

2002

John William Cox v. Brenda Lyn Krammer : Brief of Appellant

Utah Court of Appeals

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JOHN WILLIAM COX,

Petitioner/Appellee,

VS.

BRENDA LYN KRAMMER
[formerly COX],

Respondent/Appellant.

BRIEF OF APPELLANT

Case No. 20020696CA

[Oral Argument Requested]

BRIEF OF APPELLANT

AN APPEAL FROM THE FINAL JUDGMENT
OF THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
OGDEN DEPARTMENT, STATE OF UTAH
THE HONORABLE ERNIE M. JONES PRESIDING

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NOV 25 2002

IN THE UTAH COURT OF APPEALS

JOHN WILLIAM COX,)	<u>BRIEF OF APPELLANT</u>
)	
Petitioner/Appellee,)	
)	
vs.	)	Case No. 20020696CA
)	
BRENDA LYN KRAMMER)	
[formerly COX],)	
)	
Respondent/Appellant.	)	[Oral Argument Requested]

JURISDICTION

This is an appeal from a final Judgment issued in the Second Judicial District Court of Weber County, Ogden Department, State of Utah, the Honorable Ernie M. Jones presiding, wherein Judgment was awarded in favor of Respondent and Appellant.

This Court has jurisdiction to hear the appeal, pursuant to Utah Code Annotated, §78-2-2, and §78-2a-3, Utah Code Annotated.

ISSUES PRESENTED FOR REVIEW

POINT I

Did the Trial Court err in determining that the Petition of Petitioner/Appellee to Modify

the Decree of Divorce did have serious merit and was brought in good faith and, therefore, was justified in not awarding Respondent/Appellant attorney's fees, pursuant to §30-3-5(5), Utah Rules of Civil Procedure?

STANDARD OF REVIEW

The Appeal's Court accords the Trial Court's findings great deference and will not disturb those findings unless they are against the clear weight of the evidence and will set aside factual findings only if they are clearly erroneous. [Anderson vs. Brinkerhoff, 756 P.2, 95 at 98 (Utah Appeals 1988).]

POINT II

Did the Trial Court err in ordering the Respondent/Appellant to pay one-half the cost of the home evaluation?

STANDARD OF REVIEW

The Appeal's Court accords the Trial Court's findings great deference and will not disturb those findings unless they are against the clear weight of the evidence and will set aside factual findings only if they are clearly erroneous. [Anderson vs. Brinkerhoff, 756 P.2, 95 at 98 (Utah Appeals 1988).]

RELEVANT STATUTES AND RULES

Utah Code Annotated, §30-3-5(5) provides as follows:

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“(5) If a petition for modification of child custody or visitation provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorneys’ fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith.”

Utah Code Annotated, §78-27-56, provides as follows:

“Attorney’s fees - Award where action or defense in bad faith - Exceptions.

(1) In civil actions, the court shall award reasonable attorney’s fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).”

Rule 6-401(4), Code of Judicial Administration - Domestic Relations Commissioners,
provides as follows:

“(4) *Objections.* With the exception of pre-trial orders, the commissioner’s recommendation is the order of the court until modified by the court. Any party objecting to the recommended order shall file a written objection to the recommendation with the clerk of the court and serve copies on the commissioner’s office and opposing counsel. Objections shall be filed within ten days of the date the recommendation was made in open court or if taken under advisement, ten days after the date of the subsequent written recommendation made by the commissioner. Objections shall be to specific recommendations and shall set forth reasons for each objection. (Emphasis ours.)

STATEMENT OF THE CASE

Petitioner/Appellee and Respondent/Appellant were divorced from each other on February 9, 1999. The parties were parents to a child, Brittany, who was born on June 18, 1996. The Decree provided that the parties were awarded joint custody of the child, with the Respondent/Appellant being designated the custodial parent, and Petitioner/Appellee having standard visitation rights, as outlined in §30-3-33, et seq., as amended. On June 23, 2002, Petitioner/Appellee filed a document entitled “Petitioner’s Motion to Modify Custody” and alleged therein that “since the entry of the Decree on February 9, 1999, that the circumstances have materially changed”, as set forth in a Memorandum of Points and Authorities. Respondent/Appellant filed an Answer of general denial, and the matter came on for trial on April 9, 2002, and was continued to April 22, 2002, April 29, 2002, and May 6, 2002. The Court found the issues against Petitioner/Appellee, awarded Judgment in favor of the Respondent/Appellant, and Judgment was entered on July 19, 2002.

STATEMENT OF FACTS

Petitioner/Appellee and Respondent/Appellant were husband and wife, and a child, Brittany Cox, was born to them on June 18, 1996. Petitioner/Appellee, John William Cox, filed a divorce action against Respondent/Appellee, and the matter was heard as an uncontested default matter on January 12, 1999, and the Decree was signed by the Honorable Roger S. Dutson on

February 9, 1999.

The Decree provided, among other things, that “the parties were awarded joint custody of Brittany, with Respondent, Brenda Cox, being designated the custodial parent and Petitioner standard visitation rights, as outlined in §30-3-33, et seq., as amended.”

On June 23, 2000, Petitioner/Appellee filed a document entitled “Petitioner’s Motion to Modify Custody” and alleged therein that “since the entry of the Divorce Decree on February 9, 1999, the circumstances have materially changed, as set forth in the Memorandum of Points and Authorities, Affidavits and other evidence, which is attached as Exhibits to the Memorandum.”

Trial was commenced on April 8, 2002. The Court issued its Memorandum Decision on June 10, 2002 (see Exhibit “A”) and signed the Findings of Fact, Conclusions of Law (see Exhibit “B”) and Judgment (see Exhibit “C”) on July 12, 2002, which were entered on July 19, 2002.

Judgment was rendered in favor of the Respondent/Appellant, the Court holding, among other things, that there had been no showing that there had been a substantial and material change of circumstances occurring after the Decree that affected the custodial parent’s parenting abilities, that Respondent/Appellant was financially stable, that there had been no neglect or abuse of the child on the part of the Respondent/Appellant or stepfather, that the home of Respondent/Appellant is a safe environment, that the child, Brittany Cox, was healthy, happy, well nourished, adequately dressed and groomed and has thrived in the care of her mother, that there

was no religious incompatibility, and that it was in the best interest of the child, Brittany, to remain in the custody of Respondent/Appellant. The Court concluded that the Petition of Petitioner/Appellee did have serious merit and was brought in good faith. [Citing §30-3-5(5), U.C.A.] However, the Court did not make specific findings with regard to each element of the statute. The Court ordered each party to pay their own attorney's fees, and Respondent/Appellant was to pay one-half of the costs of the custody evaluation. Domestic Relations Commissioner, Daniel W. Garner, had ordered in the Pre-Trial Order that the Petitioner pay all of the costs of the custody evaluation. This Order was not appealed. (See Exhibit "E".)

SUMMARY OF ARGUMENT

The Court erred in finding that the Petition (Motion to Modify Divorce Decree) filed by Petitioner/Appellee did have serious merit and was brought in good faith. Nowhere in the Court's Memorandum Decision (Exhibit "A"), nor in the Court's Findings of Fact and Conclusions of Law and Judgment (Exhibits "B" and "C") does the Court, at any time or in any place, state a finding that would indicate merit in Petitioner/Appellee's Petition or Motion to Modify the Divorce Decree. There is no indication or factual basis, whatsoever, that the Petition or Motion was brought in good faith.

The Court erred in ordering the Respondent/Appellant to pay one-half of the costs of the custody evaluation. The Pre-Trial Order issued and executed by Domestic Relations Commissioner, Daniel W. Garner, (Exhibit "E"), stated that the Petitioner, John William Cox, the

Appellee herein, pay all of the costs of the custody evaluation. This Order, according to Rule 6-401(4), Code of Judicial Administration, is unappealable and was not appealed and was not an Order that could be changed by the Trial Court.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DETERMINING THAT THE PETITION OF PETITIONER/APPELLEE TO MODIFY THE DECREE OF DIVORCE DID HAVE SERIOUS MERIT AND WAS BROUGHT IN GOOD FAITH.

In Hogge vs. Hogge, 649 P.2 51, 53 (Utah 1982), the Utah Supreme Court developed a two-part procedure for obtaining a change of custody. The party seeking modification must first establish that there has been a substantial and material change of circumstances occurring subsequent to the Divorce Decree and then show that the change of circumstances is in the best interest of the child.

Kramer vs. Kramer, 738 P.2 624 (Utah 1987) states “that under the Hogge-Becker standard, a decree could not be opened unless there is a showing of a change of circumstances materially affecting the custodial parent’s ability or fitness to care for the child and that in making such a determination, any changes of circumstances of the ^{new} custodial parent were irrelevant.”

Utah Code Annotated, §30-3-5(5), is as follows:

“(5) If a petition for modification of child custody or visitation provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable

attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith."

The statute, above-cited, gives specific and ample warning to those who would attempt to modify the child custody arrangements of a Divorce Decree that they should be well advised and well informed of the possibility of paying reasonable attorney's fees to the prevailing party if they fail to establish substantial and material change of circumstances occurring subsequent to the Decree that affect the fitness and parenting ability of the custodial parent. These high requirements are necessary to avoid the "ping-pong" effect decried so forcefully in Hogge vs. Hogge, 649 P.2 51 (Utah 1982).

§30-3-5(5) specifically provides that, if a Petition for Modification of Child Custody is denied, the Court shall (emphasis added) order the Petitioner to pay a reasonable attorney's fee to the prevailing party if, and only if, the Court makes two separate findings. The first is that the Court finds that the Petition is without merit and, in addition and secondly, that the Petition was not asserted in good faith. If the Court does not make a finding in favor of the Petitioner on both, not just one of those requirements, it becomes mandatory for the Court to award the prevailing party a reasonable attorney's fee. It is not sufficient for the Court to deny the award of attorney's fees if the Court only finds that because of good intentions, a misinterpretation or lack of knowledge of the prevailing and applicable law that the Petition is brought in good faith, no matter how misguided.

A thorough and careful examination of the Court's Memorandum Decision (Exhibit "A"), the Findings of Fact and Conclusions of Law and Judgment (Exhibits "B" and "C") will not reveal one single finding that the "Petition" or "Motion" to Modify Divorce Decree had a modicum of merit, or that the "Petition" or "Motion", as it was designated by Petitioner/Appellee, was asserted in good faith. There is absolutely nothing, whatsoever, to the slightest degree in the said Exhibits that would justify the Court in so concluding. Therefore, pursuant to §30-3-5(5), Utah Rules of Civil Procedure, the Court had no alternative than to award Respondent/Appellant the attorney's fees properly requested, as set forth in Exhibit "D".

§78-27-56, Utah Code Annotated, is a general statute that provides for the award of attorney's fees in civil actions and is as follows:

"78-27-56. Attorney's fees - Award where action or defense in bad faith - Exceptions.

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1)."

§78-27-56, Utah Code Annotated, is distinguished from §30-3-5(5), U.C.A., in that §30-3-5(5) specifically applies to Petitions for Modification of Custody, and §78-27-56, U.C.A. applies to all civil actions.

Both statutes provide that, where the action is found to be without merit or not asserted in good faith, the Court shall award attorney's fees to the prevailing party. §78-27-56 is distinguished from §30-3-5(5) in that §30-3-5(5) specifically is directed to a Petition for Modification of Child Custody or visitation provisions of a Court Order, and §78-27-56, while providing that the Court "shall (emphasis added) award a reasonable attorney's fee to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2)." Subsection (2) provides "The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court: (b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1)."

The Trial Court did not enter into the record in this matter any reason, whatsoever, for not awarding attorney's fees to the prevailing party. (See Addendum Exhibit "A", the Court's Memorandum Decision; Addendum Exhibit "B", Findings of Fact and Conclusions of Law; and Addendum Exhibit "C", the Judgment.) The Court merely stated a conclusion: "The Petition of John Cox did have serious merit and was brought in good faith."

In Watkiss & Campbell vs. Foa & Son, 808 P.2 1061 (Utah 1991) at page 1068, the Supreme Court states:

“Section 78-27-56 clearly states, however, that the court shall award attorney fees to the prevailing party only if it determines (1) that the action is without merit and (2) that the action was brought in bad faith. If the court finds both elements of the statute, then it has no discretion and must award reasonable attorney fees to the prevailing party.

In *Amica Mutual Insurance Co. v. Schettler*, the Utah Court of Appeals stated that when a party seeks recovery of attorney fees under section 78-27-56, the trial court must make specific findings with regard to each element of the statute. Specific findings further the ends of justice by allowing appeals courts to better review the trial court’s award.”

The recently decided case of Wardley Better Homes and Gardens vs. Cannon, 458 Utah Advance Reports 15, dated October 22, 2002, provides a definition of a claim without merit on page 19 as follows:

“A claim is without merit if it is “frivolous” is “of little weight or importance in law or in fact” or “clearly [lacks a] legal basis for recovery.” . . .

“Where a party has acted on a meritless claim and in bad faith, in most cases it would be inequitable not to award attorney fees.”

Further, the Court stated:

“Section 78-27-56(2) allows the trial court to refuse to award attorney fees if it makes its reasons known on the record. Section 78-27-56(2)(b) provides: “The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if . . . the court enters in the record the reason for not awarding fees under the provisions of Subsection 1.” However, the trial court’s discretion under section 78-27-56(2) cannot be used to support an erroneous ruling under section 78-27-56(1). An award of no or limited fees under section 78-27-56(2) is predicated on proper findings.”

See also Cady vs. Johnson, 671 P.2 149 (Utah 1983).

“Claims that are without merit are those which are of little weight or importance having no basis in law or in fact.”

See also Hermes Associates vs. Parks Sportsman, 813 P.2 221 (Utah Court of Appeals 1991).

The Trial Court’s Findings of Fact (Exhibits “A” and “B”) verify that Petitioner/Appellee’s claims fell within the Cady definition of a meritless claim.

The Trial Court, in its Findings of Fact, found in favor of Respondent/Appellant on every point and did not find the Petitioner/Appellee’s Motion to Modify to have any merit whatsoever. The Court made no specific findings, as it was required to do, that Petitioner/Appellee’s Motion to Modify had any merit, and that it was asserted in good faith. The Court merely concluded, after stating Findings of Fact on every point in favor of Respondent/Appellant, that “The Petition of John Cox did have serious merit and was brought in good faith. [See §30-5-5(5), U.C.A.]

POINT II

THE COURT ERRED IN ORDERING RESPONDENT/APPELLANT TO PAY ONE-HALF THE COST OF THE HOME EVALUATION.

At the Pre-Trial of this matter on October 11, 2000, Domestic Relations Commissioner, Daniel W. Garner, made and entered a Pre-Trial Order (Exhibit “E”) wherein, in paragraph (4) thereof, he ordered as follows: “Petitioner is ordered to pay the costs of the custody evaluation.”

In the Memorandum Decision of the Court (Exhibit "A") and in the Findings of Fact (Exhibit "B"), the Court ordered Respondent/Appellant to pay one-half of the costs of the custody evaluation. The Pre-Trial Order was not appealed.

Rule 6-401 of the Rules of Judicial Administration is entitled "Domestic Relations Commissioners". Subparagraph (4) of said rule is as follows:

"(4) *Objections.* With the exception of pre-trial orders, the commissioner's recommendation is the order of the court until modified by the court. Any party objecting to the recommended order shall file a written objection to the recommendation with the clerk of the court and serve copies on the commissioner's office and opposing counsel. Objections shall be filed within ten days of the date the recommendation was made in open court or if taken under advisement, ten days after the date of the subsequent written recommendation made by the commissioner. Objections shall be to specific recommendations and shall set forth reasons for each objection."

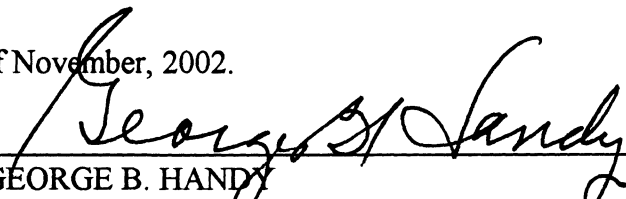
This paragraph indicates that all recommendations of the Domestic Relations Commissioner are appealable, with the exception of the Pre-Trial Order. The Pre-Trial Conference, pursuant to Rule 16, Utah Rules of Civil Procedure, is for the purpose, among other things, of setting forth the issues to be tried and certifying the matter for trial. The part of the Pre-Trial Order requiring Petitioner/Appellee to pay all of the costs of the custody evaluation was not an issue for trial, was not discussed by either party, and no evidence was produced in regard to the matter. The cost of the custody evaluation should be born solely by the Petitioner/Appellee, as ordered by the Domestic Relations Commissioner in the Pre-Trial Order.

CONCLUSION

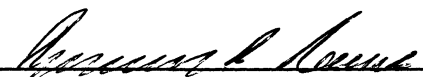
There is no factual basis or finding of fact, whatsoever, to support the Court's conclusion that the Petition or Motion of the Petitioner/Appellee had merit or was asserted in good faith, and Respondent/Appellant should be awarded the requested attorney's fees.

The Order of the Domestic Relations Commission, Daniel W. Garner, as stated in the Pre-Trial Order that the Petitioner/Appellee was to pay all of the costs of the custody evaluation was the Order that should have been followed by the Trial Court, and the Order of the Trial Court should be reversed.

DATED and signed this 25 day of November, 2002.



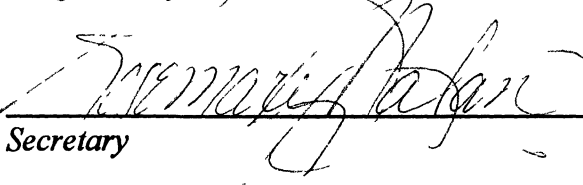
GEORGE B. HANDY
Attorney for Respondent/Appellant



RAYMOND B. ROUNDS
Attorney for Respondent/Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing *Brief of Appellant* to LAURA M. RASMUSSEN, Attorney for Petitioner/Appellee, 290 25th Street, Suite 204, Ogden, Utah, 84401; and to F. KIM WALPOLE, Attorney for Petitioner/Appellee, 2661 Washington Boulevard, Suite 203, 84401, this 25 day of November, 2002.



Secretary

ADDENDUM

EXHIBIT “A”

**IN THE SECOND JUDICIAL DISTRICT COURT, STATE OF UTAH
WEBER COUNTY, OGDEN DEPARTMENT**

JOHN WILLIAM COX,

Plaintiff,

vs.

BRENDA LYN KRAMMER,

Defendant.

MEMORANDUM DECISION

Case No. 984901378

Honorable Ernie W. Jones

John Cox petitioned the Court to obtain custody of his four-year-old daughter Brittany Cox. The child has been in the custody of her mother, Brenda Krammer, for the past four years pursuant to a stipulated divorce decree entered in 1999.

The Court heard testimony on April 9, 11, 22, 23, 27, and May 6, 2002 from approximately 28 witnesses.

Standard for Review

To grant a change of custody, there are two factors to consider:

1. A material change of circumstances.
2. The best interest of the child.

If the petitioner does not establish a material change in circumstances, the Court does not consider the best interest. However, best interest evidence can be considered in proving a material

change in circumstances.

In this case, the Court allowed John Cox to present evidence concerning “best interest” even before material change in circumstances evidence was offered. This was permitted because some testimony overlapped as to both issues and because the trial was fragmented over several weeks.

Based on the evidence offered, the Court makes the following findings of fact.

I. Material Change in Circumstances

Mr. Cox alleges that there are several areas the Court should examine to determine that a material change in circumstances exists

Debts and Bankruptcy

John Cox alleges that Brenda Krammer is not financially responsible because she filed bankruptcy with her current husband Jeremy Krammer in 1999

1. A review of the bankruptcy records shows that most of the debts were incurred by Jeremy Krammer prior to his marriage to Brenda Krammer. Only a few of the debts belonged to Brenda Krammer. Those debts were incurred primarily for medical expenses

2. Phil Johnson, who conducted a custody evaluation, said that the bankruptcy and financial problems of Brenda Krammer had little impact on the welfare of the child, Brittany Cox.

3. Despite the bankruptcy being filed, Jeremy Krammer is employed and earns approximately \$35,000 per year. Mr. Krammer earned \$32,000 in 2001 and \$29,000 in 2000.

4. Brenda Krammer is also employed. Both Mr. and Mrs. Krammer have good incomes. The Krammers had approximately \$4,000 in checking and \$1,800 in savings as of April 2002

5. Even John Cox testified that Brenda Krammer was more stable financially now in 2002 than in 1999 when the bankruptcy was filed

6. The bankruptcy is not so significant that custody should be changed based on that fact alone.

Care of the Child

John Cox alleges that Brittany Cox has been neglected and abused by Brenda and Jeremy Krammer.

7. The Division of Child and Family Services was called twice to Brenda Krammer's home to investigate allegations of child abuse. In both cases, the Division found the allegations to be "without merit" or "unsubstantiated." The Division found no evidence of abuse or neglect.

8. According to Brett Fronk (D.C.F.S. investigator), a safe environment for Brittany Cox existed in Brenda Krammer's home.

9. Several witnesses, including Kathy Krammer, Brent Blakely and Kathy Blakely, testified that they saw no evidence that the child was abused, neglected or mistreated. These witnesses saw the child on a regular basis.

10. Tina Robertson testified that Jeremy Krammer refused to take the child to the hospital for stitches. Jeremy Krammer testified that the child did not need stitches and that a band-aid was sufficient treatment for the knee injury.

11. There was evidence that Jeremy Krammer yelled or whistled at the children or that he raised his voice on occasion.

12. In fact, Kent Butler, a neighbor who heard the verbal comments testified that Jeremy and Brenda Krammer were not bad parents.

13. There is not sufficient evidence to establish any abuse of the child, Brittany Cox.

14. Even Phil Johnson, the family therapist who did the custody evaluation, testified that the

child was healthy, well-nourished and adequately dressed and groomed.

15. The child appears to be happy and healthy in her present situation, according to several of the witnesses who testified at trial.

16. The child lives with her mother in Roy. The living conditions appear to be very acceptable. Photographs show the condition of the home to be very good.

17. Mr. Johnson said he found no evidence that the child was physically abused by Brenda Krammer. Mr. Johnson also said that Brenda was not destructive with the child.

18. Although Jeremy Krammer smokes or uses tobacco, he does so away from the child, according to testimony.

19. Mr. Cox claims that Brittany Cox was "dirty" when dropped off at his house.

20. Several witnesses, including Udine Cox, testified that Brittany's clothes were dirty when she arrived for visitation.

21. Several witnesses testified that the dirty clothes may have been attributed to the fact this was an energetic four-year-old child.

22. Some witnesses suggested the dirty was because Brenda failed to bathe or clean the child.

23. Several witnesses testified that Brenda gave the child a bath on a regular basis.

24. Mr. Johnson also said that during his home visit, the Krammer home showed no signs of filth or unsanitary conditions.

25. Phil Johnson, the custody evaluator, also said the child was clean and well-groomed when he visited with her.

26. Evidence does not establish that Brittany Cox is being neglected or abused by Brenda Krammer.

Religion

John Cox and Brenda Krammer have different philosophies as to how the child should be raised or exposed to religion.

27. It does not appear that the religious teachings of Brenda Krammer are harmful to the child.

28. There is no evidence that the child was being exposed to Satanical or unorthodox religious practices while in the custody of Brenda Krammer.

29. Duane Peterson, a social worker from Texas, testified that religion is not a critical factor in determining custody. He said he found nothing harmful to the child by way of religious preference.

30. The fact that the mother and father do not agree on a religious preference is not a reason to change custody.

Visitation

31. Mr. Cox had liberal visitation until he filed this custody petition.

32. Mr. Cox has standard visitation at the present time.

33. Mr. Cox has never had visitation denied or suspended with Brittany Cox by Brenda Krammer.

34. Mr. Cox claims that Brenda Krammer threatened to leave Utah with the child because of a visitation problem.

35. Even if Mrs. Krammer made the threat, she never carried out such a threat. It appears that such comments were made in the heat of anger during conversations over visitation.

36. Mr. Cox has been cut off, however, from visiting with Miles Krammer. The testimony showed that it was Miles' decision to terminate visitation. Miles indicated that because of the custody

fight he did not wish to see John Cox. There was no indication that Brenda Krammer influenced the decision by twelve-year-old Miles Krammer to stop seeing John Cox.

37. While there is no doubt that considerable friction exists between the parties concerning visitation, the Court does not believe that changing custody will resolve this problem.

II. Best Interest

38. Phil Johnson testified that in his opinion, it would be in the best interest of the child to grant John Cox custody. Mr. Johnson concluded that Mr. Cox has a good home, good job and a stable home environment. Job security and financial responsibility were factors which favored custody with John Cox.

39. A number of the witnesses testified that John Cox was a good father and a good role model.

40. Duane Peterson, a social worker and therapist, testified that in his opinion the child should remain with Brenda Krammer. Mr. Peterson said there was no danger or threat by leaving the child with Brenda Krammer.

41. Phil Johnson testified that separating the child from the other siblings (Miles and Breesha) could be a problem because it disrupts continuity in the family. Mr. Johnson called it "separation anxiety."

42. Duane Peterson said that moving the child (ping-pong effect) is a significant issue and it should not occur, because the move would disrupt bonding among siblings.

43. Duane Peterson said both marriages (the Coxes and Krammers) were fairly stable. In his opinion, Brenda Krammer was doing well.

44. Although Jeremy Krammer has changed jobs several times, he did so to improve or better

his situation.

45. Jeremy Krammer has never been laid off for long periods of time or fired from employment. His performance evaluations have been satisfactory.

Conclusions of Law

1. Based on the evidence presented, the Court finds that there is not a material change in circumstances to justify a change in custody.

2. Custody of Brittany Cox will remain with Brenda Krammer.

3. Although John Cox failed to establish a material change in circumstances, the Court will also address the best interest factor

4. The Court finds that it is in the best interest of Brittany Cox to remain with Brenda Krammer.

5. While John Cox may provide a stable environment, Brenda Krammer also provides a stable environment for Brittany Cox.

6. The Court concludes that Brittany Cox should not be removed from the other siblings. This would be harmful and not in Brittany's best interest. Brittany should remain with Miles and Breasha.

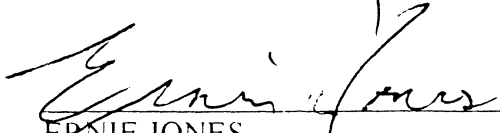
7. John Cox should continue to receive standard visitation with Brittany Cox.

8. The Court concludes, however, that Brenda Krammer should pay one-half of the cost incurred to have Phil Johnson conduct the custody evaluation in this case.

9. Each party will pay their own attorney fees. The petition of John Cox did have serious merit and was brought in good faith. See 30-5-5 (5), U.C.A.

10. Brenda Krammer's attorney will please prepare an order consistent with this decision.

Dated this 10 of June 2002.

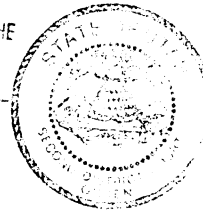

ERNIE JONES
DISTRICT COURT JUDGE

STATE OF UTAH }
COUNTY OF WEBER } SS.

I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF THE
ORIGINAL ON FILE IN MY OFFICE

DATED THIS 28 DAY OF Aug 2002
PAULA CARR
CLERK OF THE COURT

BY  DEPUTY



John Cox vs. Brenda Cox (Krammer), 984901378
Case #984901378

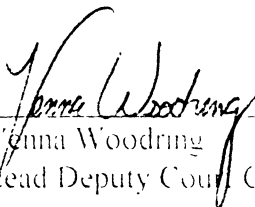
Certificate of Mailing

I hereby certify that on the 10th of June, 2002, I mailed a copy of the foregoing order to counsel,
as follows:

Laura Rasmussen
Attorney for Petitioner
290 25th Street, Suite 204
Ogden, UT 84401

Kim Walpole
Attorney for Petitioner
2661 Washington Blvd , Ste 203
Ogden, UT 84401

George Handy
Attorney for Respondent
2650 Washington Blvd , Ste 102
Ogden, UT 84401



Venna Woodring
Head Deputy Court Clerk

EXHIBIT “B”

personally present and represented by his counsel of record, LAURA M RASMUSSEN, Esquire, and KIM F WALPOLE, Esquire, the Respondent being personally present and being represented by her counsel of record, GEORGE B HANDY, Esquire, and RAYMOND B ROUNDS, Esquire, issues having been joined on Petitioner's Motion to Modify Decree and Respondent's Answer to said Motion, and evidence and testimony having been offered by each of the parties hereto, and the Court being duly advised in the premises, now finds the facts, free from all legal objections, as follows

FINDINGS OF FACT

1. Petitioner and Respondent were divorced from each other on February 9, 1999
2. The Decree provided, among other things, that the parties were awarded the joint custody of the minor child of the parties, Brittany Cox, born June 18, 1996, with the Decree providing that the Respondent, Brenda Lyn Cox (now Brenda Krammer) have physical custody of Brittany Cox. The Decree further provided that the Petitioner, John William Cox, shall have, at a minimum, standard visitation with the parties' minor child, as outlined in Utah Code Annotated, §30-3-33, et seq, as amended, unless the parties otherwise agree to more expansive visitation
3. On June 23, 2000, Petitioner filed in the above-entitled Court a document entitled "Petitioner's Motion to Modify Custody" alleging that "since the entry of the Divorce Decree on February 9, 1999, that circumstances have materially changed" and that, "as a result of these changes, it is in the best interest and welfare of the child to be in the custody of John Cox "

4. That Respondent filed an Answer to the Motion to Modify Custody denying that, since the entry of the Divorce Decree on February 9, 1999, circumstances have materially changed, and that it is in the best interests and welfare of the child that the child be in the custody of John Cox.

5. Respondent is found to be financially stable. Both Respondent and her husband are employed and have good incomes. The Bankruptcy Petition filed by Respondent and her husband had little impact on the welfare of the child, Brittany Cox, and is not so significant that custody should be based on that fact alone.

6. There is no evidence of abuse or neglect of the child, Brittany Cox, by Respondent or the step-father, Jeremy Krammer. The home of Respondent is a safe environment, and the living conditions are very acceptable. The child, Brittany Cox, is happy, healthy, well-nourished, adequately dressed and groomed, and has thrived in the care of Respondent.

7. Petitioner and Respondent have different philosophies as to how a child should be raised or exposed to religion, but the religious teachings of Respondent, Brenda Krammer, are not harmful to the child, Brittany Cox, and religion in this case should not be a critical factor in determining custody, and there is no religious incompatibility.

8. Petitioner had liberal visitation with the child, Brittany Cox, up and until he filed his Motion to Modify Custody and, at the present and since that time and to the present time, has standard and statutory visitation with the child, Brittany Cox. Petitioner, John William Cox, has

never had visitation denied or suspended by Respondent, Brenda Krammer

CONCLUSIONS OF LAW

As *Conclusions of Law* from the foregoing facts, the Court renders judgment as follows

1 There has been no substantial or material change of circumstances occurring after the Decree was entered in this matter to justify a change in custody of the child, Brittany Cox

2 That it is in the best interest of Brittany Cox that she should remain in the custody of Respondent, Brenda Krammer, and not be removed from her other siblings

3 Petitioner, John William Cox, is to continue to receive standard visitation with Brittany Cox

4 Respondent is ordered to pay one-half of the cost incurred to have Phil Johnson conduct the custody evaluation in this matter

5 Each party is to pay their own attorney's fees, as the Petition of Petitioner, John William Cox, did have serious merit and was brought in good faith

DATED and signed this 12 day of ^{July}~~June~~, 2002

STATE OF UTAH }
COUNTY OF WEBER } SS

I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF THE
ORIGINAL FILED IN MY OFFICE

DATED THIS 28 DAY OF July, 2002
PAUL A. GARR
CLERK OF THE COURT

BY [Signature] DEPUTY

BY THE COURT

[Signature]

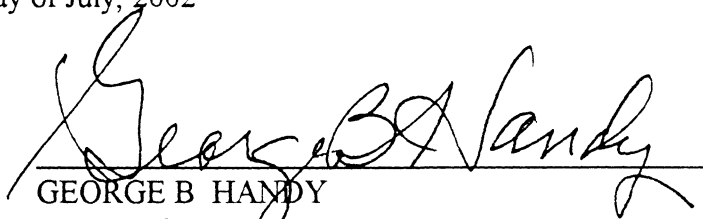
ERNIE W JONES, District Court Judge

Entered _____

NOTICE

YOU WILL PLEASE TAKE NOTICE that the undersigned party will submit the foregoing *Findings of Fact and Conclusions of Law* to the Court upon the expiration of five (5) days from the date of this Notice, plus three (3) days for mailing, unless a written objection is filed prior to that time, pursuant to Rule 4-504, Code of Judicial Administration. Kindly govern yourself accordingly.

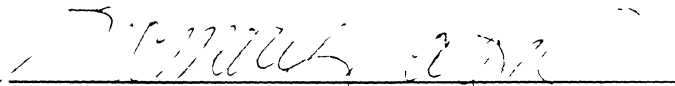
DATED and signed this 10th day of July, 2002



GEORGE B. HANDY
Attorney for Respondent

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing *Findings of Fact and Conclusions of Law* to LAURA M. RASMUSSEN, Attorney for Petitioner, 290 25th Street, Suite 204, Ogden, Utah, 84401, this 10th day of July, 2002.



Secretary

EXHIBIT "C"

GEORGE B. HANDY, #1325
Attorney for Respondent
2650 Washington Boulevard, Suite 102
Ogden, Utah 84401
Telephone (801) 621-4015
Facsimile (801) 621-0035

RAYMOND B. ROUNDS, #5012
Attorney for Respondent
2650 Washington Boulevard, Suite 102
Ogden, Utah 84401
Telephone (801) 621-4015
Facsimile (801) 337-4006

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

OGDEN DEPARTMENT, STATE OF UTAH

JOHN WILLIAM COX,	)	<u>JUDGMENT</u>	
)		
Petitioner,	)		JUL 19 2002
)		
vs.	)	Civil No. 984901378DA	
)		
BRENDA LYN KRAMMER)		
[formerly COX],)		
)		
Respondent.	)	Judge ERNIE W. JONES	
	)	Commissioner DANIEL GARNER	

Petitioner's Motion to Modify Decree having come on for trial on April 9, 2002, and being continued to April 22, 2002, April 29, 2002, and May 6, 2002; the Honorable ERNIE W. JONES presiding; Petitioner being personally present and being represented by his counsel of record, LAURA

M RASMUSSEN, Esquire, and KIM F WALPOLE, Esquire, Respondent being personally present and represented by her counsel of record, GEORGE B HANDY, Esquire, and RAYMOND B ROUNDS, Esquire, and the Court having been duly advised in the premises, enters Judgment as follows

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there has been no substantial or material change of circumstances occurring after the Decree was entered in this matter to justify a change in custody of the child, Brittany Cox

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that it is in the best interest of Brittany Cox that she should remain in the custody of Respondent, Brenda Krammer, and not be removed from her other siblings

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Petitioner, John William Cox, is to continue to receive standard visitation with Brittany Cox

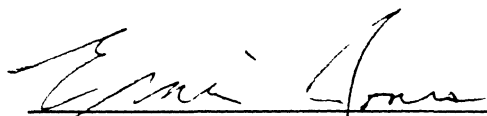
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Respondent is ordered to pay one-half of the cost incurred to have Phil Johnson conduct the custody evaluation in this matter

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each party is to pay their own attorney's fees, as the Petition of Petitioner, John William Cox, did have serious merit and was brought in good faith

Judgment
Civil No. 984901378

DATED and signed this 12 day of ^{July}~~June~~, 2002.

BY THE COURT.



ERNIE W. JONES, *District Court Judge*

Entered _____

STATE OF UTAH } SS
COUNTY OF WEBER

I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF THE
ORIGINAL ON FILE IN MY OFFICE

DATED THIS 28 DAY OF Aug 2002

PAULA CATT
CLERK OF THE COURT


 DEPUTY



NOTICE

YOU WILL PLEASE TAKE NOTICE that the undersigned party will submit the foregoing *Judgment* to the Court upon the expiration of five (5) days from the date of this Notice, plus three (3) days for mailing, unless a written objection is filed prior to that time, pursuant to Rule 4-504, Code of Judicial Administration. Kindly govern yourself accordingly.

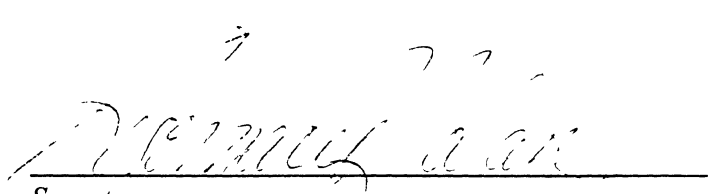
DATED and signed this 1st day of July, 2002.



GEORGE B. HANDY
Attorney for Respondent

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing *Judgment* to LAURAM RASMUSSEN, Attorney for Petitioner, 290 25th Street, Suite 204, Ogden, Utah, 84401, this 07 day of July, 2002.



Secretary

EXHIBIT “D”

21009
May 6 1 51 PM '02

GEORGE B. HANDY, #1325
Attorney for Respondent
2650 Washington Boulevard, Suite 102
Ogden, Utah 84401
Telephone (801) 621-4015
Facsimile (801) 621-0035

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

OGDEN DEPARTMENT, STATE OF UTAH

JOHN WILLIAM COX,	)	<u>REQUEST FOR AWARD OF</u>
	)	<u>ATTORNEY'S FEES AND</u>
Petitioner,	)	<u>AFFIDAVIT IN SUPPORT THEREOF</u>
)	
vs	)	[PURSUANT TO §30-3-5(5), U C A
	)	AND §78-27-56, U C A]
)	
BRENDA LYN KRAMMER	)	Civil No 984901378DA
[formerly COX],)	
	)	Judge ERNIE JONES
Respondent	)	Commissioner DANIEL W GARNER

STATE OF UTAH)
) ss
COUNTY OF WEBER)

GEORGE B HANDY, being first duly sworn on oath, deposes and says

1. That he is a member of the Utah State Bar and an attorney in good standing
2. That he has represented the Respondent, above-named, in this matter at all stages and to the final judgment
- 3 That, in representing the said Respondent, affiant has performed the following services and has spent the hours indicated in pursuing the matter to judgment

<u>Date</u>	<u>Services Rendered</u>	<u>Hours</u>
July 10, 2000	Consultation, review of Motion and 2 inches of Memorandum and Affidavits	2 00
July 10, 2000	Research	1 00
July 10, 2000	Preparation for trial	1 50
July 10, 2000	Interview with Kathy Krammer	1 00
July 10, 2000	Consultation with Brenda Krammer	1 00
July 10, 2000	Interview with Grace Mooney and Kathy Blakely	1 00
July 31, 2000	Interview with Brent Blakely	1 50
July 31, 2000	Call to Vernal Police Department, preparation of Request for Documents	0 50
August 15, 2000	Preparation for Trial	2 00
August 16, 2000	Preparation for Trial	1 00
September 6, 2000	Pre-Trial Hearing and consultation	1 25
September 6, 2000	Answering Interrogatories	1 00
September 11, 2000	Copying Interrogatories and Responses to Request for Production of Documents	1 50
September 13, 2000	Obtaining copies of photos [Costs \$34 91]	1 00
September 15, 2000	Writing Memorandum	2 50
September 15, 2000	Writing Memorandum	3 50
September 15, 2000	Research at Library	1 00
September 18, 2000	Preparing Memorandum	2 00
September 19, 2000	Research at Law Library, writing Memorandum	3 00
September 20, 2000	Writing Memorandum [Costs \$3 20 Postmaster]	1 00
September 22, 2000	Writing Memorandum and research	4 00
September 22, 2000	Law Library research	0 50
April 13, 2001	Review of Order to Show Cause	2 00
April 16, 2001	Response of Order to Show Cause	3 00
April 17, 2001	Research of Order to Show Cause	4 00
May 4, 2001	Request for Evidentiary Hearing	0 50
May 9, 2001	Memorandum in Support of Evidentiary Hearing	3 00
May 9, 2001	Receipt and review of Opposition to Request for Evidentiary Hearing, review of Reply to Response	0 50
May 15, 2001	Objection to Order to Show Cause	0 50

<u>Date</u>	<u>Services Rendered</u>	<u>Hours</u>
May 16, 2001	Order to Show Cause Hearing.	1.00
May 16, 2001	Preparation of Requests for Admissions.	0.50
May 16, 2001	Preparation of Requests for Production of Documents.	0.50
September 30, 2001	Preparation for trial. [Review of valuation report.]	5.00
November 2, 2001	Preparation for trial. [Preparation of examination of witnesses.]	4.00
November 5, 2001	Preparation for trial. [Interview of witnesses.]	2.00
November 8, 2001	Preparation for trial. [Listening to tape and transcribing.]	4.00
November 9, 2001	Preparation for trial. [Research.]	4.00
November 12, 2001	Trial preparation. [Preparation of Motion in Limine.]	3.00
November 13, 2001	Trial preparation. [Listening to tape and transcribing.]	2.00
November 14, 2001	Court appearance.	1.00
November 14, 2001	Trial preparation. [Review of law of case.]	3.00
November 15, 2001	Trial preparation. [Review of law of case.]	6.00
November 16, 2001	Trial preparation. [Interview witness - Peterson.]	4.00
November 19, 2001	Trial preparation. [Preparation of cross examination.]	6.00
November 20, 2001	Trial preparation. [Preparation of cross examination.]	6.00
November 21, 2001	Trial preparation. [Review report and prepare cross examination.]	7.50
November 23, 2001	Trial preparation. [Review of law and pleadings.]	6.00
November 24, 2001	Trial preparation. [Review of law and report.]	6.00
November 26, 2001	Trial preparation. [Research; document preparation.]	8.00
November 27, 2001	Trial preparation. [Witness consultation.]	6.50
November 28, 2001	Trial preparation. [Review of law.]	6.00
November 29, 2001	Trial preparation. [Review of documents.]	8.50
November 30, 2001	Trial preparation. [Review of report.]	5.00
December 4, 2001	Motion to Strike and Memorandum.	3.00
December 5, 2001	Motion to Dismiss, research and Memorandum.	4.00
December 5, 2001	Motion in Limine.	2.00
January 21, 2002	Review Responses to Motions.	1.00
January 26, 2002	Review of Response to Motion in Limine.	1.00
January 28, 2002	Review and response to letter from Laura M. Rasmussen.	1.00
February 4, 2002	Preparation of Motion for Summary Judgment and Memorandum.	3.00
March 14, 2002	Review and preparation for hearing.	2.00
March 15, 2002	Review and preparation for hearing.	2.00
March 18, 2002	Review and preparation for hearing.	3.00

Date	Services Rendered	Hours
March 19, 2002	Review and preparation for hearing.	3.00
March 20, 2002	Hearing on Motions.	0 50
March 20, 2002	Preparation of Orders on Motions.	1 00
April 9, 2002	Trial.	7.00
April 11, 2002	Trial.	4 50
April 22, 2002	Trial.	4.50
April 29, 2002	Trial.	4 50
May 6, 2002	Trial.	<u>4 50</u>
	TOTAL HOURS	212.00

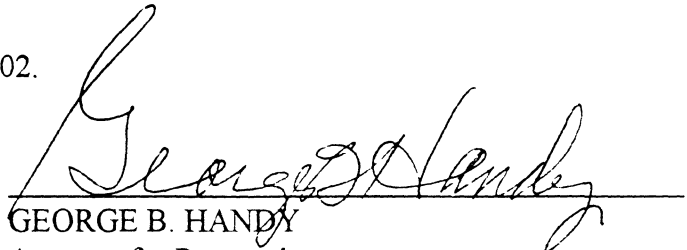
TOTAL HOURS: 212.00
BILLING RATE: \$175.00 per hour
TOTAL FEE REQUESTED: \$37,100 00

5. Affiant affirms that the hours allegedly spent in pursuing the matter to judgment are true and correct.

6. Affiant charges, for his services, at the rate of \$175.00 per hour and affirms that said charge is a reasonable charge for like services rendered in the Second Judicial District.

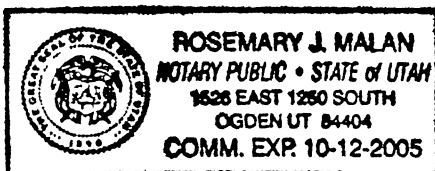
Further, affiant sayeth naught.

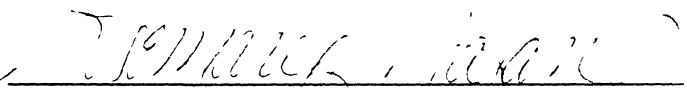
DATED this 7th day of May, 2002.



GEORGE B. HANDY
Attorney for Respondent

SUBSCRIBED AND SWORN to before me this 7 day of May, 2002.





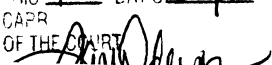
NOTARY PUBLIC
COUNTY OF WEBER } SS
I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF THE
ORIGINAL ON FILE IN MY OFFICE
DATED THIS 12 DAY OF Sept. 2002
PAULA CARR
CLERK OF THE COURT

641

EXHIBIT “E”


Laura M Rasmussen #8074
Dan Wilson & Associates
290-25th Street, Suite 204
Ogden, Utah 84401
Telephone (801) 621-6119
Facsimile (801) 621-6128

Attorney for Petitioner
John William Cox

2ND DISTRICT COURT
OCT 13 11 33 AM '00

OCT 13 2000

IN THE SECOND DISTRICT COURT, WEBER COUNTY, STATE OF UTAH,
OGDEN DEPARTMENT

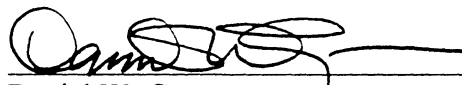
JOHN WILLIAM COX,	:	PRETRIAL ORDER
Petitioner,	:	
vs	:	
BRENDA LYN KRAMMER,	:	Civil No 984901378
(formerly, Cox)	:	
Respondent	:	Judge Roger S Dutson

The issue of custody has come before the Court upon Petitioner's Petition To Modify Custody, accompanying Memorandum, and exhibits which were filed on June 23, 2000 Respondent filed an Answer to said Petition on June 28, 2000 On July 25, 2000, Petitioner filed the required certificate of compliance with the Court Annexed Alternative Dispute Program

A Pre-trial Conference was held before the Honorable Commissioner Daniel W Garner on September 6, 2000 at 2 30 p m at the Second District Court, Ogden Petitioner, John Cox was represented by counsel, Laura M Rasmussen and Respondent, Brenda Krammer (formerly known as Cox) was represented by counsel, George B Handy Upon consideration of the Petition, the accompanying pleadings and oral argument, IT IS HEREBY ORDERED as follows

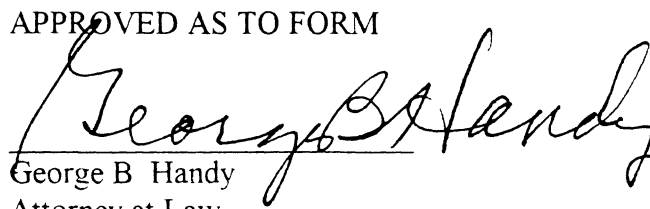
1. That Petitioner has met the requirements to re-open the issue of custody
2. Prior to scheduling a trial date, the Court orders a home evaluation be conducted
3. Petitioner is to submit to Respondent a list of four proposed evaluators, from which Respondent is to choose one evaluator. An evaluator shall be chosen on or before September 18, 2000
4. Petitioner is ordered to pay the costs of the home evaluation
5. Trial is to be continued until the home evaluation is completed, at which time counsel shall request that the matter be re-set
6. The parties are to allow open access to one another regarding the general care and medical needs of the child, including informing one another of all doctor appointments scheduled for the child in sufficient time to allow the other parent to attend those appointments

DATED this 11th day of October, 2000



Daniel W. Garner
Commissioner, Second District Court
COUNTY OF WEBER, UT

APPROVED AS TO FORM

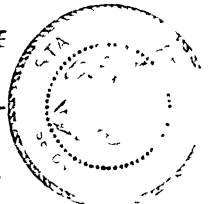


George B. Handy
Attorney at Law

I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF THE
ORIGINAL ON FILE IN MY OFFICE

DATED THIS 28 DAY OF Aug 2002
PAULA CAER
CLERK OF THE COURT

BY  DEPUTY

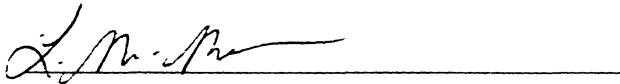


**CERTIFICATE OF MAILING AND
NOTICE OF SUBMISSION**

I hereby certify that the foregoing was this day mailed to the persons indicated below who are further notified that pursuant to Rule 4-505 of the Rules of Judicial Administration, notice of objections shall be submitted to the Court and counsel within five days after service

Mailed to:

George B. Handy
Attorney for Respondent
2650 Washington Blvd., Suite 102
Ogden, Utah 84401



CONCLUSION

There is no factual basis or finding of fact, whatsoever, to support the Court's conclusion that the Petition or Motion of the Petitioner/Appellee had merit or was asserted in good faith, and Respondent/Appellant should be awarded the requested attorney's fees.

The Order of the Domestic Relations Commission, Daniel W. Garner, as stated in the Pre-Trial Order that the Petitioner/Appellee was to pay all of the costs of the custody evaluation was the Order that should have been followed by the Trial Court, and the Order of the Trial Court should be reversed.

DATED and signed this _____ day of December, 2002.

GEORGE B. HANDY
Attorney for Respondent/Appellant

RAYMOND B. ROUNDS
Attorney for Respondent/Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing *Brief of Appellant* to LAURA M. RASMUSSEN, Attorney for Petitioner/Appellee, 290 25th Street, Suite 204, Ogden, Utah, 84401; and to F. KIM WALPOLE, Attorney for Petitioner/Appellee, 2661 Washington Boulevard, Suite 203, 84401, this _____ day of December, 2002.

Secretary