

2005

Kathleen Lenay Huish v. Glen Frank Munro : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Huish v. Munro*, No. 20050440 (Utah Court of Appeals, 2005).

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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. |) | |

REPLY BRIEF OF APPELLANT

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

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CHALLENGED STATEMENT OF FACTS

1. Appellant ("Kathy") disputes ¶ 3 of appellee's Statement of Facts because Glen is attempting to introduce new evidence into this appeal. Taylor did not reside with appellee ("Glen") from a few days after he was born until late August, 1996. Moreover, Glen did not cite to the trial record for these statements. These statements are only found in Glen's proposed findings of fact which were not adopted by the trial court. However, the testimonial record is clear that Kathy, as an accommodation to Glen and because his parents were visiting him in Park City, allowed Glen to take the infant to Park City on July 20, 1996 so Glen's parents could see him. That evening, Kathy and her mother, Lenay Russell drove to Park City to be with the baby during his visit with Glen and Glen's parents. Taylor was returned to Kathy's home in Murray either during July 21 or July 22, 1996. (6RT: 1004-1005.)

2. The only support in the record for ¶ 4 of appellee's Statement of Facts is respondent's proposed findings of fact and conclusions of law which differ from the actual findings of fact signed and entered by the trial court. These facts have no support in the record. Since Glen failed to cite to the actual transcript testimony, ¶ 4 of Glen's Statement of Facts should be stricken. Moreover, the actual testimony of Glen contradicts ¶ 4 of his Statement of Facts. (3RT: 536-537 for example.)

3. Ditto for Glen's paragraph 5 of his Statements of Fact. Accordingly, it should also be stricken. Glen failed to cite to the actual trial record. Moreover, the trial court's findings concerning this time period contradict this ¶ 5: 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 17th 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.)

4. The majority of paragraph 6 of appellee's Statement of Fact has no support in the record other than in appellee's proposed findings of fact which were not signed and entered by the trial court. These self-serving statements of Glen concerning his caring more for Taylor than Kathy should be stricken. However, this ¶ 6 is useful to demonstrate that no substantial and material change of circumstances occurred since the entry of the paternity decree July 10, 2002, that the problems experienced by the parties subsequent to the entry of that decree had been ongoing since the birth of Taylor. The last sentence of ¶ 6 is inaccurate. Dr. Gage expressed the hope, not the belief, "that improvements would occur once the Decree was entered and the custody issues were resolved".

5. Paragraph 7 of Glen's Statement of Fact again has little or no support in the trial record. Again, the support for this statement lies in Glen's proposed findings of fact which were not signed or entered by the trial court. Furthermore, this statement is contradicted by the trial court's findings as set forth in ¶ 3, above.

6. Glen's ¶ 8 of his Statement of Facts also has little or no support in the record. The only citation to the record made by Glen for this statement is found in his proposed findings of fact which were not signed or entered by the trial court.

7. Ditto for Glen's ¶ 9. Again, no citation to the trial record but only to his unsigned and un-entered findings of fact.

8. Ditto for Glen's ¶ 10. As such, it should be disregarded.

9. Regarding ¶ 11 of Glen's Statement of Facts, what Glen failed to disclose to Kathy's attorney was that Dr. Hale was paid money by Paige Bigelow or her firm to review the evaluation while a special master. (2RT: 312.) Glen also failed to disclose to Kathy's attorney the many ex parte communications his attorney had with Dr. Hale while she was Special Master. (2 RT: 321-322.)

10. Glen's ¶ 13 is not supported by the record. Dr. Hale, when questioned about why there should be a fixed parent-time schedule, testified that, "[t]he parties were unable to communicate or cooperate or be flexible, meaning the parties, meaning the situation was such that there was no way the schedule could be workable. That would require them to communicate with one another, and that wasn't working." (2RT: 271.) The conflict between the parties was not one-sided. Moreover, ¶¶ 17-20, and 22 of Kathy's Statement of Facts in the initial brief demonstrates that this alleged new matter in ¶ 13 of Glen's Statement of Facts is non-existent. In fact, Commissioner Arnett, Dr. Valerie Hale (2RT:271-272), and Special Master Brian Florence all lay the cause for much of the hostility, conflict, and inability to compromise at the feet of Glen. Dr. Gage judged Kathy to be supportive to a greater extent of Taylor's involvement with Glen than Glen did with Kathy. She also stated Kathy was not strongly negative about Glen nor criticizing his parent of their son. (CT: 2191.)

11. Glen's ¶ 14 citation to the record was his own verified petition for paternity that lacked personal knowledge about Kwajalein and the move to Kwajalein. However, it is disingenuous for Glen to raise Kwajalein as an issue in his response brief and in the findings of fact. At the outset of trial, Kathy informed the trial court that she was not moving to Kwajalein, that Kwajalein was no longer an issue. (1RT:116, 7RT: 987.)

12. Glen's ¶ 15 is other new matter unsupported by the record. The implication of the paragraph is that Glen was free from any blame in attempting for 18 months to implement the terms of the parties' stipulated agreement. *See, e.g.,* Dr. Hale's testimony at 2RT:271-272, 280-281. He was a major cause for the lack of implementation of the agreement. *See* ¶¶ 17-26, and 41 of Kathy's Statement of Facts. It is also noteworthy that what Glen claimed were problems after the entry of the paternity decree had existed since the birth of Taylor. There were no substantial and material changes of circumstances. *See* ¶¶ 6, 7 (Glen's attorney admitted that the relationship between the parties was always troubled from its inception causing Kathy to move from Las Vegas to Murray [1RT: 6]), 9, 10, 12, 25, 41, and 49 of Kathy's Statement of Facts.

13. Nowhere in the findings of fact and Glen's response brief is there any mention of the uncontroverted testimony of Taylor's school teachers concerning what a concerned parent Kathy was, how she prepared Taylor for school by making certain his homework assignments were completed, that he was successful in school (when Glen was questioned about how well Taylor had done in school when in the primary care, custody, and control of Kathy, he responded: "I say he's done really good, yes." [(11RT: 2031)]), that Kathy substantially participated in Taylor's school, and that Taylor was always clean, and prepared. *See* ¶¶ 5, 26-33, Kathy's Statement of Facts. Moreover, Dr. Christy agreed that Kathy is a competent and caring parent. (1RT: 42-43)

ARGUMENT

I. THE TRIAL COURT FAILED TO EXERCISE REASONABLE CONTROL OVER THE ORDER AND MODE OF TESTIMONY THEREBY DENYING APPELLANT HER RIGHTS OF DUE PROCESS

Rule 611(a), URE, mandates that the trial court shall exercise "reasonable control over

the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, . . ." By preventing Kathy from presenting her case-in-chief, the trial court prevented an "ascertainment of the truth". Plain and simple, when Mr. Drake was cross-examining Dr. Christy at the time the trial court terminated such cross-examination, Kathy had not rested. ((10RT: 1724-1732; (11RT: 2052, 2053.) Those words were never uttered. In fact, but for Kathy allowing Glen to call Dr. Christy and another evaluator out of order for rebuttal purposes during her case-in-chief, there would have been no confusion regarding whether Kathy rested.

Glen failed to bring to this Court's attention that the trial court terminated Mr. Drake's questioning of Dr. Christy on the mistaken belief that Kathy had rested. "And, this is, this is rebuttal. You have concluded your case-in-chief". ((10RT: 1731.) This was not true. Moreover, Glen's attorney failed to remind the trial court that Dr. Christy was called out of order by Glen as a rebuttal witness and this occurred during Kathy's case-in-chief.

The following is the dialogue that occurred between the trial court and counsel confirming the fact that Kathy had not rested:

MR. DRAKE: Your Honor, Ms. Bigelow and I had a conversation yesterday about the order and she has some witnesses evidently some rebuttal witnesses that were waiting here yesterday or last time we were in trial, and we've told that her she can go ahead just because I think, is it Valerie Hale and Monica Christy, their time -- we'll accommodate her to allow her, with the court's permission, to have these rebuttal witnesses come in at this point and then we'll finish with our case in chief.

THE COURT: What more do you have left on your case in chief?

MR. DRAKE: Your Honor, we intend to call the respondent and possibly

Monica Christy as a direct witness and that would be it. And if we can take care of Dr. Christy with our rebuttal and just to save the Court time, I think that would be more proficient [sic].

THE COURT: I have no problem with that, but what will you be asking her in your case of chief that you couldn't cover on any cross or rebuttal?

MR. DRAKE: Well, your Honor I'm just looking at the scope of the rebuttal and me having to go to questions limited by that scope, if the Court would be willing I'd like to expand that scope just to do that. Then we can end it all at one time.

MS. BIGELOW: Your Honor, Mr. Drake and I did discuss yesterday, because Glen is obviously here, he is not difficult to work around. But we had discussed just finishing Glen up at the end of the day and we hadn't discussed Dr. Christy.

THE COURT: Well, my sense is as long as Dr. Christy's here let's get her on and off, and not have to take her back and forth. So with that I'm going to allow leeway on both sides as to completing her testimony, with the idea that you don't abuse it and you don't bring up new issues, but we get her out of the way. The same thing with Dr. Hale, if there's going to be any need for any call, recalling her. As to Mr. Munro, is he going to be called in your rebuttal case?

MS. BIGELOW: Yes, your Honor.

THE COURT: Well then, why don't we allow them to call him in their case in chief and you can have the same leeway as to rebuttal and your recross of their direct. And then you can cover whatever rebuttal you need to do after they're done with their direct on him.

MS. BIGELOW: Well, I think the idea was that because -- we're trying to -- the whole purpose was to try to predict when I could have my rebuttal witnesses here. If I'm not mistaken I've got one out there now.

THE COURT: I have no problem with that. So let's begin with your rebuttal witnesses, whichever Hale or Christy. What you are saying is when you're finished with that you don't necessarily want to bring Mr. Munro on as your rebuttal witness, you'll allow them to bring on their case in chief to finish it out and then we have full examination of Mr. Munro, whenever that's going to

take place and it may or may not be the end of today; is that acceptable?

MS. BIGELOW: Yes, that –

((9RT: 1521-1524))

In spite of the foregoing, the trial court refused to allow Mr. Drake to question Dr. Christy concerning her evaluation and the fact that since she uncritically accepted whatever Glen told her as truth without any independent verification, the evaluation was not objective. The trial court may have latitude concerning the presentation of evidence but it cannot prevent a party from putting on its case-in-chief. In volume # 10 of the trial transcripts, the trial court stated;

THE COURT: And you -- and that's that's true, however, when you've had the opportunity to take this matter on cross, which is all part of her evaluation, the same ruling that I had when I -- when I've prevented you from going back into the collateral contacts. This matter should have been taken up on cross. If it wasn't taken up on cross you've waived it, you cannot revive it by calling a witness on your own behalf or terming it to be rebuttal. Rebuttal is only -- only as to what Huish -- I mean Ms. Bigelow has done. And even though I agree with you that I've allowed you to expand it a bit, it still has to be new information not covered or coverable under cross. And so, objection is sustained.

Id. at 10RT:1725.

New matter can be brought up during a party's case-in-chief as long as such is relevant. Cross-examination of Dr. Christy occurred during Glen's case-in-chief. Any relevant evidence gleaned from Dr. Christy during Kathy's case-in-chief is fair game. Consequently, there was no waiver. Moreover, this pronouncement by the trial court contradicted its prior ruling as quoted above. This prior ruling was relied on by Kathy. Had

she known that the trial court would change its mind and not allow her to question Dr. Christy as if it were her case-in-chief, she would have objected to Glen's calling Dr. Christy and others out of order.

In light of the foregoing, *In re Estate of Russell*, 852 P.2d 997, 999 (Utah 1993) is inapposite. That case did not deal with a party's presentation of its case-in-chief. It dealt with how a stipulation would be presented to a jury. Again, Kathy was denied her due process rights of being allowed to be heard at a meaningful time and in a meaningful manner. As a parent and since this trial involved child custody, Kathy was not given a meaningful opportunity to be heard by submitting testimony by her witnesses. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), and *State of Utah in the interest of S.H.*, 2007 UT App 8.

II. RES JUDICATA AND ISSUE PRECLUSION BAR MODIFICATION OF THE PATERNITY DECREE

Kathy incorporates hereat the argument she advanced under Section II of her initial brief.

Glen created the very unworkability he is now claiming is a material change of circumstance. *See* ¶¶ 10 and 12 of Kathy's Statement of Facts in this reply and ¶¶ 17-22, 24, 25, and 41 of Kathy's Statement of Facts in her initial brief. His wrongful, strident, and pugnacious actions made certain that the joint legal custody arrangement would not work. Then armed with a new custody evaluation that contained a favorable recommendation, he then sought a modification of the paternity decree. Kathy did not directly cite to the record concerning Glen's ambush attempts; however, the evidence presented overwhelmingly

supports that assumption. Eight months after the paternity decree was entered (the decree was entered 7/8/02 [CT: 1467-1481]), Glen filed a verified petition for modification (the verified petition for modification was filed 3/18/03 [CT: 1878-1883]). Nothing had changed except Kathy's intended move to Kwajalein which was later rescinded by her. The unworkability that was the hallmark of the parties' course of conduct prior to the entry of the decree continue unabated subsequent to the entry of the decree. Moreover, Glen's counsel admitted 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 also admitted that during the first trial in the above-captioned action, he intended to litigate custody. He further admitted he had the opportunity to have custody litigated and was given that opportunity but failed to avail himself of it. (3RT: 553-554.) Consequently, Glen should be equitably estopped from asserting a material change of circumstances based upon the unworkability of the joint legal custody arrangement and that the paternity decree was entered as a result of a stipulation rather than an adjudication after a trial. The case of ***Wasatch County V. Okelberry***, 2006 UT App 473, 153 P.3d 745, 755, ¶ 28, is instructive:

To prevail on their claim of equitable estoppel, the Okelberrys were required to show three elements:

- (1) an admission, statement, or act inconsistent with the claim afterward asserted,
- (2) action by the other party on the faith of such admission, statement, or act, and

(3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

Id. at ¶ 28.

As stated hereinabove, Glen entered into the stipulation at the time the paternity action was pending in order to avoid an unfavorable adjudication due to Dr. Gage's recommendation that Kathy should be awarded the primary physical custody of Taylor. *See* the above citations to the record. The very fact that without any change of circumstances whatsoever and that the unworkability of the joint custody arrangement was not only ongoing but entirely foreseeable (*see Cummings v. Cummings*, 821 P.2d 472, 478, (Utah App. 1991) regarding the element of foreseeability as an element of a substantial and material change of circumstances), Glen's claim of a substantial and material change of circumstances based upon unworkability was nothing more than a charade or legerdemain since very little the parties did together was workable. Glen's entering into this stipulation to a joint legal custody arrangement with Kathy as the primary custodian of Taylor constituted the admission or act. Additionally, his not litigating the issue of custody also constitutes an act. Kathy's action on the faith of such statement or act was her not litigating the issue of custody at the time the paternity action was pending, entering into the stipulation with Glen instead. Had she not relied on Glen's act of stipulating and litigated the issue of custody, *Elmer v. Elmer*, 776 P.2d 599 (Utah 1989), would not apply. The injury is demonstrated by the thousands of dollars of attorney fees and Monica Christy fees she has been required to pay and the loss of primary physical custody of her son which cannot be quantified. It is obvious that Glen

waited until he was able to secure a favorable custody evaluation before changing custody.

This segues into the issue of claim preclusion, a branch of res judicata. *Smith v. Smith*, 793 P.2d 407, 409 (Utah App. 1990). *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***". [Emphasis added.] 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. That particular set of facts that could have been litigated but Glen chose not to deal with the inability of the parties to work together. Again, nothing had changed when Glen filed his petition to modify.

The first six findings support Kathy's position as set forth hereinabove. The problems between the parties have always existed – prior to the entry of the paternity decree – and after its entry. The parties have always been in conflict.

Glen failed to cite to *Throckmorton v. Throckmorton*, 767 P.2d 121, 123 (Utah App. 1988) which also dealt with res judicata in domestic cases. [" 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 [Regarding 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.'"]

Glen attempts to obviate the res judicata requirement by stating that even though it was "true that the parties' conflict unfortunately continued after entry of the decree of paternity, the substantial change of circumstances is not that conflict arose where once there was none, but rather that the joint custody arrangement did not function as it was anticipated it would." The operative word is "anticipated". Any anticipation that a joint custody arrangement would function was completely unsupported by the parties' course of performance of dealing with each other. In other words, it was realistically foreseeable that the conflict between the parties would continue as it had. Since this unworkability was

entirely foreseeable, such would not constitute a substantial and material change of circumstance.

Glen raises the issue of whether the change of circumstance has "some material relationship to and substantial effect on parenting ability or the functioning of the presently existing custodial relationship", citing *Becker v. Becker*, 694 P.2d 608, 610 (Utah 1984).

Kathy is setting forth a more complete citation from *Becker*:

While there appears to be little difficulty in implementing the second step of the *Hogge* analysis, some confusion continues to exist regarding the first step. In *Hogge*, we said,

In the initial step, the court will receive evidence only as to the nature *and materiality* of any changes in those circumstances upon which the earlier award of custody was based. In this step, the party seeking modification must demonstrate (1) that since the time of the previous decree, there have been changes in the circumstances upon which the previous award was based; and (2) that those changes are sufficiently *substantial and material* to justify reopening the question of custody.

Id., 649 P.2d at 54 (emphasis added). 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 410.

Assuming arguendo that there has been a change of circumstance, Glen failed to demonstrate the requirement that the asserted change must, therefor, 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. In his brief, Glen failed to address the duration of the initial physical custody arrangement.¹ 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). Neither Glen nor the Findings 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.

Glen may have been justified to seek a change custody had there really been a significant change in the parties' relationship and Taylor were not thriving ((11RT: 2031, Kathy's Statement of Facts, initial brief, ¶¶ 5, 27, 31, 33, 34, 45, 47,). However, these two facts did not exist. It is noteworthy that it was uncontroverted that Taylor was thriving, that he was doing well in school.

¹ "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.

As a result of the foregoing, Glen should be estopped from claiming that his lack of litigating the issue of custody in the paternity action allowed him to obtain a change of physical custody, justifying the modification decree. Glen should be estopped from claiming that the unworkability of the joint custody paternity decree which resulted from his stipulation provides the basis for his claim of a substantial and material change of circumstance.

Glen attempts to invoke a public policy argument concerning his stipulation. Public policy has never countenanced a party negotiating in bad faith. Glen's bad faith is demonstrated by the statements of him and his counsel why he entered into the stipulation – because he was afraid of losing a custody battle and because he sought a change of custody only 8 months later even though nothing had changed since the time Taylor was born. *Elmer* is on point: "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". *Id.* at 603.

It is noteworthy that Glen failed to cite *Thronson v. Thronson*, 810 P.2d 428, 429-433 (Utah App.1991), even though he cites § 30-3-10.4(3) and *Elmer*. *Thronson* postdates *Elmer*. That case reiterated that joint legal custody is not joint physical custody. A finding that joint legal custody is unworkable does not necessarily affect joint physical custody. That case also highlighted the fact that in this statute, there is no joint physical custody definition nor any provision therefor. Yet, the trial court attempted to use § 30-3-10.4(3) as a basis to change physical custody. For this reason, the findings are inadequate and not supported by the record.

Glen's parting shot in this section is clearly against the weight of the evidence – that the unworkability is due, primarily, to Kathy's actions (quoting from Dr. Christy). That Glen would rely so heavily on Dr. Christy's statement which is completely against the weight of the testimony clearly demonstrates that Dr. Christy's evaluations were flawed and subjective. The great weight of the evidence contradicting Glen's and Dr. Christy's assessment is found in Kathy's Statement of Facts in her initial brief, ¶¶ 12, 14-25, 28-33, 41 (Dr. Davies' contradicting Dr. Christy), 42-45 (Dr. Christy admitting that the fact that Patrick Huish and Taylor are doing so well in school indicates Kathy's good parenting skills and effectiveness – with this admission, why was a change of physical custody necessary?), and 48-52. These paragraphs are cites to the record from the likes of Commissioner Arnett, Special Master Brian Florence, Dr. Valerie Hale, Dr. Matt Davies, Lenay Russell, Taylor's school teachers, and Dr. Christy.

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

Kathy incorporates hereat Section III in her initial brief. Glen's argument under Section III of his brief overlooks the requirements in *Hogge* and *Becker*, *supra*. Moreover, Kathy's counsel has been unable to find anything concerning the issue raised under Section III in Glen's *Elmer* cite at 604. Furthermore, *Elmer* is distinguishable on its facts. There, the noncustodial party sought custody based upon his change of circumstances – his life had improved, he matured, his employment was enhanced, as was his family life. The *Elmer* court specifically addressed the change of circumstances concerning the noncustodial parent

only and based its decision on these facts. These facts are not present in the instant case.

Cummings can also be distinguished from the facts of the instant case. This case did not involve a default divorce. Both parties appeared at trial and two custody evaluations were performed by Dr. Gage. It wasn't as if the trial court were operating in a vacuum. The trial court had the two evaluations of Dr. Gage. It had the opinion of this expert witness who would have testified at trial that the best interests of Taylor would be best served by awarding Kathy the primary care, custody, and control of Taylor. Even more distinguishing is that Glen, the noncustodial party, had the opportunity to litigate the issue of custody. In fact, he was going to litigate custody but decided against it because he feared a risk of losing based upon the two evaluations of Dr. Gage. [See ¶ 8, Statement of Facts, Kathy's initial brief.]

Cummings observed:

Both the supreme court and this court have subsequently relaxed the distinction in cases where the issue of custody was not originally litigated. [Citations omitted.] In *Elmer*, the supreme court noted that some flexibility is needed in order to promote the overriding value of the best interests of the child. [Citations omitted.] The court therefore held that in change of custody cases involving nonlitigated decrees, the trial court can receive evidence of the child's best interests in applying the change in circumstances test. *Id.* at 604-05. Both appellate courts reasoned that moderation of the evidentiary process is justified because the trial court has not previously had an opportunity to make a thorough examination of the child's best interests."

Id. at 475.

In the instant case, the trial court previously had the opportunity to make a thorough examination of the child's best interests since at the time the stipulation was entered into, the parties were ready for trial and would have gone to trial on September 4, 2001, but for the

stipulation. [See paternity decree, 1st page (CT:1467, also 1461-1481.))] These facts coupled with the above Section II argument mandate that the trial court should have followed the *Hogge-Becker* bifurcated procedure. The fact that it didn't mandates a reversal.

IV. THE FINDINGS AND CONCLUSIONS OF THE TRIAL COURT WERE NOT SUPPORTED BY THE EVIDENCE AND ARE NOT LEGALLY ADEQUATE

Kathy incorporates hereat Section IV of her initial brief. Without specificity, Glen makes the claim that Kathy failed to meet her burden to prove that the findings are "so lacking in support as to be against the clear weight of the evidence, and therefore, clearly erroneous". Without specificity, that statement is nothing more than an unsupported conclusion. In fact, Glen has made such unsupported general statements throughout this section of his brief, e.g., p.26 (marshaling of the evidence was only partial with no specifics) and p. 27 (same statement with no specifics). The very fact that he is so non-specific demonstrates that Kathy did meet her burden to marshal the evidence.

On the other hand, Glen failed to address *Throckmorton, supra*, which stated that "[i]t is reversible error if a trial court fails to make findings on all material issues". Section IV of Kathy's initial brief listed on what material issues the trial court failed to make findings. In fact, the findings, when compared to the impact a change of custody would have on a child who had lived with his mother his whole life, are quite petty and meaningless.

Glen has heavily relied on *Elmer, supra*. However, the findings omit what is mandated by *Elmer* to be included and analyzed. "[A] lengthy custody arrangement in which a child has thrived ought rarely, if at all, to be disturbed, and then only if the circumstances

are compelling." *Id.* at 604. As the facts of this case indicate, Taylor was in a lengthy custody arrangement with Kathy in which he thrived. This should never have been disturbed and there were certainly no compelling circumstances mandating a change of custody.

Cummings v. Cummings, 871 P.2d 472, 474, provides an example of an omitted material finding. "[T]he trial court should give stability and continuity the weight that is appropriate in light of the duration of the existing custodial relationship and the general welfare of the child. The findings of fact should reflect that the court considered stability as a factor in the custody decision and the weight the court accorded it." Stability was never mentioned in the findings of fact entered in the instant case. 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. Moreover, this mandate of *Elmer* was never addressed:

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.

Id. at 604.

No findings were entered to the effect that the existing custody arrangement was inimical to Taylor. Consequently, the trial court was bound to follow the foregoing mandate

which it did not.

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 where he found Taylor more bonded to his mother, as set forth in ¶ 47 of Kathy's Statement of Facts and on page 34 in the initial brief. This was also echoed by Taylor's first grade teacher, Pamela Brown who also described the bonding between Kathy and Taylor that she did not see with Glen and Taylor. (*See* page 34 of Kathy's initial brief.) Trial Exhibit 54 includes missives from Diana True who described her personal knowledge of the bonding between Kathy and Taylor. (*See* page 34 of Kathy's initial brief.) 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*.

A case very close to the issues of this case is *Cummings*.

The trial court's finding that Ms. Scott interfered with Mr. Cummings's visitation rights is based on the parties' failure to cooperate and communicate about specific visitation arrangements. Both Mr. Cummings and Ms. Scott had attorneys involved in their visitation disputes. One time, Mr. Cummings asked Ms. Scott's attorney if he could keep the children for three extra days to go to Lake Powell. Ms. Scott's attorney stated that he did not think that would be a problem, but neither he nor Ms. Scott ever confirmed the agreement. Mr. Cummings kept the boys the extra days and Ms. Scott called the police. The testimony presents instances of bickering about the exact time the children should be picked up and returned. There is evidence that both parties became upset over time differences of even one hour. Again, there is no explanation of how these disputes over visitation impact the parenting ability of Ms. Scott.

Id. at 477.

The above quote hits the nail on the head. There were no supported findings that explained how these disputes over visitation impacted Kathy's parenting ability. Consequently, the decision of the trial court should be reversed. In fact, this quote nullifies the remarks of Glen on page 23 of his brief criticizing Kathy's analysis concerning Taylor doing okay in spite of high conflict. No evidence was presented that Taylor was not doing okay. He was doing very well in school. Glen 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, 26-31, 33, and 34 in Kathy's Statement of Facts, initial brief. 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.) This is indisputable proof that in spite of the high conflict, Taylor is thriving and doing very well (also contradicting Glen's statement on page 24).

One last note in this section. Glen, on page 22, claims that Dr. Christy is a neutral expert. Kathy's initial brief and her citations to the record clearly demonstrate that Dr. Christy was anything but neutral. The initial brief describes in detail how Dr. Christy ignored the statements of Commissioner Arnett, Brian Florence, Dr. Matt Davies, and others. She refused to interview Taylor's school teachers. Moreover, her cross-examination by Mr. Drake repeatedly demonstrated that throughout her evaluations, she repeatedly and uncritically accepted Glen's statements as true. [This is cited to the record in the initial brief.]

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

This Court will address an issue not fully analyzed in an appellant's initial brief if the appellant does so in her reply brief. *U.P.C., Inc. v. R.O.A. General, Inc.*, 1999 UT App 303, 990 P.2d 945.

Rule 53, U.R.Civ.P., entitles a special master to a writ of execution against a delinquent party. Valerie Hale, as special master, wrote two letters to the Court (dated September 27, 2002 and February 14, 2003, respectively), copies of which are attached hereto, incorporated hereat, and collectively marked Exhibit 1. In both letters, she disclosed to the trial court that Kathy had refused to pay her and claimed that such impeded her ability to function as a special master. However, she never availed herself of the remedy set forth in Rule 53(a). (2RT:331) Rather than follow that procedure, she sent a letter to the judge. (2RT:331) In her February 14, 2003 letter, last page, she even incorrectly reported to the trial court that Kathy failed to sign the new special master agreement with Brian Florence, admitting she received this through an ex parte communication with Paige Bigelow. (2RT:340-341) One has to wonder why an attorney would engage in ex parte communications with a judicial officer. This was not the only time Dr. Hale engaged in ex parte communications with Ms. Bigelow. (2RT:332) Equally egregious is that she never made an independent inquiry as to whether she was being told the truth by Ms. Bigelow.

Then, in her September 27, 2002 letter to the trial court, Dr. Hale recounted her threat to Kathy that if she did pay the bill, she would report this to the trial court as a lack of cooperation. Dr. Hale also admitted that her appointment as special master did not authorize her to write letters to the court. (2RT:333)

These two letters are heavily critical of Kathy and recount specifics buttressing the criticism. However, these two letters are not critical of Glen and even though a general statement is made about his improper conduct, no specifics are mentioned. This clearly

demonstrates that Dr. Hale, as a special master, was biased against Kathy and engaged in improper conduct with the trial court to poison the well against her.

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.

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.

On page 28 of his brief, Glen asserts that the record is clear that Kathy knew that Paige Bigelow had paid money to Dr. Hale prior to Kathy signing the special master agreement. That is completely false. The record doesn't reflect any payment of monies. In fact, Exhibit 4 to Glen's brief doesn't even discuss payment of money to Dr. Hale, let alone that money was paid her. Additionally, Exhibit 5, a letter from Dr. Hale to Commissioner Arnett fails to disclose any payments of money. Without complete disclosure and knowledge of this fact or other facts, Kathy never waived any rights to complain of Dr. Hale as special master. *See* page 26 of Kathy's initial brief. Moreover, in that same vein, Glen has placed an unsupported statement in his brief (bottom of page 28) that should be stricken: "Clearly, Ms. Huish and [sic] only changed her mind regarding Dr. Hale when Dr. Hale became

sufficiently familiar with the case to begin reporting to the court Ms. Huish's inappropriate conduct". Ms. Bigelow has not only violated the Rules of Appellate Procedure by making this inflammatory and untrue statement, she has also violated the rules of civility. In light of the bias of Dr. Hale against Kathy, that statement is a canard.

As a judicial officer, Dr. Hale violated several Canons of the Code of Judicial Conduct. She violated Canon 1, A judge shall uphold the integrity and independence of the judiciary; Canon 2, A judge shall avoid impropriety and the appearance of impropriety in all activities; Canon 3, A judge shall perform the duties of the office impartially and diligently.

There is no way of knowing the degree of damage or wrongful influence the statements of Dr. Hale have effected the outcome of the trial. However, the appearance of impropriety and lack of independence is present and could have wrongfully influenced the trial court as a result. Since such is not known, the best remedy is to reverse the decision of the trial court.

CONCLUSION

For all of the foregoing reasons, the trial court's Order Modifying Decree of Paternity should be reversed in its entirety and this Court should award Kathy her costs and attorney fees incurred in prosecuting this appeal.

DATED January 5, 2008.

DAVID DRAKE, P.C.
Attorney for Appellant/Petitioner



David Drake

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 7, 2008 two copies of Appellant's Reply Brief were hand-delivered to the following counsel of record:

Paige Bigelow, Esq.
KRUSE, LANDA, MAYCOCK, & RICKS
136 East South Temple, 21st Floor
P.O. Box 45561
Salt Lake City, UT 84145-0561

By: David Drake

EXHIBIT A

Valeric Hale, Ph.D.

CLINICAL PSYCHOLOGIST

The Honorable Glenn K. Iwasaki
450 S. State St.
Salt Lake City, UT
84111

The Honorable Thomas N. Arnett
450 S. State
Salt Lake City, UT
84111

February 14, 2003

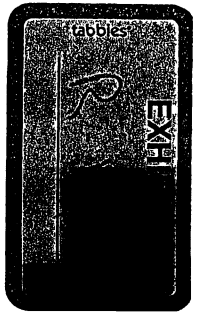
RE: Huish v. Munro Special Master Case

Dear Judge Iwasaki and Commissioner Arnett:

I am writing this letter to update you on the status of the Huish v. Munro case, as well as to ask that I be released as the Special Master in this matter. The decision to request a release from this case was difficult for me. However, I do not feel able to serve the parties and their child in this role. This letter will outline the events that led to my decision, and provide both of you with an update about the most recent facts of this case, as I understand them.

First, after Judge Iwasaki's telephone conference in November 2002, I did receive a payment from Ms. Huish for her current outstanding amount owed. It is my understanding that she has not made an effort to pay old payments or make up the difference with Mr. Munro, and she has paid nothing else on her old balance to my office since then. Mr. Munro has paid all fees to my office, including fees owed by Ms. Huish.

Next, Ms. Huish provided her November and December work schedules to me, but apparently refused to provide it to Mr. Munro, as per the decree. At the end of December, Ms. Huish's attorney told me via telephone that Ms. Huish was planning to take a three-year leave of absence from her job as a flight attendant. This would mean that she would have no reason to provide a schedule to anyone, and that some of the scheduling difficulties of the past would be resolved. Ms. Huish alluded to me that the stress that she experienced from Mr. Munro was the reason she was taking this leave of absence. Ms. Huish has recently married David Sawyer who resides in Florida. Ms. Huish said to me that she did not know whether she was planning to move to Florida or not.



Throughout the entire Special Master case, but especially in the past few months, it has become increasingly difficult for me to communicate with Ms. Huish. She absolutely refused to meet in conjoint sessions in my office with Mr. Munro, unless her mother or her attorney could be present. This made it difficult to address each party's concerns or provide a place for clarification, problem solving and the like. I have never had any other Special Master participant refuse to meet in my office, conjointly or otherwise.

Next, whenever I attempted to speak on the telephone with Ms. Huish, she would become verbally abusive, intimating that I was "on Glen's side" and made it literally impossible for me to talk with her. This was a unique experience for me. Ms. Huish could not stop talking and sometimes yelling at me, such that it became useless to continue to remain on the telephone. At one point, it was more efficient to communicate with her brother over the telephone about Ms. Huish's concerns than it was to talk with Ms. Huish directly.

Throughout the process, I asked these parties to use email because I wanted to make sure that I heard both parents' concerns clearly, and that counsel could also be aware of their concerns simultaneously. Ms. Huish began to complain that she could not use email effectively, first because of her work schedule (being out of town and away from her computer) and then because her computer was broken. She then said that she could not afford an email service provider. Ms. Huish's brother offered to help initially (he apparently lives on Ms. Huish's property) but then stated that he could not check email on his computer on a regular basis for Ms. Huish. Finally, Ms. Huish, via her brother *in an email*, stated that she did not want to use email anymore because the Supreme Court had ruled that it was not a legal form of communication. This stated "Also the supreme court (sic) did say in they're (sic) statement that no one can force another person to use E-mail to communicate."

At that point, I realized that the Special Master process was hamstrung yet again, this time by Ms. Huish's refusal to communicate with me. This lack of cooperation on the part of Ms. Huish was consistent throughout the Special Master process, whether it was through lack of payment, refusal to provide her work schedule, or now, refusal to communicate with me appropriately. I have never had this happen as yet in Special Master work. I became concerned that if Ms. Huish was obviously opposed to working with me, that another professional might be able to have a better working relationship with her. I remained concerned that this professional would need to be in place as soon as possible so that the family could move forward.

On January 22, 2003, I met with Paige Bigelow and Lynn Mabey, counsel for the parties, in order to explain my difficulties and suggest a plan for the family. Both attorneys agreed that attorney and mediator Brian Florence would be a good choice for this family as a substitute Special Master. Mr. Florence has considerable experience and enjoys an excellent reputation as a mediator, collaborative family, and Special Master. It was felt that Ms. Huish would have the opportunity to start anew with someone whom she did not feel was biased against her in any way. A new Special Master would also allow Ms. Huish the opportunity to demonstrate that her lack of cooperation with me was an isolated incident.

Next, at that meeting, Ms. Bigelow and Mr. Mabey discussed a method for finding a good psychotherapist for Taylor. While I have not seen Taylor and do not know if he requires treatment at this time, I was very concerned about him given that he is in the middle of this tremendously high conflict situation. Both attorneys asked me for a list of professionals who could serve as a therapist for Taylor and who could manage the intensity of the personalities of the parents as well. Natalie Malovich Ph.D., Johanna MacManemin Ph.D., Denise Goldsmith Ph.D., and Monty Millerberg LCSW were among those recommended. I suggested that these therapists would work with both parents and could determine what kind of therapy should be provided, if any, as well as its duration.

Because both counsel agreed that a change of Special Master would be best for this family, I have prepared my file for transfer to Mr. Florence, or for whoever would serve as Special Master if Mr. Florence were not available. Since then, I have learned from Ms. Bigelow that apparently, Ms. Huish has refused to sign Mr. Florence's Special Master agreement.

I am very concerned that this family and especially Taylor require intervention immediately. It is my belief that Ms. Huish has succeeded in actively frustrating this entire process again. It is clear that Ms. Huish has now closed all avenues of communication with me. I cannot effectively gather information from her and I cannot in good conscience continue in this role, because I am not able to make good decisions that are based on data made available by both parties. I have many families using Special Master Services that are able to work well with this system. I have never been so consistently thwarted, not to mention verbally assaulted by anyone until now. These families are eager to work hard to stay out of the court system and I believe that my services could be used in a better more, effective way with the families that are responding to the Special Master Services that I provide to them.

I want to apologize to the Court for my failing with this family. However, it is important to know when to stop and I certainly would be the first to say that another professional may be able to succeed where I have failed. I want to thank the Court for the opportunity to attempt to help this family, despite what appears to be my inability to do so. I respectfully request that the Court release me from my duties.

Sincerely,

A handwritten signature in black ink, appearing to read 'Valerie Hale', with a long horizontal flourish extending to the right.

Valerie Hale, Ph.D.
Clinical Psychologist

cc: Paige Bigelow
Lynn Mabey

Valerie Hale, Ph.D.

CLINICAL PSYCHOLOGIST

Don SM
read 7-22-03

The Honorable Judge Glenn K. Iwasaki
Third District Court
450 S. State Street
P.O. Box 1860
Salt Lake City, Utah 84114-1860

COPY

September 27, 2002

Dear Judge Iwasaki,

I am the appointed Special Master in the matter of Huish v. Munro. I was working under a temporary order for the previous year (June 8, 2001), until I received a final signed order in July of 2002.

Despite this new and clarified order, Ms. Huish has not made it possible for me to provide Special Master Services, mostly because of a dispute about what amount of payment she owed. The most recent order clarified when Ms. Huish was to begin payment of Special Master Services as well as what portion of the final costs to pay. Despite repeated efforts to secure payment, Ms. Huish has flatly refused to pay her fees, which are now \$488.74, despite repeated telephone calls, and statements sent. Further, she claimed that she did not have a copy of the Court's most recent order, and so one was sent to her, so that she might understand what her responsibilities were. In one telephone conversation with me, she stated "I am not going to pay this bill - Glen makes more than I do and this whole thing is not fair because Paige (Mr. Munro's attorney) wrote it up."

Further, as per the Court's order, Ms. Huish and Mr. Munro are to provide me with their work schedules on a monthly basis, so that we can address issues around surrogate care. Ms. Huish has not provided any schedules to me thus far. Despite lack of payment, I have monitored some emails (at no cost since March of 2002) and have provided some telephone intervention. I told Ms. Huish that she would need to make some kind of payment so that I could continue services and also so that I could avoid a report about her lack of cooperation to the Court. I also asked that Ms. Huish and Mr. Munro to meet together with me so that we could clarify the payment arrangements, my role, and go over the Court's current order. Ms. Huish refused to "be in the same room" with Mr. Munro, unless her mother or her current attorney could be present.

I spoke with both attorneys and agreed that if payment were made, then we could have a meeting to begin anew, clarify my role, and discuss the participation of both parents in the ten hour Intensive Co-Parenting Class that I conduct. The appointment was scheduled at least six weeks in advance, giving Ms. Huish ample time to make some kind

of payment. She did not, and the appointment subsequently did not occur. However, both parents continue to express interest in attending the class as well as in continued services from me.

In sum, I have felt "ham strung" in this case because of lack of cooperation and payment from Ms. Huish. This is not to say that Mr. Munro's behavior in terms of his co-parenting attitudes or relationship is without blemish. However, I cannot even begin to work on the case when I am not paid by one party for months at a time.

Both parties continue to e-mail me, despite the fact that I cannot work on their case at this point unless I am paid. However, it is clear that the co-parenting relationship has broken down completely, and I am concerned about Taylor's well being. Because of this lack of cooperation, I have not been able to see Taylor nor even find out if he is in therapy, or help to secure a therapist for him.

I am at a loss as to how to proceed. I wish that payment were not an issue so that I could simply forge ahead and work with this family. I do not know how to obtain the services that the family so desperately needs for no cost. I do not believe that agencies such as Valley Mental Health or the Department of Family Services provide this particular kind of family supervision.

I would appreciate the Court's direction in this matter.

Sincerely,


Valerie Hale, Ph.D.
Clinical Psychologist

cc. Paige Bigelow
Lynn Mabey