

2005

# Kathleen Lenay Huish v. Glen Frank Munro : Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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KATHLEEN LENAY HUISH (SAWYER), )	<b>CASE NO. 20050440 CA</b>
)	
Appellant, )	
)	
vs. )	
)	
GLEN FRANK MUNRO, )	
)	
Appellee. )	

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**SUBSTITUTE BRIEF OF APPELLANT**

---

**APPEAL FROM THIRD DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH  
JUDGE GLENN K. IWASAKI**

---

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**IN THE UTAH COURT OF APPEALS**

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KATHLEEN LENAY HUISH (SAWYER), )	)	CASE NO. 20050440 CA
	)	
Appellant,	)	
	)	
vs.	)	
	)	
GLEN FRANK MUNRO,	)	
	)	
Appellee.	)	

---

**SUBSTITUTE BRIEF OF APPELLANT**

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**JURISDICTION**

This Court has jurisdiction pursuant to § 78-2a-3(2)(j).

**ISSUES PRESENTED AND STANDARD OF REVIEW**

1. Whether Appellant was deprived of her due process rights when the trial court refused to allow her to present her case in chief.

Standard of Review: Constitutional issues, including questions regarding due process, are questions of law that the Appellate Court reviews for correctness. *Chen v. Stewart*, 2004 UT 82, 100 P.3d 1177.

Citation to Record: Kathy never rested ((9RT: 1521-1523); on the 10<sup>th</sup> day of trial, the trial court ruled that Kathy had rested and prevented her from putting on her case-in-chief ((10RT: 1724-1732)

2. Whether res judicata and issue preclusion prevent appellee from re-litigating the issue of custody.

Standard of Review: A court's legal conclusion as to whether a material change of

circumstances has occurred is reviewed for an abuse of discretion. *Sigg v. Sigg*, 905 P.2d 908 (Utah App.1995)

Citation to Record: Appellee's verified petition to modify (CT: 1878-1883); Decree of Paternity (CT: 1467-1481) and various cites to the transcripts of the proceedings.

3. The trial court erred by first allowing Dr. Christy to testify without first determining whether a substantial and material change of circumstance had occurred.

Standard of Review: A court's legal conclusion as to whether a material change of circumstances has occurred is reviewed for an abuse of discretion. *Sigg v. Sigg*, 905 P.2d 908 (Utah App.1995)

Citation to Record: Findings of Fact and Conclusions of Law. (CT: 2787-2805)

4. The findings and conclusions were not supported by the evidence and/or were improper.

Standard of Review: A trial court's factual findings may not be disturbed unless it clearly erroneous. *Sigg, supra*, at 908.

Citation to Record: Findings of Fact and Conclusions of Law. (CT: 2787-2805)

5. Finding 7, even though supported by the evidence, is legally incorrect.

Standard of Review: Review for correctness the trial court's interpretation of the law with no discretion granted to the trial court. *Jones v. Barlow*, 2007 UT 20, ¶¶ 10, 11.

Citation to Record: Findings of Fact and Conclusions of Law. (CT: 2787-2805)

6. Finding 8 is not supported by the evidence and does not constitute grounds for modification.

Standard of Review: Review for correctness the trial court's interpretation of the law with no discretion granted to the trial court. *Jones v. Barlow*, 2007 UT 20, ¶¶ 10, 11. A trial

court's factual findings may not be disturbed unless it clearly erroneous. *Sigg, supra*, at 908.

Citation to Record: Findings of Fact and Conclusions of Law. (CT: 2787-2805)

7. Finding 10 is not supported by the evidence.

Standard of Review: A trial court's factual findings may not be disturbed unless it clearly erroneous. *Sigg, supra*, at 908.

Citation to Record: Findings of Fact and Conclusions of Law. (CT: 2787-2805)

8. The last sentence of finding 10 is not supported by the evidence.

Standard of Review: A trial court's factual findings may not be disturbed unless it clearly erroneous. *Sigg, supra*, at 908.

Citation to Record: Findings of Fact and Conclusions of Law. (CT: 2787-2805)

9. Finding 11 is an erroneous legal conclusion.

Standard of Review: Review for correctness the trial court's interpretation of the law with no discretion granted to the trial court. *Jones v. Barlow*, 2007 UT 20, ¶¶ 10, 11.

Citation to Record: Findings of Fact and Conclusions of Law. (CT: 2787-2805)

10. Finding 13, even though supported by the evidence is factually incomplete and legally incorrect.

Standard of Review: Review for correctness the trial court's interpretation of the law with no discretion granted to the trial court. *Jones v. Barlow*, 2007 UT 20, ¶¶ 10, 11. A trial court's factual findings may not be disturbed unless it clearly erroneous. *Sigg, supra*, at 908.

Citation to Record: Findings of Fact and Conclusions of Law. (CT: 2787-2805)

11. Finding 15(a) is unsupported by the record.

Standard of Review: A trial court's factual findings may not be disturbed unless it clearly erroneous. *Sigg, supra*, at 908.

Citation to Record: Findings of Fact and Conclusions of Law. (CT: 2787-2805)

12. Finding 15(b) is unsupported by the record.

Standard of Review: A trial court's factual findings may not be disturbed unless it clearly erroneous. *Sigg, supra*, at 908.

Citation to Record: Findings of Fact and Conclusions of Law. (CT: 2787-2805)

13. Finding 15(c) is not supported by the evidence.

Standard of Review: A trial court's factual findings may not be disturbed unless it clearly erroneous. *Sigg, supra*, at 908.

Citation to Record: Findings of Fact and Conclusions of Law. (CT: 2787-2805)

14. Finding 16 is an erroneous legal conclusion.

Standard of Review: Review for correctness the trial court's interpretation of the law with no discretion granted to the trial court. *Jones v. Barlow*, 2007 UT 20, ¶¶ 10, 11.

Citation to Record: Findings of Fact and Conclusions of Law. (CT: 2787-2805)

15. Whether the actions of Dr. Valerie Hale, as Special Master, were in violation of the canons of judicial ethics and so tainted the judicial process that Kathy was effectively deprived of her rights of due process.

Standard of Review: Constitutional issues, including questions regarding due process, are questions of law that the Appellate Court reviews for correctness. *Chen v. Stewart*, 2004 UT 82, 100 P.3d 1177.

Citation to Record: The Statement of Facts indicate that Dr. Valerie Hale, when acting as a special master, accepted money from the firm of Paige Bigelow to review Dr. Gages' evaluation (¶ 38), had many ex parte communications with Paige Bigelow (¶ 38), and wrongfully submitted documents to the court without prior notification to the parties (¶ 39).

## **DETERMINATIVE STATUTES AND RULES**

Utah Code Ann. § 30-3-10.1, Utah Code Ann., § 30-3-10.4 [2001]; Utah Code Ann. § 30-3-10 [2004]; § 30-3-37, Utah Code Ann., and Rule 4-903(5)(D), Judicial Council Rules.

## **STATEMENT OF THE CASE**

Taylor was born as issue to the parties on July 11, 1996. (CT: 1468.) The parties lived together for approximately 3 years prior to the birth of Taylor. (1RT: 20.) A Decree of Paternity was entered on July 8, 2002, declaring Glen as father. (CT: 1467-1475.) From the moment of separation (March, 1999) until the date of the modification trial which began on July 13, 2004, the parties experienced ongoing, serious conflict and problems. (10 RTO: 1752.) From 1999 to September of 2001, a hotly contested custody battle ensued in this case between Kathy and Glen. (CT: 2210.) The court appointed an independent custody evaluator, Dr. Carol F. Gage, to perform an evaluation and to provide a written report to the court, which she did. (CT: 2166-2195.) Dr. Gage also submitted a follow-up report in August, 2001. (CT: 2197-2203.) Dr. Gage recommended Kathy be awarded primary physical custody of Taylor. (CT: 2190-2192, 2202.) On July 8, 2002, a Decree of Paternity was entered. (CT: 1467-1481.) Glen had the opportunity to litigate custody at the scheduled evidentiary hearing; however, he refused to do so because of the adverse custody evaluation of Dr. Carol Gage. (1RT: 11; 3RT: 553-554.) On March 18, 2003, Glen filed a verified petition to modify, alleging that in a short 8 months, the Decree had suddenly become unworkable and that substantial and material changes of circumstances had occurred. (CT: 1878-1883.) On April 11, 2003, a letter was submitted to Glen's attorney providing her with Notice of Relocation of Custodial Parent and on May 1, 2003, an Amended Notice of Relocation of Custodial Parent. (CT: 2205-2207.) On July 11, 2003, Dr. Monica Christy

was appointed to perform another custody evaluation (1RT: 39) which she did on March 25, 2004 (Dr. Christy Evaluation, attached to Brief as Addendum 1.) Dr. Christy recommended a change of custody from Kathy to Glen. A trial commenced on the verified petition for change of custody on July 13, 2004 and concluded on September 15, 2004. ((11RT: 2184.) During the trial, Kathy, upon questioning by the trial court, stated she would not be moving to Kwajalein and was committed to continue to live in Murray as she had done since 1999. (1RT: 116.) On April 11, 2005, the trial court entered its Findings of Fact, Conclusions of Law, and Decree Modifying the Paternity Decree. These documents mandated a transfer of primary physical custody of Taylor to Glen. (CT: 2787-2817.) Kathy timely filed a notice of appeal May 11, 2005.

### **STATEMENT OF FACTS**

1. Based upon the fact that the trial in the above-captioned matter lasted eleven days and included approximately 2184 pages of transcript which contained hundreds of evidentiary facts, pursuant to Rule 24(a)(11)(C), U.R.App.P., Kathy is including in her addenda a citation to those portions of the record that are of central importance to the determination of the appeal in addition to the exhibits received into evidence with cites.

2. At the outset of trial, Kathy informed the trial court that she was not moving to Kwajalein, that Kwajalein was no longer an issue. (7RT: 987.)

3. Taylor born July 11, 1996. (1 RT: 20.) The parties lived together for approximately 3 years prior to the birth of Taylor. (1RT: 20.)

4. Glen admitted that Kathy was a fit mother, a good mother. (3RT: 656-657.)

5. Patricia Perkins, Taylor's second grade teacher, testified that she placed parents into two categorizes: "there's the parent that is responsible for [the child's] care, they make

sure that they take a bath, they brush their teeth, they have discipline, they go to bed on time and have the right amount of sleep and that kind of thing. I give them the name the caregiver parent and that is Kathy. Then there seems to be always the parent who is the entertainer, and everything that child does when they go to that parent is camping and boating and traveling and all the fun stuff. And then as far as Taylor's parents, I perceived his father to be that fun parent, the one that he did all the fun things with and didn't seem to do the academic things." (4RT: 763-764.) This testimony directly contradicts ¶ 10 of the findings regarding the trial court's inability to determine which parent is responsible for Taylor doing well.

6. In his verified petition filed only 8 months after the entry of the Decree, Glen alleged that a substantial and material change of circumstance suddenly occurred making the joint custody arrangement unworkable. (CT: 1878-1883.) However, the two evaluations of Dr. Carol Gage indicate otherwise – that the problems between the parties as alleged by Glen in his modification petition have always been there, they have always been ongoing since prior to March, 1999. (CT: 2167-2203, Addenda, Appendix 9.) Moreover, ¶¶ 2, 3, 4, and 5 of the Findings evince that the problems alleged in the petition to modify did not occur subsequent to the Decree, that they were long-standing and dating back 5 years.

7. In opening argument, Glen's attorney, stated that the relationship was always troubled from its inception causing Kathy to move back to Murray. (1 RT: 6.)

8. In opening argument, Glen's attorney, stated that Glen had the opportunity and ability to contest custody in the initial proceeding; however, he refused to do so because of the adverse recommendations of Dr. Carol Gage fearing he would not obtain custody. (1 RT: 11.) Glen admitted that during the first trial in the above-captioned action, that he intended to litigate custody. He also admitted that he had the opportunity to have custody litigated and

was given that opportunity but failed to avail himself of that opportunity. (3RT: 553-554.)

9. Dr. Christy testified that the conflict and problems between the parties have been ongoing since 1999 to August 24, 2004. (10 RT: 1752.)

10. Regarding the conflict, Glen testified that “its been going on because we’ve been having problems” for five years, from 1999 forward. (3RT:511-512.) He provided further proof that no substantial and material change of circumstance occurred after the entry of the decree of paternity. Glen testified about the problems the parties experienced after their breakup. (3RT: 512, 516-17, 521 525.)

11. The *Decree of Paternity* entered July 8, 2002, provides in ¶3, “Petitioner Kathy Lenay Huish shall be designated primary physical custodial parent. Taylor shall reside with Petitioner in Murray, Salt Lake County, Utah, and shall attend public school in Salt Lake County, State of Utah . . .”. The *Decree* in ¶2 awards the parties joint legal custody of Taylor and provides that they shall have equal decision making authority on decisions impacting Taylor’s health, well being, education, religious training and welfare. The *Decree* ¶4 provides for Respondent’s parenting time consisting of twelve days per month and ten days on alternate months. All remaining parent time is reposed in Petitioner. (CT: 1467-1476.)

12. During her pregnancy, Glen disappeared for five weeks and would not communicate with Kathy. Glen refused to attend any of Kathy’s prenatal doctor’s appointments. She had to go through the pregnancy literally on her own. Kathy even had an amniocentesis because of her getting older; however, Glen refused to support her. “He said, [you] make enough money to take care of [yourself], and he just kind of changed as who I knew Glen to be.” (7RT:1190-1191.)

13. Kathy has been Taylor’s primary caretaker and has been primarily responsible

for his care, control and nurturing from the time of his birth through the trial concluding on September 15, 2004. (CT: 2209-2216, ¶2).

14. After the birth of Taylor, Kathy resided with Glen for a period of time at Mr. Munro's residence in Las Vegas, Nevada. She returned to Murray in March of 1999. In November, 1999, Glen, upon the pretext of taking Taylor to an early Thanksgiving celebration with his family in Montana and promising a return in three days, wrongfully removed him from Kathy's custody and kept him incommunicado for more than 33 days until the trial court ordered Glen to return Taylor to Kathy. Furthermore, this wrongful taking and holding him incommunicado for 33 days had a devastating effect on Taylor, again demonstrating that all Glen cares about is himself, not Taylor. Taylor has since resided with Kathy in her home in Murray, Utah. (7RT:1153-1155, CT: 2209-2216, ¶ 3.)

15. While Glen was in Vegas, he filed a petition for custody and had Kathy served with papers he filed in Nevada (November 20, 1999). Subsequently, Commissioner Arnett awarded Kathy temporary full custody of Taylor. (7RT:1207-1208.) The trial court found that Kathy had been the primary caretaker of Taylor since March, 1999. Moreover, the trial court found that Kathy has acted in the best interest of the minor child by facilitating a meaningful relationship between Taylor and Glen, "but [Glen] has not acted the same in regard to creating a meaningful relationship between the child and [Kathy] for the reason that [Glen] has kept the minor child since the 17<sup>th</sup> of November, 1999, and has refused to allow [Kathy] to see the minor child. The Court further finds that [Glen] has used self-help in an attempt to improve his situation." (CT: 88-91.) It should be noted that Glen's actions, referred to in CT: 88-91, predated the filing of his petition for modification.

16. Dr. Valerie Hale, who had been assigned Special Master (2RT: 269.), in her

testimony and correspondence spoke of ongoing problems between the parties that predated the filing of the petition to modify. (2RT: 282.)

17. Commissioner Arnett stated in his January 30, 2003 Minute Entry that he had reviewed the court's file, including all five volumes. "It is noteworthy that [Glen] has frequently acted unilaterally, i.e., in initially taking physical custody despite the parties' agreement, making unilateral deductions from child support, etc., but objects when [Kathy] acts without consulting him. Further, the Commissioner has previously found that [Glen] has sought 'extreme sanctions' for relatively minor disputes between the parties. Judge Iwasaki found that certain relief requested by [Glen] was 'Draconian.' Finally, Judge Iwasaki made the finding that this matter had been unnecessarily litigious when he awarded attorney's fees to [Kathy]. [Glen's] current request for a finding of contempt against [Kathy] appears to be in the same vein. The Commissioner cannot find from the evidence currently before the Court that [Kathy] has acted in contempt of the Court's Order and [Glen's] request should be denied." (CT:1725-1728, Petitioner's Exhibit 109 received 2RT: 360-61, 3RT: 627.)

18. Brian Florence was appointed the Special Master in June, 2003. This exhibit, 4<sup>th</sup> paragraph, states, "I have continually asked for Glen's schedules, to no avail. Is this a moot issue? Are we staying with the same old scheduling decree or going through you when Glen needs or wants a particular weekend?" (7 RT: 1233.) This exhibit from Brian Florence clearly indicates that contrary to ¶ 15(c) of the Findings, Glen has refused to abide by court orders and to pay attention to and interpret the orders correctly.

19. Trial Exhibit 139 was received into evidence. (7 RT: 1238.) Exhibit 139 was a letter to the parties from Brian Florence, Special Master, which said, "The concept of exchanging schedules seems to have become a source of irritation and conflict for both of

you. Accordingly, there will be no further need to exchange schedules." (Petitioner's Exhibit 139 received 7RT: 1238.) Still contained in this Exhibit 139 was an admonition from Special Master Florence to Glen: "Glen, I want you to stop referring to problems that you claim preceded my involvement in this case. It is clear that you and Kathy have a difference of opinion as to what has happened in the past and who was responsible, and the fact of the matter is that the past cannot be changed. I can only deal with the future. And, unless I ask for it there's no need for you to provide me with your perceptions of the past. If you do have issues as to Taylor's care, right now, then frame your concern on what is happening right now and not what occurred weeks or months ago. Glen, if you're asking for my involvement then do so directly, do not do it in an e-mail directed to Kathy in an accusatory manner." (7 RT: 1238-1239.) Exhibit 139 clearly refutes the trial court's Findings in ¶ 15(a) where it says that "respondent did not display such negativity toward petitioner".

20. Kathy testified that the e-mail in Exhibit 226 from Glen to her was ridiculing, demeaning, criticizing, and sarcastic. She also testified that this was the way most of Glen's e-mails were. (8 RT: 1457-1459.) Kathy didn't want to communicate with Glen and did not respond to his e-mails because she was tired of being ridiculed, demeaned, and criticized. In fact, Glen's e-mails were so inflammatory that Master Brian Florence entered an order on October 14, 2003, making special mention of these despicable e-mails: "There is one further observation that requires comment of the Special Master. In the original Special Master Order entered on June 23, 2003, the parties were ordered that all communication between them should 'be businesslike with no personal/editorial comments'. They were to refrain from communications which were demanding, positional, challenging or personally insulting. Although both parties have to some degree violated this order, it is the Special Master's view

that Glen has been the one most frequently guilty of using language that is challenging and personally insulting." (Petitioner's Trial Exhibit 57, 12, CT: 2337-2345.) Glen agreed with Brian Florence's assessment since Mr. Florence "took it that way". (3RT: 626.)

21. Brian Florence said Kathy's misinterpretation of the surrogate care provision was an understandable mistake. (Petitioner's Trial Exhibit 57, Addenda, Appendix 12.)

22. Dr. Valerie Hale, special master, testified that Glen's e-mails were filled with capital letters and exclamation points and that she interpreted this to be Glen yelling at Kathy. (2 RT: 313.)

23. During the time the parties lived together in Las Vegas, Patrick lived with them and had been with them since the birth of Taylor. In fact, Patrick has always lived with his brother Taylor, including up to and throughout the modification trial. Kathy testified that "the two of them are perfect together." (7RT:1199.)

24. Dr. Gage performed a child custody evaluation of the parties prior to the entry of the Paternity Decree, from the period of January through August, 2000. (CT: 2166-2195.) She submitted a follow-up evaluation during August, 2001. (CT: 2197-2203.) Dr. Gage judged Kathy to be supportive to a greater extent of Taylor's involvement with Glen than Glen did with Kathy. (CT: 2191.) She also stated that Kathy was not strongly negative about Glen nor criticizing his parenting of their son. "In her distressed and tearful moments, there was also the periodic temptation by Kathy to just 'quit', to give Glen anything and everything he demanded in order to escape from the present sense of serious battle." (CT: 2172)

25. From August, 2000 to the conclusion of the trial, Glen involved the police at Kathy's residence for pickup and delivery of Taylor at least five or six times. (7 RT: 1244.) Dr. Gage stated that Taylor reported that police involvement is extremely upsetting to him.

(Dr. Gage Follow-Up Evaluation, p. 6.) Glen also admitted bringing the police to Kathy's home in order to effectuate visitation at least five or six times when Taylor was present and saw the police. (3RT: 605-606.)

26. Kathy had Taylor 60% of the time. Taylor has maintained a superior grade in citizenship while he resided with Kathy 60% of the time. ((8RT: ): 1258.)

27. Pamela Brown was Taylor's first grade teacher in Murray School District Grant Elementary. She testified that Taylor did very well in school. He came to school knowing 99% of the skills teachers like to see when students come from kindergarten. She testified that Dr. Christy never even contacted her even though requested. (1RT:133-136.)

28. Glen was not honest with Ms. Brown about rescheduling a parent-teacher conference he would miss, he failed to schedule a make-up conference. On the other hand, Kathy missed no parent-teacher conferences. (1RT: 144.)

29. Ms. Brown testified that Glen refused to provide lunch money for Taylor, saying it was Kathy's responsibility, thereby subjecting Taylor to embarrassment. (1 RT: 141-142.)

30. Ms. Brown testified that when Taylor was with Glen during the school week, Glen failed to turn in Taylor's spelling and math homework. On the other hand, she testified that Kathy submitted all of the homework assignments there were due when she had Taylor during the week. (1RT: 146-47,60.) Ditto for the reading homework assignments. Glen only signed two of these; however, Kathy submitted all reading homework papers and signed them. (1RT: 149.)

31. Ms. Brown testified that Kathy appeared to her to be a caring, kind parent. She had properly prepared Taylor for school, both physically and mentally, and "the interaction

that I saw between Taylor and Kathy was everything that a good, nurturing, kind parent would be doing". Since, as a schoolteacher, she had seen both good and bad parenting, Ms. Brown was able to unequivocally testify that Kathy was a good parent and a good role model for Taylor. She based this assessment on the fact that "under difficult circumstances that she has gone forward and done what she needs to do to be a good parent to Taylor" and that she is focused on Taylor. Ms. Brown has always found Kathy to have integrity and to be truthful. (1RT: 152-153.) This is completely contrary to the opinion of Dr. Christy which was seemingly based on testing scores and on what Glen told her.

32. Mrs. Brown testified that the first time Glen met with her he lost his temper, got very angry, and banged one of his fists into the palm of his other hand, which startled her. She found this angry outburst to be unsettling and scary. (1 RT: 138-139.)

33. Ms. Brown testified that Kathy participated in classroom exercises with Taylor and she frequently saw Kathy. She described the interactions between Taylor and Kathy as nurturing and kind. She was able to conclude that they were very bonded. On the other hand, she only saw Glen when he came to get Taylor from school, he did not participate with Taylor at school. (1 RT: 140-141.)

34. Dr. Christy agreed that Kathy is a competent and caring parent. She wanted Taylor and his half-brother Patrick to maintain a relationship. Dr. Christy agreed that they maintain a relationship since they are bonded to each other. (1 RT: 42-43.)

35. Paige Bigelow asked Dr. Christy (prior to any cross-examination of Dr. Christy and any other witnesses being called): "You recommended that if Ms. Sawyer does decide to remain in Murray, and I think that it has now been indicated that she is not going to be moving to Kwajalein, that Mr. Munro should be able to choose the school that Taylor

attends?" (1RT: 116)

36. Dr. Hale was appointed special master spring, 2001. (2RT: 269.) Her appointment was not temporary. (CT: 666-669.)

37. Dr. Hale testified she reviewed both of Dr. Gage's evaluations and saw nothing wrong with either of them. (2RT: 311.)

38. Dr. Hale testified that the paternity decree was never functional from the beginning, that prior to the entry of the decree, the parties were never able to function as far as visitation and other issues involving Taylor. (2RT: 313-314)

39. Dr. Hale admitted she was paid money by Paige Bigelow or her firm to review the evaluation while a special master. (2RT: 312.) She also admitted that while she was Special Master she had an ex parte communications with Paige Bigelow. (2 RT: 321-322.)

40. In spite of the language of the Paternity Decree, paragraph 13: "subject to either party's rights to bring in a matter before the Court for final determination, Dr. Hale shall be authorized to ...." Dr. Hale admitted she is not a party and she admitted there was nothing in the decree allowing her to "write a letter to a sitting judge on this case about anything". (2 RT: 333.) In spite of this, she corresponded with the trial court and Commissioner Arnett stating many unsubstantiated negative things about Kathy. (Exhibit 59; 2 RT: 334.)

41. Dr. Matt Davies admitted that the parenting problems of the parties and the high conflict they experience is caused by Glen and Kathy, that both were to blame. (2 RT: 259-260.) This statement contradicts Dr. Christy's opinion stated in her child custody evaluations and recommendation ("evaluations"). (Addenda, Appendix 1.) Dr. Davies testified that during his second meeting with Glen and Kathy that Glen "put down Ms. Huish". He then added they probably "both put each other down. That's what part of the

problem was.” (2RT:258.) During cross-examination, he also testified that Glen and Kathy “started throwing barbs back and forth. I attempted to intercede. It didn’t work very well. Ms. Huish became distraught, Mr. Munro got angry, and that was the end of the meeting.” (2RT:258.)

42. Dr. Christy admitted she was aware of Dr. Gage’s assessment that “[w]hen Glen was present with Taylor, Glen persisted in wanting to talk about problems related to Kathy despite Taylor’s presence, and despite comments from me.” (CT:2188, 2RT:355.) To a much greater extent than Kathy had done, Glen was repeatedly making a point of demeaning Kathy as a dysfunctional individual and as a less-than-adequate parent. There was continuous demeaning of Kathy throughout the evaluation. Glen defined the present custody evaluation as a battle of power and control. It is judged that this type of battle is more familiar to Glen than to Kathy. Glen may anticipate being a 'Winner' in any game played. Yet, knowing that, Dr. Christy stated that Glen would be less apt to state negative things to Taylor about his mother than she would.

43. Dr. Christy testified it was inappropriate for Glen to have told Taylor that “his grandmother was trying to put him in jail” relating to the issue of the assault charge against him for laying a hand on Lanae Russell. (2RT:363.) Yet, Dr. Christy overlooked this in her recommendations which were adopted by the trial court in its findings.

44. In her recommendation and testimony, Dr. Christy stated that Glen is more apt to abide by the court’s orders more carefully and accurately than Kathy. Then Dr. Christy cited her having Taylor blessed in the Mormon church without Glen’s consent as a failure to abide by court’s orders. During cross, she was asked about this and acknowledged that Taylor was blessed years prior to the entry of the paternity decree of July 8, 2002, so there

was no order in existence that she failed to abide by. (2RT:368-370.) This is yet another example concerning the egregious inaccuracies in Dr. Christy's evaluations; yet, the trial court changed custody based upon these flawed evaluations.

45. Dr. Christy admitted that the fact Patrick Huish and Taylor are doing so well in school indicates Kathy's good parenting skills and effectiveness. (2RT:376.)

46. Kathy chose to be unemployed, so she can be with her two boys. That means less surrogate care since she is a full-time mother. (2RT:412.)

47. Trial Exhibit P- 61 received into evidence (1RT: 185), is an evaluation letter from Dr. Robert Williams to Dr. Monica Christy. Dr. Williams found that "Taylor feels more securely attached to his mother than to his father". (Exhibit P-61, p.2.) On page 3, Dr. Williams states that, "Taylor appears to be more securely bonded to his mother, whom he tends to regard as the more reliable, consistent, and trustworthy parent. In this evaluation, Taylor invariably expressed a preference for his mother in situations in which he might need to depend upon a parent figure to fix a problem, provide protection, or exert authority." Consequently, Dr. Williams' recommendations were that Kathy have primary physical custody of Taylor and structure visitation where Taylor and Patrick can be together in Kathy's home, and that Taylor spend three weekends a month with his father from the end of school on Friday through Sunday night.

48. During a confrontation at the Salt Lake Airport caused by Glen with Taylor present, Glen did not, in a calm manner, attempt to work things out with Lenay Russell ("Lenay") so that Taylor could visit Kathy during her turnaround, and then take Taylor with him. He justified his failure to work things out by accusing Lenay of being immature and illogical. Glen was further asked if he were willing to meet immaturity with immaturity

rather than take the high road. He responded, "So I'm supposed – I was just supposed to give him back to her and say go take my time?" This response shows his immaturity and instability, especially since he had earlier admitted that his visitation time began between 4 and 5 p.m. and this incident occurred between 1:00 and 2:00 p.m. Furthermore, Glen's willingness to meet immaturity with immaturity and create a scene in front of his son clearly demonstrates that Glen is unstable and reactive, the very things that Monica Christy accused Kathy of being. Moreover, this episode demonstrates Glen's volatile and uncontrollable temper showing he is incapable of being a proper role model for his son. He also finally admitted that he was probably acting immature in this situation. He also admitted that his actions did not really help Taylor and were not in his best interests. (3RT: 600-602.)

49. During March, 1999 when Taylor was almost 3 years old, Lenay testified that she was present when Glen drove Kathy and the boys from his home in Vegas to Kathy's home in Murray, Utah. Lenay was standing on the patio waiting for them to exit the car. She saw Glen get out of the car, flip open the trunk, and throw all of Kathy's personal effects and belongings from the trunk into a bush, all the while calling Kathy a bitch and doing so in front of her two sons. Glen was very angry and was yelling "bitch" while throwing her clothes out of the trunk. (6RT: 1006-1009.)

50. Ms. Russell testified that never once did Glen ever communicate with her regarding picking up Taylor during the times that he was not exercise in regular visitation. (7RT:1041.) On October 8, 2002, Kathy came home from flying. She told Lenay to pick up Taylor since this was her time to be with him. Lenay went to the school to pick up Taylor and saw Glen there with Taylor. Rather than give Taylor to her, Glen demanded that Lenay go back home and get Kathy. Lenay got Kathy and took her back to the school. When they

arrived, Glen had left with Taylor. Glen gave no advanced notice to Kathy or Lenay he was coming to the school. Lenay and Kathy had no idea where Glen or Taylor were. No phone calls were received from him. (7RT:1042-1044.)

51. Glen caused a scene at Taylor's school in front of Lenay and Taylor. He manifested his uncontrollable anger and had his friend mistreat Taylor's grandmother. This was reported by Sharon Weiss (4RT: 790-795) and by Lenay. (7RT: 1044-1050.)

52. In the latter part of 2002, Glen went to Taylor's school and shoved Lenay, yelling at her, grabbed Taylor and through him into his truck. (7RT: 1051-1054.) This was also witnessed by Jill Greenwood, whose affidavit was received into evidence as Exhibit 107. (1 RT: 210.) Lenay and Jill stated that Glen's anger and shoving Lenay all occurred in front of Taylor.

### **SUMMARY OF ARGUMENT**

Kathy never rested; however, the trial court prevented her from putting on her case in chief. Consequently, she was unable to effectively examine Dr. Monica Christy and was denied her rights of due process. (9 RT: 1521-1523; 10 RT: 1724-1732.) Glen had the opportunity to litigate custody prior to the Decree of Paternity ("Decree") being entered on July 8, 2002; however, he entered into a stipulation instead because he was afraid of losing in light of the adverse child custody evaluation of Dr. Gage. (3RT: 553-554.) He then filed a petition to modify claiming substantial and material changes of circumstances. (CT: 1878-1883.) Since the Findings are unsupported by the record, they are being challenged. (CT: 2787-2805.) Based upon the testimony elicited at trial (*see* Statement of Facts), it was discovered that Dr. Valerie Hale, acting as special master, accepted money from the firm of Paige Bigelow to review Dr. Gages' evaluation (Statement of Facts ¶ 38), had many ex parte

communications with Paige Bigelow (Statement of Facts ¶ 38), and wrongfully submitted documents to the court without prior notification to the parties (Statement of Facts ¶ 39), which documents were highly critical of Kathy. Consequently, Kathy was deprived of her rights of due process.

### **ARGUMENT**

#### **I. KATHY WAS DEPRIVED OF HER DUE PROCESS RIGHTS WHEN THE TRIAL COURT REFUSED TO ALLOW HER TO PRESENT HER CASE-IN-CHIEF**

During the course of the trial, Paige Bigelow asked David Drake, during Kathy's case in chief, if she could call Valerie Hale and Monica Christy out of order for rebuttal as an accommodation. Mr. Drake agreed to have these two rebuttal witnesses called out of order and stated that to the trial court. Once stated, the trial court asked Mr. Drake how many more witnesses he had for Kathy's case in chief. Mr. Drake responded that Kathy intended to call Glen and possibly Monica Christy as direct witnesses. Mr. Drake further requested that in his cross-examination of the rebuttal testimony of Monica Christy, that the court allowed him to expand the strictures of cross-examination in order to ask her the questions he would on direct examination. The court agreed since he did not want Monica Christy to be shuttled back and forth. (9 RT: 1521-1523.)

When Mr. Drake attempted to question Monica Christy as if she were a direct witness testifying during Kathy's case in chief, the trial court prohibited such. Mr. Drake argued that Kathy had a right to call any witness she wanted and question them. The court agreed; however, as if contradicting itself, it stated that "[i]f it wasn't taken up on cross you've

waived it, you cannot revive it by calling the witness on your own behalf". ((10RT: 1725.) Legally, this is flawed reasoning. A litigant has the right to call witnesses of the litigant's choosing and ask them relevant questions concerning any subject matter of the dispute, regardless if that witness testified previously during the adversary's case in chief. Moreover, the court's ruling completely undid its prior ruling upon which Kathy relied; otherwise, Kathy would not have made the accommodation to Paige Bigelow to have Monica Christy called out of order as her rebuttal witness.

The trial court then stated that Kathy had concluded her case in chief. Mr. Drake reminded the court of the accommodation made to Paige Bigelow (during this time, Paige Bigelow, even though ethically obligated to do so, failed to guide the court regarding allowing these two witnesses to testify out of order) and stated emphatically that Kathy had never rested. (10 RT: 1724-1732, (11RT: 2052, 2053.) As a result of the trial court's ruling that Kathy had rested when she had not, Kathy was denied her fundamental requirement of due process since she was denied the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). This case was cited with approval in the very recent Utah Court of Appeals case of *State of Utah in the interest of S.H.*, 2007 UT App. 8. ["In the context of parental rights, '[d]ue process requires that a parent be given a meaningful opportunity to be heard by submitting testimony herself and by witnesses.'"]

Consequently, this case should be remanded to the trial court in order to allow Kathy to put on her case in chief based upon the deprivation of her due process rights.

Moreover and related to the foregoing, the trial court refused to allow Mr. Drake to properly and directly examine Monica Christy, especially about Glen's mendacious conduct concerning his Murray Justice Court criminal case. (10 RT: 1729-1730.)

## **II. RES JUDICATA AND ISSUE PRECLUSION PREVENT GLEN FROM RELITIGATING THE ISSUE OF CUSTODY**

In opening argument, Glen's attorney stated that Glen had the opportunity and ability to contest custody in the initial proceeding; however, he refused to do so because of the adverse recommendations of Dr. Carol Gage that Kathy should be awarded custody and he feared he would not obtain custody. (1 RT: 11.) Glen admitted that during the first trial in the above-captioned action, that he intended to litigate custody. He also admitted that he had the opportunity to have custody litigated and was given that opportunity but failed to avail himself of that opportunity. (3RT: 553-554.) In this case, the physical custody award in the Paternity Decree ("Decree"), while made by stipulation, was a result of a hotly contested custody battle lasting more than two years with a court appointed independent custody evaluation lasting approximately a year and a half, and with reports from the custody evaluator resulting in a recommendation that Petitioner be awarded primary physical custody, which due to the custody evaluation Respondent agreed to, but only at the date the matter was set for trial with all the witnesses present. (CT: 2210.) In fact, the great volume of documents filed in this matter prior to the trial demonstrates the degree of contest. The Decree states that "the above-entitled matter came on regularly for trial". (CT: 1467.)

*Elmer v. Elmer*, 776 P.2d 599 (Utah 1989) stated that "the courts typically favor the

one-time adjudication of the matter to prevent the undue burdening of the courts and the harassing the parties by repetitive actions". *Elmer* stated that when a custody decree is not adjudicated, "the res judicata policy underlying the changed-circumstances rule is at a particularly low ebb". In *Elmer*, the decree was entered pursuant to stipulation. The *Elmer* court rationale for this relaxing of res judicata where there is a stipulation is that "a judicial determination of custody based on the child's best interests is based on an objective and impartial comparison of the parenting skills, character, and abilities of both parents in light of a realistic and objective appraisal of the needs of a child". *Id.*, at 603.

In the instant case, the trial court had already received two realistic and objective appraisals of the needs of Taylor vis-à-vis Dr. Carol Gage, a respected clinical psychologist who conducted two evaluations where the needs of Taylor were specifically and objectively addressed and presented to the court. Moreover, a trial had already been held on the issue of common-law marriage, thereby providing the court an opportunity to objectively assess both parties. (CT: 1467.) Under these circumstances, the case of *Smith v. Smith*, 793 P.2d 407, 409 (Utah App. 1990) is more apposite. *Smith* stated that "the doctrine of res judicata applies in divorce actions and subsequent modification proceedings. [Citing *Hogge v. Hogge*, 649 P.2d 51, 53 (Utah 1982)]. *Smith* stated that "claim preclusion prevents relitigation not only of claims actually litigated in the first proceeding, but also of claims which could and should have been litigated in the prior action, but were not raised". The above-cited facts clearly demonstrate that Glen, even by his own admission, had the opportunity and witnesses present to litigate the issue of custody; but not wanting to be confronted with the adverse

recommendation of Dr. Gage, felt he could get a more favorable result by stipulating.

"Even though the courts have continuing jurisdiction to enter subsequent orders regarding the parties, their children, or their property; nevertheless, a custody decree, which is predicated on a particular set of facts, is *res judicata* and will not be modified in the absence of a showing of a substantial or material change in circumstances which warrants doing so." *Id.*, at 410.

The particular set of facts evincing no substantial and material changes of circumstances are as follows:

- ◆ Dr. Christy testified that the conflict and problems between the parties have been ongoing since 1999 through August 24, 2004. ((10RT: 1752.)
- ◆ Glen testified that this conflict "has been going on five years". He further stated that "it's been going on because we've been having problems" for five years, from 1999 forward. (3RT: 511-512.) Glen testified that subsequent to the breakup in March, 1999, the parties experienced difficulty in communicating and there has always been a problem with that after she moved out in March, 1999. (3RT: 517, 521.)
- ◆ In her evaluation, Dr. Gage stated that "legal volleyballs" began in November, 1999 when Glen kept Taylor with him for up to five weeks in Las Vegas while Kathy repeatedly attempted to get Taylor returned. (CT: 2168.)
- ◆ Dr. Gage stated that during this period of time, Kathy was unwilling to provide Glen her schedule because Glen would use it against her. "A major battleground between Glen and Kathy related to developing and agreeing on sharing time with Taylor in a reasonable and predictable fashion [sic]. The problem of agreeing on specific dates and times of transitions continued as an unrelenting battleground." (CT: 2169.) Comparing the statements of Dr. Gage with Glen's petition to modify, it is obvious the problems alleged did not occur subsequent to the entry of the Decree but significantly predated the entry.
- ◆ Dr. Gage reported that "Glen was repeatedly making a point of demeaning Kathy as a dysfunctional individual". "There was continuous demeaning of Kathy throughout the evaluation". (CT: 2174.)
- ◆ Dr. Gage described the problems between the parties in 1999 through 2000 as a "visitation tug-of-war" which became more intense. She reported that Glen saw no problem with the extended length of time Taylor was with him,

indicating that Taylor "was used to it". Phone calls with Taylor were also an issue (just as they are now). (CT: 2180.) Even the police were involved to keep the peace in a transfer of Taylor to Glen and/or to Kathy. (CT: 2180.)

- ◆ Dr. Gage reported that in November, 1999, Glen initiated a custody request because he fully felt he was the more appropriate parent (CT: 2185.)
- ◆ Paragraphs 2, 3, 4, and 5 of the Findings evince that the facts claimed by Glen to be subsequent to the Decree had, in fact, been in existence for 5 years.

Since the above facts indicate that there has been no substantial and material change of circumstances since the entry of the Decree, the fact that Glen had the opportunity to litigate the issue of custody and failed to, and that unworkability of joint legal custody was foreseeable should preclude him from seeking custody. See *Throckmorton v. Throckmorton*, 767 P.2d 121, 123 (Utah App.1988) ["The doctrine of res judicata applies in divorce actions. When there has been an adjudication, it becomes res judicata as to those issues which were either tried and determined, or upon all issues which the party had a fair opportunity to present and have determined in the other proceeding."]; *Mitchell v. Mitchell*, 2002 UT App. 403 ["Res judicata in divorce actions. Res judicata precludes considerations of 'issues which the party had a fair opportunity to present and have determined in the [previous] proceeding.'"]; and *Hogge v. Hogge*, 649 P.2d 51, fn1 (Utah 1982) ["The use of a bifurcated procedure in efforts to modify decrees in other areas of the law has long sustained the principle of repose and the finality of judgments. For example, a federal court will not exercise its equitable discretion to modify or set aside the prospective effect of an injunction without a threshold showing of grievous wrong evoked by 'new and unforeseen conditions.'"]

Divorce courts are courts of equity. It is wrong and inequitable that a non-custodial

parent can hide in the weeds until he can evaluator-shop for a favorable evaluation, all the while allowing the child to be more firmly cemented in his present custody arrangement, and suddenly burst forth and ambush the custodial parent and child with the claim that the custody arrangement is no longer workable and then submit a false verified petition. This segues into another related issue, that of waiver and estoppel.

The doctrines of waiver and estoppel apply in this case and to the conduct of Glen at the hearing from which the Decree was entered. *Rowley v. Marrcrest Homeowners' Ass'n*, 656 P.2d 414, 418 (Utah 1982) is instructive regarding these doctrines:

'A waiver is the intentional relinquishment of a known right. To constitute a waiver, there must be an existing right, benefit, or advantage; a knowledge of its existence and an intention to relinquish it. It must be distinctly made, although it may be express or implied.' [Citations omitted.] Estoppel has been defined as:

a doctrine of equity purposed to rescue from loss a party who has, without fault, been deluded into a course of action by the wrong or neglect of another. The measure we apply to plaintiffs' claim of estoppel is an adaptation to this case of the standard heretofore approved by this court: Estoppel arises when a party . . . by his acts, representations, or admissions, or by his silence when he ought to speak, intentionally or through culpable negligence, induces another . . . to believe certain facts to exist and that such other . . . acting with reasonable prudence and diligence, relies and acts thereon so that he will suffer an injustice if the former . . . is permitted to deny the existence of such facts.

*Id.* at 418.

In accord, *Morgan v. Board of State Lands*, 549 P.2d 695, 697 (Utah 1976).

Glen relinquished his right to litigate the issue of custody at the time the Decree was

entered. He had the existing right under principles of due process to litigate the issue of custody and was obviously prepared to do so since he had witnesses present. However, as was stated by his attorney and him during the modification trial, he didn't want to risk losing custody because of the evaluations of Dr. Carol Gage; therefore, he entered into a stipulation. Without fault, Kathy was deluded into a course of action by Glen's intentional relinquishment of his right to present witnesses to testify in his behalf in order to attempt to gain custody. Kathy entered into a stipulation with Glen in good faith (an element of Glen's good faith that is lacking is his filing a petition to modify eight months after the stipulation alleging substantial and material changes of circumstance subsequent to the stipulation, which was completely false since the problems alleged predated, by many years, the decree), not knowing he would evaluator-shop and challenge the stipulation at the first opportunity. Consequently, Glen should be estopped from alleging a substantial and material change in circumstance and seeking custody because he induced Kathy to believe certain facts to exist, i.e., that he entered into the stipulation in good faith in an attempt to solve the myriad and high-conflict problems which have existed at least from March, 1999 to the time of the entry of the decree. Due to the arguable relaxed standard of res judicata and issue preclusion regarding stipulated custody arrangements as set forth in *Elmer* and *Smith, supra*, Kathy was deceived into entering into this stipulation, and by doing so, suffered a manifest injustice, and would continue to suffer this manifest injustice unless Glen was estopped from alleging substantial and material changes of circumstance to gain custody of Taylor. Such estoppel would mandate that the order modifying the decree of paternity be set aside.

Even in light of *Moody v. Moody*, 715 P.2d 507 (Utah 1985), the waiver-estoppel arguments still apply based upon Glen's wrongful conduct. At the time he entered into the stipulation, Glen knew the joint custody arrangement was unworkable – a fortiori, it was foreseeable it would not work. (See previous citations to the record.) He stipulated because according to his own and his attorney's words, he believed that with a full-blown custody fight with Dr. Gage's evaluations being presented, he would lose. However, the shortness of the time between the entry of the Decree and the filing of the petition to modify and the untrue statements made in his petition about the facts of unworkability just occurring after the decree, imply he knew the joint legal custody order would not work and all he had to do to buy time was to stipulate, get a new evaluator, and then claim unworkability. Moreover, as is demonstrated by the observations of Special Master Brian Florence and Commissioner Arnett's Minute Entry [Exhibit 57 received as evidence (1 RT: 210 and 2RT: 392-393, 3RT: 620) and Exhibit 109 received as evidence (2RT: 360-61, 3RT: 627), respectfully] Glen, by his wrongful conduct and strident forms of communicating with Kathy (knowing her inability to defend herself against him as is made clear in Dr. Gage's evaluations) made certain the joint custody arrangement would not work. With a new evaluation in his arsenal, he was then ready to claim unworkability and go to war.

### **III. THE TRIAL COURT ERRED BY FIRST ALLOWING DR. CHRISTY TO TESTIFY WITHOUT FIRST DETERMINING WHETHER A SUBSTANTIAL AND MATERIAL CHANGE OF CIRCUMSTANCE HAD OCCURRED**

The first witness called by Glen was Dr. Monica Christy. (1RT: 36.) This was done without the trial court first hearing evidence that there were substantial and material changes

of circumstance and Glen meeting his burden to prove a substantial and material change in circumstances. As set forth in previous arguments, the facts of this case are not the *Elmer* circumstances and it was inappropriate for the trial court to permit any introduction of evidence regarding the best interest of the child, before Glen met his burden to show a substantial and material change of circumstances.

Based upon the allegations in Glen's petition to modify as such are compared to the voluminous record in this case including trial exhibits, Glen would be hard pressed to prove that the allegations made in the verified petition occurred after the entry of the Decree and were entirely foreseeable. However, the trial court allowed Dr. Christy to testify concerning the best interests of the child prior to a specific finding that Glen had met his burden. Unless respondent is able to meet his burden of proof that there has been a substantial and material change in circumstances and other criteria regarding this issue, it was inappropriate to first introduce the report or allow the testimony of Dr. Christy at trial, since to do so would impermissibly allow respondent to prematurely move to the second prong of *Hogge-Becker*. [*Hogge v. Hogge*, 649 P.2d 51, 53 (Utah 1982); *Becker v. Becker*, 694 P.2d 608 (Utah 1984)].

A parent seeking a physical custody modification must meet a two step test in a bifurcated proceeding, with the first test requiring a demonstration of a substantial and material change in circumstances affecting the custodial relationship *not contemplated in the earlier decree*, and if such demonstration is made, then a demonstration that such substantial material change justifies reopening the question of custody. *Hoag v. Hoag*, 649 P.2d 51

(Utah 1982). It is only after the first step has been achieved in a petition to modify, that the court can proceed to the second step of considering the best interest of the child in deciding whether physical custody should change and how it should change. *Id.* at 54.

The *Becker* court reaffirmed *Hogge's* two-step analysis; however, it clarified the first tier to be considered by the court before any physical custody determination was to be made.

In order to meet this threshold requirement, a party must show, in addition to the existence and extent of the change, that the change is significant in relation to the modification sought. The asserted change must, therefore, have some material relationship to and substantial effect on parenting ability or the functioning of the presently existing custodial relationship. In the absence of an indication that the change has or will have such effect, the materiality requirement is not met. Accordingly, it is not sufficient merely to allege a change which, although otherwise substantial, does not essentially affect the custodial relationship.

*Id.* at 610.

Respondent, in his petition, failed to allege and demonstrate that the asserted change (which was not really a change) of unworkability is significant in relation to the modification sought, that this alleged change must have some material relationship to and substantial effect on Kathy's parenting ability or the functioning of the presently existing custodial relationship. The trial court erred by failing to follow the mandated approach of *Hogge-Becker*. See the argument presented in Subsection IV(A) below.

#### **IV. THE FINDINGS AND CONCLUSIONS OF THE TRIAL COURT WERE NOT SUPPORTED BY THE EVIDENCE AND/OR WERE IMPROPER**

The standard for review of trial court's findings is "clearly erroneous". *Hudema v. Carpenter*, 1999 UT App 290, 989 P.2d 491, 497.

**A. FINDING 7, EVEN THOUGH SUPPORTED BY THE EVIDENCE, IS LEGALLY INCORRECT**

This Finding states that "in accordance with the principles set forth in *Moody v. Moody*, 715 P.2d 507 (Utah 1985) and *Elmer v. Elmer*, 776 P.2d 599 (Utah 1989), the Court finds that the unworkability of the joint custody order constitutes sufficient grounds to modify the order." The Finding of unworkability was amply supported by the evidence. Dr. Christy, Dr. Gage, Glen, and Kathy all testified that the parties were unable to work together to resolve their differences concerning their roles as parents of Taylor. Even Findings 3 through 6 reflect the unworkability of the joint legal custody order. However, this Finding is more of a legal conclusion than a factual finding. As such, it should be reviewed for correctness with no deference being accorded to the trial court's conclusion. *Radakovich v. Cornaby*, 2006 UT App 454, 147 P.3d 1195, ¶ 3. According to § 30-3-10.4, Utah Code Ann., a claim of unworkable only terminates a joint custody order, not a physical custody order. In fact, § 30-3-10.4 only authorizes the trial court to "enter an order of sole legal custody under Section 30-3-10. All related issues, including parent-time and child support, shall be determined and ordered by the court." Physical custody is not listed.

The analysis in *Thronson v. Thronson*, 810 P.2d 428, 429-433 (Utah App.1991) is instructive regarding joint legal and physical custody:

'Joint Legal Custody' was specifically added to the sole custody statute in 1988, and designated as § 30-3-10.1 to 10.4. We emphasize that this is a joint '*legal*' custody statute and not a joint '*physical*' custody statute. In the 1988 Utah legislative session, Senator Hillyard stated: 'This is not joint physical custody. The child obviously can't live in two homes. But it's joint legal custody which would give the non-custodial parent more involvement in the decisions of child raising.' [Emphasis added.]

. . . .

. . . . Subsections (3), (4) and (5) tell us what joint legal custody is not – it is not joint physical custody. We note that this statute does not contain a definition of nor a provision for 'joint physical custody.'

. . . .

. . . . Moreover, the termination provisions, section 10.4, confer upon one parent the right to unilaterally terminate the order of joint legal custody. The order can be terminated simply by filing and serving a motion. Once the motion is filed, the court is required to replace the order 'with an order of sole legal custody under Section 30-3-10.'

. . . .

. . . . The modification provisions [of the joint legal custody statute] appear to be a codification of the *Hogge v. Hogge*, 649 P.2d 51 (Utah 1982) bifurcated procedure used in sole custody modifications. . . .

. . . . Coincidentally, while this appeal was pending, the 1990 Utah Legislature substantially amended its two year-old joint legal custody statute. . . . However, the legislature retained its initial definition of 'joint legal custody,'  
. . .

*Id.* at 429-432.

The unworkability of the joint legal custody arrangement does not constitute grounds for the trial court to modify the sole physical custody award without resorting to the bifurcation procedure in *Hogge v. Hogge*, 649 P.2d 51 (Utah 1982), which the trial court did not do. The unworkability of the joint legal custody order does not constitute sufficient grounds to modify the sole physical custody decree – it only provides the grounds to modify the joint legal custody order. *See* ¶ 3, Paternity Decree. (CT: 1467-1481)

*Moody* is inapposite since it was decided prior to the enactment of the joint legal custody statute; consequently, using it as a basis for a modification of the paternity decree is an abuse of discretion. Moreover, *Moody* only involved joint physical custody. Ditto for

*Elmer*, which has already been distinguished on its facts (and it predated *Thronson*.)

Moreover, in seeking a change of physical custody, Glen failed to demonstrate the requirement that the asserted change must, therefore, have some material relationship to and substantial effect on parenting ability or the functioning of the presently existing custodial relationship. In the absence of proof that the change has or will have such effect, the materiality requirement is not met. Finding 7 fails to address this requirement. Ditto for Finding 11. One salient factor not addressed by any of the Findings is duration of the initial physical custody arrangement.<sup>1</sup> Kathy has been Taylor's primary caretaker and primarily responsible for his care, control and nurturing from the time of his birth through the trial concluding on September 15, 2004. (CT: 2209-2216, ¶2). The Findings do not even address how the physical custody arrangement with Kathy is inimical to Taylor nor do they address the factors of continuity and stability. In fact, stability was ignored. "It is reversible error if a trial court fails to make findings on all material issues". *Throckmorton, supra*. Moreover, none of the findings address the material relationship to and substantial effect on Kathy's parenting ability or the functioning of the presently existing custodial relationship. In this regard, Findings 15 and its subparts and 16, don't even address or list the functioning of the presently existing physical custody relationship, listing instead, irrelevant factors. Rule 4-903(5)(D), Judicial Council Rules, requires the evaluator to consider and respond to "the general interest in continuing previously determined custody arrangements where the child

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<sup>1</sup> "Nevertheless, if an existing custody arrangement is not inimical to the child, the continuity and stability of the arrangement are factors to be weighed in determining a child's best interests. What particular weight to be accorded those factors . . . must depend on the duration of the initial custody arrangement, the age of the child, the nature of the relationship that has developed between the child and the . . . parents, and how well the Child is thriving physically, mentally, and emotionally. *Elmer, supra*, at 604.

is happy and well adjusted". Dr. Christy failed to do this.

An equally, important omission is the issue regarding parent-child bonding. In fact, that issue is so significant that "when the court finds that the child has bonded more closely with one parent than another, the court is within its discretion in concluding that the difference in bonding overrides the general interest in stability, especially where the prospect of stability is diminished". *Hudema v. Carpenter*, 1999 UT App. 290, 989 P.2d 491, 501, 502. The Findings do not mentioned bonding, even though it was made an issue by Dr. Williams. Trial Exhibit P- 61 received into evidence (1RT: 185) , is an evaluation letter to Dr. Monica Christy. Dr. Williams found that "Taylor feels more securely attached to his mother then to his father". (P.2.) On page 3, Dr. Williams states that, "Taylor appears to be more securely bonded to his mother, whom he tends to regard as the more reliable, consistent, and trustworthy parent." This was also echoed by Taylor's first grade teacher, Pamela Brown who testified that Kathy frequently participated in classroom exercises with Taylor. She described the interactions between Taylor and Kathy as nurturing and kind and concluded they were very bonded. On the other hand, she only saw Glen when he came to get Taylor from school, he did not participate with Taylor at school. (1 RT: 140-141.) Trial Exhibit 54 was received into evidence. (1RT: 210.) This exhibit includes missives from Diane True, a person who stated her observations from personal knowledge. On the first of three pages, she stated that "I know the bond between Kathy and her two children". (Addenda.) Since evidence of the bond between Kathy and Taylor was presented, this should have been addressed in the findings. Even though discussed by Dr. Christy in her report and testimony, the very close bond Taylor has with his grandmother who lives right next door to Kathy was not put in the Findings. (She testified that "Taylor would also lose contact most

of the time with his maternal grandmother. And from my evaluation it appears to me that he has a bond with – a very important bond with his maternal grandmother, and he reports spending an equal amount of time in her home as he does in his mother's home. So, I think that that would be very difficult for both his grandmother and for him to not – have infrequent contact. So he would lose that family support.") (1RT: 57.) Due to the importance ascribed to bonding, it is reversible error not to have addressed such in its findings. See *Hudema, supra*, and *Throckmorton, supra*.

**B. FINDING 8 IS NOT SUPPORTED BY THE EVIDENCE AND DOES NOT CONSTITUTE GROUNDS FOR MODIFICATION**

Finding 8 regarding Kathy's move to Kwajalein is based upon the following statements adduced at trial: (1) Ms. Sawyer has considered Patrick being with his father during the school year while Taylor is with her in Kwajalein. The current custody arrangement will change if Ms. Sawyer moves to Kwajalein. Kathy's move to Kwajalein would dramatically change Glen's time with Taylor. Kathy expressed a desire to move to Kwajalein. [Dr. Christy Custody Recommendation, pp. 1,2.] It is not disputed that prior to trial, Kathy gave formal notice of her intent to move to Kwajalein to be with her husband. (1RT: 15.) However, at the outset of the trial, Kathy informed the trial court that she was not going to move to Kwajalein, that the move was no longer an issue. (1RT:116;7RT: 987.)

The findings failed to specify the relevance or importance of this finding. This finding has no relevance since Kathy declared her intention not to move thereby taking relocation off from the table. Moreover, relocation is not grounds for modification. Such

a finding is an abuse of discretion.<sup>2</sup>

### C. FINDING 10 IS NOT SUPPORTED BY THE EVIDENCE

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<sup>2</sup> *Becker* appears to have been codified by the Utah Legislature's adoption in 1993 of *Utah Code Ann. §30-3-37* on "Relocation." *Section 30-3-37* (2003) provides that when either parent decides to move from the State of Utah or 150 miles or more from their residence, that parent shall provide reasonable advance written notice of the relocation and then either of the parties or the court upon motion may schedule a hearing to review the parent time schedule and make appropriate orders regarding the parent time. While *Section 30-3-37* provides in subsection (5) for a minimum visitation schedule as a result of relocation, and in subsection (6) for the non-custodial parent to have a minimum of thirty (30) days of uninterrupted parent time during summer vacation and in subsection (7) for the allocation of some travel expenses for the children, this section does not authorize a change of custody as a result of the relocation or even suggest that it would be grounds for a change of custody.

The relocation statute is consistent with the result in *Becker*, and Kathy's former intended relocation to Kwajalein does not constitute a material change in circumstances justifying a modification and transferring sole physical custody to Glen, especially since Glen's asserted change has no material relationship to or substantial effect upon Kathy's physical custodial parenting ability or the functioning of the presently existing custodial relationship. Relocation is, however, grounds for reopening the visitation rights and reallocating parent time.

With respect to Glen's argument that the relocation cannot be accomplished without changing the joint legal custody provisions of the Decree and the parent time scheduled under the *Decree*, this appears obvious under any circumstances where relocation is involved. There is no doubt that the Utah Legislature considered this when they adopted the relocation statute. In addition and in defining "joint legal custody", *UCA §30-3-10.1* states in subsection (3) that joint legal custody "does not affect the physical custody of the child, . . ." Moreover, *UCA §30-3-10.4* provides for modification or termination of a joint legal custody order after hearing when a substantial and material change has occurred or the order has become unworkable, but under subsection (2), the court is only authorized to terminate the joint legal custody order, to enter an order of sole legal custody, and to determine related issues, including parent time and child support. No authorization is given to change physical custody which makes it consistent with the definition of joint legal custody in *Section 30-3-10.1* as not affecting physical custody of the child. Therefore, a change in joint legal custody of the parties necessitated by Kathy's relocation, while being appropriate for a change in the joint legal custody provision, is not appropriate for a change in the physical custody of Taylor which custody has reposed in Kathy for a substantial amount of time.

The first sentence in Finding 10 is not disputed by Appellant. Appellant admits that Taylor is doing well; however, there is nothing in the record to support “the Court cannot determine whether that is in spite of or because of the efforts of one or the other party or both parties. Dr. Christy’s evaluation of Taylor stated, “Taylor is a lively, bright boy who is quite outgoing and clever. He does well in school, is socially adept, and loves his dog. (Addenda, Appendix 1, Children Assessment, p. 1.; 2RT: 373,376.) The vast majority of the evidence demonstrates that the reason Taylor is doing well is because of Kathy having physical custody of him, caring for him, and her efforts to ensure he succeeds at school. *See* ¶¶ 5, 13, 26, 27, 28, 29, 30, 31, 33, and 34 in the Statement of Facts. Dr. Christy admitted that the fact Patrick Huish and Taylor are doing so well in school indicates Kathy’s good parenting skills and effectiveness. (2RT:376.) Glen admitted Taylor had done extremely well in school while in the primary custody of Kathy. (11RT: 2031.) When asked what he did to contribute to his doing well in school, Glen stated he does his homework with him and helps him out. (11RT: 2031.) This was contradicted by ¶ 30 of the Statement of Facts. He admitted never being to school with Taylor except for one Halloween and to get his bicycle. (11RT: 2031-32.) Glen admitted that Taylor is at the top of his class (3RT: 655.), that prior to Taylor entering the first grade he knew how to read because Kathy and her mother (Lenay) bought him Hooked on Phonics and taught him how to read, that Taylor does well in math, and that Taylor's spelling is better than his. (3RT: 654-656.)

**1. The Last Sentence Of Finding 10 Is Not Supported By The Evidence**

The evidence adduced at trial does not support that portion of Finding 10 that "the current custody order has resulted in high conflict, high stress situation that is not good for Taylor and must change for Taylor's best interests". Appellant has canvassed the record,

including Dr. Christy's custody evaluation, and has found very little evidence that the current custody order has resulted in high conflict, high stress situation. Dr. Christy testified that "the compliance with the order [decree], the arrangements that have been set up have continued to deteriorate to the point where Taylor is exposed to a great deal of conflict and uncertainty". (2RT: 408.) Dr. Valerie Hale's opinion of the decree was that it was never functional due to the level of conflict prior to its entry. (2RT: 284-85,314.) However, the testimonies of Dr. Christy, Dr. Gage, and Glen set forth above in Subsection **II** of the **Argument** clearly demonstrate that prior to the entry of the decree, there was high conflict and stress. None of the testimony elicited by Glen specifically stated how the high conflict present in this case affects Taylor's present living arrangement. Additionally, in spite of the high conflict and stress, the testimonies of Dr. Christy, Glen, and Taylor's school teachers [set forth in **IV(C)** of the **Argument**] clearly demonstrate that Taylor was/is doing very well and was doing so with Kathy being the primary physical custodian. This fact demonstrates that this portion of Finding 10 is unsupported by the record. Moreover, since Taylor was/is doing "very well" with Kathy as his primary physical custodian, Taylor's best interests demand that his physical custody remain with Kathy. See *Elmer, supra*, at 604. Dr. Christy even reported that Taylor doesn't show anxiety, that he is pretty adaptable. (1RT: 91-92.)

#### **D. FINDING 11 IS AN ERRONEOUS LEGAL CONCLUSION**

Finding 11 lists no facts other than to say that the trial court considered several factors, with no specific mention of which. However, in light of the facts that Kathy has had primary physical custody of Taylor since his birth, that he is doing well, and especially overturning a long-standing custody award (at least 5 to 8 years) where Taylor was happy, healthy, thriving, doing well in school, had family support, was bonded to Kathy and his

grandmother, and manifested no emotional problems, the trial court should have listed the factors and what weight was attached to each one, especially "prior custody arrangements, including the duration of those arrangements, and the potential harm to the child if the arrangement is changed. Existing arrangements in which the child has thrived should be disturbed only if the court finds compelling circumstances." *Hudema v. Carpenter*, 1999 UT App. 290, 989 P.2d 491, 499, ¶ 26. The trial court's findings do not even consider these required findings; consequently, it is reversible error not to have addressed such in its findings. See *Hudema, supra*, and *Throckmorton, supra*.

**E. FINDING 13, EVEN THOUGH SUPPORTED BY THE EVIDENCE IS FACTUALLY INCOMPLETE AND LEGALLY INCORRECT**

Appellant has no quarrel with the facts stated in Finding 13; however, the facts concerning preference for keeping siblings together is incomplete. Moreover, the conclusion that the trial court does not feel this factor to be dispositive is an abuse of discretion. In her Custody Recommendation, p. 1, and in her trial testimony, Dr. Christy had this to say about keeping Taylor and Patrick together:

It is believed that Taylor needs regular contact with his brother but that the two brothers do not necessarily need to live together on a full time basis to feel secure or connected. There are age and personality differences between the two that will probably result in their seeking associations with other peers as they grow older even more than they do now. Their fathers are committed to maintaining contact between Taylor and Patrick. . . . In arriving at the recommendations stated below, I have given consideration to their need to share some meaningful time together. *Id.* at p. 1, Addenda, Appendix 1.

I don't think it's necessary that they live together full time, but I also did the evaluation in the Huish versus Huish matter, and my recommendation there was that Patrick also stay here in . . . Murray, or Sandy area with his father, . . . But if he were to stay here, then Taylor would have actually more time with his brother Patrick in that they would presumably both be visiting their mother during the summers and then have an opportunity to get together during the

year here than if Taylor were going to Quadulane [sic] with his mother. *Id.* at 1RT: 43.

*Id.* at p. 1, Addenda, Appendix 1.

Glen testified that he asks Taylor if he spent the weekend with Patrick and Taylor replied that Patrick was with his dad, weekends are not always spent together, and that Patrick spent July with his father (even though objected to by Mr. Drake on the basis of hearsay). ((11RT: 1947-48.)) However, in seeming contradiction of Dr. Christy's statement that their fathers are committed to maintaining contact between Taylor and Patrick, Glen testified that he rarely talks to Patrick's father, contradicting Dr. Christy's statement that the fathers do talk to one another. ((11RT: 2009; 1RT: 56.)) It appears that Dr. Christy's statement about the fathers being committed to maintaining contact may be nothing more than wishful thinking. [Kathy testified that Patrick's father was angry with Glen because of the way Glen treated Patrick, he was not patient with him and treated him with indifference. ((11RT: 2055.))]

Dr. Christy admitted Taylor and Patrick have a very close relationship, are bonded to each other (1 RT: 42-43.) Dr. Christy's recommendation minimized her observation about the closeness of the boys' relationship and bonding. Her opinion was based, without specificity, on the visitation schedules of the fathers of both boys, the boys were not always together and she did so without quantifying the separation time. The other justification was that the boys had somewhat different interests based upon their 8 year difference in ages.<sup>3</sup>

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<sup>3</sup> This Finding is completely refuted by the brothers' grandmother, Lenay, concerning the bond existing between Taylor and his brother, Patrick. She stated they are very, very close. She testified that any time they come back together from visiting their fathers, when they haven't seen each other, they run to each other, they hug each other, they roll on the floor, they wrestle. Patrick read to Taylor before Taylor could read. Patrick taught Taylor

(1RT: 92-93.) Dr. Christy and the Findings never specified how detrimental it would be to Taylor to take him away from his brother (and Kathy and Lenay), where the facts are uncontroverted that he is thriving physically, mentally, emotionally, and academically. On the contrary, Dr. Gage who had seen the brothers together, judged it to be very important to continue to maintain this sibling bond. (CT: 2184-2189.) Dr. Christy ignored the importance of the sibling bond and recommended that they be separated and that Taylor be given to Glen, a person with no close family and no children, and a confirmed bachelor, thereby depriving him of the close family support he had with Kathy. *See* the concurring opinion of Justice Crockett in *Jorgensen v. Jorgensen*, 599 P.2d 510, 512 (Utah 1979):

One of the principal factors to be given serious consideration is that there may be, and in most instances there are, greater values to be found in the children being together, and in their relationships with each other, than are to be found in their relationships with their divorced and contentious parents. Moreover, when for some persuasive reason their being together is not practical, it is of the utmost importance that the children have the best possible relationship with each other.

*Id.* at 512.

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how to play soccer and plays soccer with him in the back. Even though there is an almost 8-year difference between Taylor and Patrick, when Patrick's friends come over, they include Taylor. Even though they have their group of separate friends, when the two boys are together, it is amazing how well they play together. "Patrick is very, very tender and kind with Taylor and that it is very evident they love each other. They watch movies together, they go over to Lenay's house and act as if they were going camping, throwing their sleeping bags on the floor, and sleeping there for the night, side by side. Whenever they are at home, they're always together. They both express their love for each other. Taylor will grab Patrick around his lower waste and tell him, "I love you, I love you" and Patrick says the same thing in return. (6RT: 1011-1012.) Regarding splitting up her two children, Kathy testified that they've only been apart periodically because of weekend visitation; however, they're very close and they have been since the birth of Taylor. Kathy agreed with Dr. Gage that the bond between these brothers was important. (7 RT: 1240-1241.)

## **F. FINDING 15(a) IS UNSUPPORTED BY THE RECORD**

Finding 15(a), even though vague, that Kathy is unwilling to facilitate the joint custody order in the Decree and incapable of encouraging Taylor's relationship with Glen is evidently based upon the following marshaled evidence:

- ◆ Dr. Christy reported there are times Kathy goes out of her way to be very inflexible and unwilling to work with Glen so he can see Taylor. She cited one example dealing with taking Taylor to a restaurant and not allowing Glen to pick him up from the restaurant because his flight had been delayed. Kathy felt it was an invasion of her privacy. (Addenda, Appendix 1, Kathy Psychological Evaluation, p. 9; 1RT: 71-72)
- ◆ Dr. Christy reported she thought that Kathy felt that the time Taylor spent with Glen was a detriment, not positive. (1RT: 80.)
- ◆ Dr. Christy stated that Kathy thwarts any efforts of Glen to be involved in making decisions concerning Taylor's private schooling. (1RT: 82)
- ◆ Dr. Christy's trial testimony is consistent with the five pages of her custody recommendations (when asked this question by the trial court). (1RT: 117)
- ◆ Glen stated that Kathy would not let him speak to Taylor on the phone. He has no way of making decisions with her because she won't talk to him. They have no communication. (3RT: 441-42, 489.) However, see Special Master Report & Order, ¶ 6, p. 6, Exhibit 57 received into evidence (1RT: 210 and 2RT: 392-393, 3RT: 620) (Both reports of Brian Florence), that Kathy should not have to sit by the phone every other day waiting for Glen to call – advance notice should be provided.
- ◆ Glen stated he was to have Taylor when Kathy was out of town (flying) and estimated he missed 25 days of visitation because Kathy had been flying and he was not informed. He then brought up an incident at Taylor's school where Lenay picked up Taylor and he was certain Kathy was flying even though she had called the school and told them she was ill. He testified Kathy was flying and not home sick. (3RT: 446-49.) Compare this to Sharon Weiss' (school secretary) testimony that at Glen's insistence, she called Kathy at home and Kathy answered. Ms. Weiss then handed the phone to Glen, asking him if he wanted to speak to her. (4RT: 785.) The unbiased testimony of this witness completely refutes Glen's testimony. (4RT: 790-795)
- ◆ Glen testified that on October 25, Kathy wouldn't let him visit Taylor because his plane was late coming to Salt Lake City and he had until 7:00 p.m. to pickup Taylor. He said he arrived at 7:01 but Kathy wouldn't let him see Taylor until the next day. (3RT: 468-72)
- ◆ Kathy admitted interfering with Glen's visitation twice, once when coming

from Hawaii, she got her weekends confused and thought Glen had visitation on Thursday instead of Wednesday, and then on Labor Day when she thought she had continuing visitation from her August visitation with Taylor. ((11RT: 2062.) This prompted the statement by Brian Florence that Kathy's actions were an understandable mistake and were not intentional. (Exhibit 57, ¶ d, p. 3, Special Master Report & Order dated October 14, 2003.

- ◆ Glen testified that it was his opinion that Kathy would do anything to stop him from seeing Taylor – "she thwarts me from seeing him every time". However, he was very non-specific. (3RT: 584)

Comparing all of Finding 15 with the spectrum analysis in *Hudema*, evinces the minor importance of these findings and overlook the omitted important findings that have been previously addressed in *Hudema* and *Elmer*.

In her evaluation of Kathy, Dr. Christy misstated facts regarding this Finding. For example, on page 9 (Addenda, Appendix 1, Kathy Psychological Evaluation) Kathy allegedly blocked Glen's visitation because he was flying in late and she was at a restaurant.

Glen testified that on October 25, 2002, he called Kathy and told her he was in Atlanta and would pick Taylor up at 7:00 P.M. He testified that Kathy refused to allow him to visit Taylor that evening, saying she had other plans for him. He then stated he called Valerie Hale who then allegedly told Kathy to have Taylor available at 7:00 P.M. (3RT:469-470.) This is not true: the phone message from Valerie Hale to Lynn Maybe, stated that "if Glen does show up to pick up Taylor between 5:45 and 6:15, which is what he said in his e-mail of October 8<sup>th</sup> . . . that was the schedule that she would go ahead and release Taylor and let him go with his dad. What . . . that if Glen is later than 6:15 then . . . that she should just go ahead and just proceed with her evening plans with the boys. She very graciously offered to make the child available as early as 7 o'clock tomorrow morning. So, **6:15 is the magic number.** . . ." [(Petitioner's Trial Exhibit 80, which is the 2<sup>nd</sup> page of P's Exhibit 59 and the Court indicated it would use P's 59 because it had 2 pages (the second of which was marked Exhibit 80) ((9RT: 1538) (Valerie Hale letter to court), reconfirmed it was received into evidence. ((10RT: 1709)]

The above cite to the record indicates that Dr. Christy, in her evaluation, uncritically accepted Glen's version of events without ever independently verifying them and ignoring

other cogent evidence.<sup>4</sup> On page 10 of this same evaluation, Dr. Christy criticized Kathy for taking Taylor to court to testify against his dad. Dr. Christy stated that Glen had told her this.

When she was shown Exhibit 147 (received into evidence (8RT: ): 1273) that showed the Murray City Attorney, over Kathy's objection, subpoenaed Taylor, she refused to admit Glen had lied to her. ((10RT: 1727-30, 1858-1860.) *See also*, 6RT: 1004-1006, (8RT: ): 1279-1280, and 7RT:1170-1171, 1172 to refute this finding.

Moreover, ¶¶ 14, 15, 17, and 25 of the Statement of Facts evince that rather than Kathy being unwilling to facilitate the joint custody order and encouraging Taylor's relationship with Glen, it is Glen who has been unwilling to facilitate and encourage. Glen even admitted that during the 33 days he had Taylor (in 1999), he did nothing to facilitate the relationship between Taylor and Kathy. (3RT: 547.) Then there is the testimony of Kathy that she never avoided Glen's phone calls. If Taylor were home, she would answer the phone and tell Taylor his dad was on the line. If Taylor wasn't home, she wouldn't answer the phone. (11RT: 2073.) Kathy never hid from Taylor the fact that his father had called and left a message. (11RT: 2074)

The lack of communication referred to above by Glen is justified by the very strident, demanding, and demeaning communication Kathy experienced when dealing with Glen. *See* ¶¶ 20 and 22 of the Statement of Facts and Kathy's testimony about Glen's demeaning and

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<sup>4</sup> Dr. Christy's objectivity is called into question based upon her admission that during the past two days, she had discussions with Paige Bigelow regarding her testimony. She then was asked whether she rehearsed her testimony with Paige. She replied that she did not know what Mr. Drake meant by "rehearse". (10 RT: 1712.) In 1974, Dr. Christy received a doctorate in developmental psychology from the University of Minnesota (1RT: 37.); yet, she claims to not know what rehearse means. Such a trivial answer is suspect.

In violation of the exclusionary rule, Paige Bigelow, attorney for Glen, discussed with Dr. Christy to what other witnesses had testified. Dr. Christy even testified that she was aware of the invocation of the exclusionary rule because she had to wait outside the courtroom. (10RT: 1713.) Obviously, because of the violation of the exclusionary rule, her testimony may be tainted and suspect.

abusive forms of communication. (7RT: 1201-1205, 1221-23, 1238-39)

This Finding does not reflect the substance of Findings, Recommendation, and Order, CT: 88-91; 7RT:1153-1155; and Affidavit of Kathy, CT: 2209-2216, ¶ 3, about Glen's unwillingness to facilitate the joint custody order and incapability of encouraging Taylor's relationship with Kathy.<sup>5</sup>

Further evidence of Glen being guilty of this Finding is that on the day of the incident at the airport, Glen kept Taylor for evening and did not bring him back until Wednesday even though Glen admitted Kathy had been separated from Kathy for several days. (11RT: 2012) Glen admitted he refused to bring Taylor down from Park City the evening Kathy flew into town because Lenay had slapped him. (11RT: 2013.) Moreover, Glen could not recall any time he had compromised his own schedule in order to promote a successful visitation schedule between Taylor and Kathy. (11RT: 2014.)

Finding 15(a), without much specificity, accuses Kathy of a great deal of negativity toward Glen. It is silent about Glen's great deal of negativity toward Kathy and how that affected his ability to properly parent Taylor. This finding is supported by Addenda, Appendix 1, Children's Assessment, p. 2 (Taylor reported being told negative things about his father – "his mother told him that his dad wants him to think that his grandmother and mother are bad persons"); Psychological Evaluation of Kathy, p. 7 ("She readily describes her unfair treatment by Glen to her friends and she has many loyal friends and acquaintances who attest to his meanness without ever having observed it directly."), Dr. Christy's

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<sup>5</sup> Paragraph 7 of the Findings, Recommendation and Order entered in the trial court on January 10, 2000 states that "the Court finds that the Petitioner has acted in the best interest of the minor child by facilitating a meaningful relationship between the minor child and the Respondent, but the Respondent has not acted the same in regard to creating a meaningful relationship between a child and that Petitioner for the reason that that Respondent has kept the minor child since the 17<sup>th</sup> of November, 1999, and has refused to allow the Petitioner to see said minor child". (CT: 88-91.)

testimony concerning letters written as the request of Kathy which expressed a negative sentiment about Glen (1RT: 98), Lenay's assessment that Glen is a bad influence on Taylor (1RT: 99) (even though the Finding concerns witnesses who had little or no contact with Glen), and Dr. Christy's overall impression that Taylor hears more disapproval of Glen from Kathy and his grandmother than he hears from Glen about Kathy and his grandmother. (2 RT: 353) Glen also testified that Kathy has made statements about him portraying him in a negative light. ((11RT: 1953.) However, compare that to Dr. Gage's personal observation that "[w]hen Glen was present with Taylor, Glen persisted in wanting to talk about problems related to Kathy despite Taylor's presence and despite comments from me." (CT: 2188.) Moreover, Dr. Christy reported that Taylor told her his dad told him "that his grandmother was trying to put his dad in jail". (Appendix 1, Children's Assessment, p. 2., Dr. Christy evaluation documents.) Also, see Dr. Gage's assessment in ¶ 24 of the Statement of Facts concerning Kathy not being negative.

Pam Brown, Taylor's first grade teacher, testified she never heard Kathy say anything negative about Glen and even promoted Glen to Taylor. (1RT: 153-55.) However, the compelling evidence is that Glen is the one manifesting an extreme amount of negativity and hostility toward Kathy. *See* testimony of Patricia Perkins, second grade teacher of Taylor, (4RT: 755-756), testimony of Sharon Weiss (4RT: 781-795), and testimony of Lenay Russell (6RT: 991-996, 1006-1009); ¶¶ 17, 18, 19, 20, 22, 25, 41, 42, 43, 48, 49, 51, and 52 of the Statement of Facts; and Exhibits 116 received (3RT: 562) and 110 received (2RT: 358).

Finding 15(a) also states that Kathy's witnesses had a low opinion of Glen. However, that finding is silent about whether Kathy shared that low opinion with Taylor. Moreover, as seen from the cites to the record in the previous paragraph, Glen is at least, if not more, guilty of this finding that Kathy.

Dr. Gage stated that "although discussing problems between herself and Glen, [Kathy] was not strongly negative about him nor criticizing his parenting of their son. Dr. Gage stated that Kathy's MMPI-2 validity scales indicate that she is "openly honest". (CT: 2172-

2173, Addenda, Appendix 2.) Moreover, contrary to this finding, Dr. Gage also reported that "Glen was repeatedly making a point of demeaning Kathy as a dysfunctional individual". "There was continuous demeaning of Kathy throughout the evaluation". (CT: 2174.)

Finding 15(a) concerns Glen keeping his opinion of Kathy to himself. No supporting evidence could be found. On the contrary, Dr. Gage cited several examples of Glen not keeping this opinion to himself. (Addenda, Appendix 2, p. 23; ¶ 42, Statement of Facts, CT: 2188, 2174.) Also and in light of ¶¶ 17, 18, 19, 20, 22, 25, 41, 42, 43, 48, 49, 51, and 52 of the Statement of Facts and CT: 2188, Dr. Christy's ignoring Dr. Gage's statement about involving Taylor in the issues of this action may demonstrate her lack of objectivity.

The last part of Finding 15(a) states that "respondent has been and is amenable to Taylor sharing time with petitioner, whereas petitioner is not amenable to Taylor's sharing time with respondent and attempts to minimize and thwart respondent's contact with Taylor." For purposes of marshaling, please refer to Glen's testimony under the first portion of Finding 15(a), (3RT: 584), and his other marshaling testimony cited under Finding 15(a) above. Support for this Finding is also found on page 4 of Dr. Christy's Custody Recommendations, Addenda, Appendix 1, and her trial testimony which she stated was consistent with her recommendations. (1RT: 117 and 44.)

On the other hand, the overwhelming objective evidence is that Glen has not been amenable to Taylor sharing time with Kathy. (¶¶ 14, 15, and 17 of the Statement of Facts.) Moreover, Kathy has never been held in contempt of court for interfering with Glen's parent-time. ((9 RT: 1583; 10 RT: 1760.)

#### **G. FINDING 15(b) IS UNSUPPORTED BY THE RECORD**

Finding 15(b) concerns emotional stability. Support for this Finding is as follows:

- ◆ Dr. Christy expects [Glen] to provide more stability to Taylor's life. He is less changeable, more self-sufficient, less impulsive, etc. He is more emotionally stable and adaptable. He is "confident and unflappable". (Addenda, Appendix 1, pp. 2, 4, Custody Recommendations; Addenda, Appendix 1, p. 7, Glen's

Psychological Evaluation; 1RT: 94, 119, .)

- ◆ Kathy changes her mind often and is reactive and easily offended by others. (Addenda, Appendix 1, p. 2, Custody Recommendations.)
- ◆ Kathy is more changeable than Glen is. She is less apt to plan things in advance and is more influenced by relationships than is Glen. (1RT: 81)
- ◆ Dr. Christy stated during the first interview that Kathy told her she would not go to Kwajalein if she did not have custody of Taylor. (1RT: 49.) Dr. Christy said Kathy told her later that she would go to Kwajalein with or without the children. (1RT: 50, 53, 166, 168.) Dr. Christy even remembered the date of August 8; however, when asked whether Kathy had told the children, she couldn't remember what she said Patrick's response was. (1RT: 51.) Kathy categorically denied ever making the above statements. In fact, if it came down to Kathy choosing between Kwajalein and having her two boys, she would undeniably chose her boys. And, she would not consider this to be a sacrifice. (11RT: 2070)
- ◆ Kathy told Dr. Davies that Glen could have Taylor and told him so on two occasions. (7RT: 1221-1222). Kathy said she did not mean it, she just wanted to have peace. (7RT: 1222)
- ◆ Kathy and Dave Sawyer met at a Kwajalein reunion in July, 2002 and married in November, 2002. (Addenda, Appendix 1, Kathy Psychological Evaluation, p. 4.) Contrary to Dr. Christy's assessment of Kathy's stability, Kathy has known David Sawyer since her being in the second grade. They were together on Kwajalein and had the same friends. In fact, his first exwife is one of Kathy's best friends, her sister is one of Kathy's best friends, they all have the same friends. Kathy, David Sawyer, and their friends in common talk continually and have attended class reunions. At age 43, this is her second marriage. (7RT:1180-1183.)
- ◆ Dr. Christy's statement that her custody evaluation was consistent with her testimony. (1RT: 117)

There appears to be no direct evidence in the record to support the finding that Kathy's decision to not mover to Kwajalein "evidences a high degree of changeability". Consequently, this portion of the Findings should be ignored.

As demonstrated above, the undisputed evidence is that Kathy did not have a four-month courtship with David Sawyer. She knew him for 30 years. (7RT: 1180-1183)

The last portion of this Finding regarding Glen being less impulsive, less changeable,

and is able to provide more stability for Taylor is supported by the documents in Addenda, Appendix 1, the complete child custody evaluation of Dr. Christy and her testimony consistent with the evaluation. (1RT: 117)

However, the record is replete with Glen's instability, his explosive temper which is oftentimes manifested in the presence of Taylor, his strident e-mails, profanity in front of Taylor, and combative behavior providing an example for Taylor of showing little or no respect for Kathy. The overwhelming evidence adduced at trial from objective witnesses, demonstrates he has an extremely violent and ungovernable temper and unable to provide the stability and worthy example Taylor needs. (¶¶ 20, 21, 22, 25, 32, 41, 48, 49, 50, 51, and 52 of the Statement of Facts; (10RT: 1726-1737 (Glen's lack of honesty & temper); and Affidavit of Jill Greenwood, Petitioner's Exhibit 107 received into evidence at 1 RT: 210.

#### **H. FINDING 15(c) IS NOT SUPPORTED BY THE EVIDENCE**

Finding 15(c) states that Glen is more apt to abide by court orders than is Kathy and to pay attention to and interpret the orders more correctly. . . . By contrast, respondent has abided by the Decree and by the court's orders and has interpreted them correctly, whether he likes them or not. Marshaled support for this finding is as follows: a) Dr. Christy stated that Glen is apt to interpret and abide by court decrees more carefully and accurately than Kathy does, citing an example of Kathy blessing Taylor in the Mormon church without Glen's approval (which she then retracted on cross when it was made plain to her that the blessing occurred years prior to the decree – 2RT: 368-370) (Addenda, Appendix 1, Custody Recommendations, p. 4; 2RT:368-370.); b) Dr. Christy stated she considered the statements of Brian Florence and Commissioner Arnett in making this recommendation (2RT:372 & 375) even though she was not specific; c) Dr. Christy cited Kathy's violating the order of surrogate care and

having Lenay picking up Taylor when Glen was available. (1RT: 179, 180, 181;10 RT: 1753); and d) Kathy's failure to provide her flying schedule (1RT: 65-66); however, the court refused to find Kathy in contempt of court for failing to provide such schedules (CT:1725-1728) and Brian Florence stated Kathy's misinterpretation of the surrogate care provision was an understandable mistake. (Florence's Exhibit 57 was received into evidence 1 RT: 210 and 2RT: 392-393, 3RT: 620.)

Appellant was unable to find any evidence to support the last sentence of the finding that Glen has abided by the Decree and the court's orders whether he likes them or not. Since no supporting evidence has been found, this finding should be ignored.

However, the record is replete with Glen's unilateral actions in spite of court orders, his failure to abide by court orders, and his being a law unto himself. (§§ 14, 15, 17, 18, 19, and 41.

No evidence was adduced to support the finding that Kathy's positions contrary to the provisions of the Decree "have created undue conflict that has adversely affected Taylor". As such, this finding should be ignored. On the contrary, Subsections B, C, and D, above, demonstrate that Taylor is doing well, that he is thriving, doing excellent in school, etc.

#### **I. FINDING 16 IS AN ERRONEOUS LEGAL CONCLUSION**

Finding 16 is the conclusion reached from the foregoing Findings. As such, it is reviewed for correctness. With due consideration for marshaling, Dr. Christy stated it would be in Taylor's best interests to spend most of his time with his father who is less changeable and more centered. She stated Glen is looking into private schools. (1RT: 114.) Compare this with Glen's statement that he can no longer afford a private school for Taylor because of the diminution in his income. ((10RT: 1931.) When asked more about Glen and private schools, Dr. Christy stated, "He has done some research about schools, he did some research about schools in Las Vegas. He looks at the academic standards of the school." However, she admitted that she had

never seen any documentary evidence regarding this subjective research. (10 RT: 1768-1769.) Basically, that is the only evidence adduced that a transfer of custody to Glen would be in Taylor's best interests.

Appellant incorporates hereat her argument presented under **IV(A)**, above which deals with the best interest issue.

Dr. Gage found that "Glen defined the present custody evaluation as a battle of power and control." (CT: 2174.) She also stated that, "It is not my opinion that Kathy Huish presents emotional problems which would predictably interfere with parenting. (CT: 2203.)

Finding 16 is flawed since it is silent about what the trial court considered Taylor's best interest was, especially overturning a long-standing custody award (at least 5 to 8 years) where Taylor was happy, healthy, thriving, doing well in school, had family support, was bonded to Kathy and his grandmother, and manifested no emotional problems. The standard of review is an abuse of discretion. *Sigg v. Sigg*, 905 P.2d 908, 912 (Utah App.1995). The Findings are silent about applying the *Becker-Hogge's* two-step analysis (referred to hereinabove) and the considerations required by *Hudema*, *Elmer*, and *Smith*.

In accord, *Sigg v. Sigg, supra*, at 915 ["Generally, it is in a child's best interest to have custody stabilized with one parent" as has been with petitioner. "The trial court must consider the changes in circumstances along with all other evidence relevant to the welfare or best interests of the child, *including the advantage of stability in custody arrangements that will always weigh against changes in the party awarded custody*". (Emphasis added.)] This case specifically articulates the following factors to be considered by the trial court in conducting "a best-interests-of- the-child analysis:

The need for stability in custodial relationship and environment; maintaining

an existing primary custodial bond; the relative strength of parental bonds; the relative abilities of the parents to provide care, supervision, and a suitable environment for the children and to meet the needs of the children; preference of a child able to evaluate the custody question; the benefits of keeping siblings together, enabling sibling bonds to form; the character and emotional stability of the custodian; and the desire for custody; the apparent commitment of the proposed custodian to parenting.

*Id.* at 915.

It is noteworthy that Kathy has had the primary care, custody, and control of Taylor since his birth. She has always provided personal care for Taylor and has supervised him. She has always maintained a suitable environment for him. Taylor has a brother – Patrick – to whom he is extremely bonded. This is attested to in Dr. Wilfred Higashi's evaluation (CT: 2521-2525).

In accord, *Wright v. Wright*, 941 P.2d 646, 651 (Utah App.1997) ["Stable custody arrangements are of critical importance to the child's proper development. The two-part *Hogge* test is founded upon that premise. . . . 'The rationale is that custody placements, once made, should be as stable as possible unless the factual basis for them has completely changed.'" ] No factual basis has changed or completely changed in the present case.

**V. THE ACTIONS OF DR. VALERIE HALE, AS SPECIAL MASTER, WERE IN VIOLATION OF THE CANONS OF JUDICIAL ETHICS, AND SO TAINTED THE JUDICIAL PROCESS THAT KATHY WAS EFFECTIVELY DEPRIVED HER RIGHTS OF DUE PROCESS**

The Statement of Facts indicate that Dr. Valerie Hale, while acting as a special master, accepted money from the firm of Paige Bigelow to review Dr. Gages' evaluation (§ 38), had many ex parte communications with Paige Bigelow (§ 38), and wrongfully submitted documents to the court without prior notification to the parties (§ 39), which documents were highly critical of Kathy.

*Plumb v. State*, 809 P.2d 734 (Utah 1990) is on point. The Utah Supreme Court cited a U.S. Supreme Court holding that a special master has "the duties and obligations of a judicial officer". The Utah Court held that "[t]herefore, they owe similar ethical obligations to the court, the parties, and the public." *Id.*, at 743. By the same token, Glen's attorney should have been mindful of the ethical obligations of Special Masters.

The *Plumb* court then stated:

In our judicial system, . . . all parties are entitled to notice that a particular issue is being considered by a court and to an opportunity to present evidence and argument on that issue before decision. [Citations omitted.] The failure to give adequate notice and opportunity to participate can constitute a denial of due process.

*Id.*, at 743.

Since Glen called Dr. Hale as his witness and she demonstrated hostility toward Kathy, it is not known how such affected the decision of the trial court, nor how much her prior hostile communications as special master affected the decision. Because Kathy was effectively denied her due process rights in this regard, it is requested that this matter be remanded to remedy this denial.

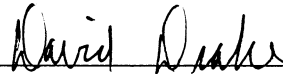
### CONCLUSION

By not being allowed to put on her case in chief, Kathy was effectively deprived her rights of due process. The remedy for such may be a remand. However, in light of the fact that Glen failed to prove substantial and material changes of circumstance, and considering the length of the trial, Kathy is asking that the order of modification be reversed and custody pursuant to the Decree be re-implemented. Ditto for the fourth issue, especially since it is unknown to what extent Dr. Hale's wrongful conduct tainted the court against Kathy.

Regarding the third issue of findings unsupported by the record, Kathy is seeking a

remand and a retrial, as such is supported by the record.<sup>6</sup> As a result of the Findings, a little boy has been completely uprooted, taken him from his mother and thrown him into a completely different atmosphere than he has ever experienced before due to a questionable evaluation.<sup>7</sup>

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of April, 2007.



David Drake  
Attorney for Plaintiffs/Appellant  
Kathy Lenay Huish Sawyer

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<sup>6</sup> It is interesting that Dr. Christy never considered what Taylor's schoolteachers had to say about Glen's rarely completing homework assignments and turning them in on time, rarely reviewing the homework assignments with Taylor, missing parent-teacher conferences with no followup, and never participating in the classroom with Taylor. On the other hand, Dr. Christy completely ignored the substantial and meaningful contributions Kathy made to Taylor's education and the fact that her diligence was a substantial and material factor in his excellent academic performance.

<sup>7</sup> For example, Dr. Christy ignored the recommendation of Lenay concerning the bonding of the two brothers. Lenay knows them very well – all of their lives. Dr. Christy doesn't have this depth of knowledge and experience with these boys; yet, she was willing to completely ignore Lenay's precise and knowledgeable opinion about not separating these boys. In fact, the testimony of Lenay completely contradicts the trial court's Finding, ¶ 13, regarding keeping siblings together. Dr. Christy admitted Lenay is very bonded to Taylor. (10RT: 1821.) Finding 13 has its only substantiation in the opinion of Dr. Christy, such opinion originating in the sterile atmosphere of her office, through the administration of tests, and only through witnessing Glen's acting in order to mask his true self, all of which is voodoo compared to the life-long experience of Taylor's grandmother. Dr. Christy only interviewed Ms. Russell for less than 50 minutes, not a lifetime. (7RT:1029-1030.)

## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 12<sup>th</sup> day of April, 2007, two copies of Appellant's Initial Brief was hand-delivered to the following counsel of record:

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# **ADDENDA**