

2003

## Laura Johnson v. Kjell Karlsson : Reply Brief

Utah Court of Appeals

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Ms. Wendy Lems, Esquire.

Brook J. Sessions; Harris and Carter; Attorney for Appellant .

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**IN THE COURT OF APPEALS FOR  
THE STATE OF UTAH**

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LAURA JOHNSON,  
F/k/a LAURA KARLSSON  
Petitioner/Appellee,

Vs.

KJELL KARLSSON,  
Respondent/Appellant.

**APPELLANT'S BRIEF**

Appellate Case No.: **2003-0602-CA**  
Trial Case No.: 994401942

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**APPELLANT'S REPLY BRIEF**

Appeal from a judgment rendered by Judge Lynn W. Davis of the Fourth District Court. Appeal to determine whether the court committed error by using goodwill to value a marital business and whether the court's award of primary physical custody to the mother should be reversed.

Brook J. Sessions (U.S.B. #6136)  
HARRIS & CARTER  
Attorney for Appellant  
3325 N. University Ave., Ste. 200  
Provo, Utah 84604  
Phone: (801) 375-9801 Fax: 377-1149

Ms. Wendy Lems, Esquire  
7050 Union Park Center, Suite 350  
Midvale, UT 84047

**UTAH COURT OF APPEALS  
BRIEF**

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HARRIS & CARTER  
Attorney for Appellant  
3325 N. University Ave., Ste. 200  
Provo, Utah 84604  
Phone: (801) 375-9801 Fax: 377-1149

Ms. Wendy Lems, Esquire  
7050 Union Park Center, Suite 350  
Midvale, UT 84047

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**INTRODUCTION**

**COMES NOW** the Appellant, Kjell Karlsson, and submits this Reply Brief in Support of his appeal. Based on the discussion herein, and the argument and authorities contained in his Brief in Chief, Mr. Karlsson respectfully submits that the trial court erred in: 1. its division of marital assets that included business goodwill; and 2. its award of primary physical custody of the parties' minor child to the Laura Johnson.

In her Response Brief, Appellee, Ms. Johnson makes a variety of mischaracterizations of Kjell Karlsson's arguments and the trial court's findings, misconstrues the legal authority and holdings relevant to a proper division of marital property in Utah, and does not challenge or contest the multitude of findings made against her on, and which are determinative of, the custody issue. For all of these reasons, which are more fully discussed

hereinafter, Kjell Karlsson requests that this Court of Appeals modify the order of the trial court such that: 1. the portion of assets attributable to goodwill be excluded from the division of the parties' marital assets; and, 2. that primary physical custody of Katrina Karlsson be awarded to Kjell Karlsson, and that the case be remanded to the trial court for entry of judgment consistent with the same.

### **ARGUMENT & AUTHORITIES**

#### **I. The Trial Court Erred By Including Goodwill To Determine The Value Of The Closely Held Catering Business.**

Kjell Karlsson has challenged the inclusion of goodwill from a closely-held food catering business by the trial court. The inclusion of goodwill, at an assumed value of \$20,000.00, is challenged on two grounds: 1. There is no evidentiary support for this "assumed" value; and 2. Utah case authority does not permit the inclusion of business goodwill as a divisible marital asset. There is no challenge here, by either of the parties, that the trial court improperly valued any marital asset other than business goodwill.<sup>1</sup>

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<sup>1</sup> Appellee, in arguing for the validity of trial court's valuation of goodwill, makes reference to a variety of business assets—including real property, equipment assets, vehicles, and a mobile kitchen—which not at issue on appeal. Neither party has challenged the valuation of those items of marital property, and they should, accordingly, be disregarded. (Appellee's Brief at pp. 5-6, 8-10. Only the goodwill component is at issue.

## 1. Lack of Evidentiary Support

Appellant, Kjell Karlsson—on the basis of his innate personal talents, capabilities, acquired skills, knowledge, intelligence, judgment, and temperament—qualified himself to become and is a professional chef. He attended college in Sweden and received a chef’s diploma. He has, since 1987, operated catering businesses in Utah utilizing these talents and skills. (FOF 149-50.) After Appellant had established his catering business, Laura Johnson assisted him in certain limited aspects in one of these catering businesses during the parties’ marriage. (FOF 149-53.) The catering business operated by the parties’ during their marriage, incurred excessive debts, including tax, labor, utility, and supply obligations. (FOF 154-60.) As acknowledged by Laura Johnson, “[a]s a result of the mounting debt, the catering business...was defunct and was shut down...” (Appellee’s Brief at 8.)

That catering business was not only “defunct and shut down”, but was bankrupt. (FOF 11, 18, 20, 23-24, 162.) In fact, Laura Johnson, herself, initiated an involuntary bankruptcy proceeding against Kjell Karlsson with regard to the catering business debts. Id. Now, after failing to challenge any of the trial court’s findings on the business valuation issue and admitting that the business was bankrupt, defunct, and shut down, **Laura Johnson** contends (without any evidentiary support) that there is some inherent goodwill in the



defunct catering business she operated with her husband. What goodwill or value exists in this bankrupt, defunct, and shut down business? It is Kjell Karlsson's position that only through speculation and conjecture can any value even be "assume[d]". (FOF 166.)

Kjell Karlsson has contested this assumption because it is nothing more than speculation. (See, Appellant's Brief at pp. 22-23.) Speculation and conjecture are not proper bases for establishing any evidentiary matter, much less the goodwill of a business. State v. Layman, 985 P.2d 911 (Utah 1999). Speculation is defined as the "act or practice of theorizing about matters over which there is no certain knowledge." Black's Law Dictionary 1407 (7th ed. 1999). And, in this instance, even the trial court acknowledged that there was "insufficient evidence . . . to determine precise values" for business goodwill. (FOF 166.)

Kjell Karlsson submits that not only is there "insufficient evidence . . . to determine precise values", but there is simply no evidence supporting the valuation found by the trial court. (FOF 17.) At the most, the evidence demonstrates that the business was bankrupt, defunct, and without sufficient assets to pay its debts and obligations. Further, Appellee does not point to any evidentiary support for this "imputed", "assumed" value because there is none

in the record. At trial, Appellee failed to introduce any evidence on the value of goodwill, which cannot now be remedied on appeal. (FOF 164-67, 170.)

Utah law cautions that “[w]hen the proximate cause of an injury is left to speculation, the claim fails as a matter of law.” Mitchell v. Pearson Enterprises, 697 P.2d 240, 246-47 (Utah 1985), quoting Staheli v. Farmers’ Co-op. of Southern Utah, 655 P.2d 680, 684 (Utah 1982). Appellant submits that when an essential element—the value of goodwill—is left to speculation, a claim for that element likewise should fail as a matter of law. Accordingly, the award of \$10,000 for goodwill to Appellee cannot stand and should be reversed.

## **2. Established Utah Case Authority**

Utah law is also clear and uncontroverted that closely-held business goodwill is not a marital asset susceptible of division. Sorensen v. Sorensen, 839 P.2d 774, (Utah 1992). Laura Johnson attempts, at some length but without any support from Utah authority, to distinguish this case from what she terms Sorensen’s holding that “professional goodwill” cannot be divided as a marital asset.<sup>2</sup> However, the fundamental holding of Sorensen, that “the goodwill of a

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<sup>2</sup> Of note, the Utah Supreme Court did not use the phrase “professional goodwill” at all in its opinion, except in quoting from or referring to cases from other jurisdictions. Id. at 777. Instead, the Supreme Court in Sorenson repeatedly refers to “the goodwill of a sole practitioner” as the matter at issue in the case. Id. at 775, 777.

sole practitioner is nothing more than his or her reputation for competency” which is not a marital asset for division upon divorce, has not been changed or altered since it was announced. Id. at 775.

In Utah, professional or advanced degrees, professional service contracts, and professional licenses, are not marital property that may be divided upon divorce. Chambers v. Chambers, 840 P.2d 841 (Utah App. 1992); Martinez v. Martinez, 818 P.2d 538, 541-42 (Utah 1991).

Additionally, the Sorensen court specifically found that “[t]he reputation of a sole practitioner is personal, as is a professional degree. (Emphasis added; supra, at 776.) If the holding in Sorensen were intended, as Laura Johnson urges, to apply to only “professional goodwill” there would be no need to compare the reputation, ie., goodwill, of a sole practitioner to that of a professional degree. In short, both a sole practitioner’s and a professionally licensed practitioner’s goodwill and reputation are not divisible marital assets under Sorensen, and Appellee’s lengthy attempt to distinguish the two are not supported by the decision in Sorensen.

If Kjell Karlsson’s reputation in the catering business and field had any value, which is implicit in the trial court’s findings and division of goodwill from the bankrupt, defunct catering business, that reputation is derived from his

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training, education, experience, skills, competency, and years of conducting business in the food service industry. His reputation is, just like that in Sorensen, Chambers, and Martinez, not a marital asset that can be divided. Similarly, if Laura Johnson had some reputation, skill, or expertise in the food industry, it would be personal to her, and not subject to division as marital property.

Because Utah case authority is clear and established on this issue, the trial court's award of \$10,000 for business goodwill to Laura Johnson was in error and should, accordingly, be reversed.

**II. The Trial Court Erred by Awarding Primary Physical Custody to Laura Johnson against the Great Weight of the Evidence and the Court's own Findings.**

Against the great weight of the evidence and its own findings, both quantitatively and qualitatively, the trial court awarded primary physical custody of the parties' minor daughter to Laura Johnson. Kjell Karlsson urges that this award of primary physical custody exceeded the permissible discretion of the trial court, based upon a review of the findings and record before the trial court. This award of primary physical custody to Laura Johnson, which is directly contrary to the findings of the trial court, contradicts the purpose and intent of Utah law that the best interests of the child should be served in making custody determinations.

Repeatedly, Laura Johnson cites to Finding of Fact No. 118, as support for the trial court's custody determination. However, that finding—which Kjell Karlsson has specifically challenged—is nothing more than a conclusory recitation of the award of primary physical custody to Laura Johnson. Moreover, Finding of Fact No. 118 specifically contradicts approximately 90 other findings made and adopted by the trial court, while failing to find support in virtually any other finding made. For these reasons, the award of primary custody to Laura Johnson is not in the best interest of the parties' child and is an abuse of the trial court's discretion. Pusey v. Pusey, 728 P.2d 117 (Utah 1986).

Laura Johnson has asserted 7 factors which she claims demonstrate support for the “qualitative determination” made by the trial court in awarding primary physical custody of the child to her. (See, Appellee's Brief, pages 14, 32-48.) However, careful scrutiny of these factors, the findings actually made by the trial court, and the evidence supporting those findings demonstrates that the trial court's award of primary physical custody contradicts its own findings, is against the great weight of the evidence, and is not in the best interests of the parties' daughter. For all of these reasons, Kjell Karlsson submits that the trial court exceeded its permissible discretion and the award of primary physical custody to the mother is “flagrantly unjust”. Hutchison v. Hutchison, 649 P.2d 38, 41 (Utah 1982).

## **1. Educational Development Factor.**

Laura Johnson argues that the trial court gave “paramount weight and consideration” to the educational development of the parties’ daughter, and that this was the basis for awarding primary physical custody to the mother. (Appellee’s Brief, pages 32-36.) However, when the trial court’s own findings regarding the education of this child are examined, a much different picture emerges. With regard to the education of the child, the trial court found as follows:

During 1999, while she was living with Laura Johnson, Katrina missed over 100 days of school, and in 2000, while she was living with her mother, the child missed approximately 70 days of school. While Laura Johnson claimed that during the time Katrina missed school, she was being home schooled, the Trial Court found the evidence not compelling, and determined that these excessive absences were “unjustified and alarming”. (FOF 53-55.)

As of the fall of 2002, the parties’ child was doing much better in school, but was still struggling in writing and spelling. The Trial Court attributed those improvements to consistent attendance, which had been curbed almost entirely by that time. (FOF 56.) In contrast to the attitude and approach of Laura Johnson concerning her daughter’s education, Kjell Karlsson has consistently demonstrated a concern for his daughter’s education by meeting with her teachers and creating an educational plan to address her needs in school. (FOF 56-57.)

Laura Johnson’s contention that the “child’s educational improvement under Laura Johnson’s custody and care” somehow supports the custody determination is absurd in the extreme. The findings made by the trial court

show that the child suffered from a lack of care and commitment by the mother to Katrina's education. The trial court found Laura Johnson's care resulted in these "excessive absences", which the court further found to be "unjustified and alarming." (FOF 53-55.) The trial court made no findings that Laura Johnson's did anything to further or enhance her daughter's educational progress. These findings plainly show that the trial court could not have based its custody determination on Laura Johnson's commitment to "the schooling and educational development" of the parties' daughter. (Appellee's Brief, page 32.)<sup>3</sup>

Instead, it was Kjell Karlsson's consistent concern, meeting with teachers, and creation of an educational plan that resulted in "consistent attendance" and educational improvement for his daughter. (FOF 56-57.) That the trial court refused to change primary custody because altering the educational situation was "a risk [it] is unwilling to take" contradicts its own specific findings as to what caused the precarious educational circumstances in the first place. (FOF 118.) To allow Laura Johnson to reap the reward of the damage she caused to the child's education—because the improvement occurred during time that Kristina

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<sup>3</sup> Appellee references the "minor child's dyslexia and prior educational difficulties" as matters which had hindered the child's educational development. (Appellee's Brief, pages 32, 36, 38.) However, there is no evidence or finding that Katrina had dyslexia or prior educational difficulties—other than those which were caused by Appellee's inattention to her educational needs.

lived with Laura Johnson —turns this factor on its face and results in a flagrant abuse of discretion.<sup>4</sup>

Essentially, Laura Johnson’s argument on this point is that because Katrina “was doing so well in school” at the time of trial—as compared to the destruction to her educational progress that had occurred in the intervening two years she had been with her mother—that the trial court properly refused to award primary physical custody to Kjell Karlsson, as recommended by the only expert testimony herein, based upon the inherent risks in altering or changing the school situation. (Appellee’s Brief, pages 32-36.) Kjell Karlsson submits that permitting Laura Johnson to harm and obstruct the educational progress of their minor child, and then to find that improvement that resulted from Kjell Karlsson efforts somehow supports Laura Johnson continuing with primary custody, “is so flagrantly unjust

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<sup>4</sup> The findings and evidence as to education also show:

Kjell Karlsson and Robyn Karlsson testified about Katrina complaining to them about being teased at school and being dressed in smelly, unclean clothes. (Transcript 209 and 622.) A change to a new school, with fresh and clean clothes and a supporting stepbrother in the same class would be a benefit to Katrina.

There was testimony that the stepchildren had already talked to their teacher and had a place set up in their classroom for Katrina. Further testimony was proffered that the stepchildren were at grade level with Katrina and often studied with her. (Transcript 404). Of note, Katrina has already established a network and relationship base at her father’s home. Kjell Karlsson, who married Robyn Karlsson in the summer of 2002, has stepchildren in his home of the same age and school grade as his daughter, and there is evidence of bonding between Katrina and these stepchildren. (FOF 58, 61.)



as to be an abuse of discretion”. Tucker v. Tucker, 910 P.2d 1209, 1214 (Utah 1996).

If the “paramount weight and consideration” is accorded to “the schooling and educational development” of Katrina,—as Appellee urges—the only consistent result, based on the evidence and the trial court’s findings, is that Kjell Karlsson be awarded primary physical custody of Katrina. To do otherwise in light of the specific findings made here is “flagrantly unjust” and an abuse of discretion.

**2. Happiness, Duration of Custody, Bond with Parent, Time Spent with Child and Primary Caretaker Factors.**

Laura Johnson next contends that the trial court accorded greater weight to factors including the happiness of the child, the duration of custody with Laura Johnson, bonding with her parents, time Laura Johnson spent with Katrina, and the fact that Laura Johnson has been the child’s primary caretaker as support for Laura Johnson’s award of primary physical custody. Again, careful review of the trial court’s findings does not support the award of custody to Laura Johnson, and instead demonstrates that this determination is “flagrantly unjust” to Kjell Karlsson and not in the best interests of Katrina.

Specific findings made by the trial court with regard to these factors include the following:

A hearing was held on February 29, 2000, and based upon the parties’

stipulation the Trial Court entered a Bifurcated Decree of Divorce on March 2, 2000. (FOF 19.) Prior to that hearing, Kjell Karlsson filed an affidavit complaining he had only been allowed to see his daughter, Katrina, a couple of times in over a year from January 1999 through February 29, 2000. As part of the same, he asked the court to find Laura Johnson in contempt and to enter sanctions and to award attorney's fees. (FOF 13.) Without an evidentiary hearing the court entered the divorce decree based on a stipulation. Upon further stipulation the Court entered orders granting Laura Johnson continued temporary physical custody, subject to visitation (parent time) to Kjell Karlsson. Visitation pick up and drop off was to take place at the Family Support and Treatment Center (FSTC) or other agreeable place if FSTC was not able to supervise pick up and drop off. (FOF 12.) The issue of Laura Johnson's contempt and an award of attorney fees because of interference with Kjell Karlsson's visitation with his daughter were specifically reserved. (FOF 14.)

Because of Laura Johnson's continuing unwillingness to allow Kjell Karlsson visitation with the minor child, numerous hearings were held respecting Kjell Karlsson's allegations that Laura Johnson was not allowing visitation with the minor child, which resulted in further specific schedules of visitation and make up visitation. In each of these instances, Laura Johnson was found to be in violation of the visitation previously ordered, and the issues of contempt, attorney's fees and sanctions were reserved, except for the imposition of a sanction in the amount of \$300.00 against Laura Johnson on September 6, 2001. (FOF 21-22, 25, 27-30.) At trial, the court noted the amount of missed visitation, interference with phone parent time, repeated harassing calls and willful violation of the Trial Court's orders—all knowingly caused by Laura Johnson—and sanctioned Laura Johnson for her contempt (which had been reserved on not less than ten occasions). (FOF 119-134.)

Although Ms. Johnson, had been more compliant with visitation than in 1999, even with all of the court orders on visitation, with contempt reserved and in the face of a looming trial, Laura Johnson did not provide Kjell Karlsson with all of his year 2002 visitation up until the time of trial. (FOF 109.) Moreover as to the visitation that he had, the father testified, without any contrary testimony or evidence, that Laura Johnson was late on numerous occasions. Accordingly, the Trial Court

found that Ms. Johnson's disrespect for Appellant's time was a factor supporting an award of custody to him. Further, the Trial Court found this to be an additional ground for a finding of contempt. (FOF 110.) Kjell Karlsson has promptly returned Katrina to her mother at the conclusion of each visitation session. (FOF 111.) The evidence presented at trial showed clearly that Kjell Karlsson was denied parent time. (FOF 113.)

During the course of these proceedings, Kjell Karlsson has been granted the minimum parent time schedule set forth by Utah Code Annotated 30-3-33 et seq., but, as noted above, he has not received nor obtained that visitation. (FOF 52.)

At the time of trial, Katrina Karlsson was a ten-year old child who attended Highland Elementary in Highland, Utah. Throughout the marriage and separation of her parents, Katrina resided with her mother in Highland, Utah, and she had lived her entire life with her mother or her mother and father, but never with her father alone, except for periods of visitation. (FOF 50-51.)

Kjell Karlsson, who married Robyn Karlsson in the summer of 2002, has stepchildren in his home of the same age and school grade as Katrina. In fact, there is evidence of bonding between Katrina and these stepchildren. (FOF 58, 61.) Due to the numerous visitation orders, Kjell Karlsson's weekends of visitation have changed during these proceedings. However, both he and his current wife have worked with her ex-husband to arrange weekends so the children can all be together. The Trial Court specifically found this cooperation to be evidence of Kjell Karlsson's desire for Katrina to have appropriate time with the important people in her life. (FOF 69.)

While, Laura Johnson's duration and depth of desire for custody, throughout the proceedings, does favor her, the thickness of the court file alone, with the numerous proceedings brought by Kjell Karlsson regarding visitation, attests to his desire to maintain a relationship with his child, even though he has not had primary physical custody since the separation in January 1999. (FOF 96.) Kjell Karlsson did not initially seek custody; however, his later determination to seek custody was based on the child's overall best interest and on Ms. Johnson's failure to comply with court orders. (FOF 97.)

While Katrina would like to spend more time with her father, she was also very happy with her mother. (FOF 117.)

Close scrutiny of these findings, in conjunction with the Laura Johnson's assertions, again demonstrates that they do not support the conclusions contained in Finding of Fact No. 118 nor the award of primary physical custody to Laura Johnson.

Happiness and bonding are shown in the findings to be relatively equal. (FOF 50-51, 61, 85-86, 117.) Katrina is happy with and has shown evidence of bonding with both of her parents, but would like to spend more time with her father. As to the duration of custody, time spent with the child, and the primary caretaker factors, the evidence shows that Laura Johnson repeatedly and continuously interfered with and frustrated Kjell Karlsson's custody, visitation and ability to operate as a caretaker for Katrina. (FOF 12-14, 19, 21-22, 25, 27-30, 52, 109-11, 113, 119-34.) While it is true that Laura Johnson had primary custody and was the primary caretaker for the minor child, Kjell Karlsson submits that the weight assigned these factors is mitigated by the Laura Johnson's interfering and destructive conduct.

Sections 30-3-10 (2) and 30-3-34 (k), U.C.A., specifically require that this type of interference with and disruption of the child's relationship not be rewarded. Instead, these statutes require that the trial court consider "which

parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the non-custodial parent” and “a substantial and chronic pattern of missing, canceling, or denying regularly scheduled parent-time” as factors in making a custody determination.

It should be specifically noted that the court ordered custodial evaluation specifically addresses the considerations raised in these particular factors. That custodial evaluation, and the testimony of the evaluators, is the only expert, opinion evidence in the record concerning the child custody matters. With regard to that evaluation, and the experts’ testimony, the trial court found:

the parties were referred to a court-appointed custodial evaluator, Dr. Grant Taylor, who presented a custodial evaluation and recommendation. The Trial Court also received testimony from Tom Baxter, LCSW, who worked with Dr. Taylor to prepare the custodial evaluation. The custodial evaluation and recommendation by Dr. Taylor, and the testimony of Tom Baxter, both recommend that Kjell Karlsson have permanent physical custody of Katrina. (FOF 118.)

The evaluation found that both parents were fit and proper to have the custody of the minor child and based its recommendation of a change of primary physical custody to Kjell Karlsson on the Laura Johnson’s interference with visitation. (FOF 75.) The Trial Court found Dr. Taylor’s and Mr. Baxter’s report credible, less than thorough, and yet of import in showing very troubling activities and thinking of Laura Johnson. (FOF 76-77.) Moreover, the Trial Court specifically noted that it relied on the contents of the custodial evaluation. (FOF 77.) There was no expert testimony, opinion, or evaluation contrary or at odds with this court-ordered evaluation and testimony.

Ms. Johnson was not initially cooperative with the evaluators, did not provide honest and accurate information to the evaluators, blamed the evaluators for not timely completing the evaluation when she in fact

caused the delays, and did not answer the psychological testing candidly, which resulted in the invalidity of her psychological test results. (FOF 78-81.) Dr. Taylor and Tom Baxter opined that Laura Johnson incorrectly saw Kjell Karlsson's motives as only to take Katrina from Laura Johnson rather than seeking a decision in Katrina's best interest. (FOF 82.) Dr. Taylor and Mr. Baxter testified they found no evidence to substantiate the mother's numerous false allegations of abuse. (FOF 83.) While these experts did not find Laura Johnson to be actively engaged in intentional parental alienation, they did express a concern that if she retains custody and continues with her actions, the child may become alienated from Kjell Karlsson. (FOF 84.) The evaluators also expressed concerns over Laura Johnson's attempts to alienate Katrina from her father by actively discussing the divorce proceedings with Katrina. (FOF 89.)

While the child repeated Ms. Johnson's allegations of abuse to the evaluators, she stated neutrality as to her preference for placement. Upon the evaluators using non-direct questioning techniques they reached the conclusion that Katrina would like more time with her father. (FOF 85-86.) These experts indicated that the child's direct statements being contrary to the indirect questioning suggests the mother may have coached the child and that Laura Johnson overburdens the child with adult decisions such as physical custody placement. (FOF 87.) The evaluators also reported that Katrina is concerned her father will go to Sweden and take her from her mother. However, the only time the child has been to Sweden is with both parents when the mother 'found' Katrina's passport during a period of reconciliation, and no credible evidence was submitted to support the contention that Kjell Karlsson has any intent to leave the United States and flee to Sweden with his daughter. (FOF 88.)

In Laura Johnson's home Katrina has half-siblings (her mother's children from a previous marriage); however, all of these half siblings have reached adulthood. One of these half-siblings was previously married and, at the time of trial, was engaged to re-marry, while the other was attending college. The next oldest half-sibling in her mother's home is at least nine years older than Katrina and has

reached adulthood.<sup>5</sup> (FOF 90-91) Katrina does not have any blood siblings at Kjell Karlsson's home; however, her stepsiblings there are much closer in age than the adult half siblings in Laura Johnson's home. (FOF 92.)

At trial and during the course of the expert evaluation, Laura Johnson sought to use Kjell Karlsson's cohabitation, prior to his marriage, with his current wife as grounds to support her physical custody of Katrina. While doing so, Ms. Johnson neglected to acknowledge that she was spending nights at her boyfriend's home and having Katrina sleeping on a couch during these nights. (FOF 93.) Ms. Johnson's statements to the child regarding her father's relationships were emotionally and mentally overburdening for Katrina. (FOF 94.)

Again these findings, which directly address the best interests of Katrina—in addition to the deleterious effects of Laura Johnson's actions on her daughter—contradict the conclusory assertions of Finding No. 118. It is inconsistent, and an abuse of discretion, for the trial court to make such findings and yet conclude that primary physical custody should be awarded to Laura Johnson. As with the educational factor cited to above, the trial court's custody determination actually rewards Laura Johnson for her interference with and disruption of Kjell Karlsson's parenting time and opportunities. That should not be permitted nor encouraged as it creates a flagrant injustice and amounts to an abuse of discretion.

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<sup>5</sup> At trial Judge Davis noted that it was likely the adult half siblings would likely move out. In fact, they all have now moved out.

### **3. Religious Compatibility.**

Laura Johnson states, “The trial court did *not* use religious compatibility for or against the parties since [it] concluded that both parties could accommodate and facilitate the religious upbringing of the minor child equally.” (Appellee’s Brief at 41.) Mr. Karlsson hopes that Ms. Johnson’s stated religious compatibility is not used as a factor to support an award of custody to her. A careful review of the findings and evidence makes it clear that her stated compatibility is not supported by the facts. Apparently, Laura Johnson recognizes this and has abandoned this factor as supportive of the custody determination because it is so obviously in contradiction to the underlying facts. (FOF 98-101.) However, the trial court cited to “religious incompatibility” as one the bases for the award of primary physical custody to Laura Johnson. (FOF 118.) Since Laura Johnson’s brief concedes that this ground does not support the custody determination, “and is a non-issue because of the equal footing afforded to the parties by the trial court”, Kjell Karlsson does not further address it beyond the arguments and authorities cited in his Brief in Chief.

Kjell Karlsson would urge this Court of Appeals to consider that Laura Johnson’s abandonment of this factor is illustrative of what has



occurred in each of the grounds cited by the trial court in Finding No. 118. As noted above, that finding contains conclusory bases for awarding primary physical custody to Laura Johnson, but is directly contradicted, and outweighed, by the myriad of earlier findings made by the trial court. Just as Laura Johnson acknowledges this duplicity and contradiction here, it is appropriate for this court to acknowledge the same with regard to the other conclusory grounds cited in Finding No. 118.

#### **4. Encouraging Visitation Factor.**

Laura Johnson acknowledges that “encouraging a minor child to have “a positive relationship between the child and the other parent” is a factor in determining the best interests of the child. U.C.A. §§30-3-10.2(2)(c); 30-3-10(1)(a)(ii); 30-3-10(2); 30-3-10.2(2)(h), Sigg v. Sigg, 905 P.2d 908 (Utah Ct. App. 1995). Yet, in spite of this acknowledgment, and the myriad of findings made against her—including the imposition of repeated sanctions for interference and attempted parental alienation, Laura Johnson claims that this factor was not properly weighted against her. Such disingenuous positions are hard, if not impossible, to reconcile.

The trial court found:

A hearing was held on February 29, 2000, and based upon the parties’ stipulation the Trial Court entered a Bifurcated Decree of Divorce on March 2, 2000. (FOF 19.) Prior to that hearing, Kjell Karlsson filed an affidavit complaining he had only been allowed to see his daughter,

Katrina, a couple of times in over a year from January 1999 through February 29, 2000. As part of the same, he asked the court to find Laura Johnson in contempt and to enter sanctions and to award attorney's fees. (FOF 13.) Without an evidentiary hearing the court entered the divorce decree based on a stipulation. Upon further stipulation the Court entered orders granting Laura Johnson continued temporary physical custody, subject to visitation (parent time) to Kjell Karlsson. Visitation pick up and drop off was to take place at the Family Support and Treatment Center (FSTC) or other agreeable place if FSTC was not able to supervise pick up and drop off. (FOF 12.) The issue of Laura Johnson's contempt and an award of attorney fees because of interference with Kjell Karlsson's visitation with his daughter were specifically reserved. (FOF 14.)

Because of Laura Johnson's continuing unwillingness to allow Kjell Karlsson visitation with the minor child, numerous hearings were held respecting Kjell Karlsson's allegations that Laura Johnson was not allowing visitation with the minor child, which resulted in further specific schedules of visitation and make up visitation. In each of these instances, Laura Johnson was found to be in violation of the visitation previously ordered, and the issues of contempt, attorney's fees and sanctions were reserved, except for the imposition of a sanction in the amount of \$300.00 against Laura Johnson on September 6, 2001. (FOF 21-22, 25, 27-30.) At trial, the court noted the amount of missed visitation, interference with phone parent time, repeated harassing calls and willful violation of the Trial Court's orders—all knowingly caused by Laura Johnson—and sanctioned Laura Johnson for her contempt (which had been reserved on not less than ten occasions). (FOF 119-134.)

Although Ms. Johnson, had been more compliant with visitation than in 1999, even with all of the court orders on visitation, with contempt reserved and in the face of a looming trial, Laura Johnson did not provide Kjell Karlsson with all of his year 2002 visitation up until the time of trial. (FOF 109.) Moreover as to the visitation that he had, the father testified, without any contrary testimony or evidence, that Laura Johnson was late on numerous occasions. Accordingly, the Trial Court found that Ms. Johnson's disrespect for Appellant's time was a factor supporting an award of custody to him. Further, the Trial Court found this to be an additional ground for a finding of contempt. (FOF 110.)

Kjell Karlsson has promptly returned Katrina to her mother at the conclusion of each visitation session. (FOF 111.) The evidence presented at trial showed clearly that Kjell Karlsson was denied parent time. (FOF 113.)

During the course of these proceedings, Kjell Karlsson has been granted the minimum parent time schedule set forth by Utah Code Annotated 30-3-33 et seq., but, as noted above, he has not received nor obtained that visitation. (FOF 52.)

The evaluation found that both parents were fit and proper to have the custody of the minor child and based its recommendation of a change of primary physical custody to Kjell Karlsson on Laura Johnson's interference with visitation. (FOF 75.)

Yet, in the face of these unchallenged findings, Laura Johnson contends that "the best interest of the minor child" were what motivated the trial court to ignore its own findings—which Utah law defines and Laura Johnson acknowledges are determinative of the child's best interests—in making the custody determination.

Apparently, Laura Johnson must take this indefensible position since to acknowledge that she was found to have repeatedly interfered with and attempted to alienate the child from Kjell Karlsson would support reversal of the custody determination. However, the findings cited above cannot be reconciled with Laura Johnson's assertion that "[n]either the [trial] court, nor the custody evaluators found Laura Johnson 'intentionally' or 'actively' engage[ed] in parental alienation and interference." The custody evaluators in part recommended a change in custody to Kjell Karlsson because of the intentional

and active interference and attempted parental alienation. (FOF 75.) For its part, the trial court must have found Laura Johnson to have intentionally and actively interfered with the relationship, otherwise it could not have held her to be in contempt. Von Hake v. Thomas, 759 P.2d 1162, 1168 (Utah 1988).

Clearly, it is not in the child's best interests for Laura Johnson to continue to interfere with and alienate her from her father. Laura Johnson acknowledges the same in her brief. (Appellee's Brief at 42.) As with the other factors discussed *supra*, Kjell Karlsson asserts that the trial court's conclusion in awarding custody to Laura Johnson is not supported by, and in fact is contradicted by, its own findings and actions herein. Such a result is flagrantly unjust, and an abuse of discretion, which should be reversed by this Court of Appeals.

#### **5. & 6. Financial Condition and Moral Character Factors.**

Laura Johnson concedes that the financial condition and moral character factors are essentially "equally balanced." (Appellee's Brief at 45-47.) For this reason, and without agreeing to that position, Kjell Karlsson relies upon the arguments, facts, and authorities contained in his Brief in Chief on these issues. And, since Laura Johnson concedes the relative equality of these factors between the parties, they cannot support the custody determination made by the trial court.

## **7. Pets at Home.**

It appears that Laura Johnson acknowledges that having pets in the home of is not determinative of child custody. (Appellee’s Brief at 48.) Kjell Karlsson merely points out in his Brief in Chief, in response to the trial court’s conclusions in Finding No. 118, that this factor should be essentially equal between the parties as the child will have the opportunity to bring her pets with her, and Kjell Karlsson was willing to make arrangements to accommodate the pets. If, as Laura Johnson urges “the trial court relied on other factors, such as education and happiness of the child, and continuity and stability of previous child placement...in making its determination”, and the trial court’s findings were properly reconciled with its conclusions, Kjell Karlsson submits that he should have been awarded primary physical custody of the parties’ daughter. Regardless, the pets should be a non-factor as Katrina would still be with her pets on the weekends she would spend at her mother’s.

## **CONCLUSION**

For all of the foregoing—and for the authorities, factors, and argument contained in his Brief in Chief—Kjell Karlsson respectfully submits that the decision of the trial court with respect to inclusion of business goodwill and the award of primary physical custody should be reversed.

The trial court's inclusion of business goodwill (and apportioning \$10,000 each to Laura Johnson and Kjell Karlsson as divisible marital property) does not accord with Utah law. There is no evidence to support the award, which is based only upon speculation or conjecture, and even if there were substantial evidence, such an award conflicts with established case law of the Utah Supreme Court.

The trial court's award of primary physical custody to Laura Johnson amounts to an abuse of discretion and is flagrantly unjust in that this conclusion conflicts with virtually every other finding on child custody. As shown here, the best interests of the minor child are not served by that determination. Instead, both the vast quantity of findings made by the trial court—as well as the qualitative weight, content and import of those findings—when properly considered support an award of primary physical custody to Kjell Karlsson.

RESPECTFULLY SUBMITTED,

this 5 day of <sup>October</sup>~~September~~, 2004.

/s/

Brook J. Sessions (USB 6136)  
HARRIS & CARTER L.L.C.  
Attorney for Kjell Karlsson  
3225 N. University Ave., Ste. 200  
Provo, Utah 84604  
(801) 375-9801  
Fax: (801) 377-1149

MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed a true and correct copy of the Kjell Karlsson's Brief on this 5 day of <sup>October</sup>~~September~~, 2004, by first-class, U.S. Mail, postage prepaid to the following:

Original and seven copies filed with the Court of Appeals.  
Two copies to the following:

Ms. Wendy Lems, Esquire  
7050 Union Park Center  
Suite 350  
Midvale UT 84047

Telephone: 801-256-9500      Fax: 801-255-2442

/s/

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Secretary