

2004

# Jennifer Elaine Behunin v. Dean Farlan Behunin : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS  
OF THE THIRD JUDICIAL DISTRICT COURT  
FOR THE STATE OF UTAH

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JENNIFER ELAINE BEHUNIN,

Petitioner/Appellant,

vs.

DEAN FARLAN BEHUNIN,

Respondent/Appellee.

**BRIEF OF THE APPELLEE**

Trial Court Case No. 004907012  
Appellate Court Case No. 20040874

**UTAH COURT OF APPEALS  
BRIEF**

**UTAH  
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**DOCKET NO. 20040874**

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**FILED**

**UTAH APPELLATE COURTS**

**APR 15 2005**

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### **STATEMENT OF JURISDICTION**

This is an appeal from a final judgment of Order of Modification of Decree of Divorce in the Third Judicial District Court of Salt Lake County, State of Utah, before the Honorable Stephen L. Henriod, entered on the 28<sup>th</sup> day of September, 2004.

The Court of Appeals has jurisdiction over this appeal by virtue of Rule 3(a) of the Utah Rules of Appellate Procedure.

This Court has jurisdiction pursuant to Utah Code Annotated 78-2a-3(2)(h).

### **STATEMENT OF THE CASE**

The Respondent filed a Petition to Modify the Divorce Decree on October 10, 2002 requesting that the Court change primary physical custody of the two minor children to him. On July 7, 2004, the matter came to trial before the Honorable Stephen L. Henriod of the Third Judicial District Court of Salt Lake County, State of Utah. Marsha M. Lang represented the Respondent. John R. Bucher represented the Petitioner. The issues at trial included whether there has been a substantial change in the circumstances which would warrant a change of physical and residential custody from the Petitioner to the Respondent and whether it was in the best interests of the minor children to change primary residential custody to the Respondent. The trial judge found that a substantial change of circumstances had occurred in the parenting ability of both Petitioner and Respondent and that it was in the best interests of the children that Respondent be awarded physical custody.

## **SUMMARY OF THE ARGUMENT**

The trial Court was correct in finding that there were substantial changes in circumstances based upon the changes in parenting abilities of the Appellant and the Appellee and in consideration of the best interests of the minor children. The Court's decision was based on solid testamentary evidence, and exhibits, at trial, especially the custody evaluation. The Court's decision was consistent and followed well established Utah case law, especially Hogge, Elmer and Shioji.

## **ARGUMENT**

### **I. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE SUPPORTED BY TRIAL TESTIMONY**

Appellant argues that the Court made certain findings that were unsupported by the testimony at trial. Appellant especially found issue with the findings that the Appellant had moved five times and had multiple relationship, two of them with felons. Appellant argues that the Court's Findings regarding her lack of attention to Jake's speech therapy was not supported by the record.

In examining the Findings of Fact which state that Appellant "has moved five times and has had relationships with multiple men, two of which are felons", Appellee finds sufficient testimony evidence to support these Findings as follows:

(1) "moved five times"

At the time of divorce, in November, 2000, Appellant moved from the marital residence to West Valley (Tr pages 7-8). After two months, in January, 2001, Appellant then moved to Tremonton (Tr page 8). In August 2001, Appellant moved to Salt Lake City to the Katherine Huntsman Building (Tr page 12). In August, 2002, Appellant moved to Ogden (Tr page 14). In July, 2003, Appellant moved to Magna (Tr, pages 27-28). That constitutes five moves supported from the uncontroverted testimony of both parties.

Appellant is incorrect when she states that the five moves are not supported by testimony evidence. In Appellant's direct testimony at trial she reports that she lived in West Valley City, Tremonton and Salt Lake City by 2002 (Tr pages 117-118). Appellant admits Jake was enrolled in Monroe Elementary (Ogden)(Tr page 121) and then that he was enrolled in Magna Elementary (Magna)(Tr page 122). Therefore, the five moves were testified to by Appellant, herself.

(2) "had relationships with multiple men, two of which are convicted felons"

As far as the Finding concerning "multiple men", the direct testimony of Appellant supports her relationships with Darrell James McGuire with whom she and the children resided on and off from February 2001 until she moved to Salt Lake City to reside at the Kathleen Huntsman Building. (Tr page 117) and (Tr pages 138, 139). Appellant admitted that she married Mr. Steeley, a felon, on January 7, 2002. (Tr page 18). Appellee testified that his children talked about being abused by Alan Valdez (Tr page 29 to 32), a "boyfriend"

or "close friend" of Appellant. Appellant admitted Mr. Valdez is "a friend of mine" but claims she didn't live with him (Tr page 126). Mr. Valdez was a witness at trial that admitted to having a relationship with Appellant and her children (Tr pages 160-163).<sup>38</sup> The Court was correct in its findings that Appellant has had relationships with multiple men, two of which were felons.

Appellant argued that there was no evidence of any relationship when the case came to trial on July 7, 2004, however, Appellant admitted at trial that she remained married to Mr. Steeley.

In summary, the testimony evidence alone supports the Findings of the Court that Appellant "moved five times and has relationships with multiple men, two of which she lived with, who were felons". She married one of the felons and remained married to him at the time of trial.

(3) Jake's speech therapy

To support her claim that she had followed through with Jake's speech therapy, Appellant refers to her testimony in the transcript on pages 120-122. Careful examination of Appellant's testimony indicates she had been aware of Jake's problems since he "started speaking". She admits the Head Start program in Ogden first put Jake in a speech therapy class. At the time of trial, Jake was enrolled in Magna Elementary. Appellant gave no detailed testimony about his enrollment in any class at Magna for speech therapy. The record does not show that Appellant took "immediate steps to correct the problem". The Court is



correct in its evaluation concerning the effort Appellant put forth concerning Jake's speech therapy and her follow up.

## II. APPELLANT IS NOT SUBSTANTIALLY EMPLOYED IN A STABLE JOB

Appellant on page 11 of her brief concludes that there has been no substantial change of circumstances since the divorce because Appellant has had a "steady job" and "housing". To support the "steady job", Appellant refers to Mr. Jeppson's testimony on pages 63-64 of the transcript. Mr. Jeppson testified that Appellant works at the Redwood Lounge as a "janitor". Mr. Jeppson, in his direct testimony, does not indicate how long Appellant has worked for him on how many hours per week she presently works for him. He did not testify about how many hours per week she had worked for him in the past. He did not testify about her earning history. At trial, the Court questioned Mr. Jeppson (Tr pages 164-165). He told the Court that Appellant earned about \$120.00 per month working five or six hours per week (Tr pages 164-165). The Appellant cannot claim this is a "steady job" as is usually the definition of a "steady job" as being forty hours per week. Appellant is not substantially employed at a stable job.

## III. THE COURT MADE ADDITIONAL FINDINGS THAT SUPPORT A SUBSTANTIAL CHANGE OF CIRCUMSTANCES

On pages 1, 2, 3 and 4 of the Findings of Fact and Conclusions of Law, the Court made additional findings regarding the parenting skills of both parties that support his decision.

Findings of Fact concerning Appellant's parenting skills are:

"(a) Appellant does not follow through with Jake's speech therapy;

(b) Appellant has been involved with two convicted felons, one of whom was sent back to prison after stealing Appellee's identity;

(c) the children are exposed to conflict in Appellant's marriage to Mr. Steeley;

(d) Appellant has moved five times;"

The Court also finds that the Appellee's circumstances are more favorable to custody than they were at the time of divorce as follows:

"(a) Appellee has maintained consistent visitation with the children;

(b) Appellee has good parenting skills, providing discipline and guidance;

(c) Appellee's life has been much more stable since separation;

(d) Appellee's wife has good parenting skills and has taken an active role in parenting."

The Court also notes that at the time of divorce the parties stipulated to joint legal custody with primary physical custody with Appellant.

#### IV. UTAH CASE LAW SUPPORTS THE FINDINGS OF FACT AND CONCLUSIONS OF LAW

Hogge v. Hogge, 649 P.2d 51 (Utah1982) is the leading authority in Utah on the changed circumstances test. Hogge held that: "parent seeking a change in custody must first establish there has been a substantial change of circumstances and then address the best

interests of the child". In Becker v. Becker, 694 P.2d 608 (Utah, 1984) the Court explained the necessary nexus between the changed circumstances and the welfare of the child:

"The asserted change, must, therefore, have some material relationship to and substantial effect on the parenting ability or the functioning of the presently existing custodial relationship" Id, page 610.

In Elmer v. Elmer, 776 P.2d 599 (Utah, 1989) the Court states: "But that does not mean that the circumstances of the noncustodial parent are irrelevant to the inquiry". See Kramer v. Kramer, 738 P.2d 624 at p 629 (Utah 1987)." (overruling or qualifying Becker)

Elmer further states on page 102:

"Furthermore the changed circumstances rule should be applied with the regard for the policies it was designed to further. Two principle policies are served by the rule. First, the emotional, intellectual and moral development of a child depends upon a reasonable degree of stability on its relationship to important people and to its environment. Second, the Courts typically favor the one-time adjudication of a matter to prevent the undue burdening of the courts and the harassing of parties by repetitive actions."

Elmer further holds:

"the res judicata aspect of the rule must always be subservant to the best interests of the child". In the present case, the original decree was not adjudicated, but based on stipulation, and therefore the res judicata aspect is at low ebb.

The trial Court in this case included the following statement in the substantial change

of circumstances section of its decision:

"They (the children) need guidance, structure and discipline, as well as educational support, positive role models who will teach them values and appropriate conduct. They also need stability and consistency".

The trial Court applied this standard supported most directly by the dicta and holdings in Elmer, and found the Appellant's circumstances had changed unfavorably to the best interests of the children. The Court concluded that Appellee's circumstances had changed favorably in regard to the best interests of the children. According to Elmer, this is a correct application to the substantial change of circumstances test.

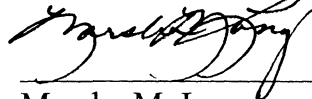
The Court's Findings concerning the Appellant's relationships with men of questionable moral conduct subsequent to the Divorce as supports a substantial change of circumstances, is supported factually by Shioji v. Shioji, 712 P.2d 197 (Utah 1985). In Shioji, the Court was disturbed that the (custodial parent) and her boyfriend "appeared indifferent to the potential adverse effect this arrangement might have on the children" convincing the Court that a substantial change of circumstances had occurred. Certainly, a careful examination of Appellant's trial testimony and deposition testimony demonstrates a lack of realization that the children's exposure to police arrests, domestic violence, drug paraphernalia and other concerns related to felons would have an adverse effect on her children.

### CONCLUSION

In Conclusion, the Findings of Fact and Conclusions of Law of the trial Court are solidly based in trial evidence, especially testimony evidence, and Utah case law, including Hogge, Kramer, Elmer and Shioji. The Court's decision to change primary physical custody to Respondent should be affirmed.

DATED this 15<sup>th</sup> day of April, 2005.

MARSHA McQUARRIE LANG, P.C.



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IN THE UTAH COURT OF APPEALS  
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JENNIFER ELAINE BEHUNIN,

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**CERTIFICATE OF SERVICE**

Trial Court Case No. 004907012  
Appellate Court Case No. 20040874

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I hereby certify that a true and exact copy of the foregoing BRIEF OF THE APPELLEE was  
mailed via first class mail, postage prepaid, and sent to the following:

John Bucher  
957 East 1st Avenue  
Salt Lake City, Utah 84103

DATED this 15 day of April, 2005.



## **ADDENDUM**

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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JENNIFER ELAINE BEHUNIN,	:	MEMORANDUM DECISION
(aka Jennifer Steeley),	:	CASE NO. 004907012
Petitioner,	:	
vs.	:	
DEAN BEHUNIN,	:	
Respondent.	:	

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This matter came on for trial on July 7, 2004, on respondent's Petition to Modify. Petitioner was represented by John R. Bucher, and respondent was represented by Marsha M. Lang. Respondent alleges that there has been a substantial change in circumstances since entry of the Decree of Divorce and that it would be in the best interests of the children to have sole custody awarded to respondent. In addition to the parties, among others the Court heard testimony from Pam Romrell from the visitation facilitating organization WillWin, and from Kim D. Peterson, M.S.W., who performed the custody evaluation in the case.

Since the Decree of Divorce, the petitioner has moved five times, and has had relationships with multiple men, two of which are convicted felons.

The children are Shayna, d.o.b. 4/28/95; and Jacob, d.o.b. 12/19/98. The evidence was that petitioner and respondent have had



significant conflict ever since the time of their separation and they disagree about many issues concerning the children, and it would clearly be in the children's best interest for petitioner and respondent to learn to get along better and to improve the environment of the children, because if the parents' conflicts continue at the level they are currently at, the children are at risk to develop serious emotional or behavioral difficulties.

Shayna is too aware of parental conflict, tries hard to stay out of the middle and not take sides, and she is afraid of hurting either of her parents. Other than that, she appears to be reasonably well-adjusted. Jacob has significantly greater problems, is more of a challenge to his parents, tends to be more noncompliant, and pushes limits. He also presents as somewhat developmentally delayed and has a significant speech impediment.

The children need to be raised in an environment where their basic needs, including medical, food and shelter are met. They need nurturing and support, as well as attention and positive interaction with parents, stepparents and significant others. They need guidance, structure and discipline, as well as educational support, positive role models who will teach them values and appropriate conduct. They also need stability and consistency.

When these parties' marriage began falling apart, petitioner became less attentive and less focused on the children. She does

seem to meet most of the children's basic needs, but she does not follow through with speech therapy for Jacob, and has not provided much stability for the children at all in recent years. She has been involved with two convicted felons, one of whom was sent back to prison after stealing respondent's identity. The children reported a lot of conflict during the time petitioner lived with Larry Steele.

During the parties' marriage, the respondent was an involved parent, but spent more time at work and had less time to parent than did the petitioner. Since separation, he has maintained consistent visitation with the children, except for a period when he and petitioner were in a struggle over transportation and he failed to see the children for several months. Both parents bear responsibility for this hiatus in the children's relationship with their father. Since resolving that issue, the respondent again exercises regular visitation, and is a very important part of the children's lives. He has good parenting skills and seems to have a good balance between having fun with the children and giving them attention, and providing discipline and guidance. His disciplinary skills are much better than the petitioner's and his life has been much more stable since the time of the parties' separation. Respondent's wife has good parenting skills, is accepting of the

children, and takes an active role in parenting them during visits and the children have a good relationship with her.

At the time of the divorce, the parents were granted joint legal custody of the children, with petitioner being awarded primary physical custody. There is a substantial change in circumstances as set forth above that has to do with the best interests of the children, and it is in the best interests of the children that the respondent be granted primary physical custody. Petitioner should have parenting time at least consistent with the statutory minimum visitation schedule and the parties should work together to provide for additional time between petitioner and the children. Respondent should restrict his second job, which is a self-employment matter, to times that the children are with their mother.

With respect to the Rule 4-903 considerations:

1. The children's preference is to reside with their father.
2. The children should be kept together.
3. The children are more closely bonded to their father and their positive and secure feelings about him and his home are increasing.
4. Since the time of separation, the children have had less stability in their mother's home than if they had been with their

father, and will have a stable situation where they can be happy and well-adjusted in their father's home

5. Moral character:

(i) Petitioner's history since the divorce demonstrates serious lack of emotional stability and serious judgment errors with respect to persons she has chosen to spend time with socially, including James McGuire and Larry Steele. The petitioner wasn't even honest and candid with the evaluator about her employment.

(ii) At the time of the initial divorce, the petitioner expressed a stronger desire to have custody of the children than the respondent did, but because of his concerns for the children's welfare, he has developed a strong and sincere desire to obtain custody.

(iii) Respondent works full-time, but his wife is available for child care. Petitioner works minimally and is more available for the children, but should be working more.

(v) Even though respondent voluntarily agreed that petitioner have physical custody of the children at the time of the divorce, it was clear that he wanted to stay highly involved in the children's lives, because he sought joint legal custody.

(vi) Not a factor.

(vii) Petitioner's relationships since divorce have been ill-advised and have contributed to lack of stability.

Respondent's stable relationship with Samantha Anderson to whom he is not married has positively affected the stability of his home.

(viii) Respondent is far better able to financially support the children than is petitioner, who is at best barely able to meet the children's basic needs financially.

(ix) This criteria favors respondent.

6. Both parents harbor negative feelings for each other and have put the children in the middle. Neither one appears more likely than the other to allow visitation or promote the children's relationship with the other parent.

I accept most of the evaluator's recommendations as being best for the children, and find that the other evidence adduced at trial was consistent with the custody evaluation.

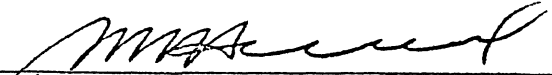
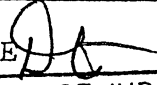
Child support should be awarded to the respondent according to the statutory guidelines, and the statutory guidelines should be in place with respect to the children's health care, and work-related daycare.

The parties should each take one child for tax exemptions each year that each party pays taxes, except that in order to be eligible to take the child as a tax exemption, petitioner must be current on her child support and other financial obligations from this Order. The advisory guidelines found in the Code shall be part of the parenting plan.

The parties are ordered to take the High Conflict Parenting Class taught by Dr. Valerie Hale and the parties may discontinue use of WillWin, and have a more normal pick up and delivery schedule according to the statutory provisions, unless that proves unworkable, in which case they should attempt to resolve their differences first through mediation before returning to the Court.

Ms. Lang shall do Findings of Fact, Conclusions of Law, and a Decree of Divorce, including these specific findings of fact and all other findings that are consistent with this opinion and the evidence from trial.

Dated this 10 day of August, 2004.

  
STEPHEN L. HENRIOD  
DISTRICT COURT JUDGE  
by   
STAMP USED AT DIRECTION OF JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 10 day of August, 2004:

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