

1992

Lisa Hartwig v. David Hartwig : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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UTAH COURT OF APPEALS

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LISA HARTWIG,)
Appellee,)
vs.)
DAVID HARTWIG,)
Appellant,)
-----o000o-----
REPLY BRIEF
Case No. 920496-CA
Priority 15
APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, UTAH
HONORABLE ANNE M. STIRBA, DISTRICT COURT JUDGE
-----o000o-----

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FILED
Utah Court of Appeals

MAR 23 1993


Mary T. Noonan
Clerk of the Court

UTAH COURT OF APPEALS

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Appellee,) REPLY BRIEF
vs.)
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STATEMENT OF JURISDICTION

Jurisdiction is conferred upon the appellate court pursuant to § 78-2a-3, Utah Code Annot. (1953, as amended).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

The following are the citations for the constitutional provisions, statutes ordinances and rules which Defendant cites herein that may be determinative of the issues presented in this brief. Each provision, statute or rule is set forth in its entirety in the attached addendum.

Statutes:

§78-45-7.7 Utah Code Annot. (1990)

§78-45-7.8 Utah Code Annot. (1990)

Constitutions:

Constitution of the United States
Articles 5 and 14

Constitution of the State of Utah
Article 1, §§1, 6, 11 and 24

SUMMARY OF THE ARGUMENT

1. The trial court did abuse its discretion in awarding visitation based upon Appellant/Defendant's prior history of extended visitation which was controlled by Appellee/Plaintiff. Visitation as established by the trial court severely limits the ability of the Defendant and children to maintain their relationship, maintenance of which is in the best interests of the children.

2. The fixed day care expenses set by the trial court is inappropriate as it denies Defendant the protections allowed under statute and requires him to pay day care when the children are not with the day care provider.

3. Plaintiff has no basis or need, in law or fact, for an award of her attorney fees and costs incurred in the defense of this matter. She had an income well above that of Defendant and this appeal raises real issues of law.

4. Defendant has shown that the written findings of fact for the order of modification of the decree of divorce do not comport with the oral findings announced from the bench in significant areas. Those findings should be amended to reflect the findings of the court as reflected by the transcript.

ARGUMENT

APPELLANT HAS ESTABLISHED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN THE AWARD OF VISITATION.

The first point is that the issue is not extended visitation as Plaintiff would have this court believe, but visitation in total over the entirety of the year. The fact is that with the Plaintiff moving to California, weekend, usual holiday, and other short period visitation is impractical, if not impossible.

The standard of review cited by Plaintiff, that of an abuse of discretion, is the standard of review for custody issues. The issue presented in *Nilson v. Nilson*, 652 P.2d 1323 (Utah, 1982), was "whether the evidence supports the trial court's determination that the best interests of the children are served by awarding custody of them to the mother." *Nilson*, 652 P. 2d at 1324. Likewise *Bake v. Bake*, 772 P.2d 461 (Utah App. 1989) dealt with custody modification. *Bake*, 772 P.2d at 462, and 464.

In fact, all cases cited by Plaintiff in this section of her brief deal with custody only. *Walker v. Walker*, 707 P. 2d 110 (Utah, 1985) tangentially dealt with a challenge on visitation, wherein the court discussed whether the visitation met the statute, or was unsupported by evidence and also discussed the choice of a health care provider to determine "remission" of a

mental impairment. *Walker*, 707 P. 2d at 112. In *Walker*, there was extensive expert testimony concerning the visiting parent's mental condition and how it affected relationships with the children. *Id.* In the instant case, there was only Plaintiff's admission that she wanted no visitation over one week in duration based upon her fears. Transcript at 54, and 57 - 58. Contrary to the representations of Plaintiff in her brief, there was a timely objection to the alleged behavior of Defendant during the marriage. See, transcript at 33 at which point upon challenge, Plaintiff simply indicated to the court that she would move on to other matters with the court so instructing her to do. Hence that testimony should have been excluded from consideration by the court.

Defendant does concur with Plaintiff that the best interests of the children are of prime consideration. This court has recently discussed the value of visitation and stated that the best interests of the children are promoted by having a strong relationship with the non-custodial parent by way of visitation.

Dana v. Dana, 789 P. 2d 726 (Utah Ct.App. 1990.) is one such case. In *Dana* this court stated that "[f]ostering a child's relationship with the non custodial parent has an important bearing on the child's best interests." *Dana* 789 P. 2d at 730 (citation omitted).

This court through Judge Greenwood directly affirmed and quoted *Dana* in *Smith v. Smith*, 793 P.2d 407 (Utah Ct. App. 1990),

addressing the value of visitation. This court stated that

"The best interests of a minor child are promoted by having the child respect and love *both* parents. 'Fostering a child's relationship with the non custodial parent has an important bearing on the child's best interest.' *Dana v. Dana*, 789 P.2d 726, 730 (Utah Ct.App. 1990). Visitation by a non custodial parent helps to develop this bonding of respect and love. Interference by the custodial parent with a non custodial parent's visitation rights as ordered by the court may clearly be contrary to a child's best interests. *Entwistle v. Entwistle*, 61 A.D. 2d 380, 402 N.Y.S. 2d 2-13, 215-216 (1978) ("It is readily apparent that the respondent's very act of preventing the [minor children] ... from seeing and being with their father is an act so inconsistent with the best interests of the children as to, per se, raise a strong probability that the mother is unfit to act as custodial parent.")

Smith, 793 P. 2d at 410 (emphasis and omissions in the original).

By significantly decreasing the amount of time that Defendant has with the minor children in this case, the trial court has severely limited the ability to foster and maintain those bonds of love and affection referred to in *Smith*. In raising this issue, Defendant does not assert "mathematical precision" as Plaintiff asserts, Defendant uses the numbers to show in an easily understand way just how much his access to the children is significantly decreased.

That is also the reason for Defendant's citation to the standardized visitation schedule set forth by the Third District court. Quite simply stated, Defendant is deprived of visitation,

a valuable opportunity to foster his relationship with his sons, to an extent well below that which he and the two boys would enjoy under those guidelines, simply because Plaintiff removed those children from this state.

When there is a change of circumstance, consisting of the removal of the children from this state, does the visitation order that existed before that change control visitation after the change? Defendant asserts that it does not control the subsequent visitation. Defendant and the two boys should have at least as much access to visitation to foster the parent-child relationship, as they enjoyed it before the move, if the same can realistically and economically be accomplished.

The standardized visitation schedule would have granted Defendant a calculable number of opportunities to enhance Defendant's relationship with the two children. Commissioner Arnett's recommendation is representative of an experienced commissioner attempting to approach that amount of time spent with the children. While his statements are merely a recommendation and made without benefit of full trial, they are reflective of a person with knowledge and ability in these matters based upon hearing representations of the same facts and arguments of the parties later heard by Judge Stirba. He recognized the changed circumstances and recommended more visitation than the court awarded. The trial court made its award based upon Defendant's

historical extended visitation record, that Plaintiff controlled. Record at 174 - 175 and transcript at 57.

If this court finds that the abuse of discretion standard is the appropriate standard to be applied in this case, then Defendant has shown that the court has abused its discretion in severely limiting Defendant's visitation to less than he had before the change. This action of the trial court severely affects Defendant's relationship with the children, the maintenance of which is recognized as being in the best interests of the children, and is not support by any finding of harm, past or present, to the children in allowing a comparable amount of visitation.

THE CHILD CARE EXPENSE AWARD IS UNREASONABLE AND INAPPROPRIATE AND DEFENDANT HAS SHOWN THAT THE AWARD WAS UNREASONABLE.

Plaintiff's recognition of the fact that §§ 78-45-7.7 and -7.8, Utah Code Annot. (1990) apply to this case is very helpful to Defendant, for that is very much the basis for this part of Defendant's appeal of the trial court's ruling. Plaintiff's circular argument on this issue shows the dilemma faced by Defendant.

Plaintiff asserts that Defendant has the protections afforded by those statutes, yet relies on the flat monthly payment. With the flat monthly payment, there is no accounting. These statutes, to work properly, require an accounting. Defendant has shown that

Plaintiff tried to charge him with day care costs for her honeymoon and Plaintiff has never denied this point. Without the accounting, how does the Defendant know that the expense is not being incurred so that he may suspend payment as allowed under the statute? Furthermore, why is it that when Defendant did attempt to suspend payment during a time when the two boys were with him for two two-week periods that Plaintiff filed an order to show cause for payment for those two periods, obtained a finding that Defendant had to pay Plaintiff for day care for those periods and that Defendant was not to again attempt such a termination of payment?

This is the exact quandary which Defendant faces. He cannot know exactly what is being spent for day care, whether day care is work related nor can he stop paying if the children are receiving day care. The record in this matter shows a history of abuses by Plaintiff of the day care claims. Record at 253 - 254, 256 - 257, and 259 - 261. This is a clear statement of the error the trial court made in making this determination and the clear violation of the intent of these statutory safeguards.

There is a second aspect of Defendant's appeal on this issue, which is the question of whether it is reasonable under the statutes that the day care provider be "on call" while the children are in school and that this "on call" be equated with day care. The trial court included this "on call" status as day care.

Transcript at 78 - 79.

The transcript shows that there was no "on call" person until just a couple of months before the trial of this matter. Transcript at 45. The children had day care only after school. *Id.*

Plaintiff also assert that her new husband is an appropriate provider for the children. Plaintiff's counterclaim at ¶¶ 2d and 3g. and record at 146 and 148, respectively. Therefore there are two adults available for emergencies at school.

The statutes involved herein concern work related day care to the children, not mere "on call" while the children are in school. It is an abuse of discretion to require Defendant to pay for one-half of this "on call" status where there is no direct benefit to the children.

PLAINTIFF SHOULD NOT BE AWARDED HER ATTORNEY FEE'S AND COSTS INCURRED IN THE DEFENSE OF THIS MATTER.

The Plaintiff now raises a claim for an award of her attorney fees and costs incurred on appeal. The cases cited by Plaintiff upon close examination do not fully support her stated position.

Carter v. Carter, 584 P. 2d 904 (Utah, 1978), did allow that defendant an award of attorney fees on appeal. *Carter*, 584 P.2d at 906. That was not based upon §30-3-3, Utah Code Annot. (1953,

as amended). A review of *Carter* shows no citation of a Utah Code section in the entirety of the opinion.

Furthermore, the award of attorney fees in *Carter* is based solely upon defendant's request, without any basis other than the fact that the plaintiff therein prosecuted the appeal. Justice Maughn raised this point in his dissent wherein he dissented "from the rationale used to support the award of costs and attorney fees, on appeal, to defendant, viz., because plaintiff was unwilling to abide by the trial court judgment. Such a rationale appears to me to be *in terrorem*." *Carter*, 584 P.2d at 906.

This type of "*in terrorem*" has been limited by this court, otherwise every losing party would be responsible for the fees and costs of the winning party on appeal. Such a rule would have an extreme chilling effect upon the entire appellate process.

Chilling of the right to appeal has been a concern of this court for some time. In *Maughn*, 770 P.2d 156 (Utah Ct.App, 1989), cited by Plaintiff as being authority on this issue, this court stated that requests for attorney fees and costs on appeal are generally pursuant to Rule 33, Utah Rules of Appellate Procedure and that such sanctions would be "applied only in egregious cases, 'lest there be an improper chilling of the right to appeal erroneous lower court decisions.'" *Maughn*, 770 P.2d at 162.

Maughn is also distinguishable from the instant case in another way. Besides asking for an award of fees and costs under

Rule 33, Utah Rules of Appellate Procedure, Paulette Maughn claimed that she could not afford the appeal, and as the trial court had awarded her attorney fees, so should this court. *Maughn*, 770 P. 2d at 162. This court recognized the record of Paulette Maughn's financial need and exercised its discretion in awarding Paulette Maughn her attorney fees on appeal. *Maughn*, 770 P. 2d at 163.

In the instant case, attorney fees were awarded to neither party at the trial court level. Neither party has challenged that. Furthermore, the record clearly shows that Plaintiff is not in financial need, having a monthly income of almost twice that of Defendant. Transcript at 12, 26, 48, and 67, and record at 169 - 175. Therefore, there is no basis under *Maughn* for an award of fees and costs to Plaintiff.

In *Dahlberg v. Dahlberg*, 292 P. 214 (Utah, 1930), Plaintiff was awarded attorney fees on appeal. *Dahlberg*, 292 P. at 218. But Plaintiff was the one who brought the appeal. Plaintiff was not defending the appeal. This is the exact opposite of the position of the Plaintiff in the instant case and supports the position that the Defendant in this case should be awarded his fees and costs incurred in prosecuting this appeal.

Returning to the improper chilling referred to in *Maughn*, the Plaintiff cites as the basis for an award of attorney fees the fact that Defendant is a licensed attorney allowed to practice law

in this state. Plaintiff does not ask the court to consider the financial status of the parties, Plaintiff was earning approximately twice that which Defendant was earning (transcript at 67), nor does she cite that this matter is frivolous or unfounded, two of the major basis for and award of fees on appeal.

An award of attorney fees based on Defendant's being an attorney, if allowed, would be violative of equal protection clauses of the United States Constitution as well as the Constitution of the State of Utah. Articles 5 and 14, United States Constitution and §§1, 7, 11 and 24 of Article 1 of the Constitution of the State of Utah. It would be singling out a class of citizens, attorneys, as being liable for fees incurred in litigation involving those attorneys personally. What could be more chilling to attorneys who are personally involved in suits but that the specter of an order of attorney fees and costs against them is very likely simply because that individual is an attorney?

Furthermore, how would the court handle pro se litigants. Pro se litigants, by definition, do not incur any attorney fees on their part. Should all pro se litigants have to pay the opposing party's attorney fees and costs on appeal? Defendant respectfully suggests that such a stance would have such a chilling effect upon pro se litigation that individuals would not dare to litigate a matter, or prosecute an appeal, pro se.

So if pro se litigants can come before the courts of this land without automatically being subject to a judgment for attorney fees against them because of their status, why should Defendant pay Plaintiff's attorney fees even if for the sake of argument he has assisted his counsel in the prosecution of this matter? This court must find some other reason and basis and Defendant asserts that there is no other such reason or basis.

It is clear from the content of this appeal and the issues presented that this case is one of first impression, and that a request for the interpretation of the statutes raised and rules referred to in this matter is permitted.

DEFENDANT HAS MARSHALLED THE EVIDENCE TO SUPPORT HIS CLAIM THAT SOME OF THE WRITTEN FINDINGS ENTERED BY THE COURT WERE ERRONEOUS.

Plaintiff asserts that Defendant's challenge that some of the written findings are clearly erroneous must fail due to her allegation that Defendant has failed to marshal evidence as required under *Saunders v. Sharp*, 806 P. 2d 198, 199 (Utah, 1991). This assertion is contained in one paragraph at the end of point 1 of Plaintiff's argument.

Defendant has marshalled the evidence. There is a transcript of the pronouncement of findings from the bench. Transcript at 70 - 82. Defendant's objection notes the specific errors in the

written findings. Record at 211-213. Those written additions to the oral pronouncement of the court which were objected to by Defendant's counsel were clearly never orally stated by the court, otherwise the transcript would contain them. The discrepancies between the oral pronouncement as contained in the transcript and the written findings constitute sufficient evidence under *Saunders* to substantiate Defendants claims on this issue. This court may properly consider those oral findings expressed from the bench by way of the transcript. *Merriam v. Merriam*, 799 P. 2d 1172 (Utah Ct.App., 1990).

CONCLUSION

The Defendant has established that the trial court abused its discretion in its award of visitation by substantially limiting the time allowed the Defendant with the two boys and in considering the limited amount of visitation allowed by Plaintiff prior to Plaintiff's move to California as a basis for limiting Defendant's ongoing visitation.

Defendant has shown that the trial court has erred in its award of a fixed amount of day care where that day care includes "on call" periods when the children are not present. The court further erred by denying the protections allowed to Defendant by the statutes cited above in its setting of a flat fee without any

requirement to show that the day care is actually work-related. Defendant should be granted the full benefit of the protection allowed by those statutes as argued by Defendant and admitted by Plaintiff in her brief.

Plaintiff should not be awarded her attorney fees and costs incurred in the defense of this appeal. Plaintiff has shown no basis or need in law or fact for that such an award.

Defendant has marshalled sufficient evidence to show that the challenged portions of the written findings of fact do not comport with the ruling of the court. Therefore those findings must be amended to following the oral findings as supported by the transcript in this matter.

Respectfully submitted this 23 day of March, 1993.

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UTAH COURT OF APPEALS

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LISA HARTWIG,)	
)	
Appellee,)	CERTIFICATION OF DELIVERY
)	
vs.)	
)	Case No. 920496-CA
DAVID HARTWIG,)	
)	
Appellant,)	
)	
-----oO0Oo-----		

The Defendant/Appellant above-named, by and through counsel, Kathryn S. Denholm, Esq., and pursuant to Rule 21, Utah Rules of Appellate Procedure, served a true and correct copy of Defendant's Reply Brief upon Plaintiff by placing that copy in the United States mail, postage prepaid, and addressed to:

Sharon Donovan, Esq.
310 South Main Street
Suite 1330
Salt Lake City, UT. 84101

Attorney for Plaintiff

DATED this 2nd day of March, 1993.

15/
KATHRYN S. DENHOLM, ESQ.
Attorney for Defendant / Appellant

ADDENDUM

AMENDMENT V**[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI**[Rights of accused.]**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

AMENDMENT VII**[Trial by jury in civil cases.]**

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII**[Bail — Punishment.]**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section	Section
1. [Citizenship — Due process of law — Equal protection.]	4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]
2. [Representatives — Power to reduce appointment.]	5. [Power to enforce amendment.]
3. [Disqualification to hold office.]	

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives — Power to reduce appointment.]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.]

No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

ARTICLE I

DECLARATION OF RIGHTS

Section

1. [Inherent and inalienable rights.]
2. [All political power inherent in the people.]
3. [Utah inseparable from the Union.]
4. [Religious liberty — No property qualification to vote or hold office.]
5. [Habeas corpus]
6. [Right to bear arms.]
7. [Due process of law.]
8. [Offenses bailable]
9. [Excessive bail and fines — Cruel punishments.]
10. [Trial by jury.]
11. [Courts open — Redress of injuries.]
12. [Rights of accused persons]
13. [Prosecution by information or indictment — Grand jury.]
14. [Unreasonable searches forbidden — Issuance of warrant.]

Section

15. [Freedom of speech and of the press — Libel.]
16. [No imprisonment for debt — Exception.]
17. [Elections to be free — Soldiers voting.]
18. [Attainder — Ex post facto laws — Impairing contracts.]
19. [Treason defined — Proof]
20. [Military subordinate to the civil power.]
21. [Slavery forbidden]
22. [Private property for public use.]
23. [Irrevocable franchises forbidden.]
24. [Uniform operation of laws]
25. [Rights retained by people.]
26. [Provisions mandatory and prohibitory.]
27. [Fundamental rights.]

Section 1. [Inherent and inalienable rights.]

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Sec. 11. [Courts open — Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

History: Const. 1896.

Cross-References. — Prohibition on pri-

vate or special laws, Utah Const., Art. VI, Sec. 26.