

1994

# William Powell v. Marcia Powell, nka Mortensen; In Re: Chase Powell, Jennica Powell : Reply Brief

Utah Court of Appeals

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COURT OF APPEALS  
BRIEF

DOCKET NO.

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 REPLY 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)

**FILED**

Utah Court of Appeals

FEB 01 1995

Marilyn M. Branch  
of the Court

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IN THE UTAH COURT OF APPEALS FOR THE STATE OF UTAH

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WILLIAM POWELL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Court of Appeal No. 940392-CA
MARCIA POWELL, nka MORTENSEN	)	
	)	
Defendant.	)	District # 88-1159
-----	)	Juvenile # 831480-004
	)	Juvenile # 831479-004
IN RE:	)	
	)	
CHASE POWELL (5-19-87)	)	Judge Leslie D. Brown
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	)	

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### ARGUMENT

The father files this reply brief to point out that the mother has not properly cited the evidence to the court in her brief.

1. ABUSE: The Appellee (hereafter "mother") claims that Dr. Jensen, the court appointed custody evaluator, conceded that not all of the evaluators came to the conclusion that abuse was occurring. (Appellee Brief 3) The mother does not properly cite the testimony. Doctor Jensen was the only evaluator in this entire case. Others investigated allegations of abuse and some spoke with the mother solely for the purpose of offering rebuttal testimony.

Doctor Jensen testified that he was concerned about those who investigated the allegation of abuse in Beaver County because of their conflict of interest and their failure to properly pursue available information. (Transcript 21)

This conflict of interest was highlighted by a written order of the Fifth District Juvenile Court. The case had at first been transferred for trial from the Fourth District Court to the Fifth District Juvenile Court because the children lived in Beaver. The Fifth District Juvenile Court found this transfer not to be in the children's best interest because of a conflict of interest on the part of the Division of Family Services (DFS) in Beaver County where the mother was employed. The Fifth District Juvenile court found that DFS in the Beaver area could be of no service to the court in dealing with the abuse. (Record 560)

2. LYNN RUSSELL WAS NOT TOLD THE TRUTH ABOUT ABUSE: The

mother does not make it clear to the court that Lynn Russell and Sharon Lynn Russell Nielsen are the **same witness**. (Appellee Brief 4) Ms. Nielsen, formerly Ms. Russell, testified that one (1) of the children told her that she had observed her step father "thump" her younger brother and "kick" him. (Transcript 146). Ms. Nielsen went on to testify that the children told her that the mother got "mad" when they reported this violence and told the children not to disclose such things to investigators. (Transcript 146)

Ms. Nielsen conceded that if you believed what the children were saying about their treatment, the children had been abused and if you believed the step father, they had not. (Transcript 150) Ms. Nielsen also testified that additional reports of abuse and neglect would be a proper basis to remove the children from the home of the mother. (Transcript 151).

Contrary to the claims of the mother in her brief that there was no other evidence of continuing abuse except "unsupported allegations from Mr. Powell...." (Appellee Brief 4), the record shows much evidence of continuing abuse.

Ms. Nielsen was not aware when she did her investigation that Alpine Police Officer Elvin Brauman witnessed injury to the parties five (5) year old son in June 1992, (Record 906 and 818); that Donna Crowley of the Children's Justice Center reported abuse on July 22, 1992, (Record 906 and 374); that Cliff Elmore and Judy West of Provo DFS substantiated abuse in July 1992, (Record 906); or that the step father would subsequently admit his conduct.

(Transcript 184-202 & 288-309)

3. EVIDENCE OF ON-GOING ABUSE & CONFLICT OF INTEREST: The mother claims that a licensed clinical social worker named Betsey Durham testified that the step father no longer disciplined the children by kicking and thumping them. (Appellee Brief 4). This was not Ms. Durham's testimony. What she said was that the step father reported to her that he had stopped this method of discipline. (Transcript 105) In fact, Ms. Durham was not told and did not know that DFS has twice substantiated abuse of the children by the step father, but rather was told by the mother that Appellant (hereafter "father") was the cause of the children's problems. (Transcript 98 and 105) The mother was not truthful with Ms. Durham. (Transcript 98)

Ms. Durham did testify to problems which are indicative of on going child abuse. She testified that one (1) of the children was bed wetting and that this could be a sign that the child was still being abused. (Transcript 103)

Dr. Jensen was concerned about the conduct of Ms. Durham and her lack of objectivity because Ms. Durham was a co-worker of the mother. Doctor Jensen did not feel her investigation could be objective due to her conflict of interest. (Transcript 47 & 55) This was the same concern expressed by the Fifth District Juvenile Court. (Record 560)

The conflict of interest and potential for distortion was clear when Ms. Durham appeared to condone the conduct of the step

father in thumping and kicking the children. She stated that "abuse" may have a different meaning in Beaver County than in Utah County. (Transcript 96)

The mother also claimed that the children were experiencing nightmares and that they were disruptive after visitation with their father. She claimed that such conduct was the fault of the father. (Appellee Brief 10). The mother still refuses to deal with the evidence of abuse or to consider that the children's nightmares and disruptions may be caused by the children's desire to live with their father to avoid abuse by the stepfather. The post divorce hostilities are still seen by the mother as the fault of the father so that she will not protect her children.

4. VISITATION PROBLEMS: The mother claims that the father "conceded that he was satisfied with visitation." This was not his testimony nor was it the testimony of Doctor Jenson. The latest visitation and communication problems had been the week prior to trial. (Transcript 85)

The father's 1989 petition to modify was based on visitation problems. (Record 69) The sheriff of Beaver County, Utah, was involved in visitation problems. (Record 146) In an order of May 31, 1991, the mother was admonished by the Court about denial of visitation. (Record 146 & 172) Doctor Jensen testified that there was a frequent denial of visitation by the mother. (Record 922)

5. CONTINUING LITIGATION: The mother takes an interesting position. She denies the father contact with the children, though



court ordered, she denies that the children are being abused by their step father and when the father brings these matters to the court, the mother stands up and claims that she is burdened because "....Mr. Powell has offered the majority, if not all, of the litigation since the divorce..." and "....this litigation has put a financial burden on Mrs. Mortensen...". (Appellee Brief 8)

This court should note that but for the "litigation" brought by the father, these children would not have a relationship with their father and would probably still be undergoing abuse at the hands and feet of the step father. This statement by the mother is like saying, a felon's children are on welfare because the state put their father in prison for his crimes.

The father is frustrated each time he tries to protect his children. For example, several of the children's teachers were called by the mother to testify that they were doing fine in school. This was not true. Within a short period after the trial, the youngest child was required to attend summer school. The father brought a post trial motion to bring these facts to the attention of the court and his motion was summarily denied. (Record 948)

In fact, the children were so devastated by the trial outcome that they requested to speak to the court which request was also denied. (Record 948 and 951)

5. LACK OF COMMUNICATION: The mother also testified that she kept the father informed of the children's school and church activities, but this was clearly against the weight of the

evidence. (Appellee Brief 7)

There was much evidence of a lack of communication by the mother. The court had to appointed a visitation monitor (Record 906). The mother did not tell the father about his daughter's baptism into the L.D.S. Church. (Transcript 220-221) The mother had been held in contempt of the mother for refusing to communicate about visitation. (Record 109)

6. MR. WORTHINGTON DID NOT DO AN EVALUATION: The mother claims that Mr. Worthington found that the problems of the children were related to trauma from the custodial disputes of the parents. (Appellee Brief 8) Mr. Worthington never spoken with the father or any one on his side of the dispute. In fact, the only information that Mr. Worthington received was information from the mother. (Transcript 152) For this reason, the court denied admission of his written report. (Record 990)

Doctor Jensen and Cliff Elmore of DFS found that the abuse was probably the cause of the children's trauma and not the on going disputes of the parents. (Transcript 22, 55, 105 & 152)

7. HOME ALONE: The mother states that "Dr. Jensen noted that Mr. Powell claims that the children were being left alone yet he states that all random phone calls to the home revealed that there is always a caretaker present with the children". (Appellee Brief 9) Such a statement must be intended to convince the court that the children were always cared for, but such a conclusions is contrary to the evidence.

A number of witnesses testified that the children are continually left home alone and that this was neglectful and placed the children at risk. Dr. Jensen (Transcript 11 and 16), the father (Transcript 88), Julie Powell (Transcript 227-238), Catharine Westfall (Record 906), Donna Crowley (Record 906), and DFS worker Cliff Elmore (Record 906).

9. STEP FATHER & MOTHER BLAME FATHER: The step father has taken the same position as the mother. He justifies all of his actions by claiming that the father causes them. (Appellee Brief 10) The step father claimed that his assault on the father was because of the conduct of the father and not his own aggression.

The evidence, however, from the step father was that he had made threats to do serious bodily harm to the father. Jeff Clark testified that he was present when the step father threatened and assaulted the father. (Record 906). The father testified to several threats and assaults by the step father. (Transcript 222-227) The step father admitted to some threats. (Transcript 303) The parties stipulated that such threats were made and that a tape recording had been made by the father of the threats. (Transcript 310-313)

10. EMOTIONAL ABUSE NOT DENIED: The most interesting part of the mother's brief is that she does not deny the evidence of emotional abuse related to the acts of the step father in showing the video taped interview by the Children' Justice Center to the children. (Transcript 227-238) The trial court observed:

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)

11. CHILD SUPPORT NOT AT ISSUE: The mother attempts to cloud the issues before this court by stating "...Mr. Powell's payment of child support is minimal and can in no way support the two children..." (Appellee Brief 17) Child support was not at issue. This was argument of counsel and not a court finding. This statement by the mother is improper and should not be considered by the court; not only because it is not in the record, but because it is not true.

12. MISCELLANEOUS ARGUMENT: Doctor Jensen stated in his report to the court the numerous resources which were available to him in making his recommendations to the court. These were extensive, but appear to have been ignored by the trial court and by the mother in her brief. (Record 922)

a. The mother's argument attempts to paint the father as a bad person who has no other goal in life than to harass her and the step father. Dr. Jensen's report to the court showed that the mother was passive-aggressive and uses the control of the children

so as to hurt the father. For example, the mother refused to allow the father to perform the baptism of his child after the parties had agreed in mediation that he could. (Record 992 & Transcript 75)

b. The father's present wife has a normal psychological profile, however, the step father does not. (Transcript 29-30) Ms. Powell does not work out of the home and is available to the children at all times while both the mother and the step father have full time jobs. The father works nights and sleeps while the children are in school. (Transcript 40) He clearly has more time to spend with the children than does the mother which is contrary to the assertions of the mother. (Appellee Brief 19 & Record 992)

c. The fact that the mother refuses to admit the abuse of the children was of concern to Doctor Jensen and to the court. (Record 992 and 971) Doctor Jensen testified that the mother internalized her problems and refuses to deal with them and that this behavior puts the children at risk. (Transcript 9) The father on the other hand has taken the advice of Doctor Jensen and sought to gain new parenting skills. (Transcript 84)

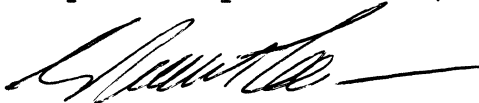
d. Contrary to the claims of the mother, the visitation problems are not "minor", but continue to be major. (Appellee Brief 9) Only the intervention of the court has helped and for this the father is criticized. (Appellee Brief 8) If this court can direct the father on how to compel the mother's compliance with the court's order outside of court, he stands ready to follow such direction.

### CONCLUSIONS

The father has marshalled the evidence to show that the trial court's findings are lacking in support so as to be against the clear weight of the evidence. Walton v. Walton, 814 P.2d 619 (Utah App. 1991). The father believes that any clear thinking person will see that the best interest of his children cannot be served in the home of the mother where the children are abused, where they are taught to lie and where the mother has made a concerted effort to deny the children contact with their father and his family.

This court should reverse the trial court and order that custody of the children be immediately given to the father and should award the father his costs and attorneys fees.

Respectfully Submitted,



C. ROBERT COLLINS  
Attorney for Father

### CERTIFICATE OF MAILING

This is to certify that on this 1st day of February 1995, 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