

2016

**KELLIE P. SUNDAY, Petitioner/Appellee, v. ERNEST J. PEASE,
Respondent/Appellant. : Reply Brief**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KELLIE P. SUNDAY,)	Appeal No. 20160164
)	
Petitioner/Appellee,)	Case No. 034906783
v.)	
ERNEST J. PEASE,)	
)	
Respondent/Appellant.)	

Reply Brief of Appellant

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Reply Brief of Appellant

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APPELLEE'S ISSUE I: The trial court's Findings of Fact and Conclusions of Law are sufficient pursuant to Utah law and are supported by the evidence presented at trial; and **APPELLEE'S ISSUE II:** The trial court did not abuse its discretion in awarding custody of the minor child to appellee and the trial court's decision is supported by the evidence presented at trial.

Appellant's Reply

Kellie claims that because the court is allowed great deference in deciding the case, the trial court's decision should stand. Kellie's brief argues that the trial court made a lawful custody determination because there is no definitive checklist of factors required for such a decision and the trial court cited to Utah's best interest statute in its findings. Kellie's brief additionally argues that the trial court properly disregarded the recommendation of the Guardian ad Litem because the recommendation was largely based on the desires of the minor child, which the court said it would not consider.

The trial court is allowed great deference in deciding the case, but the trial court is still required to make Findings of Fact based on the evidence presented at trial, consider various factors outlined in the "best interest statute," and explain its reasoning in a way that reconciles its ruling with the Findings of Fact and the best interest analysis. The trial court's Findings do not reflect the evidence presented at trial. The trial court mentioned the best interest aspect, but failed to actually analyze any of the best interest factors.

The Court did, however, mention that the best interest analysis did not require the court to take the desires of the minor child into consideration. While that ostensibly addressed one of the best interest factors, but the Court provided no further reasoning that

supported the Court's outright rejection of that factor. The trial court's ruling was not reconciled with the evidence presented at trial, and the trial court failed to explain why it deviated from the recommendations of the Guardian ad Litem.

Kellie inaccurately claims that the Guardian ad Litem's recommendation is based only on the wishes of the minor child. This is not so. The Guardian ad litem's duties are dual: to convey the desires of the child to the Court, and to make a recommendation or report as to what the GAL believes is in the best interests of her client. These two prongs are frequently at odds.

As is her duty, the Guardian ad Litem represented to the court what the desires of her client were. The Guardian ad Litem also gave a thoughtful and comprehensive best-interest evaluation that was based on her own research and interviews with her client's family members, educators, and therapist. This evaluation gave considerable weight to her client's health and safety, emotional development, opportunities for personal and scholastic growth, household stability, and relationships with her siblings and parents.

A trial court is not required to adopt the recommendation of the Guardian ad Litem, but it is required to explain its reasons for not doing so. The trial court did not give any such meaningful explanation for rejecting the recommendation of the Guardian ad Litem.

APPELLEE'S ISSUE III: The Invited Error Doctrine prevents appellant from prevailing on the assertion that the trial court failed to rule on issues presented for trial.

Appellant's Reply:

Kellie erred in her application and analysis of the Invited Error Doctrine. An Invited Error can occur when a party induces a trial court to make a ruling and then argues on appeal that the ruling hurt them. The Invited Error Doctrine is intended to give the trial court the first opportunity to address the claim of error, which promotes judicial efficiency by reducing unnecessary appeals.

The Court set forth a comprehensive statement of the doctrine in *State v. Winfield*, 2006 UT 4, ¶ 15:

“Utah’s invited error doctrine arises from the principle that “a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error.” *State v. Geukgeuzian*, 2004 UT 16, ¶ 9 (quoting *State v. Anderson*, 929 P.2d 1107, 1109 (Utah 1996)); accord *State v. Pinder*, 2005 UT 15, ¶ 62; *State v. Hamilton*, 2003 UT 22, ¶ 54. By precluding appellate review, the doctrine furthers this principle by “discourag[ing] parties from intentionally misleading the trial court so as to preserve a hidden ground for reversal on appeal.” *Geukgeuzian*, 2004 UT 16, ¶ 12 (internal quotation marks omitted). Encouraging counsel to actively participate in all proceedings and to raise any possible error at the time of its occurrence “fortifies our long-established policy that the trial court should have the first opportunity to address a claim of error.” *Hamilton*, 2003 UT 22, ¶ 54 (quoting *Anderson*, 929 P.2d at 1109).”

In the case at hand, Jay did nothing to induce the trial court to make any ruling that it is now arguing is in error, and Jay did not keep the court from ruling on issues certified for trial. In addition to testifying about the issues, including lengthy testimony relating to medical expenses incurred, child support regarding school registration/supplies, and Dr. Dunn’s fees, Jay restated the certified issues to the trial court before the trial court issued its ruling and filed a post-trial Rule 52 Motion for Reconsideration, which invited the trial court to address the issues and remedy the errors that are the subject of this Appeal. Jay did everything in his power to give the trial court opportunities to rule on the issues

certified for trial, and to explain its ruling on the issues that were inadequately explained by the court.

The three Invited Error Doctrine cases that were cited in Kellie's Brief are both factually and procedurally distinct from the case at hand. In *Kerr v. Salt Lake City*, Salt Lake City invited error when it moved to prevent Mr. Kerr's witness from presenting opinion testimony on the condition of the sidewalk and the trial court applied the same ruling to Salt Lake City's witnesses. In *Zavala v. Zavala*, Father invited error by alleging a material and substantial change in circumstances, thereby waiving any post-trial claim that such change in circumstances had not occurred. In *State v. Geukgeuzian*, Geukgeuzian invited error when he submitted jury instructions that that were missing an important element of the crime he was charged with, the instructions were accepted by the court, and the jury found him guilty.

The Court should decide both the issues that the trial court refused to decide and the issues that the trial court decided against the weight of the evidence presented at trial. By filing a timely Rule 52 Motion for Reconsideration, the Appellant extended to the trial court ample opportunity to rule on the various issues which are now before this Court, thus preserving the issues for appeal. Not only is it procedurally proper for the Appellate Court to decide the issues that were certified for trial and undecided, but it is the only venue that is able to do so.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

Based upon the foregoing, and upon the content of his initial Brief,
Respondent/Appellant E. Jay Pease requests that the Court overturn and reverse the
award of sole custody of the parties' minor child to Petitioner, and request that the trial
court address the issues that were not ruled upon at trial.

Respectfully submitted,

Date: 19 December 2016

/s/Virginia Sudbury
Virginia Sudbury, Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ 2016, I served a true and
correct copy of the foregoing

Reply Brief

upon the following individuals by causing the same to be delivered by the method and to the
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Dated: _____

By: _____