

1994

William Powell v. Marcia Powell nka Mortensen : Brief of Appellant

Utah Court of Appeals

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940392

IN THE UTAH COURT OF APPEALS FOR THE STATE OF UTAH

WILLIAM POWELL,

Plaintiff,

v.

MARCIA POWELL, nka MORTENSEN

Defendant.

IN RE:

CHASE POWELL (5-19-87)

JENNICA POWELL (1-12-85)

Court of Appeal No. 940392-CA

District # 88-1159

Juvenile # 831480-004

Juvenile # 831479-004

Judge Leslie D. Brown

APPELLANT'S BRIEF

APPEAL FROM:

Fourth District Juvenile Court
Utah County, The Honorable Leslie Brown

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ARGUMENT PRIORITY - 4

Utah R. App. 26(b)((4)

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Marilyn M. Brand

TABLE OF AUTHORITIES

STATUTES

Pages

Utah Code Annotated §78-28-3(2)(a)	3
Utah Code §30-3-10	3, 18, 21

CASES

<u>Becker v. Becker</u> , 649 P2d 608, (Utah 1984)	23
<u>Hogge v. Hogge</u> 649 P2d 51 (Utah 1992)	14
<u>Jorgensen v. Jorgensen</u> , 599 P2d 510 (Utah 1979)	4
<u>Maughan v. Maughan</u> , 770 P2d 156 (Utah App. 1989)	22
<u>Pennington v. Pennington</u> , 711 P2d 254 (Utah 1985)	24
<u>Robinson v. Myers</u> , 599 P2d 513 (Utah 1979)	23
<u>Smith v. Smith</u> , 793 P2d 407 (Utah App. 1990)	17-18
<u>Wall v. Wall</u> , 700 P.2d 1124 (Utah 1985)	4
<u>Walton v. Walton</u> , 814 P2d 619 (Utah App. 1991)	4, 22

Rules:

Rule 24 (f) of the Rules of Appeal	3
------------------------------------	---

TABLE OF CONTENTS

<u>SUBJECT</u>	<u>PAGES</u>
<u>TABLE OF AUTHORITIES</u>	1
<u>JURISDICTION & NATURE OF PROCEEDINGS BELOW</u>	3
<u>STATUTES INVOLVED</u>	3
<u>ISSUES PRESENTED FOR REVIEW</u>	4
<u>STANDARD OF REVIEW</u>	4
<u>STATEMENT OF THE CASE</u>	5-14
PRE-TRIAL RECORD & BACKGROUND	5
TRIAL ISSUES & PROCEDURES	5
TRIAL COURT DECISION	6
SUBSTANTIAL CHANGES	6
EVIDENCE OF ABUSE	7-9
HOME ALONE	9-10
DESIRES OF THE CHILDREN	11
VIDEO SHOWN TO CHILD	11-13
ASSAULT BY STEP FATHER	13
VISITATION PROBLEMS	13-15
<u>SUMMARY OF ARGUMENT</u>	16
<u>ARGUMENTS</u>	15-23
VISITATION & CUSTODY	17-18
FACTORS IN DETERMINING CUSTODY	19-22
EXPERT'S RECOMMENDATIONS	23
APPELLANT'S BURDEN	23
<u>SUMMARY</u>	24
<u>APPENDIX</u>	A-1-22

JURISDICTION & NATURE OF PROCEEDINGS BELOW

The Court of Appeals has appellant jurisdiction in this matter pursuant to Utah Code §78-28-3(2)(a) since this is an appeal from a final judgment of the Fourth District Juvenile Court for Utah County as the result of a petition to modify custody filed by the Plaintiff/Appellant (hereafter "father") and a neglect/abuse petition filed by the Beaver County Attorney. (Record 226, 271, 437 and 610)

STATUTES INVOLVED

The statutes and rules involved in this appeal are hereby reproduced as permitted by Rule 24 (f) of the Rules of Appeal:

Utah Code §30-3-10

(1).....In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. The court may inquire of the children and take into consideration the children's desires regarding their future custody, but the expressed desires are not controlling and the court may determine the children's custody otherwise.

(2) In awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate.

ISSUES PRESENTED FOR REVIEW

a. Did the trial court abuse its discretion in refusing to change custody of the children to the father after finding abuse and expressing serious concerns for the welfare of the children?

b. Did the evidence support the trial court's decision to retain the children in the custody of Defendant/Appellee (hereafter "mother") after the court found abuse, visitation problems and a refusal by the mother to admit that the children had been abused or could be abused in the future?

c. Should a custody order be modified when there is substantial evidence of on-going problems with visitation and substantiated abuse?

STANDARD OF REVIEW

The standard of review for the trial court's findings of fact is the clearly erroneous standard. Walton v. Walton, 814 P.2d 619 (Utah App. 1991). The party seeking to overturn the findings of the trial court must marshal the evidence to show that the findings are so lacking in support as to be against the clear weight of the evidence. Walton, supra.

The trial court's modification of a divorce decree or refusal to modify a decree will not be disturbed absent abuse of discretion or manifest injustice. Jorgensen v. Jorgensen, 599 P.2d 510 (Utah 1979) and Wall v. Wall, 700 P.2d 1124 (Utah 1985)

STATEMENT OF THE CASE

This is an appeal from a order of the Fourth District Juvenile Court where the Court refused to transfer custody of two (2) minor children to their father after finding a substantial change in circumstances and after finding that the children had been abused in the home of the custodial parent. (Record 990)

Appellant filed a post trial motion for a new trial which was denied summarily. (Record 948 & 986)

PRE-TRIAL RECORD & BACKGROUND

Plaintiff and Defendant were divorced by decree entered December 6, 1988, in the Fourth District Court. (Record 52) Trial was held December 1, 1988, at which only visitation was at issue, all other issues having been resolved by stipulation. (Record 43) The mother was awarded custody. (Record 52) The decree was amended August 14, 1989 to provide for specific rights of visitation. (Record 69)

Plaintiff filed a petition to modify on November 17, 1989, related to on going visitation problems, but the petition was amended February 7, 1992, to request custody when physical abuse was substantiated by the Utah State Division of Family Services. (Record 175, 226, & 271)

TRIAL ISSUES & PROCEDURES

Trial on the issues of custody and visitation was held on

April 29, 1994. Because of the number of witnesses, the parties stipulated with approval of the court that the testimony of most witnesses would be by written stipulation. (Transcript 2-7)

The parties, their spouses, the court appointed custody evaluator, several character witnesses and several other witnesses were heard by the court at trial. There were a number of stipulations as to what testimony would be given if a witness were to be called and these proffers were accepted into evidence. (Transcript 2-7)

TRIAL COURT DECISION

The trial court found a substantial change in circumstances, found abuse, found visitation problems and found inappropriate conduct toward the children, but with only a brief explanation as to its reasons, retained custody with the mother after expressing serious concerns for the children's welfare. (Record 990 & 981)

SUBSTANTIAL CHANGES

The trial court found that there had been a substantial change in circumstances since entry of the original custody order and this finding is not challenged. (Record 990 & 581) In fact, the evidence is clear that at least two (2) major changes have occurred since entry of the original decree.

The obvious change was related to on-going emotional and physical abuse of the children by the mother and her husband and

the mother's refusal to admit the physical abuse of her husband toward the children. (Record 906, paragraphs 1, 2, 3, 4, 6, and 7, and Transcript pages 7-67) Dr. Jay Jensen, the court appoint custody evaluator, found "significant" abuse. (Record 73)

The second change was the continuing, intentional interference with the father and the children's rights of visitation. (Record 906, paragraph 5 and Transcript 79-113 and 203-237)

EVIDENCE OF ABUSE

There was substantial evidence of abuse of the children by the mother's present husband and the mother's refusal to accept that there had been abuse. For example:

1. Officer Elvin Brauman of the Alpine Police Department witnessed injury to the five (5) year old son of the parties and was told by the child that the injury was inflicted by his step father. (Record 906, paragraph 1, attached report and transcript 67-68) Officer Brauman provided photographs of the black and blue marks on the child. (Record 818)

2. Donna Crowley of the Children's Justice Center in Provo, testified that she interviewed the children and that they had been told "not to tell" about abuse in the home. Ms. Crowley provided the court a transcript of these interviews and Dr. Jensen evaluated a video of the interviews conducted by Ms. Crowley. (Record 906, paragraph 2, attached transcripts and Record 374).

3. Cliff Elmore of the Division of Family Services testified that he had investigated allegations of abuse against the step father by the children and that his investigation had substantiated physical abuse. Mr. Elmore stated:

It is apparent that Kelly Mortensen does indeed punish the children by kicking them. This is unacceptable. Physical abuse is substantiated. It is also apparent that the children have been coached as to what to say about it. I find this to be emotional maltreatment and substantiate the same. (Record 906, paragraph 3 and reports attached)

4. Judy West testified that she had assisted Mr. Elmore in his investigation and that she had interviewed the children who confirmed the abuse. (Record 906, paragraph 4 and reports attached)

5. Janet Barlow testified that the children had told her of being kicked by their step father and of being thrown on the bed by him. This last incident resulted in one (1) of the children striking her head. She also testified that the step father threw objects at the children. (Record 906, paragraph 6)

6. Bill Rogers of the Division of Family Services testified that he had seen injuries on the children and that they had told him that the injuries came from their step father. (Record 906, paragraph 7 and attached reports)

7. Dr. Jensen testified to the extensive abuse, the danger this posed to the children and the problems related to the denial of the mother of the abuse. (Record 922, and Transcript 8-75)

8. Lynn Russell Nielsen who was called by the mother

testified that the children had told her of their abuse and that the mother and step father had agreed to counseling because of the abuse. (Transcript 184-202)

9. The step father admitted his conduct, but did not feel that it was abusive and stated that he had now stopped. (Transcript 184-202 & 288-309)

The trial court obviously accepted these witnesses and their testimony because of the court's statement in its written opinion where the court stated:

The Court is most concerned that the mother to this date refuses to accept that there was any inappropriate violence directed by her present husband toward the children. It appears clear that she is very likely the only person in any way related to this case who refuses to accept that fact. That is most disconcerting to the court. (Record 990 and Appendix A-15)

Such a finding by the court carries with it the implication that the mother cannot protect the children from the abuse of her present husband since she refuses to believe that it exists. (Record 990 and Appendix A-16)

HOME ALONE

A number of witnesses testified that the children are continually left home alone. This was denied by the mother of the children. Dr. Jensen testified that such conduct left the children at risk. (Transcript 11) Testimony from others was as follows:

1. The father testified to contacting the children by

telephone and being told by the children that no one was home to care for them. (Transcript at 88)

2. Julie Powell testified that she observed the children left home alone. (Transcript at 227-238)

3. Catharine Westfall testified that she was present when the children were scheduled for pick up and that they had been left home along without adult supervision. (Record 906, paragraph 8)

4. Dr. Jensen found that the children had been improperly left home alone. (Transcript 16)

5. When Donna Crowley interviewed the children at the Children's Justice Center, they disclosed that they were often left home alone. (Record 906, transcript attached)

6. Cliff Elmore also verified that his investigation revealed that the children were left home alone. (Record 906, report attached)

7. Office Brauman of the Alpine Police Department interviewed the children and they reported to him that they were often left home alone. (Record 906, report attached)

DESIRES OF THE CHILDREN

The children both expressed a desire to live with their father rather than their mother and this had been a long standing desire at the time of trial and after trial. (Record 948) Lynn Russell Nielsen testified to this as did Dr. Jensen (Transcript 40-43,

Record 922 and Transcript 184-202)

VIDEO SHOWN TO CHILD

One (1) of the most disturbing piece of evidence of emotional abuse came from Julie Powell who testified that the eight (8) year old child of the parties told her just before the trial that she (the child) and her brother had been shown the video tape of her interview at the Children' Justice Center by her step father who threaten her because of its contents. (Transcript at 227-238) Mrs. Powell testified:

Question I want to direct your attention to a conversation you had with Jennica regarding the video tape. Do you recall such a conversation?

Answer Yes.

Question Do you recall when that conversation occurred?

Answer She talked about it several times, but she went more into detail the last time I talked to her about it which was approximate -- well, which was at her last visit about two weeks ago.

Question Would you tell the court what she told you about that video tape?

Answer Jennica told me that when Kelly received the video that he sat her and Chase -- and he sat by them and watched it on the TV -- he said see, I told you I'd find out and if you tell anybody again, I'll find out again. She said Chase then didn't get in anymore trouble, but for the following week she had to go in her room immediately after school and stay there the rest of the day for a week. (Transcript 229)

The step father admitted having a copy of the video which was

provided to the attorneys for the purpose of preparing for trial and of watching it; he testified: (Transcript at 288-313)

I started to watch the video one day, uh, she came home from school, I turned it off, that was the end of it.

This also concerned the trial court who wrote:

The second matter which is of concern to this court was related to testimony suggesting that the stepfather has in fact watched a video-taped statement made by the young girl in question in her presence, of her statement made at the Children's Justice Center, and then had made threatening comments to her. The stepfather, as part of his testimony, testified that such an event has not taken place, but that on one occasion he had been at home simply watching the video of her testimony when she walked into the room. This court is certainly not able to make any finding as to exactly what took place. But assuming the evidence most favorable to the respondents in this matter, it is most disturbing to the court that something as delicate as the video-taped statement of an alleged abused child which was provided to counsel for preparation for trial should be distributed in this manner so that one of the parties could casually be watching the video at home at a time when the child in question would be present. (Record 990 and Appendix A-15)

ASSAULT BY STEP FATHER

There was substantial evidence that the step father had assaulted the father of the children and at a minimum had made threats to do serious bodily harm to him.

1. Jeff Clark testified that he was present when the step father threatened and assaulted the father. (Record 906, paragraph 9)

2. The father testified to several threats and assaults by the step father. (Transcript at 222-227)

4. The step father admitted to some threats, but denied most of them as well as the assault. (Transcript at 303)

5. The parties stipulated that such threats has been made and that a tape recording had been made by the father of the incident. The substance of the tape recordings were read into the record by stipulation and was contradictory to the testimony of the step father. (Transcript at 310-313)

Police reports were made on these threats, but no action taken.

VISITATION PROBLEMS

The record in this case shows clearly that visitation has been a problem since the date of the separation of the parties and subsequent to the divorce. The latest visitation problem had been the week prior to trial. (Transcript 85)

1. The testimony of Shirley Reynolds who was appointed by the court to monitor visitation was that the mother was uncooperative with visitation and made little, if any effort, to facilitate visitation between the children and their father. She also testified that the mother denied visitation. (Record 906, paragraph 5)

2. The father testified that the mother tried to keep him from any participation in the activities of the children and cited as one (1) example, the problems related to the baptism of his

daughter into the L.D.S. Church. He testified that the mother failed to notify him of the event and refused to allow him to perform the service even after agreement by the parties that the father would be permitted to do so. Even after some discussion, the father was allowed to perform only a portion of the service. (Transcript at 220-221)

3. The record reflects that at hearing on July 11, 1989, the mother was held in contempt of court for refusing the father visitation. (Record 109)

4. The father's August 14, 1989, petition to modify was based on visitation problems. (Record 69) Specific visitation orders were made by the court on May 13, 1991. (Record 146)

5. Shirley Reynolds was ordered to monitor visitation because of these problems and the mother was ordered to pay for the cost of transportation for visitation because of her resistance to visitation. The sheriff of Beaver County, Utah was ordered to monitor pick and return of the children. (Record 146)

6. In the May 31, 1991 order, the mother was also admonished by the Court about denial of visitation. (Record 146 & 172)

7. Doctor Jensen also testified that there had been a frequent denial of visitation by the mother. (Record 922)

8. Mr. Powell testified that since the parties original divorce, the mother wanted him to have as little contact with the

children as possible. (Transcript 80-83)

9. Visitation problems were still occurring at the time of trial. (Transcript 85-86)

SUMMARY OF ARGUMENT

The father argues that the trial court abused its discretion in maintaining custody of the minor children in their mother with the overwhelming evidence of abuse, the fact that the mother denies that abuse has occurred or is occurring, and the fact that virtually all professionals testified that such conduct is detrimental to the minor children.

The father further has marshalled the evidence to show that the decision of the trial court was against the clear weight of the evidence and that the on-going abuse, problems with visitation and the threats and the conduct of the step father make a transfer of custody clearly indicated in the best interests of these children.

ARGUMENTS

A trial courts' decision as to whether or not to modify the provisions of a custody decree by transferring custody of a minor child from one (1) parent to another, involves a two (2) step bifurcated procedure. The first step is to determine whether or not there has been a change of circumstances sufficient to warrant the exercise of the court's continuing jurisdiction to change a custody award and the second step consists of a de novo consideration of evidence bearing on the best interest of the children. Hogge v. Hogge 649 P.2d 51 (Utah 1992).

The trial court in this case found that a substantial change in circumstance had been established by the father by "clear and convincing evidence". (Record 990-Appendix A-15)

The next step which the trial court is required to follow is to determine the best interest of the children de novo. Hogge, supra. The crux of the father's arguments is that it is not in the best interest of the children to remain in an environment where they are subjected to abuse nor to remain in a home where their mother denies there has been any abuse nor to remain in a home where the children are encouraged to lie and conceal abuse. (Record 922 and 906, paragraph 3, attached reports). The father urges that since the mother refuses to facilitate visitation or contact between the children and their father, it is harmful to leave the

children in her custody.

VISITATION & CUSTODY

In Smith v. Smith, 793 P.2d 407 (Utah App. 1990) the parties agreed that the mother would have custody and the father would have reasonable rights of visitation. The mother refused visitation and the court, by order to show cause, set specific visitation rights. This did not solve the problems. The father filed a series of motions to enforce and resolve visitation problems, but none of the court's order resolved the problems.

The father in Smith petitioned for modification regarding visitation and the decree was modified with very specific visitation. At the same time, the mother was held in contempt of court for refusing visitation. After an out of state attempt by the mother to modify visitation, the father petitioned for a modification of custody alleging that the visitation problems constituted a change in circumstances sufficient to modify the decree related to custody.

The trial judge disagreed with the father's reading of the law and dismissed the petition to modify, partially finding that the prior visitation modification was res judicata on the issue of custody. The father appealed. Justice Greenwood wrote the opinion of the court and held:

The best interests of a minor child are promoted by having the child respect and love both parents. 'Fostering a child's

relationship with the noncustodial parent has an important bearing on the child's best interest Visitation by the noncustodial parent helps to develop this bonding of respect and love. Interference by the custodial parent with a noncustodial parent's visitation rights as ordered by the court may clearly be contrary to the child's best interest.

We are persuaded....that interference with visitation may be a factor relevant to the issues of both a change in circumstances and the child's best interest."

FACTORS IN DETERMINING CUSTODY

The court may consider a number of factors which it feels are relevant to the issue of the best interest of the children and must consider those facts set out in Utah Code §30-3-10 which include "....past conduct...." of the parties; i.e. abuse by the step father and refusal to admit such abuse by the mother; the ".....demonstrated moral standards of each of the parties...."; i.e. the assaults and threats by the step father and refusal of the mother to foster a father-child relationship between the children and their father; and "...the court may inquire of the children and take into consideration the children's desires regarding their future custody, but the expressed desires are not controlling"; these children have consistently wanted to live with their father because of the abuse and threats; ".... and the court may determine the children's custody otherwise."

The latter provision of the statute allows for a variety of evidence to be considered by a trial judge. In this case, the only consideration cited by the trial judge for retaining custody with

the mother, was:

It is important to note that the abuse in question took place in December 1991 and June 1992. The court finds that the children at the present time are well adjusted within their own home and are doing well in school. The psychological trauma which they have experienced appears to be more related to the on-going battle between the two parents than the abuse which took place in 1992. (Record 990-Appendix A-15)

The father found that even this portion of the trial's court decision was not accurate according to the children who alleged that they were not doing well in school as had been claimed at trial, but rather that one (1) of the children was doing very poorly in school. As a result, the father filed a motion for a new trial based on the fact that the children were not doing well in school as claimed. (Record 948)

The trial court also failed to consider the impact of the delays created by the system on the rights of the father and the children. These delays started when the Fourth District Court incorrectly transferred the case to Fifth District Juvenile Court on November 26, 1992 rather than the Fourth District Juvenile Court. (Record 524 and 537)

The father moved for a change of venue which was granted because of the conflict of interest with the Division of Family Services in Beaver. It took the father almost one (1) year to correct this problem so that venue would be fair to both parties. (Record 524 & 560)

The petition to modify custody was filed February 7, 1992, related to abuse substantiate in 1991. (Record 175 and 226) While this petition was pending, another incident of abuse occurred in June 1992. (Record 271)

A custody evaluation was ordered in early 1993, but not completed until January 11, 1994. (Record 922) The trial court scheduled trial for February 14, 1994, but continued the trial until April 29, 1994. (Record 555 & 633) These events took up more than two (2) years after the father first learned that his children were being abused.

There was also no evidence to support a finding that the children's problems were related to the on-going battle between the parents with the exception of the mother and her husband's self serving statements to that effect. While several mental health workers assumed that this was true, these assumptions were all traced to the mother. Transcript 147-181 and 184-202)

The trial made no factual findings about the best interest of the children, but rather made the following statement:

The court, however, must make the following observations. In the event that future abuse should take place and this particular issue arrives back before some court in the future, it is important that such a court be aware that this court had a sincere concern about the potential for the mother to choose her loyalty for her present husband over the protection of the children. (Record 990-Appendix A-15)

The statement amounts to a finding that the mother would not

protect the children, yet the court still refused to transfer custody. The father does not understand the court's apparent lack of concern in this area. The court assumed that the problems of the children were related to on-going court battles between the parents, but it is only because of the abuse and denial of visitation that this case is before the court. (Record 100-105)

The trial court has left it to the father to act as the protector of the children by using the judicial system to blow the whistle on abuse and lack of visitation by the mother and her husband; thus fueling the very problem that the court was concerned about (the continuing battles between the parents) The juvenile justice system has failed these children.

Each child has reported on-going and continuing abuse. The step father and the mother have coached and threatened the children regarding their disclosure of the abuse. (Transcript 42 and 229) The trial court has made good on the mother and step father's threats to the children. This was best summarized by Julie Powell when she testified:

Jennica told me that when Kelly received the video that he sat her and Chase -- and he sat by them and watched it on the TV -- he said see, I told you I'd find out and if you tell anybody again, I'll find out again. She said Chase then didn't get in anymore trouble, but for the following week she had to go in her room immediately after school and stay there the rest of the day for a week. (Transcript 229)

Utah Code §30-3-10(2) requires the trial court to consider the

issue of visitation in awarding custody. It states:

....in awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate.

The record shows substantial evidence that the mother is not likely to foster such contact in the future as she has not done so in the past, but rather she will likely continue to coach the children to lie and not disclose their abuse. (Record 42)

EXPERT'S RECOMMENDATIONS

The decision to transfer custody does not have to follow the recommendations of the court appoint expert. Walton v. Walton. supra. Walton stands for the proposition argued by the mother in this case that "ping pong" custody changes are not in the best interest of children. In Walton, however, the custody evaluator found that both parents could care for the children equally as well and then recommended custody to the father who appealed because the court did not follow the recommendation.

Walton indicated in its dicta, by citing Maughan v. Maughan, 770 P.2d 156 (Utah App. 1989), that if there had been exceptional circumstances, the trial court may have abused its discretion in going contrary to the custody evaluator's recommendations. In this case, there are exceptional circumstances, including abuse, failure to protect and denial of visitation.

APPELLANT'S BURDEN

In Becker v. Becker, 649 P.2d 608, (Utah 1984) the Utah Supreme Court held that the burden is on the one seeking to reopen custody to show that the change in circumstances are such as to have a substantial effect on the parenting ability and the functioning of the presently existing custodial relationship. The father has meet with burden.

At trial the mother continued to maintain that there had been no abuse and that none existed. (Transcript 266 and 273) This testimony by the mother is proof that she will not protect the children in the future as she failed to protect them in the past and that this affects her ability to parent. (See testimony of Dr. Jensen, Record 922, Transcript 35-37)

In Robinson v. Myers, 599 P.2d 513 (Utah 1979), the court stated:

Although the trial court was not bound to accept the evaluation of the Department of Social Services, the court indicated no reason for totally dismissing the report submitted under court order. In light of the trial court's own factual findings which support the recommendation of the Department, we think some reason for rejecting the recommendation and awarding custody on the basis of rather frail findings is in order.

The father finds himself in the same position as did the Supreme Court in Robinson. The trial court gave rather frail findings for its refusal to award custody to the father in light of its own findings of abuse and failure to protect. This court can

and should review the law and the facts to correct the trial court's refusal to act. Pennington v. Pennington, 711 P.2d 254 (Utah 1985)

SUMMARY

The trial court abused its discretion given the weight of the evidence of abuse, failure to protect and denial of visitation. This court has the jurisdiction to review the facts and the law and to correct the injustice of the trial court before the children are abused further.

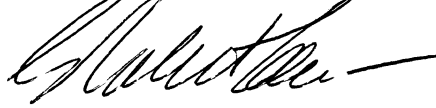
The trial court's own concerns justify a change in custody. The trial court found abuse, found denial of this abuse by the custodial parents, and found that the step father had shown one (1) of the children her video disclosure of his abuse.

The evidence is clear that there had been a serious problem with abuse which the children would not have disclosed without the father's support and encouragement. The evidence is clear that there have been visitation problems for years and that the mother has not been supportive of visitation with the father. The evidence is clear that the children want to live with their father. There was little, if any evidence, to support a retention of custody with the mother.

The evidence of abuse has been clearly marshalled for the court's review. The evidence of visitation problems has also been

marshalled and admitted by the parties. The mother of the children has attempted to prohibit meaningful visitation ever since custody was awarded to her.

Respectfully Submitted,



C. ROBERT COLLINS
Attorney for father

CERTIFICATE OF MAILING

This is to certify that on this 14th day of October, 1994, four (4) true and correct copies of the foregoing was mailed, postage prepaid to Don Peterson, Attorney At Law, P.O. Box 778, Provo, Utah, 84603.



C. ROBERT COLLINS

APPENDIX

This appendix contains copies of the following documents:

- A. Order
- B. Findings of Fact & Conclusions of Law
- C. Order of May 31, 1994
- D. The Notice of Appeal and Amended Notice of Appeal
- D. Index to Transcript of testimony

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Our File No. 18,850

Attorneys for Defendant-Appellee

IN THE FOURTH DISTRICT JUVENILE COURT OF UTAH COUNTY

STATE OF UTAH

<p>WILLIAM POWELL,</p> <p>Plaintiff,</p> <p>vs.</p> <p>MARCIA POWELL nka MORTENSEN,</p> <p>Defendant.</p>	<p>ORDER</p> <p>District Case No. 88-1159 Juvenile # 831480-004 Juvenile # 831479-004</p> <p>Hon. Leslie D. Brown</p>
<p>IN RE:</p> <p>CHASE POWELL (5-19-87) JENNICA POWELL (1-12-85)</p>	

This matter came on regularly for trial on April 28, 1994. Plaintiff William Powell was present and represented by his counsel, C. Robert Collins; defendant Marcia Patrea Mortensen was present and represented by her counsel, Don R. Petersen. The Court having heard testimony from various witnesses, having accepted the stipulation of the parties by which counsel would submit testimony by way of affidavit, and the Court having taken the matter under

advisement and issued an Order dated May 31, 1994, and having heretofore entered its Findings of Fact and Conclusions of Law, now makes and enters the following:

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. This matter came before the Court for trial on a petition to modify custody. Prior to entering its order on the primary issue, the Court took under advisement the admissibility of a home study performed by Mr. Charles Sullivan of the State Division of Family Services. Counsel for petitioner objected to the admission of such home study. It is the order of this Court that counsel's objection is sustained. The home study is not admitted and was not considered by this Court in making its determination.

2. Under Utah law in order to modify a decree of divorce, it is necessary for the Court to find first that there exists a material change in circumstances from those at the time of the entry of the divorce decree; and second, that in light of those new circumstances, that it is in the best interest of the children to order a change in custody. The petition for change in custody is based upon allegations of physical abuse directed toward both of the children. The abuse was alleged to have taken place in last 1991 and the summer of 1992. An investigation was conducted by the Cedar City Office of the Division of Family Services and the abuse was in fact substantiated; however, the worker who performed the investigation felt that it was not necessary that the children be removed from the home, and accordingly, such action did not take place.

3. The Court heard various allegations back and forth between the parties which were unsubstantiated by anyone other than the parties themselves. Two matters of particular concern with respect to the children's present circumstances are as follows: The Court is most concerned that the mother to this date refuses to accept that there was any inappropriate violence directed by her present husband toward the children. It appears clear that she is very likely the only person in any way related to this case who refuses to face that fact. That is most disconcerting to the Court. That was the primary reason why Dr. Jensen in his recommendation suggested that the custody should be changed in order to protect the children. The second matter which is of concern to this Court was related to testimony suggesting that the step-father had in fact watched a video-taped statement made by the young girl in question, in her presence, of her statement made at the Children's Justice Center, and then had made threatening comments to her. The step-father, as part of his testimony, testified that such an event had not taken place, but that on one occasion, he had been at home simply watching the video of her testimony when she walked into the room. This Court is certainly not able to make any finding as to exactly what took place, but assuming the evidence most favorable to the respondents in this matter, it is most disturbing to the Court that something as delicate as the video-taped statement of an alleged abused child which was provided to counsel for preparation for trial should be distributed in this matter so that one of the parties could casually be watching the video at home at a time when the child in question could be present.

4. This Court finds that the petitioner did, in fact, establish with clear and convincing evidence that a material change in circumstances did take place. The Court must next deal with the issue of what is in the best interest of the children. It is important to note that the abuse in question took place in December of 1991 and June of 1992. The Court finds that the children at the present time are well-adjusted within their own home and are doing well in school. The psychological trauma which they have experienced appears to be more related to the ongoing battle between the two parents than on abuse which took place in 1992.

5. This Court finds that it is not in the best interest of the children to change custody. The Court, however, must make the following observations. In the event that future abuse should take place and this particular issue arrives back before some court in the future, it is important that such a court be aware that this Court had a sincere concern about the potential for the mother to choose her loyalty for her present husband over the protection of the children. It is the order of this Court that the present custody and visitation remain in effect and that both parties bear their own costs of bringing and prosecuting this action.

DATED this ____ day of July, 1994.

BY THE COURT

LESLIE D. BROWN
JUVENILE COURT JUDGE

DON R. PETERSEN (2576), for:
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Our File No. 18,850

Attorneys for Defendant-Appellee

IN THE FOURTH DISTRICT JUVENILE COURT OF UTAH COUNTY
STATE OF UTAH

<p>WILLIAM POWELL,</p> <p>Plaintiff,</p> <p>vs.</p> <p>MARCIA POWELL nka MORTENSEN,</p> <p>Defendant.</p> <hr/> <p>IN RE:</p> <p>CHASE POWELL (5-19-87) JENNICA POWELL (1-12-85)</p>	<p>FINDINGS OF FACT AND CONCLUSIONS OF LAW</p> <p>District Case No. 88-1159 Juvenile # 831480-004 Juvenile # 831479-004</p> <p>Hon. Leslie D. Brown</p>
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This matter came on regularly for trial on April 28, 1994. Plaintiff William Powell was present and represented by his counsel, C. Robert Collins; defendant Marcia Patrea Mortensen was present and represented by her counsel, Don R. Petersen. The Court having heard

testimony from various witnesses, having accepted the stipulation of the parties by which counsel would submit some testimony by way of affidavit, and the Court having taken the matter under advisement and issued an Order dated May 31, 1994, and being fully advised in the premises, now makes and enters the following:

FINDINGS OF FACT

1. On December 1, 1988, the Fourth District Court entered a Decree of Divorce divorcing plaintiff and defendant, which, among other things, awarded custody of the parties' two minor children, Jennica Powell, currently 9 years of age, and Chase Powell, currently 6 years of age, to their mother, Marcia Patrea Powell, the defendant. Subsequent to the entry of the Decree of Divorce, the defendant Marcia Patrea Powell married Kelly Mortensen and they reside in Beaver, Utah.

2. Marcia Patrea Mortensen, her husband, Kelly Mortensen, and the two children, Jennica and Chase Powell, live together in Beaver, Utah, with Kelly's 16-year-old daughter, Jacy, from a prior marriage. Marcia Patrea Mortensen and Kelly Mortensen have had one child together, to-wit: A. J. Mortensen, who is now 3 years of age and resides with Mr. and Mrs. Mortensen.

3. Subsequent to the entry of the Decree of Divorce on December 1, 1988, Marcia Patrea Mortensen returned to college, obtained a degree from Southern Utah State University, and is employed full-time with the Beaver Office of Family Support Division of the State of Utah.

4. William Powell remarried after the divorce and lives in Utah County with his wife and several of her children from a prior marriage.

5. William Powell works the graveyard shift at the Utah State Training School, the same employer he had prior to the divorce from Marcia Patrea Mortensen. He has not obtained a college degree.

6. Subsequent to the divorce, William Powell brought numerous order to show cause actions and other legal actions against Marcia Patrea Mortensen. The first action was initiated approximately six months after the divorce.

7. Between January 1, 1989 and December 4, 1989, the parties experienced substantial difficulties related to visitation. The Beaver County Sheriff's Department was instructed to help monitor the visitation.

8. In March, 1990, pursuant to an order to show cause brought by William Powell, the Court ordered that Sheriff Yardley, Sheriff of Beaver County, was to monitor visitation and that William Powell was to pay one-half of the transportation costs incurred relative to visitation.

9. In December, 1991, William Powell reported an alleged incident of child abuse to the Alpine Police Department in Utah County.

10. On February 7, 1992, William Powell amended his Petition to Modify to request custody.

11. During January and February, 1992, Lynn Russell, S.S.W. of the Cedar City Office of the State of Utah Department of Human Services investigated the alleged abuse incident. She noted that Marcia Patrea Mortensen and Kelly Mortensen denied that the children were being abused in their home. They stated that although Chase was periodically sent to his room, neither of them could recall a time when he was physically kicked into his room. They both expressed concern that the children were suffering emotional abuse in William Powell's home in the form of coercion, citing an incident in which William Powell stated that he was going to put Marcia Patrea Mortensen in jail.

12. Lynn Russell concluded that there was not enough evidence of abuse serious enough to warrant an out-of-home placement of the children and recommended that the Mortensens contact John Worthington of the Mental Health Agency in Cedar City. The Mortensens agreed to do this. Lynn Russell recommended that the case be closed as "unfounded."

13. On February 4, 1992, Lynn Russell sent a report of her investigation to the Court concluding that although "there may be some inappropriate physical discipline used in the Mortensen home, it is nothing that can't be taken care of with parent education. The children are not in immediate danger." She recommended that the parties be "urged to settle their differences in a more effective manner so as to lessen the trauma already caused the children by their parents' divorce and the ensuing battle."

14. Subsequently, Marcia Patrea Mortensen and Kelly Mortensen, together with the children, sought counseling from John Worthington, as per Ms. Russell's recommendations. Finding no evidence that the children had been abused, Mr. Worthington recommended that "the family, including William Powell, receive out-patient counseling to assist them to adjust to the upheaval which appears to be occurring in the home."

15. In the fall of 1993, Marcia Patrea Mortensen and the children sought out-patient counseling from Elizabeth Durham as per the recommendation of John Worthington. She likewise found no evidence of child abuse and testified in court that the children were doing well in the Mortensen home.

16. On February 12, 1994, Charles Sullivan conducted a second home study of the Mortensen home and found that there was no abuse. The court refused however to allow his study to be admitted.

17. During the course of the trial, the school teachers for Jennica Powell and Chase Powell testified in court that the children were doing well in school, that they were above average students, and that their attendance in school was excellent. In their opinion, the children were happy and well-adjusted. They testified as to the involvement of their mother, Marcia Patrea Mortensen, who frequently visited the classrooms and was involved in the activities of the children.

18. The amount of child support paid by William Powell in support of the two minor children is minimal and in no way can support the minor children, thus leaving the

responsibility for supporting and maintaining the children to their mother, Marcia Patrea Mortensen, and their step-father, Kelly Mortensen.

19. The Court finds that the children at the present time are well-adjusted within their home and are doing well in school.

20. The psychological trauma which the children have experienced appears to be related more to the ongoing battle between William Powell and Marcia Patrea Mortensen than to the abuse which allegedly took place in 1992.

21. The Court finds that it is not in the best interest of the children to change custody.

The Court having entered its Findings of Fact, now makes and enters the following:

CONCLUSIONS OF LAW

1. This matter came before the Court for trial on a petition to modify custody. Prior to entering its order on the primary issue, the Court took under advisement the admissibility of a home study performed by Mr. Charles Sullivan of the State Division of Family Services. Counsel for petitioner objected to the admission of such home study. It is the order of this Court that counsel's objection is sustained. The home study is not admitted and was not considered by this Court in making its determination.

2. Under Utah law in order to modify a decree of divorce, it is necessary for the Court to find first that there exists a material change in circumstances from those at the time of the entry of the divorce decree; and second, that in light of those new circumstances, that it is

in the best interest of the children to order a change in custody. The petition for change in custody is based upon allegations of physical abuse directed toward both of the children. The abuse was alleged to have taken place in last 1991 and the summer of 1992. An investigation was conducted by the Cedar City Office of the Division of Family Services and the abuse was in fact substantiated; however, the worker who performed the investigation felt that it was not necessary that the children be removed from the home, and accordingly, such action did not take place.

3. The Court heard various allegations back and forth between the parties which were unsubstantiated by anyone other than the parties themselves. Two matters of particular concern with respect to the children's present circumstances are as follows: The Court is most concerned that the mother to this date refuses to accept that there was any inappropriate violence directed by her present husband toward the children. It appears clear that she is very likely the only person in any way related to this case who refuses to face that fact. That is most disconcerting to the Court. That was the primary reason why Dr. Jensen in his recommendation suggested that the custody should be changed in order to protect the children. The second matter which is of concern to this Court was related to testimony suggesting that the step-father had in fact watched a video-taped statement made by the young girl in question, in her presence, of her statement made at the Children's Justice Center, and then had made threatening comments to her. The step-father, as part of his testimony, testified that such an event had not taken place, but that on one occasion, he had been at home simply watching the video of her testimony when

she walked into the room. This Court is certainly not able to make any finding as to exactly what took place, but assuming the evidence most favorable to the respondents in this matter, it is most disturbing to the Court that something as delicate as the video-taped statement of an alleged abused child which was provided to counsel for preparation for trial should be distributed in this matter so that one of the parties could casually be watching the video at home at a time when the child in question could be present.

4. This Court finds that the petitioner did, in fact, establish with clear and convincing evidence that a material change in circumstances did take place. The Court must next deal with the issue of what is in the best interest of the children. It is important to note that the abuse in question took place in December of 1991 and June of 1992. The Court finds that the children at the present time are well-adjusted within their own home and are doing well in school. The psychological trauma which they have experienced appears to be more related to the ongoing battle between the two parents than on abuse which took place in 1992.

5. This Court finds that it is not in the best interest of the children to change custody. The Court, however, must make the following observations. In the event that future abuse should take place and this particular issue arrives back before some court in the future, it is important that such a court be aware that this Court had a sincere concern about the potential for the mother to choose her loyalty for her present husband over the protection of the children. It is the order of this Court that the present custody and visitation remain in effect and

that both parties bear their own costs of bringing and prosecuting this action.

DATED this ____ day of July, 1994.


BY THE COURT

LESLIE D. BROWN
JUVENILE COURT JUDGE

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 13TH day of July, 1994.

C. Robert Collins, Esq.
405 East State Road
P. O. Box 243
American Fork, UT 84003



SECRETARY



JUVENILE COURT
FOR UTAH COUNTY, STATE OF UTAH

WILLIAM POWELL, Plaintiff

VS

Case No.: 831480/831479
Civil No.: 88-1159

MARCIA POWELL, nka MORTENSEN, Defendant

ORDER

This matter came before the Court for trial on a petition to modify custody. Prior to entering its order on the primary issue, the Court took under advisement the admissibility of a home study performed by Mr. Charles Sullivan of the State Division of Family Services. Counsel for petitioner objected to the admission of such home study. It is the Order of this Court that counsel's objection is sustained. The home study is not admitted, and was not considered by this Court in making its determination.

Under Utah law in order to modify a decree of divorce, it is necessary for the Court to find first that there exists a material change in circumstances from those at the time of the entry of the divorce decree; and second that in light of those new circumstances, that it is the best interest of the children to order a change in custody. The petition for change in custody is based upon allegations of physical abuse directed toward both of the children. The abuse was alleged to have taken place in late 1991 and the summer of 1992. An investigation was conducted by the Cedar City Office of the Division of Family Services and the abuse was in fact substantiated. However, the worker who performed the investigation felt that it was not necessary that the children be removed from the home, and accordingly such action did not take place.

The Court heard various allegations back and forth between the parties which were unsubstantiated by anyone other than the parties themselves. Two matters of particular concern with respect to the children's present circumstances are as follows. The Court is most concerned that the mother to this date refuses to accept that there was any inappropriate violence directed by her present husband toward the children. It appears clear that she is very likely the only person in any way related to this case who refuses to face that fact. That is most disconcerting to the Court. That was the primary reason why Dr. Jensen in his recommendation suggested that the custody should be changed in order to protect the children. The second matter which is of concern to this Court was related to testimony suggesting that the stepfather had in fact watched a video-taped statement made by the young girl in question in her presence, of her statement made at the Children's Justice Center, and then had made threatening comments to her. The stepfather, as part of his testimony, testified that such an event had not taken place, but that on one occasion he had been at home simply watching the video of her testimony when she walked into the room. This Court is certainly not able to make any finding as to exactly what took place. But assuming the evidence most favorable to the respondents in this matter, it is most disturbing to the Court that something as delicate as the video-taped statement of an alleged abused child which was provided to counsel for preparation for trial should be distributed in this manner so that one of the parties could casually be watching the video at home at a time when

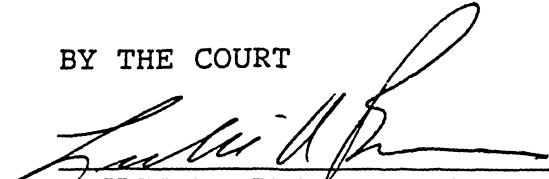
the child in question could be present.

This Court finds that the petitioner did, in fact, establish with clear and convincing evidence that a material change in circumstances did take place. The Court must next deal with the issue of what is in the best interest of the children. It is important to note that the abuse in question took place in December of 1991 and June of 1992. The Court finds that the children at the present time are well adjusted within their own home and are doing well in school. The psychological trauma which they have experienced appears to be more related to the on-going battle between the two parents than on abuse which took place in 1992.

This Court finds that it is not in the best interest of the children to change custody. The Court, however, must make the following observations. In the event that future abuse should take place and this particular issue arrives back before some court in the future, it is important that such a court be aware that this Court had a sincere concern about the potential for the mother to choose her loyalty for her present husband over the protection of the children. It is the order of this Court that the present custody and visitation remain in effect and that both parties bear their own costs of bringing and prosecuting this action. It is furthermore ordered that counsel for the defendant prepare written findings and decree for the Court's signature. Once those documents are prepared and executed by this Court, it is the order of this Court that the matter be remanded back to the Fourth Judicial District Court for all further proceedings.

Dated this 31 day of May, 1994.

BY THE COURT



LESLIE D. BROWN, JUDGE

FILED: MAY 31 1994
State of Utah, Utah County
FOURTH DISTRICT JUVENILE COURT
Deputy Clerk Don Peterson

Copies mailed: MAY 31 1994
by: Don Peterson Deputy Clerk
to: Robert C. Collins
Attorney at Law
P.O. Box 243
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FILED

JUL 21 1994

Juvenile Court
Fourth District

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IN THE FOURTH DISTRICT JUVENILE COURT OF UTAH COUNTY

STATE OF UTAH

WILLIAM POWELL,

Plaintiff and Appellant,

v.

MARCIA POWELL, nka MORTENSEN

Defendant and Appellee,

IN RE:

CHASE POWELL (5-19-87)
JENNICA POWELL (1-12-85)

AMENDED
NOTICE OF APPEAL

District # 88-1159
Juvenile # 831480-004
Juvenile # 831479-004

Judge Leslie D. Brown

NOTICE is hereby given that Plaintiff and Appellant, WILLIAM POWELL, appeals to the Utah Court of Appeals the final judgment of the Honorable Judge Leslie D. Brown, entered in this matter on May 31, 1994. The appeal is taken from the entire judgment.

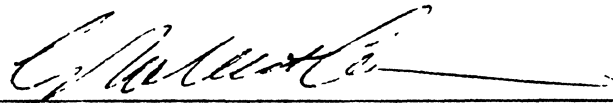
Dated this 20th day of June, 1994.

C. ROBERT COLLINS
Attorney for Plaintiff

CERTIFICATE OF MAILING

THIS IS to certify that a true and correct copy of the foregoing document was mailed, postage prepaid, to Defendant's attorney on the 2nd day of June 1994, at:

Don R. Peterson
Attorney At Law
120 East 300 North
P.O. Box 778
Provo, Utah, 84606



C. ROBERT COLLINS

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Attorney for Plaintiff
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=====

IN THE FOURTH DISTRICT JUVENILE COURT OF UTAH COUNTY

STATE OF UTAH


=====

WILLIAM POWELL,)	
)	
Plaintiff and Appellant,)	
)	NOTICE OF APPEAL
v.)	
)	
)	
MARCIA POWELL, nka MORTENSEN)	
)	
Defendant and Appellee,)	District # 88-1159
-----)	Juvenile # 831480-004
)	Juvenile # 831479-004
IN RE:)	
)	
CHASE POWELL (5-19-87))	Judge Leslie D. Brown
JENNICA POWELL (1-12-85))	
)	
)	

=====

NOTICE is hereby given that Plaintiff and Appellant, WILLIAM POWELL, appeals to the Utah Court of Appeals the final judgment of the Honorable Judge Leslie D. Brown, entered in this matter on May 31, 1994. The appeal is taken from the entire judgment.

Dated this 20th day of June, 1994.



C. ROBERT COLLINS
Attorney for Plaintiff

CERTIFICATE OF MAILING

THIS IS to certify that a true and correct copy of the foregoing document was mailed, postage prepaid, to Defendant's attorney on the ____ day of June 1994, at:

Don R. Peterson
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120 East 300 North
P.O. Box 778
Provo, Utah, 84606

C. ROBERT COLLINS

Index to Transcript

<u>Subject</u>	<u>Pages</u>
Stipulations & Exhibits	2-7
Dr. Jay Jensen	8-75
Officer Brauman	76-78
Will Powell	79-113 203-226
Anne Marshall	114-118
Norma Yardley	119-124
Elizabeth Durham	125-145
Charles Sullivan	147-181
Lynn Russell Nielsen	184-202
Julie Powell	227-238
Julie Powell	227-238
Patria Mortensen	239-287
Kelly Mortensen	288-309
Stipulation on Tape Recording	310-313