

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

FLOYD H. GRANT III,

Petitioner Appellee,

Court of Appeals Number: 24445

vs.

District Court Number: DR 95-2675

LESLIE D. CUMIFORD
(f/k/a Leslie D. Interrante),

Respondent Appellant.

APPEAL FROM THE
BERNALILLO COUNTY DISTRICT COURT
HONORABLE DEBORAH DAVIS WALKER
(RECENTLY HONORABLE ERNESTO J. ROMERO)

APPELLANT'S BRIEF IN CHIEF

Respectfully submitted by:

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CERTIFICATION AS TO RECORDING DEVICES USED TO CITE RECORD

The Appellant used a Radio Shack CTR-117 Tape Player to make citations to the proceedings conducted by Hon. Deborah Davis Walker during 2002 and 2003. Recordings were made on one side of the court-furnished tapes and the counter reads from 0-628.

LESLIE D. CUMIFORD

SUMMARY OF PROCEEDINGS

This case is a dispute regarding custody, timesharing, and child support between Floyd H. Grant III, Petitioner Appellee, and Leslie D. Cumiford, Respondent Appellant. The parties were never married and never lived in the same state, but they are the natural parents of a son, age nine. Petitioner claimed that significant changes of circumstances in this matter warranted a modification of custody and timesharing. He initially requested a change in primary residence, but later added a request for a change from joint custody to sole custody, claiming that a significant change had become apparent during the course of the proceedings. The judge's final Order (10/9/03) found no material change in circumstances warranting a change in custody.

The case is a typical custody case with two exceptions: three back-to-back custody evaluations, creating the need for additional experts in defense of Respondent and greatly increasing costs, and the sealing of the trial. Respondent appeals from the Court's October 9, 2003 Orders concerning attorney's fees and costs, the imputing of salary to Respondent (with associated split of medical and other costs according to income), payment of Guardian *ad Litem* fees from child support, abatement of child support, and sealing of the hearing on the merits.

Petitioner argued in his Verified Motion to Modify Custody, Timesharing, and Child Support (6/25/03) that "Significant changes of circumstances in this matter warrant a review and modification of custody and timesharing." Respondent denied this allegation in her Response (7/12/02) and argued in favor of mediation prior to court action as per the court's existing custody Order (4/22/96). Petitioner admitted (Response to Motion to Dismiss, 7/22/02) that no mediation had taken place, arguing that mediation with Respondent was "unworkable". Petitioner argued for an 11-706 custody evaluation [7/23/02 tape, 013] and a Guardian ad Litem

[7/23/02 tape, 050] at the July 23, 2002 hearing. Respondent argued against these measures prior to mediation [7/23/02 tape, 079-091]. The judge ordered the parties to mediation with Frank Spring, Esq., and appointed him Guardian *ad Litem* (Order, 7/23/02).

Respondent contended that she worked “part-time at Sandia Labs, and I also have a business” [7/23/02 tape, 216] When asked by the judge if her 1996 salary was in the ballpark, Respondent replied, “No, it [current salary] is considerably lower.” [7/23/02 tape, 225] The court used Respondent’s 1996 salary in calculating the split of expenses for costs. Petitioner was ordered to pay 60% of the GAL fees and Respondent to pay 40% of his fees, respectively (Order, 7/23/02). By stipulation, the 11-706 expert was appointed (11/20/02 Order) to perform an evaluation.

Petitioner filed a Motion to Modify Joint Legal Custody (3/13/03) in which he argued:

“A change in legal custody is warranted because of the heightened conflict between the parents . . .” and requesting that the court “modify the parties’ 1996 parenting plan to award [Petitioner] Hank Grant sole legal custody of Alex.”

The 11-706 expert completed his evaluation and provided his Parenting Plan to counsel on March 31, 2003 (Court’s trial exhibit 1), maintaining joint custody, primary residence with Respondent, and frequent out-of-state visitation to Petitioner. Respondent attempted to conclude the case by filing a Motion to Adopt Recommended Parenting Plan (4/7/03). Petitioner’s Response (4/22/03) argued that testimony from the 11-706 expert was necessary, and that “A two day setting is more reasonable to hear the necessary evidence and recommendations.” Both motions were argued on April 29, 2003. The judge asked, “If everybody is agreeing to Dr. Zieman’s recommendation, why do we need a trial?” [4/29/03 tape, 201] Petitioner’s counsel replied, “No. We are agreeing that the child can go for the summer. . . [we will see] based on the parents’ actions over the next couple of months, whether that’s what Dr. Zieman’s recommendation is going to continue to be . . .” [4/29/03 tape, 203] The judge ordered (4/29/03)

that the 11-706 recommendations should be followed on a temporary basis, ordered the parties to [settlement] facilitation, and set aside two days for trial in August 2003. The Guardian ad Litem stated during the hearing that recent events necessitated an update to the 11-706 evaluation., less than one month after the initial evaluation results were provided to counsel. [4/29/03 tape, 208]

The Guardian ad Litem filed an Emergency Motion to Transfer Custody (5/16/03) making a number of allegations that were later impeached with evidence and testimony, including expert testimony, at trial. The motion claimed that Petitioner Hank Grant:

“has provided me with a log of his attempts to call [the minor child] Alex, which show very modest success,” and that “telephone communication between Alex and Hank Grant has become extremely tenuous; Hank Grant reports that it has been practically nil.”

Petitioner’s Response (5/19/03) reiterated the allegations and request to transfer custody. The 11-706 expert testified on May 21, 2003 based on an updated evaluation report that did not include as sources either the Respondent or the child (Petitioner’s trial exhibit 2, page 2, Data Sources), but was based solely on input from Petitioner and the Guardian ad Litem. The 11-706 testified that Petitioner provided a log of telephone calls, and that the Guardian ad Litem was concerned about a report from Petitioner that phone calls between him and the minor child had changed dramatically. [5/21/03 tape, 189] No testimony, witnesses or evidence were allowed from Respondent in her defense. The court granted immediate, temporary sole physical and legal custody to Petitioner (5/21/03 Order), and the child was moved from Albuquerque to Petitioner’s residence in Oklahoma (5/22/03 Order).

Respondent filed a Motion for Emergency Evidentiary Hearing to Remove Court Appointed Expert Witness (6/20/03), but it was not set for hearing prior to trial (Order, 7/15/03), stating:

“He [11-706] also revealed that his anger toward Respondent escalated when she was unable to pay his proposed bill in full prior to June 13, 2003, which was less than 30 days after he first informed her of the amount due.”

Petitioner argued against participation in settlement facilitation in his Motion to Excuse Parties from Pre-Trial Order Provision to Attend Settlement Facilitation with Muriel McClelland (7/15/03). Respondent did not provide concurrence with the motion.

The Guardian ad Litem noted Respondent's poor payment record on June 4, 2003, stating:

“since she paid the original \$400. I think I have gotten maybe three checks in the amount of \$50 or \$75. So I think that it's true that I have received something like \$175 or a couple of hundred dollars, something like that. That's actually not what I had in mind, because I think the debt is closer to \$5000.”

Clearly, Respondent was having difficulty covering the costs leading up to trial.

The Guardian ad Litem filed a Motion and Brief to Exclude Televised Media from Hearing on the Merits (8/15/03), stating therein:

“There is a high probability that very personal and private family matters will come before the court during the hearing on the merits . . . It is unreasonable to have this information made public for anyone to view, most of all Alex, age 8.”

Attached to the motion was an affidavit from the court's 11-706 expert, claiming that inclusion of televised media would be “emotionally detrimental to Alex”. The Guardian ad Litem filed a Motion and Brief Requesting that the Court Seal the Hearing on the Merits for Purposes of Protecting the Emotional Health of the Minor Child, Alex (8/18/03), basing his argument on a children's code statute and the 11-706's affidavit. Non-party KRQE's Response to the Guardian ad Litem's Motion (8/19/03) objected to the draconian measure of closing the trial. Both matters were heard on August 20, 2003. The Court sealed the hearing (Order, 10/9/03) but contradictorily allowed KRQE to attend and televise the trial on the merits (Order, 10/9/03), even though both motions relied on the same basis in law.

Respondent filed a Motion to Redistribute Shared Costs (8/19/03) arguing therein that she does not work part time, that she has made a good-faith effort at developing a high-technology

software firm and that salary should not be imputed to her. Respondent requested that the income split be modified to 80% for Petitioner and 20% for Respondent, respectively, reflecting actual 2002 incomes of both parties. Petitioner did not file a response.

Petitioner admitted during testimony at trial that his telephone log which triggered the 11-706's first reevaluation was not an accurate indicator of communication between him and the minor child when compared to Respondent's actual telephone records (Respondent's trial exhibit F). [8/21/03 tape 2, 242-311] Trial evidence verified both parties' gross incomes for 2002 (Petitioner's trial exhibits 9, 10, 20, and 21).

Respondent filed a Second Motion to Release Guardian ad Litem (8/19/03) prior to the trial, and submitted evidence of his biased and fraudulent behavior during the trial (Respondent's trial exhibits P, Q, and R). The Guardian ad Litem withdrew from the case after trial (GAL Closing Statement, 8/25/03). Petitioner's Closing Argument (8/25/03) requested sole custody and the imputing of income to Respondent, dubbing her corporation "non-viable". Respondent's Closing Argument (provided to the judge on August 25, 2003 but not filed until October 3, 2003) argued for continued joint custody, removal of the GAL and 11-706 expert, redistribution of shared costs, and the use of Respondent's actual income for child support calculations.

Controversy remains (and discovery continues) regarding whether Respondent filed her Attorney Affidavit Regarding Attorney Fees and Costs on September 9, 2003. The judge made reference to her receipt of Respondent's Affidavit during the October 3, 2003 hearing [10/3/03 tape 1, 493] and Petitioner's Motion to Strike (9/16/03) indicates that the Affidavit was filed and provided to Petitioner's counsel. The Affidavit claims \$93,082.47 plus an outstanding bill from the Guardian ad Litem in costs and fees. Petitioner did not file a cost and fee statement. The record proper does not include notice of the October 3, 2003 hearing when fees were discussed.

Respondent entered her appearance (9/26/03) and filed a request for postponement of the October 3 hearing (10/2/03), asking for the immediate withdrawal of her counsel on the basis that her counsel “refuses to file any motions or responses to motions or provide any advice in preparation for the [October 3, 2003] hearing”. The judge proceeded with the hearing in spite of Respondent’s *Pro Se* request for a delay and refused to let Respondent speak during the hearing. [10/3/03 tape 1, 224] [10/3/03 tape 1, 562] The judge did not allow argument or evidence regarding attorney costs and fees, and summarily made her ruling that each party would pay his/her own fees. The judge ordered (10/3/03) the withdrawal of Respondent’s counsel and the entry of Respondent *Pro Se*. Respondent filed her Response to Motion to Strike Attorney Affidavit (10/3/03) making arguments regarding attorneys fees and costs but it was not heard.

In summary, Respondent prevailed in that the final Order (10/9/03) stated that:

“There has not been a material change in circumstances since the 1996 Stipulated Judgment and Final Decree of Custody and Support of April 22, 1996 that warrants a change in legal and physical custody of the minor child from Leslie Cumiford to Hank Grant at this time.”

The Worksheet A, Monthly Child Support obligation attached to the order contains an imputed income for the Respondent and abates Petitioner’s annual child support by a total of \$1298 (two half-month payments, one for June and one for July). 11-706 expert and Guardian *ad Litem* fees are split 60% [Petitioner]/40% [Respondent] based on the imputed income of Respondent. Petitioner is ordered to deduct \$300 per month from child support to pay Respondent’s share of GAL fees. No judgment was ever made regarding the other costs claimed in Respondent’s Affidavit, and each party was ordered to pay his/her own attorney’s fees.

ARGUMENT

WHETHER THE JUDGE ABUSED HER DISCRETION IN NOT PROPERLY CONSIDERING THE FACTORS OR THE TIMING FOR ARGUMENT PROVIDED FOR BY LAW IN HER DECISION REGARDING ATTORNEYS FEES AND COSTS

This issue was preserved by Respondent's Attorney Affidavit Regarding Attorney Fees and Costs (provided to the Court and to opposing counsel on 9/9/03) and Respondent's Response to Motion to Strike Attorney Affidavit Regarding Attorney Fees and Costs (10/3/03).

NMRA 1-127 provides four factors for awarding fees in domestic relations cases: disparity of resources, prior settlement offers, total fees and costs expended by each party, and success on the merits. Evidence (Petitioner's trial exhibit 9) shows that the Petitioner's 2002 gross income plus Schedule C profits was \$141,301, and Respondent's 2002 gross income (Petitioner's trial exhibit 21) was \$51, 136. Petitioner and Respondent's gross incomes, as a proportion of the sum of 2002 incomes, were 67% and 33%, respectively. However, the Court deducted Respondent's monthly support of \$992 for two prior children from her income as per NMSA 40-4-11.1 [8/25/02 tape, 305], reducing Respondent's income to \$39,232, leaving a disparate 78%, 22% income split.

Petitioner's allegation regarding significant changes of circumstances (Verified Motion, 6/25/02) warranting modification of custody and timesharing was denied by the Court in her final Order (10/9/03). Respondent attempted mediation and Petitioner did not want to take this step. This is a case that may not have required litigation at all, if Petitioner had followed the mediation requirement in the existing order (4/22/96). From the beginning, Petitioner showed his unwillingness to resolve the dispute, refusing to answer any interrogatories (Respondent's 9/13/02 Motion to Compel), resulting in a hearing (9/23/02) to obtain basic income information.

Otherwise, this was a fairly unremarkable custody case that should have ended with both parties' acceptance of the 11-706 expert's March 14, 2003 Parenting Plan (Court's trial exhibit 1) when Respondent's Motion to Adopt Recommended Parenting Plan (4/7/03) was heard on April 29, 2003. However, Petitioner greatly complicated the case by filing his Motion to Modify Joint Legal Custody (3/13/03), alleging that a significant change in circumstances had occurred

during the course of the proceedings and claiming Respondent's interference with school visits and telephone communication between Petitioner and the child. He stated therein that "a two day setting is more reasonable to hear the necessary evidence and recommendations".

At this point the custody case became complicated and atypical, resulting in three back-to-back custody evaluations (the original evaluation and two updates), the need for two experts in defense of claims against the Respondent, and multiple depositions. Testimony at the May 21, 2003 hearing notes that a key factor in triggering the custody evaluation update was Petitioner's complaint regarding "dramatic changes" in phone calls. [5/21 tape, 189] At trial, Petitioner's testimony regarding his representation of the calls (in his "telephone log") was impeached with Respondent's telephone records (Respondent's trial exhibit F), [8/21/03 tape 2, begins at 242].

The record proper shows that Petitioner sidestepped every opportunity to settle the case. His Motion to Excuse Parties from Pre-Trial Order Provision to Attend Settlement Facilitation (7/15/03) stated: "The likelihood of a successful facilitation is extremely unlikely [sic]." The Court's Final Order (10/9/30) stated that there was not a material change in circumstances warranting a change in legal and physical custody. Respondent enjoyed success on the merits in spite of Petitioner's frequent attempts complicate an otherwise straightforward case, but it was not without great financial burden, a burden which she was not financially equipped to bear.

Respondent's struggle with legal expenses is evident in the following documents [GAL's Motion for Order for Payment of GAL Fees (5/30/03); Respondent's Motion for Emergency Evidentiary Hearing to Remove Court Appointed Expert Witness (6/20/03), page 3; Report of GAL Regarding the Court's Order to Establish Fee Arrangement (7/31/03); Respondent's Motion to Redistribute Shared Costs (8/19/03), paragraph 5; and Brief Regarding GAL's Motion to Arrange Payment of Fee 8/25/03]. Respondent argued in her Response to Motion to

Strike Attorney Affidavit (10/3/03) that the fees [actually, fees and costs] in this case exceed the sum of all child support paid by Petitioner to benefit the minor child over the child's lifetime (approx \$85,000), and that to not award attorney's fees in effect nullifies all support established by New Mexico law for the care and well being of the minor child. Respondent's current husband testified that the case was financially draining and that they had to "go to a lot of resources" to find money to defend themselves in the case [8/21/03 tape 6, 292].

NMSA 40-4-7(A) states:

"The court may make an order, relative to the expenses of the proceeding, as will ensure either party an efficient preparation and presentation of his case."

Ample case law exists to support the contention that the judge abused her discretion in not awarding attorneys fees to Respondent. *Gomez v. Gomez*, 119 N.M. 755; 895 P.2d 277 states:

"The award of attorney fees under Section 40-4-7(A) rests within the sound discretion of the trial court. *Gilmore v. Gilmore*, 106 N.M. 788, 792, 750 P.2d 1114, 1118 (Ct. App.), cert. denied, 107 N.M. 16, 751 P.2d 700 (1988). That discretion is not unrestrained, however, see *Roberts*, 117 N.M. at 301, 871 P.2d at 397, and the trial court, in determining whether to award attorney fees, should consider various factors, including the most important one of economic disparity between the parties. See *Foutz v. Foutz*, 110 N.M. 642, 644, 798 P.2d 592, 594 (Ct. App. 1990). We have previously held that 'where a party lacks sufficient funds to pay attorney fees for representation incident to dissolution of marriage or rights incident thereto, and the financial situation of the parties is disparate, it is error to deny an award of reasonable attorney's fees.' *Sheets v. Sheets*, 106 N.M. 451, 456, 744 P.2d 924, 929 (Ct. App. 1987). However, economic disparity between the parties is not the only factor to be considered. *Gilmore*, 106 N.M. at 792, 750 P.2d at 1118. The trial court should also consider the 'nature of the proceedings, the complexity of the issues, the relief sought and recovered, the ability of the parties' attorneys and the ability of the parties to pay.' *Id.*"

Michelson v. Michelson, 89 N.M. 282; 551 P.2d 638 (1976) puts forth additional factors:

"the ability, standing, skill and experience of the attorney; the nature and character of the controversy; the amount involved, the importance of the litigation and the benefits derived therefrom."

Schuerman v. Schuerman, 94 N.M. 81, 607 P.2d 619 (1980) adds:

“It is important for trial judges to be liberal in awarding attorney’s fees in cases where economic disparity between the parties and costs involved in pursuing the action are so great that participation becomes economically oppressive to one party. To do otherwise would have a chilling effect upon the less affluent parties ability to represent his or her case and upon the trial judge’s ability to determine which parent can provide best for a child’s welfare.”

Allen v Allen, 98 N.M. 652, 651 P.2d 1296 (1982) states:

“if there is economic disparity between two adverse parties such that one party may be inhibited from preparing or presenting a claim, then the trial and appellate courts should be liberal in exercising their discretion to award attorney’s fees to discourage any potential judicial oppression.”

In *Bustos v. Gilroy*, 106 N.M. 808, 751 P.2d 188 (Ct. App. 1988), even with no disparity of income, “success on the merits is a factor which the trial court may properly consider in awarding attorney fees.”

Respondent was denied the ability to efficiently prepare for and argue her case regarding attorney’s fees and costs. Controversy remains (and discovery continues) at the District Court level regarding the alleged September 9, 2003 filing of Respondent’s Attorney Affidavit Regarding Attorney Fees and Costs. However, it is clear that the affidavit was provided to opposing counsel (Motion to Strike Attorney Affidavit Regarding Attorney Fees and Costs, 9/16/03) and to the Court [10/3/03 tape 1, 493]. After acknowledging the parties’ right to an evidentiary hearing regarding this issue [8/25/03 tape, 214], the judge at the October 3, 2003 hearing, hastily moved up in time from October 10, 2003 without proper notice, refused to hear argument on this issue and summarily ruled that each party should pay his/her own attorney fees. No opportunity was given to provide evidence and argument regarding NMRA 1-127.

Respondent’s *Pro Se* Appearance (9/26/03) and argument by Motion for postponement (10/2/03) of the October 3, 2003 hearing, informing the Court that her attorney, L. Bernice Galloway, refused to file any motions or responses to motions or to provide any advice in

preparation for the hearing were ignored by the Court. The Court refused to let Respondent speak. [10/3/03 tape 1, 562] *Burnside v. Burnside*, 85 N.M. 517, 514 P.2d 36 (1973) remanded the issue of attorney's fees because the Plaintiff was "precluded at the outset of the final hearing, and at every point thereafter, from citing any law or giving any testimony on the question of attorney fees. . . she was entitled to present her evidence on these questions."

The Court did not address the considerable costs other than for the GAL fees and 11-706 fees as provided in Respondent's Attorney Affidavit of Fees and Costs [10/3/03 tape 1, 493] to which Respondent is entitled based on NMRA 1-054(D)(1) awarding costs to the prevailing party. Petitioner filed no affidavit of fees and costs. Although the judge stated that she considered the factors by statute, local rule, and case law regarding attorney's fees [10/3/03 tape 1, 493] she did not provide the reasons for her decisions regarding fees and costs. The judge abused her discretion by not properly considering the factors established by law along with the facts of the case when making her ruling regarding attorneys fees and costs, and by refusing Respondent the opportunity of an evidentiary hearing regarding the matter.

WHETHER THE COURT ERRED IN IMPUTING SALARY TO RESPONDENT IN CALCULATING CHILD SUPPORT AND DISTRIBUTION OF FEES

This issue was preserved in Respondent's argument during the July 23, 2002 hearing, Respondent's Motion to Redistribute Shared Costs (8/19/03), Respondent's testimony at trial (8/21/03), and Respondent's Closing Argument (10/3/03).

In the court's Modified Order for Custody, Timeshare, and Child Support and accompanying worksheet (10/9/03) the judge made a decision to impute higher income to Respondent. Testimony at trial and argument in motions showed that Respondent is not underemployed. Respondent splits her full-time workweek between a part-time job with a large company, Sandia

National Laboratories, and a high-tech startup company in which she is the principle officer and shareholder. The record proper shows repeated statements by Respondent, during testimony at the July 23, 2002 hearing [7/23/02 tape, 195] and during the trial [8/21/03 tape 4, 126-172] that she works more than 40 hours per week, and that she is founder and President of SilverWeb Production Technologies, Inc., a high-technology software company developing a product to sell. She testified that she works 20 to 25 hours per week at SilverWeb, that she works very hard, that SilverWeb employees are developing a product to sell, that such companies typically take two to three years to generate income, and that no revenues had been produced in 2002 or 2003. She testified that she has employees and that it would be impossible to maintain the company if she was employed full time [elsewhere]; the company would have to shut down. The judge stated on July 23, 2002 that “if you have a business, it shouldn’t affect child support” [7/23/02 tape, 265], and on August 25, 2003 at the close of the trial [8/25/03 tape, 140], “I used the figure of your full time income at Sandia National Laboratories. It’s fine with me if you develop your own company, but you can’t do it at the child’s expense.”

NMSA 40-4-11.1(C)(2)(b) defines income from self-employment as gross receipts minus ordinary and necessary expenses required to produce such income. Respondent argued at the July 23, 2002 hearing [7/23/02 tape, 350] that since the expected higher income from her business will be considered in the child support calculation in the future, the current financial risks being taken to get to that point should also be taken into account. Argument propounded in Respondent’s Motion to Redistribute Shared Costs (8/19/03) and in Respondent’s Closing Argument for the case (10/3/03) provided ample information regarding the viability of Respondent’s company, stating that it is a viable high-technology New Mexico C-corporation in the startup phase with employees and offices, and that the corporation submits monthly tax

returns to the state. Respondent's Closing Argument states that Respondent is developing her company in good faith, that she has maintained her employment with Sandia National Laboratories in order to supplement her income until her company begins to generate revenue, and requests that future child support and past "cost distributions" be recalculated using her actual gross income. NMSA 40-4-11(A) states:

"[The court] shall make a specific determination and finding of the amount of support to be paid by a parent to provide properly for the care, maintenance and education of the minor children, considering the financial resources of the parent;"

The financial resources of the parent were not properly considered in the judge's decision. To set child support such that Respondent is forced to shut down a company at a critical time with legal obligations to its stockholders would result in a high risk of lawsuits from stockholders causing harm to Respondent's financial condition and reducing or completely eliminating the resources available for care of the minor child, *even if employed full-time again at Sandia Labs*, while also eliminating the expected financial payoff of the investment Respondent and her family have made over the last several years.

NMSA 40-4-11.1(C)(1) states:

"'income' means actual gross income of a parent if employed to full capacity or potential income if unemployed or underemployed."

Development of a high-technology software company is not equivalent to underemployment. Investors provide large sums of capital to such ventures every day in this country for the high payoffs provided by such firms, even though they typically take several years to generate initial revenue. Respondent testified that it is typical for such a company to take two to three years to generate revenues, and Petitioner did not argue this point. Petitioner did not testify at all in rebuttal to Respondent's position regarding the viability of her company, nor did he provide any

facts or expert testimony to counter her position. Petitioner never argued or provided testimony that Respondent's efforts to develop her business were not in good faith.

Evidence at trial included Respondent's 2001 income tax return (Petitioner's trial exhibit 20) showing Respondent's business, a sole proprietorship, operating at a loss on Schedule C for that particular tax year, as is typical for high-tech startup companies. Respondent testified that the income tax return was not yet completed [for the 2002/2003 business cycle]. [8/21/03 tape 4, 106] Respondent's closing argument (10/3/03) stated that she maintained part-time employment at Sandia Labs in order to provide for her children during the startup phase of her company. She should not be penalized for doing so by having full-time employment at Sandia Labs imputed to her, forcing her to shut down her company at a critical stage and after much investment.

The rebuttable presumption principle regarding the child support guidelines of NMSA 40-4-11.1(A), the written support for deviations required by NMSA 40-4-11.2, and the requirements propounded in *Tedford vs. Gregory*, 1998-NMCA-067, 125 N.M. 206, 959P.2d 540 (Ct. App.), N.M. 958 P.2d 105 (1998) dictate that, at the very least, the Court should have provided better justification for her decision to impute income. There is no reason to question whether Respondent's self-employment was not challenged, nor were her efforts or the circumstances of her corporation's progress. The New Mexico statutes are clear regarding self employment. The October 9, 2003 order does not make any mention of imputed income or of Respondent's self employment although imputed income is incorporated into the attached worksheet.

Respondent contended in her October 3, 2003 Closing Argument that, consistent with *Boutz vs. Donaldson*, 128 N.M. 232; 1999 NMCA 131; 991 P.2d 517, the Court should decline from imputing income against Respondent because she has made and continues to make a good faith effort to succeed at developing her software company. Future salary distributions, expected to be

high, will certainly be taken into account in child support calculations. *Bouz vs. Donaldson* held that the mother was acting in good faith in her employment endeavors and that she had taken reasonable steps to provide support for her children in attempting (unsuccessfully) to maintain a viable bookstore business (*Id.*). *Major v. Major*, 1998 NMCA 1, P9, 124 N.M. 436, 952 P.2d 37 contends that a self-employed parent's 'actual cash flow' for child support purposes is the money 'reasonably available to apply toward the support of his [or her] children'. *Leeder vs. Leeder*, 118 N.M. 603, 607, 884 P.2d 494, 497 (Ct. App. 1994), contends that technical definitions that run contrary to this central purpose are disfavored.

Imputation of income is properly applied in cases such as *Styka vs Styka*, 126 N.M. 515; 1999 NMCA 2; 972 P.2d 16 (Ct. App 1998), in which a parent is capable of working full time but chooses not to do so. Unlike that case, Respondent *does* work full time, in fact she testified that she works slightly more than full time to make the required effort to help her software company succeed while also providing for her children by maintaining some level of employment and benefits at Sandia Labs. Respondent is in transition from full-time salaried employment at Sandia to full-time employment at her software firm, but is allowing the time required for her high-technology company to move out of the startup phase and generate income.

Respondent maintains earnings of over \$50,000 per year (Petitioner's trial exhibit 21) and full benefits for the minor child and works in her area of expertise while developing her high-technology software company. The Court held in *Quintana vs Eddins*, 131 N.M. 435; 2002 NMCA 8; 38 P.3d 203 (Ct. App. 2001) that "as long as a parent is working full time in his area of expertise, earning an amount of money within the range presented by the evidence, and in a location reasonably accessible to his child, the trial court may not find that he is underemployed without making a specific finding of bad faith." This case shifts the burden of proof such that

evidence must be provided that Respondent was acting in bad faith in starting her software company for the court to reasonably impute income. No such evidence, argument, or testimony was provided by Petitioner in this case and no such statement was made by the Court. *Quintana vs Eddins, Id.*, also remands to the lower court the issue of attorneys fees based on the disparity of resources considering Father's actual income as opposed to imputed income.

WHETHER THE COURT ERRED IN ORDERING PETITIONER TO PAY RESPONDENT'S GUARDIAN AD LITEM FEES BY DEDUCTING FROM CHILD SUPPORT PAYMENTS

This issue was preserved in the numerous objections to the GAL's representation provided in Respondent's First and Second Motions to Remove the GAL (2/11/03 and 8/19/03, respectively), and in Respondent's trial evidence P, Q, and R.

The Modified Order of Custody, Timeshare, and Child Support (10/9/03) states that the Petitioner shall pay Respondent's share of any outstanding Guardian ad Litem fees owed. It further states that Petitioner shall be allowed to deduct up to \$300 per month from the monthly child support obligation to offset the Guardian ad Litem payments made on behalf of Leslie Cumiford. This order is a tax on child support payments that is not provided for in NMSA 40-4-11.1, effectively reducing statute-mandated support for the minor child by 23% for several years. The record proper shows that the Guardian ad Litem's fees were high, resulting in an alleged \$9869.32 owed by Respondent for her 40% share (GAL's Brief and Affidavit, 8/25/03, para. 4). In addition, Respondent's [First] Emergency Motion to Release Guardian ad Litem (2/11/03), Respondent's Second Emergency Motion to Remove Guardian ad Litem(8/19/03), and evidence supporting the second motion provided at trial (Respondent's trial evidence P, Q, and R) show that much controversy existed regarding the GAL's actions, likely leading to a fee dispute.

Fee disputes belong in the jurisdiction of Civil Court, affording litigants the right to a jury trial, discovery, expert testimony regarding malpractice, and more extensive opportunity to

present the case than side mention in a Domestic Relations hearing. The payor has a right under the Civil Laws and Rules of New Mexico to dispute fees and withhold payment, and a judgment should not be rendered regarding fees without hearing evidence and applying the Civil code.

It is one thing for the Court to order the payment of an attorney, but it is entirely another matter in law for the Court to order payment for an attorney to be deducted from child support. The Court labels the \$300/month payment to the GAL as “child support”. In fact, this money is not used for child support, nor is it provided to the household where the child to be supported resides. When the Court orders a mandatory deduction from child support to pay an attorney, it deprives Respondent of the opportunity to withhold payment in a legitimate fee dispute and shifts the burden of proof regarding legitimacy from the GAL to Respondent. Damages recovery is complicated since a third party, Petitioner, is involved. NMSA 40-4-11.1 does not provide the Court with the discretion to tax child support by mandating attorney fee payments from it. This decision, if upheld, sets a dangerous precedent that puts the payment of attorneys first, before the support of children. As such, it defies the intent of the NMSA 40-4-11.1 standards for insuring adequate support for a child and invites attorneys to charge high fees with a guarantee they will receive them at the expense of the child. The Court’s failure to state the basis for her ruling does not meet the tests of NMSA 40-4-11.1(A) and NMSA 40-4-11.2 regarding deviations from the guidelines. An evidentiary basis for legitimacy of the fees is necessary prior to judgment.

WHETHER THE COURT IMPROPERLY ABATED PETITIONER’S SUMMER CHILD SUPPORT PAYMENTS ON AN ANNUAL BASIS

This issue was preserved in Respondent’s counsel’s objections to the decision at the time it was conveyed by the Court at the August 25, 2003 hearing. [10/3/03 tape 1, 475]

The October 9, 2003 Modified Order of Custody, Timeshare, and Child support explicitly states that child support payments for the months of June 2003 and July 2003 shall be abated by

one half. But in the attached worksheet, Petitioner's contribution to two months of support for the child is annually abated by one half. New Mexico statute allows the judge the discretion to abate support [NMSA 40-4-11.1(F)(1)]. However, no statement is made in the order regarding annual abatement of child support; only regarding the year 2003. Since such abatement modifies the amount of support established by law in NMSA 40-4-11.1 (F)(1) for Worksheet A which applies in this case, a statement regarding annual abatement should have been made in the October 9, 2003 Modified Order as per NMSA 40-4-11.1 (A). This matter should be remanded to the lower court for reconsideration and/or clarification.

WHETHER THE COURT IMPROPERLY SEALED THE HEARING ON THE MERITS

This issue was preserved by third party KRQE's Response to GAL's Motion for a Protective Order and to Seal the Court Record of Summary Judgment Proceedings (8/19/03) and by Respondent's counsel's argument at the August 20, 2003 hearing. [8/20/03 tape 1, 472]

The court adopted the recommendations in the Guardian ad Litem's Motion and Brief Requesting that the Court Seal the Hearing on the Merits for Purposes of Protecting the Emotional Health of the Minor Child, Alex (8/18/03), but denied his Motion and Brief to Exclude Televised Media from the Hearing on the Merits (8/15/03). Both motions were based on the same arguments and the same affidavit from the court's 11-706 expert (attached to 8/15/03 Motion). Non-party-KRQE argues in its Response (8/19/03) against the Guardian ad Litem's motion to seal the file, citing ample statutory and case law to prove his point.

The GAL cites NMSA 32A-4-20(B) from the Children's Code regarding abuse and neglect hearings and a child abuse and neglect case [8/20/03 tape 1, 087] in an attempt to apply the Children's Code and case law from Children's Court to a domestic affairs case. No claim of abuse or neglect of the child was made by Petitioner or Respondent in pleadings, and this is not a

Children's Court case. To uphold such a ruling has serious implications in reducing the openness of the courtroom intended by local, state, and federal law. Domestic affairs cases touch virtually every person, directly or indirectly, in New Mexico today, and it is important to the proper functioning of our system that such proceedings remain open and subject to public scrutiny.

KRQE eloquently argues in his Response (8/19/03) that the burden of proof is on the movant for closing proceedings, the standard is a high one, and that the GAL does not meet the burden of proof required for closing. The GAL cites *Thomas vs Thomas*, 1999-NMCA-135, 991 P.2d 7, a case in which the sealing of a trial was overturned by the higher court because the movant did not provide sufficient evidence to warrant sealing. The GAL claimed that the 11-706 expert's affidavit (attached to his 8/18/03 motion) is "strong evidence". Claims were made regarding the 11-706 expert's credibility in Respondent's Motion for Emergency Evidentiary Hearing to Remove Court Appointed Expert Witness (6/20/03). The 11-706 expert did not testify regarding his affidavit or provide his basis for determining potential harm to the minor child. He provided no facts and cited no research in his affidavit.

The GAL further cited NMRA LR2-111, claiming the case to be "extraordinary", making reference to the placing of information about the case on the internet. [8/20 tape 1, 51] The degree to which case information is made public is not a proper consideration for hiding it from public view. This criterion does not fit the requirements of law, namely: child abuse, child neglect, or "extraordinary". KRQE cites ample case law upholding the principle of openness of the courts in his Response (8/19/03). KRQE further argued that closing the hearing on the basis of the GAL's motion and the one-page affidavit "puts the judge in the position of prior restraint" and censorship which is improper under the United States and New Mexico constitutions [8/20 tape 1, 238]. The case is differentiated from typical custody cases only in the three back-to-back

custody evaluations and the degree of scrutiny regarding the activities of the GAL and the 11-706 during the case. KRQE counsel appropriately suggested [8/20/03 tape 1, 199] that the underlying reason for the GAL's desire to hide this hearing from the public's view may have a lot more to do with the GAL's self-preservation in light of allegations of bias than protection of the child.

CONCLUSION

WHEREFORE, Respondent Appellant respectfully requests that the Court:

1. Reverse the Court's decision regarding attorney fees and costs and award both to Respondent, or in the alternative remand the issue for an evidentiary hearing on the matter,
2. Reverse the Court's decision regarding the imputing of Respondent's salary, recalculating child support and associated costs for the child accordingly, or in the alternative remand to the lower court for an evidentiary hearing on Respondent's good faith efforts and viability of her corporation,
3. Reverse the Court's decision regarding the payment of GAL fees from child support and allow Respondent and GAL to litigate their dispute in civil court if necessary,
4. Remand the issue of abatement of child support for clarification,
5. Reverse the Court's decision regarding the sealing of the trial.

Respectfully submitted,

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