Pasquin would be appropriate. Switter never changed these views, because she never made an affidavit in the case, and did not appear at the hearing to determine visitation. In addition, Judge Nehring based his ruling of no visitation in part on a finding that Geri Pasquin made only token efforts to see Torri Lynn, when in fact Geri Pasquin made all reasonable efforts possible to see Torri Lynn. Finally, proper representation of Torri Lynn's interests was not achieved in this case. The GAL at the time of the visitation hearing did not ever meet with Torri Lynn and did not attend the hearing.

ARGUMENT

I. Geri Pasquin was never given a valid reason for why visitation was stopped; in her deposition Switter admitted the reason was due to other familial disputes about which she did not care, and that Geri Pasquin's fitness was not the issue-further, Switter said visitation of Torri Lynn by Geri Pasquin would be okay and would be beneficial

Geri Pasquin enjoyed a close relationship with her granddaughter Torri Lynn for the child's first three years. Then, suddenly, without reason and without indication that Geri Pasquin was harmful to Torri Lynn, the visitation was terminated. After trying to revive the visitation, Geri Pasquin brought court action, as she was, and is, entitled to do under Utah Code Section 30-5-2.

This statute, as made clear in *Campbell v. Campbell*, 896 P.2d 635 (Utah App. 1995) does not allow visitation as a matter of right for petitioning grandparents, but rather mandates that the matter be heard on the merits and a decision reached that's in the best interests of the minor child (" If the statute gave grandparents an unrestricted vested right of visitation, we would be far more likely to question its constitutionality. But under the existing statutory scheme, a court cannot grant visitation until an action is filed in district court, a hearing is conducted before a judge or commissioner, and detailed findings of fact and conclusions of law are entered explicitly demonstrating that the best interests of the children will be served by granting visitation. Moreover, the visitation schedule is in no way permanent, but may be modified as necessary to meet the evolving best interests of the children. Such judicial oversight adequately protects the integrity of the family while promoting the welfare of the children." *Campbell*, at 643).

It is no stretch at all to state that part of the best interests analysis includes inquiry into the stated reason for why the parent does not desire the grandparent to have visitation. In this case, as alluded to, as Suitter was cutting off visitation she gave Geri Pasquin no reason. Suitter never said, at the time, to Geri Pasquin that Geri Pasquin was harmful to Torri Lynn or that visitation had not been beneficial.

Geri Pasquin, of course, had an idea why the visitation was terminated- the disputes that family members were involved in. However, Geri Pasquin never would have dreamed of involving Torri Lynn in those controversies, she simply wanted to continue the close relationship. Further, as alluded to, in her deposition Suitter admitted that the other disputes were the reason she stopped visitation, and further stated that she did not care about the other disputes.

She still further stated in the deposition that it would be okay for Geri Pasquin to see Torri Lynn and that such visitation would be beneficial.

Most tellingly, Switter never testified again, in any hearing, deposition, by affidavit, in any way. She did not attend the visitation hearing. Thus, at the time of the May 31, 2001 hearing, Switter had stated as her only reason for withholding visitation the family disputes, and that she did not care about them. In her deposition Switter, in essence, refuted her own rationale for no visitation by saying that Geri Pasquin could visit, that it would be a benefit, and that Geri Pasquin was fit and proper to visit. This was her testimony at the time of the hearing- that Geri Pasquin could have visitation. This was not ever changed. Indeed, portions of her deposition testimony were read into the record at the May 31, 2001 hearing, making that her hearing testimony. No stated reason for denying visitation was ever in the record, yet the trial court still found there to be one.

The evidence before the trial court was that Switter was not opposed to visitation. Still, the Court, as part of its basis for the no visitation holding, writes of the interest of Switter in defining the relationships Torri Lynn will have with her step-siblings. There is no evidence that this was Switter's reason for withholding visitation. Even if it was, it is properly refuted by Switter's own testimony where she states that Geri Pasquin can have visitation. Further, such step-sibling relationships must be balanced against, as stated in *Campbell*, the state's legitimate interest in fostering relationships between grandparents and their grandchildren. *Campbell*, at 643.

The trial court had no evidentiary basis to find that Switter had provided a reasonable rationale for terminating visitation and that the interests of step-siblings were an issue. The

evidence instead pointed in the other direction- that no real reason for withholding visitation was given, that Switter admitted it was due to family disputes, about which she did not care, and that Switter said that visitation was okay. With the evidence undisputed that Geri Pasquin was fit and proper to have visitation, the trial court could not have found that Switter objected to visitation, let alone that she had stated any valid reason for withholding it. No best interests of the child decision can be made where no stated reason for denying visitation is on the record.

That being the case does not automatically mean that Geri Pasquin should be awarded visitation. It does mean, however, that, in light of the other errors mentioned below, dealing with efforts to see Torri Lynn and the role of the GAL in this case, remand for further consideration is necessary.

II. Geri Pasquin made all reasonable efforts to see Torri Lynn

The issue of whether a Petitioning grandparent makes a real effort to revive visitation with a grandchild before resorting to litigation is an important consideration, and one contemplated in the grandparent visitation statute. And it is appropriate for the trial court to base, in part, its decision upon its finding on the “effort” issue. However, in this case, the trial court simply erred when it found that Geri Pasquin made only token efforts to see Torri Lynn. In actuality, Geri Pasquin tried within reason to contact Switter and Torri Lynn. She tried calling Switter, but got nowhere, and then the number was changed. She tried contact via other relatives, unsuccessfully. She attempted to have some gifts delivered to Torri Lynn. Quite simply, Geri Pasquin’s access was cut off, and there was nothing else she could do, except resort to conduct that would be of criminal nature, in that, by necessity, it would violate privacy and personal and real property interests.

The evidence before the trial court simply did not add up to a finding that only token efforts by Geri Pasquin were made. Real, reasonable efforts were made. Given the fractious family circumstances, Geri Pasquin did all she could. At that point, she had no choice but to file a lawsuit. Thus a finding that Geri Pasquin's efforts were insufficient simply cannot be made, and must be corrected on remand.

III. The Guardian ad Litem (GAL) at the time of the May 31, 2001 hearing did not do a sufficient job of advocating the interests of her client, Torri Lynn, in this case- the GAL did not ever talk to Torri Lynn, to Suitter, or to Geri Pasquin, and she did not attend the May 31, 2001 hearing

In June, 2000, the then-GAL in this case, Penny Heal Breiman, submitted her report and recommendation for this case. By the time of a pre-trial/status conference in January, 2001, a new GAL, Robin Ravert, was on board. Other than attending said conference, it appears she did very little in the case. On May 30, 2001, one day before the visitation hearing, Ravert submitted her report and recommendation, which report basically incorporated Breiman's report. Ravert did not talk to any of the parties, and instead relied on the interviews of the parties done by Breiman in Spring of 2000, a year earlier.

Further, citing a recent Supreme Court case limiting the role of GAL's (*State of Utah v. Harrison*, 2001 UT 33), Ravert did not attend the May 31, 2001 hearing. Thus Ravert did not advocate for her client at the hearing like she should have. She did not hear the testimony, ask questions, and otherwise look out for her client. In sum, an incomplete representation by the GAL occurred. An important decision like grandparent visitation demands more involvement from the GAL assigned to the case.

Indeed, the case which compelled Ravert not to attend the visitation hearing, *Harrison*, was a criminal, not civil case, in which the Supreme Court expressed its reservations about the role of GAL's—in criminal cases. While it is natural that such opinion would cause the use of GAL's in all sectors to be re-examined, it would appear the holding in *Harrison* is limited to criminal cases, and rightly so. The GAL is an important and effective tool in a civil visitation dispute. There is nothing wrong with the GAL, in such case, as the one at bar, attending hearings, questioning witnesses, making motions and arguing their client's position. In fact, the process works better when the GAL performs those functions. The parties have counsel in such disputes; thus, the minor child needs a voice, and the GAL provides it. Such assistance should have been provided in this case, but was not.

Because of this incomplete representation, Geri Pasquin's counsel asked the trial court, at the May 31, 2001 hearing, to interview Torri Lynn, to in essence do part of the GAL's job which she had neglected, so that the views of Torri Lynn would more fully before the Court. As stated, such request was denied. Geri Pasquin, and the Court, is entitled to a more complete representation of Torri Lynn than what occurred. Torri Lynn's interests were not made known to the Court and not looked after. The job of the GAL is do advocate for the minor child, and it simply did not happen here. A decision on whether visitation is in the best interests cannot be made with so little input from the GAL. As such, this case should be remanded so that a thorough GAL representation can occur and a decision on visitation made that is based on a full and complete GAL representation.

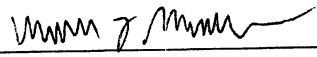
CONCLUSION

The evidence before the trial court was clear. The only reason Sutter ever gave for terminating the visitation of Torri Lynn by Geri Pasquin was due to family disputes, about which she did not clear. Whatever weight this reason held was refuted by Sutter's own deposition testimony that Geri Pasquin could visit with Torri Lynn, that it would be beneficial, and that Sutter had no concerns about Torri Lynn's safety when Torri Lynn was around Geri Pasquin. In sum, there was no reason on the record for why visitation was stopped, and the testimony of Sutter was that she was okay with visitation. The deposition testimony was Sutter's testimony of record for the case, because she never changed her statements in any future court proceeding, she did not attend the visitation hearing, and portions of her deposition were read into the record as evidence at the visitation hearing.. Thus no other position of Sutter can be before the Court. In addition, the evidence is clear that Geri Pasquin made every effort to visit with Torri Lynn, and not just the token efforts the trial court stated she made.

As such, the findings by the trial court that a valid reason for denying visitation existed- interest in directing step-sibling relationships- and that Geri Pasquin did not make sufficient efforts to visit with Torri Lynn before suing were and are simply not supported by the record. For those reasons, and due to the fact that an insufficient GAL representation occurred in this case, this matter must be remanded to the trial court for proceedings consistent with the arguments made herein. Specifically, the GAL must undertake a more active role in this case, and another visitation hearing must be held wherein the GAL can properly bring the interests of Torri Lynn to the trial court and the proper findings as to reason for denial of visitation and efforts made by Geri Pasquin to visit Torri Lynn can be made. Only then, based on these corrections, can a

decision on whether visitation is in the best interests of Torri Lynn be made.

DATED this 3rd day of December, 2001.



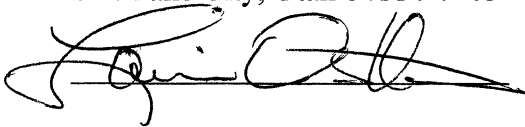
Brian W. Steffensen
William J. Middleton
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of Dec., 2001, I caused two true and correct copies of the foregoing instrument to be X mailed, postage prepaid; and/or hand-delivered by _____ fax and/or by _____ courier, addressed to:

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Salt Lake City, Utah 84111-2803

Robin Ravert
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A handwritten signature in black ink, appearing to read "Robin Ravert", written over a horizontal line.

FILED

DEC 06 2001

IN THE UTAH COURT OF APPEALS
COURT OF APPEALS

Geri Pasquin,

Petitioner/Appellant,

vs.

**APPELLANT'S STATEMENT THAT NO
ADDENDUM IS NECESSARY**

Civil No. 20010717-CA

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Respondent/ Appellee.

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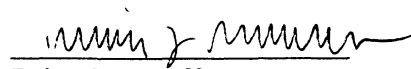
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Petitioner/Appellant requests oral argument and a Published Opinion

STATEMENT AS TO ADDENDUM

Comes now the Petitioner/Appellant Geri Pasquin, by and through undersigned counsel, and affirmatively states that there is no addendum to the Appellant Brief submitted on December 3, 2001, and that no addendum is necessary, pursuant to Rule 24 (a) (11).

DATED this 6th day of December, 2001.


Brian W. Steffensen
William J. Middleton
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of Dec, 2001, I caused two true and correct copies of the foregoing instrument to be X mailed, postage prepaid; and/or hand-delivered by _____ fax and/or by _____ courier, addressed to:

Robert H. Copier
243 East 400 South, Suite 200
Salt Lake City, Utah 84111-2803

Robin Ravert
Guardian ad Litem
450 South State Street, 2nd Floor
Salt Lake City, Utah 84114-0403

