

2003

# Wendy Lomsdal v. Keith Cox : Brief of Appellant

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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IN THE UTAH COURT OF APPEALS

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WENDY LOMSDAL,	:	
Appellee and Plaintiff,	:	Guardian ad Litem's
vs,	:	Brief
KEITH COX,	:	200370-CA
Appellant and Defendant.	:	Case No. <del>2000370</del> -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 3 2000

Paulette Stagg  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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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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IN THE UTAH COURT OF APPEALS

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

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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 acted within its pasture of discretion in determining custody. While the principles of res judicata apply in the context of divorce proceedings, the court has continuing jurisdiction to make reasonable and necessary orders in the best interests of children, their custody and support. Bayles v. Bayles, 1999 UT App 128, 981 P.2d 403, 405 (Utah Ct. App. 1999); In re J.J.T., 877 P.2d 161, 164 (Utah Ct. App. 1994). This Court grants trial courts a wide pasture of discretion when it comes to weighing evidence, assessing credibility and making custody and visitation determinations. Hudema v. Carpenter, 1999 UT App 290.

## **STATUTES, RULES, CONSTITUTIONAL PROVISIONS**

Utah Code Ann. § 30-3-10(1).

### **STATEMENT OF THE CASE**

Nature of the Case: The Father appeals a final order of custody of the parties' daughter, who is now five years old.

Course of the Proceedings: The child was conceived and born while the Mother was married to another man. The child was born in 1995. The parties married in 1997 and were divorced in 1998. R.257-59. At the time of the divorce, the court reserved the issues of custody, visitation and attorney fees for an evidentiary hearing to be heard in February of 2000.

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



## STATEMENT OF THE FACTS

Keith Wayne Cox is the fifty-four year old father of A.M.L. Wendy Lomsdal is the forty-four year old mother. The present appeal primarily involves the custody and welfare of the five year old child.<sup>1</sup>

In May 1994, when the Mother was married to and living with another man in Plato, Missouri, the Father, moved into the household and began a sexual relationship with her. A month later, the Child was conceived. When the Mother was four months pregnant, the Father moved out of the household. The Child was born in March of 1995. R.263.

When the Child was nine months old, she and her Mother moved to Utah, leaving the Father in Missouri. One month later, the Father began legal proceedings in Missouri resulting in the Missouri court establishing by default in October 1996 that both parents had joint legal custody, while the Mother had primary physical custody of the Child. R.78-100.

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<sup>1</sup>The Father also appeals an award of attorney fees. The Guardian ad Litem declines to address this claim because it does not directly affect the Child's best interests.

By June 1997, the Child was two and living with both parents in Utah. The Child's parents married each other only to separate five months later. The Mother began divorce proceedings. R.4-6. At the same time, the Father made various allegations of abuse and neglect against the Mother to the Division of Child and Family Services ("the Division"). Even though the Division unsubstantiated all reports, the court appointed the Office of the Guardian ad Litem to represent the Child's best interests pursuant to Utah Code Ann. § 78-3a-912.<sup>2</sup> R.53. The court also ordered the Father to obtain and pay for a custody evaluation.

The trial court granted the divorce in September of 1998, reserving the issues of custody, visitation and attorney fees for an evidentiary hearing, which was later held in February 2000. R.275-62. The evidentiary hearing resulted in the court awarding the Mother primary physical custody and the Father standard visitation. R.483-88. The Father appeals. R.491-92.

### **SUMMARY OF ARGUMENT**

The Father's claims are without merit because they go to weight and credibility. His sufficiency-of-evidence claims are without merit because he fails to marshal the

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<sup>2</sup>The Father was uncooperative with the Guardian's efforts to obtain information from him about the Child's best interests.

evidence. His claims of res judicata and judicial notice are without merit because the court in fact acknowledged earlier orders and admitted the Division's investigation. In other words, his claims of res judicata and judicial notice really amount to claims of weight of evidence.

## **ARGUMENT**

### **1. THE TRIAL COURT ACTED WITHIN ITS PASTURE OF DISCRETION IN DETERMINING CUSTODY.**

The Father claims the trial court erred because it (1) 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 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) acted with bias; (6) relied on insufficient evidence; (7) made inadequate findings; and (8) allowed counsel to interview potential witnesses.<sup>3</sup>

Utah courts are required to make orders regarding the "future care and custody" of the minor children of parties who are divorcing. Utah Code Ann. § 30-3-10(1) ("the court shall make an order for the future care and custody . . .").

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<sup>3</sup>The Father probably makes more claims than these. However, his other claims are difficult to follow.

While the principles of res judicata apply in the context of divorce proceedings, the court has continuing jurisdiction to make reasonable and necessary orders in the best interests of children, their custody and support. Bayles v. Bayles, 1999 UT App 128, 981 P.2d 403, 405 (Utah Ct. App. 1999); In re J.J.T., 877 P.2d 161, 164 (Utah Ct. App. 1994).

This Court grants trial courts a wide pasture of discretion when it comes to weighing evidence, assessing credibility and making custody and visitation determinations. Hudema v. Carpenter, 1999 UT App 290. In general, a court looks at “the preference of the child; keeping siblings together; the relative strength of the child’s bond with one or both of the prospective custodians; and, in appropriate cases, the general interest in continuing previously determined custody arrangements where the child is happy and well adjusted.” Tucker v. Tucker, 910 P.2d 1209, 1215 (Utah 1996).

Trial courts also look at each parent’s

moral character and emotional stability; duration and depth of desire for custody; ability to provide personal rather than surrogate care; significant impairment of ability to function as a parent through drug abuse, excessive drinking, or other cause; reason for having relinquished custody in the past; religious compatibility with the child; kinship, including, in extraordinary circumstances, stepparent status; and financial condition.

Hudema v. Carpenter, 1999 UT App 290.

Again, trial courts have great discretion to weigh the factors according to the unique circumstances of the case. Hudema v. Carpenter, 1999 UT App 290.

This Court independently reviews claims involving res judicata and choice of law. In re J.J.T., 877 P.2d 161, 164 (Utah Ct. App. 1994). However, this Court grants the trial court a wide pasture of discretion in weighing evidence, assessing credibility and making fact-intensive determinations involving child welfare, custody and visitation. Hudema v. Carpenter, 1999 UT App 290.

Here, the Missouri court had earlier granted the parties joint legal custody with the Mother having primary physical custody. After the order was entered, the parties married. After the separation, the parties continued the earlier situation where the Mother had primary physical custody. The parties then submitted themselves to the Utah court's jurisdiction to determine the terms of the divorce, including custody and visitation. Even so, the parties, as well as the court, acknowledged that the Missouri court had earlier entered orders regarding the Child's custody.

In acknowledging the Missouri order, the Utah court did not simply adopt it.<sup>4</sup> Because the legal and factual circumstances had changed, the court carefully considered the evidence before it including two days of testimony as well as photographs and documentary evidence. The court also considered the following factors: that the Child had lived her entire life with the Mother, that the Child had a close relationship with her half-siblings, and that she enjoyed a good visiting relationship with her father.

In short, the Father's claims regarding res judicata and judicial notice are without merit because the trial court did take into account the prior court orders and Division investigations. The Father's claims regarding weight of evidence, credibility and sufficiency of evidence are without merit because he fails to marshal the evidence and because he fails to show how the trial court abused its discretion and because issues of weight and credibility are strictly within the trial court's purview.

This Court should affirm the custody and visitation orders.

#### **ORAL ARGUMENT; PUBLICATION OF OPINION**

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

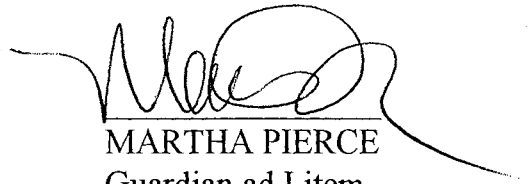
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<sup>4</sup>Even had the Utah court adopted the Missouri order, it would not have helped the Father much because the Missouri order, like the Utah order, granted the Mother primary physical custody with the Father having standard visitation.

### CONCLUSION

For the reasons stated above, the Guardian moves this court to affirm the trial court's custody order.

DATED this 3<sup>rd</sup> day of November 2000.



MARTHA PIERCE  
Guardian ad Litem

### CERTIFICATE OF MAILING

I hereby certify that on the 3<sup>rd</sup> day of November 2000, I caused to be mailed, postage prepaid, two true and exact copies of the Guardian ad Litem's Brief to:

Keith Cox, Pro Se  
Appellant  
5380 Hollow Road  
Nibley, Utah 84332

Dennis Matthews  
Attorney for Appellee  
55 North Main Street, Suite 302  
Logan, Utah 84321



MARTHA PIERCE  
Guardian ad Litem

## **ADDENDA**

1. Findings of Fact, Conclusions of Law and Order, entered March 20, 2000. R.486-88.



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Logan, Utah 84321  
Telephone: (435) 753-7999

Attorney for Petitioner

IN THE FIRST JUDICIAL DISTRICT COURT  
CACHE COUNTY, STATE OF UTAH

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WENDY A. COX (LOMSDAL),

Petitioner,

DECREE OF CUSTODY

vs.

KEITH COX,

Respondent.

Civil No. 974100564 DA

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This matter came on for trial on the 3rd and 23rd of February, 2000, before the Honorable Clint Judkins, District Court Judge. The Petitioner was present in court represented by her attorney, Dennis Mathews. The Respondent was present in court, pro se. The minor child of the parties was represented by the Guardian ad Litem, Dianne R. Balmain. This matter came before the court having been bifurcated for trial, a Decree of Divorce having been entered on or about the 24th day of September, 1998. The issues reserved for trial were: child custody, visitation, fees and costs and attorney's fees. Witnesses were sworn and evidence was presented, and based upon the evidence, and the Court being fully appraised in the matter, and the Court having entered its Findings of Fact and Conclusions of Law, the Court now enters the following:

DECREE OF CUSTODY

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The care, custody and control of the minor child, Anna

Marie, born March 19, 1995, is hereby awarded to the Petitioner, subject to the Respondent's right of reasonable visitation. In this matter reasonable visitation shall be as such time as the Parties may agree, and if they can not agree, then as is set forth in Utah Code Section 30-3-35.

2. It is hereby ordered that the statutory provisions concerning health and medical insurance, day care costs and uninsured medical expenses shall apply, and it is so ordered.

3. The Respondent is hereby ordered to pay \$1,000.00 to the Petitioner for Petitioner's costs and attorney's fees.

DATED this 20 day of March, 2000.

BY THE COURT:

Clint Judkins  
District Court Judge

APPROVED AS TO FORM:

Dianne R. Balmain  
Dianne R. Balmain  
Guardian ad Litem