

2006

# Loren E. Pearce v. Oksana Zapassoff : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH STATE COURT OF APPEALS

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Loren E. Pearce

Appellant

**BRIEF OF APPELLANT**

Vs.

**Appeal No. 20061077**

Oksana Zapassoff

Appellee

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BRIEF OF APPELLANT


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Appeal from an Order in the Second Judicial District Court In and For  
Weber County, State of Utah,  
The Honorable Pamela Heffernan Presiding

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**ORAL ARGUMENT REQUESTED**

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**STATEMENT OF JURISDICTION**

Jurisdiction to hear this appeal properly lies with the Utah Court of Appeals pursuant to Sec.78-2a-3 (2) (h), Utah Code Ann. (1953 as amended).

**STATEMENT OF ISSUES AND STANDARD OF REVIEW**

**Issue I** : WHETHER TRIAL COURT ERRED IN ADMITTING EVIDENCE  
IN VIOLATION OF U.R.C.P. RULES 26(a)(4) AND 37(f)

Standard of Review: "We review the district court's legal determination ...  
under a correctness standard, and thus accord it no deference."

Bourgeois v. Department of Commerce, 1999 UT App 146, ¶15, 981 P.2d  
414 (citing C.P. v. Utah Office of Crime Victims' Reparations, 966 P.2d  
1226, 1228 (Utah Ct. App. 1998)).

**Issue II:** WHETHER THE COURT VIOLATED RULE 610 OF THE RULES OF EVIDENCE AND COMMITTED CUMULATIVE ERROR BY ALLOWING EVIDENCE DESIGNED TO DENIGRATE AND EMBARRASS APPELLANT WITH RESPECT TO HIS RELIGIOUS BELIEFS.

**Standard of review:** "We review a trial court's decision to admit evidence ... for an abuse of discretion." State v. Fedorowicz, 2002 UT 67, ¶24, 52 P.3d 1194, cert. denied, 537 U.S. 1123 (2003). "To properly exercise its discretion, a trial court must scrupulously examine the evidence before it is admitted." Id.

**Issue III:** WHETHER THE COURT MADE CONTRADICTORY AND/OR IMPROPER STATEMENTS THAT WERE PREJUDICIAL TO THE APPELLANT AND THAT CONSTITUTED PLAIN ERROR AND/OR ABUSE OF DISCRETION

Standard of review: To establish the existence of "plain error" and obtain relief from an alleged error that was not properly objected to, [A party] must show the following: "(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for [party]." State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993).

**Issue IV :** IN AWARDING SOLE CUSTODY TO THE PETITIONER/APPELLEE, WHETHER THE COURT ABUSED ITS

DISCRETION AND ERRED AS TO LAW IN DECLARING THE PETITIONER TO BE THE MORE COOPERATIVE PARENT.

**Standard of Review:** In divorce proceedings, we disturb the action of the trial court only when the evidence clearly preponderates to the contrary or the trial court has abused its discretion or misapplied principles of law.

Lord v. Shaw, Utah, 682 P.2d 853 (1984); Fletcher v. Fletcher, Utah, 615 P.2d 1218, 1222 (1980). Subject to those limitations, we are free to review both the facts and the law. Openshaw v. Openshaw, Utah, 639 P.2d 177, 178 (1981); Christensen v. Christensen, Utah, 628 P.2d 1297 (1981).

**Issue V** : WHETHER THE COURT ERRED IN DISREGARDING EVIDENCE OF VIOLENT AND UNCOOPERATIVE BEHAVIOR ON PART OF OKSANA'S MOTHER AND ITS HARMFUL EFFECT ON THE BEST INTERESTS OF THE CHILD.

**Standard of Review:** Same as Issue IV.

**Issue VI** : WHETHER THE COURT ERRED IN FINDING A DISTINCT POSSIBILITY THAT ABUSE MAY HAVE OCCURRED BY APPELLANT IN THE FACE OF THE MANIFEST WEIGHT OF THE EVIDENCE THAT PREPONDERATES TO THEIR FALSITY.

**Standard of Review:** Same as Issue IV

**Issue VII** : WHETHER FALSE ACCUSATIONS OF ABUSE ARE GRAVE ENOUGH TO OPERATE AGAINST THE BEST INTERESTS OF THE CHILD AND REQUIRE A DIFFERENT AWARD OF CUSTODY.

**Standard of Review :** "Trial courts may exercise broad discretion in divorce matters so long as the decision is within the confines of legal precedence."  
Whitehead v. Whitehead, 836 P.2d 814, 816 (Utah Ct.App. 1992).

**Issue VIII :** WHETHER THE COURT ERRED IN RELYING ON THE PREGNANCY OF APPELLANT'S WIFE AS A REASON FOR DENYING CUSTODY OF MARIA TO APPELLANT WHILE DISPARATELY FAILING TO CONSIDER CONCURRENT PREGNANCY OF APPELLEE.

**Standard of Review:** In divorce proceedings, we disturb the action of the trial court only when the evidence clearly preponderates to the contrary or the trial court has abused its discretion or misapplied principles of law.

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**Issue IX :** WHETHER THE COURT ERRED AND/OR ABUSED ITS DISCRETION IN FINDING THAT APPELLANT IS NOT A RESPONSIBLE PARENT BASED ON WHAT THE COURT DEEMED TO BE CREDIBLE EVIDENCE THAT APPELLANT HAD NOT PAID HIS CHILD SUPPORT FROM A PREVIOUS MARRIAGE.

**Standard of Review:** "Trial courts may exercise broad discretion in divorce matters so long as the decision is within the confines of legal precedence."  
Whitehead v. Whitehead, 836 P.2d 814, 816 (Utah Ct.App. 1992).

**Issue X:** IN THE ALTERNATIVE , WHETHER THE TRIAL COURT’S AWARD OF SOLE CUSTODY TO THE APPELLEE AND THE CONSEQUENCES OF THE COURT’S ORDER COMPLY WITH THE CONSTITUTIONS OF THE UNITED STATES AND UTAH AND OTHER RELEVANT STATUTES AND WHETHER ANY STATUTES OR COLOR OF LAW RELIED ON BY THE COURT ARE IN CONSTITUTIONAL COMPLIANCE.

**Standard of Review:** “We employ heightened scrutiny under [Utah Constitution] article I, ... when reviewing legislation that "implicates" rights under article I, ...”. Lee, 867 P.2d at 581. Wood v. University Medical Center where, "most, if not all, of [article I] rights have generated some form of heightened judicial scrutiny" and that "[n]otwithstanding the presumption of constitutionality we give to statutes, this court has consistently applied various forms of heightened review when article I rights are at issue." 2002 UT 134, ¶¶ 37-46.

“We review the trial court's ... judgment for correctness given the constitutional questions [Appellant] raises.” Grand County v. Emery County, 2002 UT 57, ¶ 6, 52 P.3d 1148.

## **STATEMENT OF THE CASE**

The parties, Loren Pearce, Respondent/Appellant and Oksana Zapassoff, Petitioner/Appellee, were married on July 28, 1997. A child issued from

the union, Maria Gloria Pearce, now age 7. Each party had custody of a child from previous marriages, Appellant's (hereinafter denoted as Loren) son, Ammon, age 15 and Appellee's (hereinafter denoted as Oksana) daughter, Alina, age 16. On February 15, 2003, the parties separated and obtained a bifurcated divorce on October 25, 2004.

Custody of Maria and property division were adjudicated at trial on July 5<sup>th</sup> and 6<sup>th</sup>, 2006 with an Amended Decree of Divorce entered on October 13, 2006.

Loren appeals as to the award of Sole Physical and Legal Custody to the Appellee which he alleges, was in substantial part, unjustly influenced by false allegations of abuse and other parental unfitness.

Loren argues that, during the course of the litigation associated with the judicial process of divorce, custody and property division, Oksana, implemented a premeditated strategy, in conspiracy with other biased witnesses, to discredit and demonize Loren with multiple counts of false allegations of abuse and dishonesty, with the intent of showing that he was/is an unfit parent, gain unfair advantage in Court and that he should be awarded as little parenting time as possible.

## **ARGUMENT**

### **ISSUE I**

**WHETHER TRIAL COURT ERRED IN ADMITTING EVIDENCE IN  
VIOLATION OF U.R.C.P. RULES 26(a)(4) AND 37(f)**

Failure to Disclose Evidence Prior to Trial

Appellant asserts that Appellee failed to disclose prior to trial the majority of her evidence offered at time of trial. Appellant did not receive the evidence prior to trial or a timely list of exhibits of all evidence offered and that such evidence offered was a surprise and in violation of Rule 26.

Rule 26(a)(4)(C) states in relevant part,

an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises. Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(4) shall be made at least 30 days before trial.

Appellant asserts that Trial Court committed reversible error in allowing such untimely and incomplete evidence to be admitted. Furthermore, Trial Court violated Rule 37(f) that states,

If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose.

In contrast, prior to trial and in compliance with Rule 26, Appellant provided to Appellee a copy of all exhibits and evidence he intended to use at trial. This put Appellant at a disadvantage in that Appellee was able to review

the Appellant's evidence and rehearse a response. In *Glacier v. Klawe*, 2006 UT App 516 (Utah App. 12/29/2006), the Appellate Court noted that,

“there is a strong policy underlying the modern rules of civil procedure that the ‘instruments of discovery . . . together with pretrial procedures make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.’ *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958); see also *Roundy v. Staley*, 1999 UT App 229, ¶11, 984 P.2d 404 (plurality opinion) (‘[T]he purpose of Utah's discovery rules [is to] facilitat[e] fair trials with full disclosure of all relevant testimony and evidence.’).”

### Harmless Error

Appellant asserts that Appellee's failure to disclose her evidence prior to trial was not harmless error and that a reasonable trier of fact would have decided differently had Trial Court enforced Rule 26 . The evidence offered by Appellee goes to the substance of the case and not solely to impeach the credibility of the Appellant. Specifically,

1. Appellee offered financial evidence dealing with the substantive issues of property division and financial obligations of the Appellant. The Appellant was prejudiced in not being able to review the information beforehand and to challenge calculations, estimates of values, etc. The Appellant stated that he disputed the information offered but needed time to review it and provide rebuttal (R. 206 : 7). Although the Court had already scheduled a third day for trial, that third day was denied by the Court as an opportunity to rebut the financial information.



2. A personal and confidential letter written by the Appellant to the Appellee in which the Appellant's religious beliefs were held up to ridicule (R. 13:11; 19:18; 21:5; 299:12). This goes to the substantive aspect of who is the more fit/responsible parent as well as the issue of credibility. This letter was not part of Oksana's list of exhibits.
3. A Quit Claim Deed for a marital home in West Valley City in which the Appellant allegedly quit claimed his interest to the home to Appellee (R. 321:9). This goes to the substantive issue of equity in the home and pre-marital assets. Not included in the list of exhibits.
4. Hearsay comments from Loren's first wife, Tania Pearce, were read by Rhett Potter, Custody Evaluator, while on the witness stand (R.11:19) and were not on exhibit list. This goes to the issue of Appellant's fitness as a parent and previous allegations of abuse as mentioned in the Court's findings.
5. A Notice of Lien against Appellant, not provided prior to trial, for alleged failure to pay child support and alleging an "astronomical" amount on which the court relied in its findings. (R. 178:23).
6. A 19 year old divorce decree from Loren's first wife on which the Court relied in determining that Loren was probably guilty of abuse.

Appellant's Failure to Object Does Not Constitute Waiver of His Claim

In Emmett, 839 P.2d at 785.(Utah 1992), the Appeals Court, "observed that an appellate court will review an allegation of plain error despite the

lack of a timely objection if the trial court was not led into error. 'We do so in order to avoid manifest injustice and because, if the error is obvious, the trial court has the opportunity to address the error regardless of the fact that it was never brought to the court's attention.'" Moreover, Rule 103(d) of Utah Rules of Evidence states,

"Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

In discussing this part of Rule 103, the Appeals Court held that,

"The plain error rule permits the appellate court to assure that Justice is done, even if counsel fails to act to bring a harmfully erroneous ruling to the attention of the trial court...The plain error rule exists to permit review of trial court rulings as a way of protecting a defendant from the harm that can be caused by less-than-perfect counsel." State v. Bullock, 791 P.2d 155 (UT 1989)

In the instant case, Petitioner is pro se and that constitutes less than perfect counsel. The record will show that Loren never made one objection while Oksana's counsel made dozens. This can be attributed to Loren's inexperience as a pro se litigant to whom "should be accorded every consideration that may reasonably be indulged," Lundahl v. Quinn, 2003 UT 11, ¶3, 67 P.3d 1000 (quotations and citations omitted).

## **ISSUE II**

**WHETHER THE COURT VIOLATED RULE 610 OF THE RULES OF EVIDENCE AND COMMITTED CUMULATIVE ERROR BY ALLOWING EVIDENCE DESIGNED TO DENIGRATE AND EMBARRASS APPELLANT WITH RESPECT TO HIS RELIGIOUS BELIEFS**

Rule 610 states in relevant part,

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Repeatedly, Oksana introduced a highly personal letter written to her at a time when reconciliation was being sought (R. 13:11; 19:18; 21:5; 299:12).

During their marriage, Loren and Oksana had shared sacred religious experiences together and Loren had hoped to appeal to that side of her.

The focus was on one sentence in the letter in which Loren stated that he had Christ personally come and visit him. The written affidavit of Oksana shows that Oksana introduced this letter with the intent to cast Loren in a negative light before the Court, impeach his credibility and make him look like a religious zealot, mentally unbalanced and unfit. Using this malicious strategy, Joseph Smith the founder of the predominant religion in Utah, many of his contemporaries (Wilford Woodruff, John Taylor, Lorenzo Snow, etc.) and current church members could be held up to similar ridicule and be discredited for having similar experiences. Ironically, Oksana had similar experiences of her own while married to Loren and now seeks to discredit Loren for his.

While the Court makes no mention of the evidence in its findings, there exists the distinct possibility that this was prejudicial to Loren, given the multiple attempts by Oksana to introduce it. Combined with other errors in

this case, e.g., having Rhett Potter read hearsay comments from Loren's first wife regarding her opinion about Loren, visits from extra-terrestrials, etc. (R. 13:20) and other errors, constitute cumulative error. "When two or more harmless errors result in potential prejudice to a defendant, the court may find cumulative error." *Miller v. Mullin*, 354 F.3d 1288, 1301 (10th Cir. 2004), petition for cert. filed, No. 04-6188 (Sept. 3, 2004); *Workman v. Mullin*, 342 F.3d 1100, 1116 (10th Cir. 2003), cert. denied, 124 S. Ct. 2397 (2004).

While Loren did not object to the Rule 610 error, it was obvious error to which the Court could have objected on its own cognizance, *Emmet*, *Id.* Furthermore, these kinds of attacks on Appellant form a pattern and practice of bad faith, unclean hands, lack of cooperation and unjustified maliciousness.

### **ISSUE III**

#### **WHETHER THE COURT MADE CONTRADICTORY AND/OR IMPROPER STATEMENTS THAT WERE PREJUDICIAL TO THE APPELLANT AND THAT CONSTITUTED PLAIN ERROR AND/OR ABUSE OF DISCRETION**

During cross examination of Oksana by Loren to establish that false allegations had been made by Oksana and her witnesses, the Court interrupted with these comments:

Court: "I think you've made your point fairly repeatedly about using the prior affidavits that were filed with the Court and I understand the allegations [ of abuse] against you have hurt you in the sense that you feel hurt by them, that they were made." (R. 148:23) ... There's apparently no evidence other than the accusations themselves. So I think to go over it repeatedly is just kind of making a point repetitively rather than helping your situation any (R. 149:4)... While I recognize that there were some strong statements made and they were made in court filings, I think your point has been made (R. 149:14)... to me they're just accusations without basis. (R. 149:18). . . I want you to understand I'm not going to go back through the files and look at those and say, yeah, they were made and there must be something to this. (R. 149:23) ... What I'm saying is, if it was used, it was simply used for the temporary situation. This is the permanent decision that I'm making." (R. 150:18). .. Let me just say, I'm getting your point is what I'm saying (R. 151:21).

The Court committed plain error as follows:

1. By repeatedly telling Loren that he had made his point and that to go on had diminishing returns, served as a chilling effect to Loren and misled Loren to believe that by getting his point that the Court fully captured the significance of the false allegations and that further proof was not required.
2. The Court contradicted itself in later statements made in the Findings of the Court, "These accusations are very serious and troubling." (R.I. P.750) and that there was a distinct probability that these allegations of abuse happened (page 748, Ibid).
3. Failing to find a nexus between false allegations in the temporary custody situation and the decision for permanent custody. This would be akin to a Court finding that accusations of a bank robbery or other felony crime had no relevance if it only related to temporary custody.

The allegations of abuse and whether they are truthful go to the very essence of this matter as testified by Loren (R. 150:7) and as set forth in abundant case law (See Loren's closing argument R. 325:25).

Failure by a Utah Court to comprehend the seriousness of false accusations, regardless of its timing, is completely out of step with sister Courts across the country and violates the doctrine of comity. As to the matter of temporary custody, the custody evaluator considered it an important factor and was hesitant to disturb the existing arrangement based on temporary custody (R. 6:13). The false allegations, occurring during the temporary custody arrangement, were designed to bolster Oksana's primary custody of Maria and thus gave her an unfair advantage resulting in an award of permanent custody directly related to the false allegations.

4. The Court committed plain error by distinguishing between allegations of abuse made during a temporary custody hearing and then disregarding them in a trial for permanent custody. This is contradictory in the sense that Loren raised these false allegations in a Show Cause hearing before Commissioner Garner and the Commissioner deferred to rule on them stating that the more appropriate forum was before the Trial Court during an evidentiary hearing. Upon reaching the evidentiary hearing, the Trial Court then

failed to hear or consider all the evidence and give it the full weight that it deserved based on the chilling effect of the Court's comments.

5. The Court characterized Loren's concern about the false allegations as being hurtful to Loren in the sense that they hurt Loren's feelings or his pride. However, this further demonstrates that the Court failed to comprehend that this issue went far beyond the feelings of Loren but goes to a strategy frowned on by the Courts, is dishonest, is illegal, is not in the child's best interests and causes extreme injury to the victim of the false allegations and is manifestly unjust (R. 326:24).

#### **ISSUE IV**

#### **IN AWARDING SOLE CUSTODY TO THE PETITIONER/APPELLEE, WHETHER THE COURT ABUSED ITS DISCRETION AND ERRED AS TO LAW IN DECLARING THE PETITIONER TO BE THE MORE COOPERATIVE PARENT**

Loren argues that the Court erred as to law and abused its discretion by disregarding the weight of the evidence showing that Oksana affirmatively and without good cause, was the most uncooperative parent and that, in contrast, Appellant sought from the inception of the divorce, a cooperative relationship, supported by clear and convincing evidence.

A summary of uncooperative statements by Oksana and her witnesses is found in Addendum 2 and contrasting statements by Loren showing cooperativeness.

There does not exist any supporting evidence showing a desire by Loren or his wife to prevent Maria from having any exposure to Oksana, in spite of their false allegations. To the contrary, Loren recognizes the importance of Oksana in the life of Maria, albeit conditioned on not continuing her false allegations (R. 337:25).

In his written and oral testimony, Rhett Potter, custody evaluator, stated that he had concerns about Oksana cooperating with Loren. The Court refers to Mr. Potter's concern about Loren's sincerity, "He [Potter] further questioned whether Respondent's [Loren] willingness to allow Maria to spend time with her mother was genuine or mere lip service." (R.I. pg. ).

While the pro se Appellant did not object to Mr. Potter's opinion on the basis of speculation, this was speculation nonetheless, unsupported by any evidence that showed uncooperativeness or probability of uncooperativeness.

Oksana's statements while under oath about unwillingness to cooperate are supported by the evidence offered up by Loren through documentation and exhibits during trial. It is clearly not in the best interests of the child for sole custody to be awarded to an obviously uncooperative parent. See *Thurman v. Thurman*, 73 Idaho 122, 245 P.2d 810, 814 (Idaho 1952) (holding custodial parent's attempts to alienate affections of non-custodial parent from the child constitutes a material change in circumstances).

In contrast, no evidence, beyond oral testimony and speculation, was



offered that show Loren was equally uncooperative. In the Findings of Fact and Conclusions of Law of the case at bar,(R.I. page 747) states,

“The Court finds, based on the testimony of the parties and Rhett Potter, that both parties expressed some unwillingness to encourage the parties minor child, Maria, to have a good relationship with the other parent... However, the Court finds, based on the testimony of Petitioner, that Petitioner would be more likely to adhere to the Court’s Order (emphasis added), even if she is unwilling to go beyond those Orders.”

Thus, the Court only has the oral testimony and bald allegations of Oksana to go on while disregarding the clear and convincing evidence of Loren.

The Court’s finding is manifestly contrary to the evidence as cited above.

In Barnes v. Barnes, 857 P.2d 257, (Utah 1993) reversing the trial court’s custody decision and noting that, “The record is replete with highly disputed evidence relevant to the custody issue which is not dealt with at all in the findings. It is reversible error if the trial court fails to make specific findings on all material issues unless the facts in the record are ‘clear, uncontroverted, and capable of supporting only a finding in favor of the judgment,’” Throckmorton, 767 P.2d at 124 (quoting Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987)).

No evidence was offered by any party that showed that Loren “expressed some unwillingness to encourage ... a good relationship with the other parent.” (Court Findings, Id.). To the contrary, in Loren’s affidavit offered at trial at page 694, he stated,

"In Exhibits group H, is found abundant evidence [emails to Oksana] of my desire for cooperative parenting. Exhibit 13, shows my extensive proposal for a "Win Win" solution provided to Rhett Potter which enumerates the many advantages of equal, shared parenting supported by statistical and scholarly studies extolling the virtues of shared parenting. [Appellant's] Exhibits group H (Trial Court Exhibits ), shows numerous emails that I sent to Oksana in which I share photos and in other ways seek cooperation. Oksana maliciously rejected these overtures and never reciprocated. Oksana's behavior and words are diametrically opposed to the intent and spirit of Utah law encouraging cooperative parenting." Loren, in oral testimony, stated, "I sent emails to Oksana, to Maria's teachers. Never reciprocated...." (R. 336:1-6)

In Loren's trial affidavit at R.I. page 699, stated,

"I am fully aware of Maria's love and bonding with her mother and as such, in her best interests, I would encourage frequent and meaningful contact between Maria and her mother to the extent that such contact is not harmful."

No such offer was made by Oksana. In fact, to the contrary, Oksana expressed every hope that all parental rights would be denied to Loren (R. 88:13; 145:11). In Kanth v Kanth, 2002 Utah App 415, the Appeals Court, in reviewing conflicting evidence and denying Husband's appeal, stated, "The only alternative evidence to support a finding to the contrary was the bald allegation of Husband." Contrary to Kanth, Loren has offered substantial evidence, other than bald allegation, to support a finding of cooperation on his part and uncooperation on the part of Oksana. Contrary to Kanth, the Court has used bald allegations of Oksana to support its finding that Oksana is the more cooperative parent and that Loren is uncooperative. "Trial courts may exercise broad discretion in

divorce matters so long as the decision is within the confines of legal precedence." Childs v Childs, 967 P.2d 942, (Utah1998). The Court violates legal precedence set forth in Kanth requiring more than bald allegation to support a finding.

**Evidence of Pattern and Practice of Uncooperativeness with Father of Alina**

The Court refers to the emails from Oksana to Loren while she was in Ukraine and prior to their marriage. (R.I. p.750). While expressing some concern, the Court concludes that it was not serious or matter of great weight by stating that:

1. Conflicting evidence existed as to whether Oksana "needed to obtain government permission to leave Ukraine with Maria" (R.I. at p.750).  
(The Appellant assumes that the Court meant "Alina", Oksana's daughter from her first marriage, as Maria never resided in Ukraine and is the subject of the custody dispute.)
2. There is no evidence that Alina's biological father has made a claim that Alina was kidnapped or that he objected in any way.
3. Oksana gave oral testimony that she had no intention of taking Maria illegally out of the country. (R.I. p. 751).

As to the first point, Appellant entered evidence that the U.S. Embassy does require the permission of the biological father before a child can leave the country. (Ad. 4). This requirement is unconditional unless proof

of death or missing status of the father is provided. In contrast, the Court relied on the oral testimony of Oksana that she had a divorce document giving her plenary parental rights and none to the biological father (R. 98:10). No such document was ever offered into evidence. Loren found the Ukrainian divorce after trial (Ad. 5) and while it does give Oksana sole custody of Alina, it does not provide for supervised visitation or no visitation to the father as alleged by Oksana. It does not explicitly waive the requirement to obtain written permission to remove the child from the country. To give more weight to oral testimony against documented evidence to the contrary is in violation of *Kanth, Id.* and is plain error.

As to the second point, the Court errs in saying that “there is no evidence” that the biological father objected to Alina being taken from Ukraine. Given the many admissions by Oksana in her emails that Alina’s father (Valari) wanted to be part of Alina’s life (R. 93:20; 97:16; 99:21; 105:13; 106:15) and the great lengths that Oksana went to keep Alina’s departure secret and to deceptively leave Ukraine without his permission (R. 95:6; 95:23; 100:1; 103:3; 104:1; 105:8; ), it is manifestly obvious that Alina’s father would have objected to Alina being taken from the country had he known.

As to the third point, the past is the best predictor of the future. The Court erred in relying on the bald testimony of Oksana against the documented evidence to the contrary, *Kanth, Id.* Oksana established in her email correspondence with Loren that she is willing and capable of taking a

biological child from his/her father without his knowledge or permission. Oksana's subterfuge and lack of regard for international law provides clear and convincing evidence that impeaches Oksana's credibility during oral testimony.

Thus, the evidence for finding in favor of the Petitioner in this case is "completely lacking or so slight and unconvincing as to make the [decision] plainly unreasonable and unjust." *Child v. Gonda*, 972 P.2d 425, 433 (Utah 1998).

### **Legally Inadequate**

Nevertheless, the Court, in writing its decision, said, "There is no evidence that petitioner [Oksana] is deficient parent in any respect." (R.I. p. 725 ) In reaching such an all encompassing conclusion, the Court failed to offer sufficient subsidiary facts and discussion to explain why it came to that conclusion and therefore is legally inadequate. In its Findings of Fact, the Court fails to explain why the bald testimony of Oksana was sufficient to support its findings while there was no mention of the evidence offered by Loren. Barnes v. Barnes, 857 P.2d 257 (holding that the failure of trial courts to make adequate findings has been a reoccurring problem in custody appeals). "The threshold consideration on review is whether the trial court's findings are adequate to support its custody award." *Roberts v. Roberts*, 835 P.2d 193, 195 (Utah App. 1992). If the findings are legally

inadequate the exercise of marshalling the evidence in support of the findings becomes futile and the appellant is under no obligation to marshal. Woodward v. Fazzio, 823 P.2d 474, 477 (Utah App. 1991).

Not only were the findings of the Trial Court inadequate, the Court's findings are not supported by the evidence. When the Court's findings are obviously contrary to or unsupported by the evidence, this reaches beyond their broad discretion and falls within the ambit of flagrantly unjust and is an abuse of discretion. Hutchison v. Hutchison, 649 P.2d 38, 41 (Utah 1982) holding that where a decision is, "flagrantly unjust as to constitute an abuse of discretion should the appellate forum interpose its own judgment."

The Court has discretion to assign weight to various factual considerations in awarding custody. In this case, by referencing the more cooperative parent doctrine as provided for in Utah Code , the Court , to avoid abuse of discretion, has a duty to consider weight in light of legal precedence. "Trial courts may exercise broad discretion in divorce matters so long as the decision is within the confines of legal precedence." Childs v Childs, Ibid.

Legislators and Courts in sister states recognize that the parent who intentionally sabotages the relationship between a parent and a child, without evidence to support a showing of harm to the child, is highly destructive to that child and will award custody to the more friendly parent.

E.g., In re Marriage of Donly, 528 N.W.2d 663 (Iowa Ct. App. 1995)

(proper to award custody to father where he had not tried to disparage mother in the presence of the minor child); In re Marriage of Kunkel, 546 N.W.2d 634 (Iowa Ct. App. 1996) (proper to award custody to father where mother made false allegations of abuse against father); Campbell v. Campbell, 604 A.2d 33 (Me. 1992) (court may consider parent's attempt to gain a tactical advantage in custody matter by filing false abuse charges against other parent); Seidman v. Seidman, 226 A.D.2d 1011, 641 N.Y.S.2d 431 (1996) (proper to award custody to mother where father had difficulty in engaging in cooperative decision making with respect to children); Jones v. Jones, 185 A.D.2d 228, 586 N.Y.S.2d 146 (1992) (proper to award custody to father where mother was not able to cooperate with father to further children's best interests). Thus, our society, as a whole, assigns great weight to the issue of which parent is the more cooperative parent. In the instant case, while the degree of weight assigned is unknown, the Court, failed to properly consider the evidence that preponderates in favor of the Appellant.

#### Legal Error

As to law, the Court failed to comply with the provisions of the Utah Code Utah Code 30-3-32 that state in relevant part,

- (1) It is the intent of the Legislature to promote parent-time at a level consistent with all parties' interests.
- (2) (a) A court shall consider as primary the safety and well-being of the child and the parent who is the victim of domestic or family violence.

- (b) Absent a showing by a preponderance of evidence of real harm or substantiated potential harm to the child:
  - (i) it is in the best interests of the child of divorcing, divorced, or adjudicated parents to have frequent, meaningful, and continuing access to each parent following separation or divorce;
  - (ii) each divorcing, separating, or adjudicated parent is entitled to and responsible for frequent, meaningful, and continuing access with his child consistent with the child's best interests; and
  - (iii) it is in the best interests of the child to have both parents actively involved in parenting the child.

The Court errs in not finding a showing, by a preponderance of evidence, of real harm or substantial real harm or substantiated potential harm to the child sufficient to deny the child frequent, meaningful, and continuing access to each parent. Appellant asserts that sole custody to Oksana and minimum visitation to Appellant does not fall within that definition of “meaningful and frequent” and thus inveighs against the best interests of the child.

## **ISSUE V**

### **WHETHER THE COURT ERRED IN DISREGARDING EVIDENCE OF VIOLENT AND UNCOOPERATIVE BEHAVIOR ON PART OF OKSANA’S MOTHER AND ITS HARMFUL EFFECT ON THE BEST INTERESTS OF THE CHILD**

Conspicuously absent from the Court’s Finding of Facts, is discussion of police reports offered by Appellant into evidence showing a long pattern and practice of uncooperative behavior (Ad. 6). Most significant, was a May 14, 2003 police report in which the Petitioner’s mother, Olena Skripnik, was handcuffed by a North Ogden Police Officer during an



incident in which she refused Loren parent time with his daughter and was done in the presence of the child. Loren testified under oath the circumstances surrounding the incident and entered the police report into evidence (R. 285:23).

See Sigg v. Sigg, 905 P.2d 908, (1995) (upon reversing and awarding custody to the non-custodial father, the Court noted, "Such behavior [by the mother and boyfriend] evinces not only contempt for Mr. Sigg [the father], but also a willingness to involve the children,"). Likewise, Oksana, in company with her mother (and later her older daughter), sought to withhold visitation with Loren's daughter and did so through force and violence.

Additionally, the Appellant offered into evidence other police reports where Oksana and her mother were uncooperative (R.287:10). In stark contrast, there exists no police reports or other documented evidence that show violent and uncooperative behavior on Loren's part. By no stretch of the imagination can a reasonable person conclude that it is in the best interest of a child to be in the sole custody of a violent grandmother and daughter team who unjustifiably interfere with custody and who are observed by a police officer to be the perpetrator of violence. "A finding is clearly erroneous when, even though there is evidence to support it, the reviewing court is 'left with the definite and firm conviction that a mistake

has been committed.” State v. Walker, 743 P.2d 191, 193 (Utah 1987) as cited in Shindler v. Shindler, 776 P.2d 84, (Utah 1989).

This is not a matter of “he said/she said” with equally conflicting evidence for the Court to sift through, this is a matter of no evidence to support the proposition that Oksana is the more cooperative parent. In fact, the evidence heavily preponderates against Oksana.

A custodial parent's inflexibility regarding visitation may in itself constitute a material change in circumstances. See Norenberg v. Norenberg, 168 N.W.2d 794, 797 (Iowa 1969) (holding conflict between non-custodial mother and custodial father's second wife over visitation upset child and constituted a material change in circumstances); Pulley v. Pulley, 587 So. 2d 116, 120 (La. App. 1991) (affirming finding of material change in circumstances where the custodial mother "seized virtually every opportunity to deny [non-custodial father] his court-ordered visitation privileges or to make the exercise of those privileges inconvenient or frustrating."); see also Hermosillo, 797 P.2d at 1209; Ash, 622 So. 2d at 1267; Amedei, 801 S.W.2d at 493.

## **ISSUE VI**

**WHETHER THE COURT ERRED IN FINDING A DISTINCT POSSIBILITY THAT ABUSE MAY HAVE OCCURRED BY APPELLANT IN THE FACE OF THE MANIFEST WEIGHT OF THE EVIDENCE THAT PREPONDERATES TO THEIR FALSITY.**

The Court states on page 748 under (3) Findings by the Court re: Respondent (as written by the Petitioner's counsel), "...the Court hereby finds that there is a distinct possibility that they [the incidents of abuse by Loren] 'may have' occurred, particularly since they are referred to in the Decree of Divorce from Respondent's first marriage." The Decree of Divorce on which the Court relies for evidence, occurred over 19 years ago and the abuse alleged by Loren's first wife, Tania Pearce, is unsupported and her credibility impeachable. There is no documented evidence or admission by me that such ongoing abuse throughout the marriage occurred. As in the instant case, the Florida Court merely took the language from the opposing counsel and adopted it. No police, medical, psychiatric or social worker reports of abuse were ever offered into evidence nor do they exist because such allegations of abuse are false. Had such evidence existed, Oksana would have produced it. Oksana provided an affidavit that Loren had been seen by a famed psychiatrist who was also a talk show host for a period of 5 years and that Loren had "severe psychological problems". (Ad. 3). Yet, the famed psychiatrist was not named nor was any documentation offered to support this allegation. The Appellant asserts that he never visited any psychiatrist and has no idea who they are talking about. This forms a pattern and practice of false allegations maliciously machined to wrongfully sway the broad discretion of the Court.

### False Allegations by Tania Pearce, Loren's First Wife

During testimony before the Court, Loren strenuously denied these allegations of abuse (R. 212:12) and (R. 288:25; 289:4; 324:8-16) and offered into evidence items that impeach the credibility of Oksana's key witness and Loren's first wife, Tania Pearce . Among the many false allegations made by Tania Pearce, was statement in her written affidavit that,

"Loren barricaded himself behind the door with a gun and when the police arrived, they told me they could not do anything because he had a gun".  
(Ad. 3)

This is obviously false. A reasonable person knows that there does not exist a police force in this nation that would back down to someone with a gun barricading himself in a house. This nor any event remotely resembling it, that involves Loren, ever happened. No police or news report exists to verify such a dramatic, news making event. Several other unsupported or verifiably false statements were made by Tania Pearce which are found in Addendum 15.

The Court, sua sponte, and without the necessity of objection by the Pro Se Appellant, should have recognized that these events were manifestly false on their face and should have so noted in its Findings. Ordinarily, failure to object to improper remarks constitutes a waiver of the claim, "unless the remarks constitute plain error." Emmett, 839 P.2d at 785. In

Emmett, the Appeals Court, “observed that an appellate court will review an allegation of plain error despite the lack of a timely objection if the trial court was not led into error. ‘We do so in order to avoid manifest injustice and because, if the error is obvious, the trial court has the opportunity to address the error regardless of the fact that it was never brought to the court's attention.’” *Id.* In this case, plain error was committed in failing to catch or comment on obvious error.

If Oksana’s witness is capable of lying about these events, her entire testimony should be questioned but the Court committed plain error in failing to do so. Courts have considered several factors in determining whether to exclude, under Rule 403 of the Rules of Evidence, impeachment evidence otherwise admissible under Rule 608(b): remoteness of the evidence, importance of credibility, probative value of the evidence, likelihood that the prior misconduct actually occurred, and whether the evidence is inflammatory. See 28 Charles Alan Wright & Victor James Gold, *Federal Practice* [946 P2d Page 723]. Under the remoteness factor, the credibility and weight of the evidence fails as it allegedly occurred over 22 years ago. As to importance of credibility, witness’ credibility was critical to Petitioner’s case. Oksana paid for her travel from Florida to Utah. She was a lynchpin in her case. The lack of corroborating evidence in this case made the credibility of Tania Pearce very important. Cf. *United States v. Watson*, 669 F.2d 1374, 1383 (11th Cir. 1982)

(concluding that trial court erred in excluding impeachment of witness whose testimony was "the lynchpin to the government's case"). The key witness, Loren's first wife, use of false incidents are highly probative of untruthfulness. See *United States v. Ojeda*, 23 F.3d 1473, 1477 (8th Cir. 1994) ("If a man would lie about his name, a jury may reasonably infer that he would lie about other matters, even on the witness stand."). While the lies were not about a name, it was a lie about an event that never occurred and intended to prejudice Loren without probable cause.

As to the inflammatory factor, the witness, under cross-examination, was asked about an incident of violent abuse that she perpetrated, (R. 317:24)

Loren: "Do you remember climbing up into the second or I don't know what it's called, it's over the cab where we had a bed, a queen sized bed over the cab of the motor home, do you remember that?"

Tania: "No."

Loren: "Okay. Do you remember grabbing a gun and attempting to shoot me with that gun?"

Tania: "I wish I did, but no, I don't remember that"

Any reasonable person would be alarmed by such an inflammatory comment. A Court would not countenance or let pass without reaction a similar comment made by a man towards a woman. Certainly, the idea of threatening somebody with a gun as an ex-parte means of settling a matter casts serious doubt on the credibility of such a person.

Likewise, Tania Pearce during cross-examination corroborated her desire for violence up to and including murder, (R. 319:1)

Loren: "And do you remember your reaction when I came home? What did you do? Do you remember throwing chairs at me?"

Tania: "With my experience today, I would have done a lot worse. "

The Court abused its discretion in failing to note or react to the comment made from the witness stand. Rhetorically, would any Court tolerate similar comments from the Appellant during open court?

Upon cross-examination of Loren's sister, Charlene Stott, opposing counsel, Terry Spencer, asked her what motive Loren's ex-wife would have to lie and Charlene responded, that it was for revenge and money. (R.242:14).

With money and revenge as motives, the trial Court improperly relied on testimony of Tania Pearce in reaching its decision and in not impeaching the credibility of the witness by and through virtue of her prejudice and bias and failed to consider the relation by previous marriage. In *Wanstreet v. Wanstreet*, 847 N.E.2d 716, (2006), the Court noted, "It is settled law that a witness is not equally available to a party if there is a likelihood that the witness would be biased against him, as, for example, a relative of the other party. (Citing also *Moore v. Bellamy*, 183 Ill. App. 3d 110, 118-19, 538 N.E.2d 1214, 1219 (1989); *Chapman v. Foggy*, 59 Ill. App. 3d 552,

559, 375 N.E.2d 865, 870 (1978). "It is well-established that '[a] party to an action or proceeding, either civil or criminal, may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him or his cause.'" State ex. rel. Everett v. Hardy, 65 N.C. App. 350, 352, 309 S.E.2d 280, 282 (1983)

### **False Accusations of Abuse by Alina Zapassoff**

In declaring that the "there is a distinct possibility that they [the incidents of abuse during the marriage with Oksana] 'may have' occurred" as perpetrated by the Appellant, the Court errs in failing to discuss the preponderance of evidence that weighs against Oksana and her co-conspirators. The Court construed a nexus between the allegations of abuse made by Appellee and the best interests of the child, and in so doing, the Court is under obligation to consider all the evidence and support its findings with adequate discussion. The Court committed plain error in failing to do so.

The Court erred in failing to include in it's findings a discussion of testimony by Rhett Potter, Custody Evaluator, in which he stated, that he had been an investigator of abuse for the state and gave little credence to the claim of hundreds of beatings (R. 35:12-16). Such a statement by an expert witness, one called by Oksana, preponderates against the Court's proposition that abuse was probably committed by Loren. However, Mr. Potter later minimizes the false allegations as "teenage hyprivoly [sp]"



(R. 35:18). Such hyperbole of teenage girls has caused great harm to adult males. Loren testified to the incalculable harm and potential harm of such false allegations (R. 266:15; 327:6). It is manifestly unjust for the Court to disregard the seriousness of her allegations or to regard them as innocent “hyperbole”. Alina testified that she understood exactly what she was saying, that she is of above average intelligence and is taking advanced math. As such, she fully comprehends what the number 270 means and cannot hide behind “teenage hyperbole”. Adden. 13 more fully sets forth the documentable false statements made by Alina under oath. A reasonable person, upon hearing of severe, unrelenting abuse with a leather belt on a “innumerable” occasions and at least 270 times, would conclude that such abuse would be utterly devastating to a child with obvious physical and mental results that cannot be hidden. The evidence indicates the opposite, with Alina excelling in school as a straight “A” student, recipient of scholastic honors and active in church while living with Loren (R. 161:23). Testimony showed that Alina was active in dance, swimming and other activities where any marks would be disclosed. Dozens of photos with Alina in swimsuits and other skimpy clothes were offered into evidence to show that she was not hiding marks from these alleged severe beatings with a belt. In stark contrast, no evidence other than the bald allegation was offered to support the allegation of even one incident, much less “innumerable” incidents of abuse. So overwhelming is

the manifest weight of the evidence against Alina and her allegations that it is plain error and manifestly unjust for the trial court to ignore such evidence and rule in favor of the Appellee.

While the Appellate Court may be loath to review evidence de novo, the Appellant urges that they do, in the interest of justice. "It is reversible error if the trial court fails to make specific findings on all material issues unless the facts in the record are "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment," Throckmorton, 767 P.2d at 124 (quoting Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987)).

#### **False Allegations by Oksana Zapassoff**

In an affidavit on record with the Court, Oksana testified that, "I swear before the court and God, that all the facts that Alina and I have provided to the court...are all true." (Ad. 3, P.7, item 20). As such, Oksana is complicit with Alina in the false allegations. Additionally, Oksana perpetrated many false allegations of her own. The Court committed plain error and abused its discretion in failing to consider the false allegations made by Oksana and her many inconsistencies as enumerated in Addendum 14.

#### **Coached testimony by Maria Pearce**

Oksana's counsel offered into evidence a transcript of the DCFS investigator which he asked Loren's son, Ammon, to read, (R. 231:20). The language of the transcript shows that Maria, who was 4 or less years

old at the time of the alleged abuse, told the DCFS investigator that she personally witnessed the beatings of her brother Ammon and that she saw the scars from the beatings. Ammon denied this and said that any scars he had came from skateboarding and other youthful activities, not from beatings (R. 232:17). After trial, Loren once again asked Maria why she said that. She responded that her mother and Alina had told her what happened and she believed them. Loren asked her if she actually saw any beatings herself and she said no. While this may be dismissed as a “he said/she said” stalemate, Appellant urges the Appellate Court to consider this in light of all the evidence:

1. Ammon denies ever being beaten or having any scars from beatings.  
(R. 233:5)
2. Ammon had his own cell phone on which he could have called for help at any time he chose (R.230:10). Furthermore, he had many opportunities to report abuse at school, at church and with his many friends and cousins.
3. The many inconsistencies and contradictions in Appellee and her witness’ testimonies show a motivation to lie and coach Maria to lie.

In “Interference with Parental Rights of Noncustodial Parent as Grounds for Modification of Child Custody” by Edward B. Borris, Divorce Litigation, January, 1997, p. 1, the author quotes notable custody expert, Dr. Richard Gardner, clinical professor of child psychiatry, .” These days, according to

Gardner, 90 percent of the abuse allegations that come up in custody cases are false, and this is almost always the result of "parental programming" by the mother, which he considers a form of child abuse. "You can convince a child of anything," he argues. "You can make them believe anything you want." In *Peterson v. Peterson*, 818 P.2d 1305 (1991), the Utah court found that Mr. Peterson, by "repeatedly coaching his daughter to make false reports of sexual abuse and repeatedly coaching her to denounce her mother, is abusing a child psychologically by causing her to have ill feelings about her mother."

The courts have held that an official investigation by a state agency that concludes in its finding that accusations of abuse as being unsupported is sufficient grounds by itself for the Court to make a finding of false accusations. In *re Marriage of Peller*, No. G031826 (Cal.App. Dist.4 01/21/2004), a mother filed two false accusation against the father one of which included shoving a block of wood in the child's mouth. This accusation was investigated by child protective services and was considered unfounded. In awarding sole custody to the father and monitored visitation to the mother, "The [trial] court finds that it [is] not believable that chapped lips were mistaken for sticks or potentially splinters in the mouth." While only one "not believable" incident of abuse was required to award custody to the father, the instant case reveals many incidents and reasons for not believing the accusations of Oksana and her co-conspirators, including a thorough investigation by Utah DCFS and a conclusion of unsupported. On appeal, the California court stated that, "the court assessed Kerry's [mother]

credibility and found it lacking. Implicit in that order is the court's conclusion it was not in Cameron's [child] best interest to be with a mother who was falsely accusing the father of child abuse. Nothing further is necessary." The appeals court also concludes, "despite all evidence to the contrary, she [mother] holds to the belief that Cameron is 'unsafe' in Brian's home; and she surrounds herself with family members supportive of her perceptions, which find little, if any, basis in reality." (Id). This is on point with the instant case where Oksana has stated repeatedly and without any evidence that Maria is unsafe in Loren's house (R. 145:16) and is supported by her family members but without anything other than bald allegation.

## **ISSUE VII**

### **WHETHER FALSE ACCUSATIONS OF ABUSE ARE GRAVE ENOUGH TO OPERATE AGAINST THE BEST INTERESTS OF THE CHILD AND REQUIRE A DIFFERENT AWARD OF CUSTODY.**

While courts have broad discretion in determining the weight of many factors in divorce and custody decisions, their broad discretion is not absolute and is constrained by legal precedence. Under the legal precedence constraint, the appellate court has ruled, "Trial courts may exercise broad discretion in divorce matters so long as the decision is within the confines of legal precedence."

Whitehead v. Whitehead, 836 P.2d 814, 816 (Utah Ct.App. 1992). Legal precedence is overwhelmingly for the proposition that false allegations of abuse inherently operate against the best interests of the child and therefore, receives the highest weight in custody decisions. The trial court failed to consider the

plethora of case law presented by Loren that supported the proposition that false allegations operate against the best interests of the child.

The Vermont Supreme Court stated it well, “Across the country, the great weight of authority holds that conduct by one parent that tends to alienate the child's affections from the other is so inimical to the child's welfare as to be grounds for a denial of custody to, or a change of custody from, the parent guilty of such conduct. See generally Annotation, Alienation of Child's Affections as Affecting Custody Award, 32 A.L.R.2d 1005 (1953)” *Renaud v. Renaud* (97-366); 168 Vt. 306; 721 A.2d 463 (1998). The Vermont Court further noted, “a child's best interests are plainly furthered by nurturing the child's relationship with both parents, and a sustained course of conduct by one parent designed to interfere in the child's relationship with the other casts serious doubt upon the fitness of the offending party to be the custodial parent. See *Young v. Young*, 628 N.Y.S.2d 957, 958 (N.Y. App. Div. 1995) (interference with relationship between child and noncustodial parent raises “a strong possibility that the offending party is unfit to act as a custodial parent”) (quoting *Maloney v. Maloney*, 617 N.Y.S.2d 190, 191 (N.Y. App. Div. 1994)); see also *McAdams v. McAdams*, 530 N.W.2d 647, 650 (N.D. 1995) (“A parent who willfully alienates a child from the other parent may not be awarded custody based on that alienation.”). ... And although stability is undoubtedly important, the short-term disruption occasioned by a change of custody may be more than compensated by the long-term benefits of a healthy relationship with both parents.” (Ibid). The Vermont Court in its in-depth analysis went on to say, “A more subtle, but no less

invidious, form of interference in parent-child relations may take the form of persistent allegations of physical or sexual abuse. In *Young*, for example, the court reversed an award of custody to the mother where the trial court had inexplicably ignored uncontradicted evidence that the mother had filed numerous false accusations of sexual abuse by the father. As the court observed, "[t]hese repeated uncorroborated and unfounded allegations of sexual abuse brought by the mother against the father cast serious doubt upon her fitness to be the custodial parent." 628 N.Y.S.2d at 962. Other decisions are to similar effect. See, e.g., *Lewin*, 231 Cal. Rptr. at 437 n.4 (change of custody compelled where mother had "made numerous bizarre, outrageous and totally unfounded accusations" of child abuse against father); *Ellis v. Ellis*, 747 S.W.2d 711, 715 (Mo. Ct. App. 1988) (change of custody justified where mother had "used the device of making a false accusation of sexual abuse against [father] as a weapon to cut off his access to [the child]"). The Court declared that only in cases where a parent acted in "good faith" in reporting child abuse later found to be unsupported, might they be spared a change in custody. To be "good faith", the parent must have diligently sought a remedy or professional assistance at the time they first became aware of the abuse. Oksana's own testimony shows she knew of the abuse early in the marriage (See Addendum 14) and never sought professional help nor reported it until time of the custody evaluation, an obvious attempt to gain an unfair advantage in court. The manifest weight of evidence is so compelling towards "bad faith" on the part of Oksana as to shock the conscience of any reasonable person.

## ISSUE VIII

### WHETHER THE COURT ERRED IN RELYING ON THE PREGNANCY OF APPELLANT'S WIFE AS A REASON FOR DENYING CUSTODY OF MARIA TO APPELLANT WHILE DISPARATELY FAILING TO CONSIDER CONCURRENT PREGNANCY OF APPELLEE.

In its Findings, the Court stated,

“any advantage of having the stepmother [Loren’s wife] provide care is outweighed by the stresses that the stepmother is currently facing in the adjustment to life in the United States and the birth of her first child. Overall this factor favors Petitioner as the custodian parent.” (R.I. @ 750).

The Appellant asserts that: (1) The negative effects of pregnancy and its alleged stresses are mere speculation by the Court, unsupported by any expert or medical evidence . (2) This is disparate treatment on two counts: (a) Oksana was also pregnant having delivered on December 12, 2006 and (b) Oksana also was relatively new to the country and her fitness as a parent was never in question or relevant to the Court.

Oksana failed to disclose her pregnancy to either the custody evaluator or to the court. If she failed to disclose her pregnancy because she deemed it as not relevant, then that prejudices the Appellant in that the Court failed to balance the two pregnancies against each other. Loren had already raised the pregnancy of his wife as positive factor in his Affidavit at time of trial,

- i) “Maria has a strong bonding to my wife, her step-mother Olga (Exhibits group D). My wife does not work and is available to



Maria for full time attention, care and education throughout the year. Contrary to Mother's allegations, my wife does speak sufficient English and is at a similar level to what Oksana was when she began teaching. Additionally, we are expecting a child which will be a new sibling for Maria. Maria is very excited about the prospect of a new brother or sister and wants to be intimately involved in her baby sibling's care." (R.I. @ 690)

Oksana could have rebutted this argument if she were not pregnant, arguing the negative aspects of pregnancy. She did not disclose her own pregnancy which the Appellant asserts is more evidence of her untruthfulness and leaves Appellant at a disadvantage on a substantive issue on which the trial court relied.

## **ISSUE IX**

### **WHETHER THE COURT ERRED AND/OR ABUSED ITS DISCRETION IN FINDING THAT APPELLANT IS NOT A RESPONSIBLE PARENT BASED ON WHAT THE COURT DEEMED TO BE CREDIBLE EVIDENCE THAT APPELLANT HAD NOT PAID HIS CHILD SUPPORT FROM A PREVIOUS MARRIAGE**

The Court stated,

"The Court finds that there is credible evidence that respondent is indeed significantly in arrears on child support owed to his first family. The failure to support his family from his first wife casts respondent [Loren] in a negative light and must be taken into consideration by the court as a factor in determining who is the more responsible parent to have custody of Maria." (Ex. 2 @7)

The Courts reasoning is plain error on several grounds:

1. For credible evidence, the Court relies on a Notice of Lien (as discussed in Issue # 1) on file with the Weber County Records Office that the Court claims shows an “astronomical amount of \$100,324.47”. ( R.I. , p. 750) . However, anybody, with or without good cause, can file a lien against anybody. The Appellee and her co-conspirators filed the lien shortly before trial. Appellant did not become aware of it in time to get it dismissed prior to trial (R. 339:19) but has subsequently had it dismissed (Ad. 12). As testified in court, the Appellant showed that the lien was filed by a private collection agency, CSE, and that it was an illegal and naked lien unsupported by documentation or itemized accounting of how it arrived at its claim. Upon dismissing the lien, the 4<sup>th</sup> District Court, Provo, ordered that the lien be voided and that legal costs of \$255 be reimbursed to Appellant. CSE promptly paid the \$255 and never requested a hearing to dispute Appellant’s objection. The trial court erred in relying on the lien as credible evidence.
2. The Court relies on oral testimony of Appellant’s first wife. As has already been shown above, first wife’s testimony should not be found to be credible or admissible.
3. The Court errs in concluding that there was a “failure to support his family from his first wife” and the Court fails to acknowledge any payment of support. The Court is here declaring that there was no payment of support. The Appellant offered several evidences why the

money wasn't owed and even overpayment of child support which the court rejected. (R.339:23). By relying only on the testimony of the first wife, who was a biased witness, and by relying on an illegal and dismissed lien, the Court caused great harm to the Appellant and to the best interests of the child by awarding sole custody to Appellee and reducing the association between parent and child.

4. While precedent has given the Court broad discretion in considering many factors in making a custody determination, the Court has been given specific guidelines that should be considered as found in Hutchison and Rules of Judicial Administration. Failure to pay child support is not found among them. A search of relevant case law does not show a precedent for denying custody on the basis of failure to pay all or part child support in a previous marriage. Assuming arguendo, the Appellant failed to pay some support, there exists no nexus either by law or by precedent that an arrearage in child support makes a parent less responsible or less fit. What is on record and what is relevant is the fact that Appellant has been paying support for Maria for the over 3 years.

## **ISSUE X**

**IN THE ALTERNATIVE , WHETHER THE TRIAL COURT'S AWARD OF SOLE CUSTODY TO THE APPELLEE AND THE CONSEQUENCES OF THE COURT'S ORDER COMPLY WITH THE CONSTITUTIONS OF THE**

**UNITED STATES AND UTAH AND OTHER RELEVANT STATUTES  
AND WHETHER ANY STATUTES OR COLOR OF LAW RELIED ON BY  
THE COURT ARE IN CONSTITUTIONAL COMPLIANCE.**

The Appellant urges the Appellate Court to find that the Trial Court committed reversible error by awarding sole custody to the Appellee and by not awarding parental rights, including joint legal custody, to the Appellant, while disregarding the manifest weight of the evidence that preponderates against the Appellee and in favor of the Appellant.

Therefore, under the best interests of the child standard, a reversal of custody to the Appellant would be in the best interests of the child.

However, in the alternative and not mutually exclusive to the best interests of the child, the Appellant raised a constitutional challenge at trial to any decision that would remove, reduce, deny or otherwise eliminate the rights of parenthood, absent a showing of substantial harm to the child. The Appellant asserts that any legislative scheme or color of law that would deny a parent equal access to his/her child is blatantly unconstitutional and is subject to the heightened scrutiny required for protection of fundamental liberty interests. "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected." *Quillon v. Walcott*, 434 U.S. 246 @ 255 (1978). "The liberty interest at issue in this case...the interest of parents in the care, custody, and control of their

children...is perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Troxel v. Granville*, 530 U.S. 57 (2000). The Appellant has previously raised the constitutional issues in his Memorandum in Support of Respondent’s Counter Claim, April, 2003 with abundant case law and argument. Constitutional issues and parental rights were again raised at trial (R. 336:21). The Trial Court took the cogent position that the best interest of the child is the only standard under which a court will review a custody decision and ignored any constitutional challenges.

Absent a clear and convincing showing of substantial harm to the child, the Court should not deny parental rights under the pretext of the best interests standard. The interests of the state to promote judicial economy under the lowered scrutiny of the preponderance of evidence standard must yield to the much weightier and constitutionally protected rights of a parent to the care and nurture of their child. Absent a showing of substantial harm by a heightened scrutiny afforded by clear and convincing evidence, the only shared parenting arrangement that is constitutionally compliant is a presumption of equal and joint physical and legal custody. Parents are afforded much greater protection in Utah courts under circumstances not involving divorce such as in Juvenile Court, Department of Children and Family Services, etc. where heightened scrutiny is required. However, there is no compelling state interest to carve out

divorce as a unique circumstance. In spite of the dilemma of Solomon, where the competing interests of two battling parents place the Courts in an awkward position, the fundamental liberty interests of parents are not somehow magically extinguished and yielded to the best interests of the child standard wherein the Courts have broad discretion to violate those parental rights.

Across the country, there is growing momentum by disenfranchised parents, mostly fathers, to claim the Supreme Court sanctioned fundamental liberty interests. More and more cases are being removed to Federal Court and eventually, through class action or otherwise, will overcome the Rooker-Feldman, 11<sup>th</sup> Amendment and other obstacles to the granting of a presumption of joint physical and legal custody, absent a showing of harm under heightened scrutiny.

### **Custody of the Child to Appellant Complies with Best Interest**

### **Standard and Complies with Constitutional Heightened Scrutiny**

Since the inception of the divorce proceedings, the Appellant has sought the best interests of the child by:

1. Seeking court mandated conciliation under Utah Code and the doctrine that the ultimate best interests of the child is to remain in a healthy and intact family where marriage is sacred and both parents have equal access to the child. The case file at bar will show that Oksana rejected marriage counselling and was the initiator of divorce.

2. Seeking court ordered mediation. Appellant offered a joint custody situation which was vigorously rejected by Appellee with no counter offer and no compelling reason to reject joint physical and legal custody. Oksana did not play the child abuse card until custody evaluation.
3. Now seeking primary custody under the heightened scrutiny standard in which Appellant has presented evidence that Appellee has willfully, knowingly, and maliciously conspired to falsely allege abuse and in other ways falsely and illegally demonize and discredit the Appellant with the intent to deprive him of his parental rights. Abundant case law presented herein and at trial, show that false allegations constitute abuse and unfitness and that it is not in the best interests of children to remain with such parents. Under Utah statute, if child abuse is found, it is reason to award primary custody to the other parent. Thus, Appellee intended to sabotage the possibility of a cooperative parental relationship, setting up a situation where it was nearly impossible for the parents to have a cooperative parenting arrangement. In contrast, Appellant wanted to avoid this. (Adden. 7 & 8). It is a well known tactic by unethical primary caretakers to intentionally sabotage the relationship knowing that in a "he said/she said" stalemate, the Courts will always default to the primary caretaker. However, in the instant

case, the Appellant provided abundant evidence that broke through the stalemate, clearly showing the malignant motives of the Appellee.

### **CONCLUSION**

Appellant asserts that his position from the outset has been one of cooperative parenting and that the only reason for now claiming primary custody is that it is clearly in the best interests of the child to not be in the primary custody of a mother, mother's spouse, grandmother and a sibling who are intentionally uncooperative without good cause, who seek to sabotage the relationship, alienate the child from the father and who model untruthful behavior.

For the trial Court to reinforce such repulsive behavior with an award of sole physical and legal custody reinforces future bad behavior and sets a precedent for other parents to emulate that behavior.

WHEREFORE, the Appellant prays that the entire judgment be reversed and that if remand is necessary, that it be remanded to another Judge for a fair and impartial trial on the merits.

Dated this 21 day of March, 2007

A handwritten signature in cursive script, reading "Loren E. Pearce", written over a horizontal line.

Loren E. Pearce, Appellant



### CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Brief of Appellant to be served on  
Appellee's counsel by mailing/hand delivering a true and correct copy to:

Terry R. Spencer  
Attorney at Law  
140 West 9000 South, Suite 9  
Sandy, Utah 84070

On the 21 day of March, 2007.

A handwritten signature in cursive script, appearing to read "L. Pearce", written over a horizontal line.

Loren E. Pearce, Appellant