

2003

# Wendy Lomsdal v. Keith Cox : Brief of Appellee

Utah Court of Appeals

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Keith Cox; Pro Se; Martha Pierce; Guardian ad Litem.

Dennis Mathews; Attorney for Appellee.

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## Recommended Citation

Brief of Appellee, *Lomsdal v. Cox*, No. 200370 (Utah Court of Appeals, 2003).

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IN THE UTAH COURT OF APPEALS

2

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WENDY LOMSDAL,	:	
Appellee and Plaintiff,	:	<del>Guardian ad Litem's</del>
	:	Brief <i>of Appellee</i>
Vs,	:	
KEITH COX,	:	
Appellant and Defendant.	:	Case No. 200370-CA
	:	Priority 4

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APPEAL FROM A FINAL CUSTODY ORDER  
OF THE FIRST DISTRICT COURT  
HONORABLE CLINT S. JUDKINS, PRESIDING

---

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

**FILED**  
Utah Court of Appeals

NOV - 9 2000

Paulette Stagg  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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WENDY LOMSDAL,	:	
Appellee and Plaintiff,	:	<del>Guardian ad Litem's</del>
	:	<del>Brief</del> <i>Brief of Appellee</i>
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## **PARTIES**

### **The Child:**

**A.M.L.**, born March 19, 1995. She is the five year-old daughter of Keith Wayne Cox and Wendy Lomsdal. The Court appointed the Office of the Guardian ad Litem to Represent her best interests.

### **The Parents:**

**Wendy Lomsdal, "the Mother."** She is the Mother of A.M.L. She was the Plaintiff and is the Appellee.

**Keith Wayne Cox, "the Father."** He is the Father of A.M.L. He was the Defendant and is the Appellant.

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## **TABLE OF AUTHORITIES**

### **CASE LAW**

Riche v. Riche, 784 P. 2d 465

### **STATUTES**

Utah Code Ann. Section 78-2a-3

Utah Code Ann. Section 30-3-3(1)

IN THE UTAH COURT OF APPEALS

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WENDY LOMSDAL	:	
Appellee and Plaintiff	:	Appellee's Brief
	:	
vs.	:	
KEITH COX,	:	Case No. 2000370-CA
Appellant and Defendant	:	

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JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this case pursuant to Utah Code Ann. § 78-2a-3

ISSUES FOR REVIEW

1. Whether the court erred in awarding attorney fees to Appellee. The court has discretion to award attorney fees pursuant to Utah Code Ann. § 30-3-3(1), based upon evidence that the fees are reasonable, and that the requesting party is in need. Riche v. Riche, 784 P.2d 465.

2. Whether (1) the court should have adopted the earlier Missouri court granting the parties joint legal custody; (2) should have taken judicial notice of prior adjudicated facts regarding the Mother's prior incidents of alleged child abuse; (3) should have given more weight to his evidence; (4) should have given more credibility to his evidence and none to the Mother's or the Guardian ad Litem's (5) the court acted with bias; (6) relied on insufficient evidence; (7) made inadequate findings; and (8)

allowed counsel to interview potential witnesses.

The issues set forth in Paragraph 2 above, have been addressed in the brief filed by the Guardian ad Litem. The Appellee concurs with the brief and joins therein and in the interest of judicial economy, the Appellee will address only the issue of attorney fees.

**STATUTES, RULES, CONSTITUTIONAL PROVISIONS**

Utah Code Ann. § 30-3-3(1)

**STATEMENT OF THE CASE**

Nature of the Case: Appeal by the Respondent/Appellant Father from a final order of custody of the parties' 5 year old daughter and an award of attorney fees to Petitioner/Appellee.

Course of the Proceedings: The child was born to Petitioner/Appellee while she and the Respondent/Appellant were married to others. The Respondent/Appellant is the natural father of the child. The Parties subsequently married in Lewiston, Utah on July 27, 1997. The court granted a divorce in October 20, 1998. reserving the issues of custody, visitation and attorney fees.



Disposition at Trial Court: After two days of trial, the court awarded permanent custody to the Mother and reasonable visitation to the Father. The court also awarded attorney fees to the Mother. The Father appeals.

### STATEMENT OF THE FACTS

We concur with the Guardian ad Litem brief as to the Statement of Facts.

### SUMMARY OF ARGUMENT

Appellant's claim that the court erred in awarding attorney fees is without merit, and is not supported by the evidence, and he has failed to marshal the evidence.

### ARGUMENT

#### 1. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN AWARDING ATTORNEY FEES

The Appellant claims that the trial court erred in awarding attorney fees because the Appellee had filed a fraudulent affidavit of Impecuniosity. Here the court heard evidence on the filing of the affidavit of impecuniosity, the allegation of fraud,

and Appellee's financial need. Appellee is the mother of six children, all of whom were living at home. She received an inheritance from her mother's estate, some \$4,000.00. The money was put aside to purchase a home and was used for that purpose prior to the filing of the affidavit a petition for divorce. Trial Transcript Page 100, line 20 through 25 and Page 101, line 1 through 5.

The court has discretion to award attorney fees in custody cases "to enable the other party to prosecute or defend the action." Utah Code Ann. §30-3-3(1) The court may also award attorney fees where the court finds that the fees are reasonable, and the requesting party is in need. Riche v. Riche, 784 P.2d 465. Here the court heard evidence on the hours spent, the per hour fee charged and whether the fee charged was reasonable. The court further found that the Appellant used an inordinate amount of time to present his case and that the Petitioner was required to retain an attorney to defend her in all of the these matters. Trial Transcript Page 219, lines 4 through 13.

The Appellant's claim regarding attorney fees is without merit because he has failed to marshal the evidence and he has failed to show how the court has abused its discretion in awarding fees.

This Court should affirm the award of attorney fees.

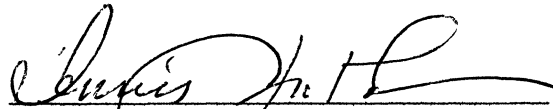
ORAL ARGUMENT: PUBLICATION OF OPINION

The Appellee does not request oral argument nor a published opinion because the Father raises no new issues.

CONCLUSION

For the reasons stated above, the Appellee moves this Honorable Court to affirm the trial court's award of custody and attorney fees.

DATED this 7th day of November, 2000.

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

Dennis Mathews  
Attorney for Appellee

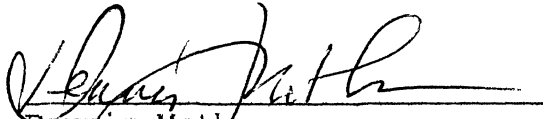
CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the Appellee's Brief were mailed, postage paid, this 8th day of November to the following:

Kieth Cox, Pro Se  
Appellant  
5380 Hollow Road  
Nibley, UT 84321

Martha Pierce  
Guardian ad Litem  
450 South State, Second Floor  
Salt Lake City, Utah 84114-0403

DATED this 8th day of November, 2000.

  
Dennis Mathews  
Attorney for Appellee

ADDENDA

1. Transcript of Case No. 974100564; Wendy Cox vs. Keith Cox  
Bench Trial electronically recorded on February 3, 2000  
Before the Honorable Clint S. Judkins

Pages 100, and 101

2. Transcript of Case No. 974100564; Wendy Cox vs. Keith Cox  
Bench Trial electronically recorded on February 23, 2000  
Before the Honorable Clint S. Judkins

Page 219

1 Q. Judge Garner said that I was supposed to do the  
2 initial -- I was supposed to pay the initial evaluation.

3 A. I will not say that I remember what he said. I just  
4 remember something where you were going to go find someone and  
5 hire someone to do an evaluation because you did not want me to  
6 have custody of your daughter, and you were trying to protect  
7 your daughter. I do not remember the details of how it came  
8 about that way.

9 MR. COX: Okay. That's all, I guess.

10 THE COURT: Any additional questions, Mr. Mathews?

11 MR. MATHEWS: (Inaudible).

12 THE COURT: Ms. Balmain?

13 MS. BALMAIN: No, thank you.

14 THE COURT: Thank you. You may step down.

15 MR. MATHEWS: Your Honor, I think you misheard. I said  
16 I just have one quick --

17 THE COURT: Oh, I'm sorry. I did misunderstand you.  
18 Sounds like we have another question for you.

19 REDIRECT EXAMINATION

20 BY MR. MATHEWS:

21 Q. At the time the money was deposited in your bank  
22 account, what was the source of those funds?

23 A. It was a gift from my brother from my mother's  
24 passing, and I used it for a down payment on the home that I  
25 was in.

1 MR. MATHEWS: Okay, thank you. No further questions.

2 THE COURT: Ms. Balmain?

3 Q. BY MR. MATHEWS: At the time you signed the affidavit,  
4 that was true?

5 A. I didn't have any money.

6 MS. BALMAIN: I don't have any questions.

7 THE COURT: Mr. Cox, any additional questions?

8 MR. COX: I have a question.

9 REXCROSS EXAMINATION

10 BY MR. COX:

11 Q. What time was this money given to you?

12 A. I don't remember. I asked my brother to help me buy a  
13 house. My mother passed away, and they sent me --

14 Q. When was this?

15 A. My mother passed away shortly after we left Missouri  
16 and came to Logan. I think it was in September or October. I  
17 wasn't able to attend the funeral because I had no way to get  
18 there.

19 Q. You don't remember the date?

20 A. No, I don't remember the day.

21 Q. That was in '96?

22 A. I'm sorry, Keith. I don't remember exactly. I had to  
23 beg my brother, just to find out that she passed away.

24 Q. You had to beg your brother?

25 A. Yes.

1 treatment. They should both take the parenting class. I would  
2 recommend either DFS or the Education Institution in the Cache  
3 Valley area. Again, I strongly recommend that.

4 As it relates to attorney's fees, quite frankly this  
5 case has drug on. Mr. Cox, I appreciate the fact you have not  
6 been represented by Counsel, but it's taken you an inordinate  
7 amount of time to present what you wanted to present to the  
8 Court. This could have been done a lot quicker than that.

9 For that very reason, the opposing party has to retain  
10 her attorney to represent her in regards to all these matters.  
11 The Court finds that an appropriate attorney's fee in this case  
12 is \$1,000. I'm going to limit it to \$1,000, but I will grant  
13 \$1,000 attorney's fees.

14 MR. COX: May I make some objections?

15 THE COURT: Well, your objections are noted.

16 MR. COX: Okay.

17 THE COURT: One of the reasons for doing that is  
18 because the inordinate amount of time that the Court has seen  
19 it's taken to bring this matter to trial and to try the case.

20 Now, you can include that in the findings as well,  
21 Mr. Mathews. Very well. Have I covered all of the issues that  
22 need to be covered?

23 MR. COX: May I argue one point?

24 THE COURT: No, the time for argument has passed,  
25 Mr. Cox. If you have a question about my ruling, I'll hear