

2007

Lecia Swallow, f.k.a Lecia Kennard v. Randy Kennard : Reply Brief

Utah Court of Appeals

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Randy Kennard; Appellee/Respondent; Representing himself pro se.

Recommended Citation

Reply Brief, *Swallow v. Kennard*, No. 20070198 (Utah Court of Appeals, 2007).
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IN THE UTAH COURT OF APPEALS

LECIA SWALLOW, f.k.a.
LECIA KENNARD,

Appellant/Petitioner,

-vs-

RANDY KENNARD,

Appellee/Respondent,

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: Appellate Court Case No. 20070198

: Lower Court Case No. 044402268

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LECIA SWALLOW, f.k.a.	:	
LECIA KENNARD,	:	
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Appellant/Petitioner,	:	
	:	Appellate Court Case No. 20070198
-vs-	:	
	:	Lower Court Case No. 044402268
RANDY KENNARD,	:	
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Appellee/Respondent,	:	
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LECIA SWALLOW, f.k.a.
LECIA KENNARD,

Appellant/Petitioner,

-vs-

RANDY KENNARD,

Appellee/Respondent,

LECIA SWALLOW, f.k.a.
LECIA KENNARD,

Appellant/Petitioner,

-vs-

RANDY KENNARD,

Appellee/Respondent,

REPLY BRIEF OF APPELLANT

28-1162
3-8243



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FILED
UTAH APPELLATE COURTS
OCT 10 2007

LECIA SWALLOW, f.k.a.
LECIA KENNARD,

Appellant/Petitioner,

-vs-

RANDY KENNARD,

Appellee/Respondent,

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LECIA SWALLOW, f.k.a.
LECIA KENNARD,

-VS-

Appellee/Respondent

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Aside, many of the “facts” were authored by him when he submitted them to the court as findings of fact and conclusions of law. They appear nowhere else in the record.

In Classic Cabinets, Inc. v. All American Life Insurance Company, 978 P.2d 465 (Utah App. 1999), this court held that “mistake, inadvertence, surprise, or excusable neglect,” may be found where documents were not properly forwarded as had been anticipated, and a default judgment had been entered. Id. At 466. In the instant case, not only was there ample evidence before the trial court of problems with receipt of mail by Appellant’s counsel, but the record shows that the trial court clerk never mailed a copy of any order to Appellant’s counsel. This clearly creates “mistake, inadvertence, surprise, or excusable neglect” as outlined in U.R.C.P. Rule 60(b) where a mailed notice of court action was never sent.

There is no “apparent carelessness or neglect to the proceedings” as claimed in Appellee’s Brief (page 18). The court docket clearly shows that Appellee filed responsive pleadings to Appellee’s initial Petition to Modify. Wife filed an answer and counter petition to Appellee’s initial Petition. She responded to his requests for admissions and interrogatories in a timely matter. She responded despite the absence of an attorney planning order, as required by Rule 26 of the Utah Rules of Civil Procedure.

URCP Rule 26f specifically states:

“The parties *shall*, as soon as practicable after the commencement of the action, meet in person or by telephone to discuss the claim... and to develop a stipulated discovery plan.”

Rule 26 also mandates that this plan *shall* include the subject of discovery including dates when discovery should be completed. Such a plan was never filed, as verified by the lower court docket. Appellee indicates that he mailed a copy of the scheduling order to the Appellant. However, sending a proposed plan via mail is inconsistent with and violates the provisions of U.R.C.P. Rule 26f. Even in Appellee's response, he admits there was *no* stipulation as to time, form, and deadlines for discovery.

Appellee argues that he sent the proposed order via mail because he was having difficulty reaching Appellant's counsel. Even if this were the case, Rule 26 provides relief and instruction. U.R.C.P. Rule 26f(4) states that "if the parties are unable to agree to the terms of a discovery plan or any part thereof, the plaintiff *shall*... move the court for entry of a discovery order." In the instant case, no discovery order was ever entered to which the parties stipulated. The Appellee never moved the court for entry of a discovery order as required by Rule 26. Therefore, Appellee could not propound discovery nor compel Appellant to provide answers to discovery. Thus, an order compelling discovery and a default judgment based upon Appellant's alleged non-compliance could not be entered.

Further, when there is sufficient confusion as to the procedural state of the case, "default judgments should be set aside to allow trial on the merits." Locke v. Peterson 285 P.2d 111 (Utah 1955). The state of the instant case was in substantial flux when the memorandum supporting Appellee's motion to compel and subsequent notice to submit

and motion for default judgment were filed with the trial court and default was entered. Appellee filed his Motion to Compel Petitioner's Answer to Remaining Requests for Interrogatories and Production of Documents before he was given leave to amend his pleadings and without any supporting memorandum or affidavit of Appellee. It was not until September 12, 2006 that the Appellee filed his supporting memorandum and affidavit on his motion to compel. Moreover, Appellee's motion to compel discovery occurred weeks before Appellant was even required to answer Appellee's amended petition.

Finally, "[w]here a default has been entered and there is any justifiable excuse, the court should be indulgent in setting aside the judgment to afford the defaulted party an opportunity for a trial on merits." Utah Sand & Gravel Prods. Corp. v. Tolbert, 16 Utah 2d 407 (Utah 1965). *See also* Rules 55©) and 60(b), U.R.C.P; Board of Educ. v. Cox, 14 Utah 2d 385, 384 P.2d 806 (1963); Mayhew v. Standard Gilsonite Co., 14 Utah 2d 52, 376 P.2d 951 (1962); Locke v. Peterson, 3 Utah 2d 415, 285 P.2d 1111 (1955). The facts of the instant case and the record of the proceedings below logically lead one to see there exists more than one justifiable mistake to support Appellant's Motion to Set Aside Default Judgment.

As argued in Appellant's opening brief, domestic cases may follow procedure outlined in Utah Code of Judicial Administration, Rule 6-401 which states that "all domestic relation matters filed in the district court in counties where court commissioners

are appointed and serving...shall be referred to the commissioner... unless ordered by the Presiding Judge of the District.” In the instant case, Appellee’s Petition to modify was filed in a district that has a Commissioner. Despite that fact, no motions nor hearings were ever referred to or heard by the Commissioner. Furthermore, there is no order in the record nor any indication from the Presiding Judge of the District that the matters were to by-pass the Commissioner.

In addition, Rule 6-401 Utah Code of Judicial Administration, Rule 6-401, mandates mediation for resolution of all domestic cases. Thus, it logically would fall within the meaning of inadvertence, mistake or excusable neglect, for the Appellant or her counsel, to believe the trial court would not sign a final judgment and order against her without the parties first submitting to mediation.

The procedural record alone supplies multiple justifiable reasons for setting aside the default judgment. No “apparent carelessness or neglect to the proceedings” can be construed from failure to respond to a motion to compel that was not supported by affidavit or memorandum. The procedural flux and confusion in the case at the time of Appellant’s motion also support a finding of excusable neglect and inadvertence on the part of Appellee’s counsel. Said events and the reactions (or inaction) by Wife’s trial counsel fall squarely within the parameters set forth in Rule 60 (b) of the Utah Rules of Civil Procedure. Thus, the trial court abused its discretion when it did not grant Wife’s motion to set aside the default judgment.

II. THIS COURT HAS THE AUTHORITY TO MAKE ITS DECISION ON ALTERNATE GROUNDS.

This Court may overturn the trial court's decision and remand for further proceedings on alternative grounds. It is well established that "[a] party to an appeal does not have a constitutional right to have a cause of action decided on a particular ground." Debry v. Noble, 889 P.2d 428, 444 (Utah 1995). This is true even where such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court. State v. Rynhart, 2005 UT 84 (Utah 2005). *See also*, Bailey v. Bayles, 2002 UT 58 (Utah 2002); Dipoma v. McPhie, 2001 UT 61, P 18, 29 P.3d 1225 (quoting Limb v. Federated Milk Producers Ass'n, 23 Utah 2d 222, 225-26 n.2, 461 P.2d 290, 293 n.2 (1969)); Orton v. Carter, 970 P.2d 1254, 1260 (Utah 1998). Thus, it is proper for this court to review and examine the trial court's final judgment on the merits where the judgment effects the rights and interests of a child. Larsen v. Collina, 684 P.2d 52 (Utah 1984). This Court should include this consideration in deciding whether to set aside the default judgment. The wife has an excellent case on the merits, as pointed out in her opening brief.

In the instant case, the trial court entered a default order of modification substantially reducing sums the trial court in its own same default judgment now on appeal specifically found to be entirely in the nature of child support. This judgment affects not only the Appellant, but also the parties' six minor children. The judgment was made without hearing, or consideration of the best interest of the children via a Guardian

ad Litem. To support the trial court's denial of Appellant's motion to set aside is tantamount to subverting Utah statutes, case law and public policy that a child's best interests should be strongly considered when entering and enforcing child support orders.

The trial court abused its discretion when entering its denial of Appellant's motion to set aside and in affirming the default, specifically when the order had significant ramifications for the best interest of the children. Therefore, it is appropriate for this Court to reverse the trial court's denial of Appellant's motion to set aside, and to remand this case for further hearings. The refusal to set aside a default judgment in a case like this has much greater importance than failure to set aside a default pertaining to a mere money judgment.

REQUEST FOR ATTORNEY FEES

The actions of the Appellee in forcing the motion to compel despite his recently amended petition to modify and lack of a Rule 26 order, as well as his objection to setting aside the default and his position on appeal here are not well taken. Wife should therefore, be awarded her attorney's fees on appeal, in accordance with Rule 34 of the Utah Rules of Appellate Procedure.

CONCLUSION

The trial court abused its discretion in denying Appellant's Motion to Set Aside Default Judgement and improperly disregarded the best interest of the minor children as to child support, in considering the default judgment. Based upon the foregoing, the

Appellant, respectfully requests that Judge Howard's denial of Appellant's Motion to Set Aside Judgment be reversed and the case be remanded to set aside the judgment and consider the petition to modify case on its merits.

DATED THIS _____ day of _____, 2007.

CORPORON & WILLIAMS, P.C.

Mary C. Corporon
Allison R. Librett
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of _____, 2007, I caused a true and correct copy of the foregoing to be [] mailed, postage prepaid, [] hand-delivered, [] transmitted via facsimile, to:

RANDY KENNARD
Appellee/Respondent
478 South 1220 West
Provo, Utah 84601

Attorney