1996

# Wright v. Wright : Brief of Appellant

Utah Court of Appeals


Willard R. Bishop; Attorney for Defendant-Appellee.
Floyd W. Holm; Attorney for Plaintiff-Appellant.

IN THE UTAH COURT OF APPEALS

| | | |
|---|---|---|
| PAULA JEAN WRIGHT, and the State of Utah, by and through Utah State Department of Social Services,<br><br>Plaintiff-Appellant,<br><br>vs.<br><br>JOHNNY FRANK WRIGHT,<br><br>Defendant-Appellee. | ) | Case No. 960367-CA<br><br>Classification Priority 4 |

# BRIEF OF APPELLANT

Appeal from Orders entered April 23, 1996 and June 7, 1996, in the Fifth Judicial District Court, in and for Washington County, State of Utah, the Honorable James L. Shumate, presiding.

FLOYD W HOLM
Attorney for Plaintiff-Appellant
965 South Main, Suite 3
P.O. Box 765
Cedar City, Utah 84720
Telephone: (801) 586-6532

WILLARD R. BISHOP
WILLARD R. BISHOP, P.C.
Attorney for Defendant-Appellee
P.O. Box 279
Cedar City, Utah 84720

IN THE UTAH COURT OF APPEALS

| | | |
|---|---|---|
| PAULA JEAN WRIGHT, and the State of Utah, by and through Utah State Department of Social Services,<br><br>Plaintiff-Appellant,<br><br>vs.<br><br>JOHNNY FRANK WRIGHT,<br><br>Defendant-Appellee. | ) | Case No. 960367-CA<br><br>Classification Priority 4 |

BRIEF OF APPELLANT

Appeal from Orders entered April 23, 1996 and June 7, 1996, in the Fifth Judicial District Court, in and for Washington County, State of Utah, the Honorable James L. Shumate, presiding.

FLOYD W HOLM
Attorney for Plaintiff-Appellant
965 South Main, Suite 3
P.O. Box 765
Cedar City, Utah 84720
Telephone: (801) 586-6532

WILLARD R. BISHOP
WILLARD R. BISHOP, P.C.
Attorney for Defendant-Appellee
P.O. Box 279
Cedar City, Utah 84720

TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . iv

JURISDICTION OF THE COURT OF APPEALS . . . . . .1

ISSUES FOR REVIEW . . . . . 1

TEXT OF AUTHORITIES . . . . . 2

STATEMENT OF THE CASE

**A.** NATURE OF CASE . . . . . 2

**B.** COURSE OF THE PROCEEDINGS . . . . . 2

**C.** DISPOSITION AT TRIAL COURT . . . . . 3

**D.** STATEMENT OF FACTS . . . . . 3

SUMMARY OF ARGUMENT . . . . . 5

ARGUMENT

POINT I

THE TRIAL COURT'S ENTRY OF DEFAULT JUDGMENT AS A SANCTION FOR FAILURE TO PROVIDE DISCOVERY WAS AN ABUSE OF DISCRETION . . . . . 6

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO SET ASIDE THE DEFAULT JUDGMENT . . . . . 9

CONCLUSION . . . . . 13

ADDENDUM . . . . . 15

1. Utah R. Civ. P. 37
2. Utah R. Civ. P. 60(b)
3. Order Striking "Answer to Petition to Modify Decree of Divorce", and Striking "Counter-Petition", and Granting Judgment in Favor of Defendant
4. Order entered June 7, 1996
5. Affidavit of Paula J. Tisdale

TABLE OF AUTHORITIES

CASES

Ames v. Maas, 846 P.2d 468 (Utah Ct. App. 1993) . . . . . 1

Bollard v. Volkswagen of America, Inc., 56 F.R.D. 569 (W.D. Mo. 1971) . . . . . 7

Darrington v. Wade, 812 P.2d 452 (Utah Ct. App. 1991) .7, 8, 9, 10

Heathman v. Fabian and Clendenin, 14 Utah 2d 60, 377 P.2d 189 (1962) . . . . . 9

Interstate Excavating, Inc. v. Agla Development Corp., 611 P.2d 369 (Utah 1980) . . . . . 9, 10, 11, 12

Locke v. Peterson, 3 Utah 2d 415, 285 P.2d 1111 (1955) . . . . 9

Mayhew v. Standard Gilsonite Co., 14 Utah 2d 52, 376 P.2d 951 (1962) . . . . . 9

Vac-Air, Inc. v. John Mohr & Sons, Inc., 471 F.2d 231 (7th Cir. 1973) . . . . . 7

W.W. & W.B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734 (Utah 1977) . . . . . .6, 7, 8

RULES

Utah R. App. P. 29(b) . . . . . 12

Utah R. Civ. P. 37. . . . . 2, 6

Utah R. Civ. P. 60(b) . . . . . 2, 9

IN THE UTAH COURT OF APPEALS

| | | |
|---|---|---|
| PAULA JEAN WRIGHT, and the State of Utah, by and through Utah State Department of Social Services,<br><br>Plaintiff-Appellant,<br><br>vs.<br><br>JOHNNY FRANK WRIGHT,<br><br>Defendant-Appellee. | ) | Case No. 960367-CA |

## JURISDICTION OF THE COURT OF APPEALS

The above-entitled court has jurisdiction of this appeal because it is an appeal from the district court involving domestic relations, specifically child custody. Utah Code Ann., Section 78-2a-3(2)(h) (Supp. 1996).

## ISSUES FOR REVIEW

The issues for review herein are as follows:

1. Did the District Court abuse its discretion in imposing the sanction of striking Plaintiff Wright's (hereinafter "Plaintiff") pleadings and entering a Default Judgment against Plaintiff?

2. Did the District Court abuse its discretion by denying Plaintiff's Motion for Relief from Order and Judgment?

The standard for review for a discretionary decision by a trial court is that it should be reversed if the ruling is so unreasonable as to be arbitrary and capricious or a clear abuse of discretion. Ames v. Maas, 846 P.2d 468, 476 (Utah Ct. App. 1993).

Both issues herein were preserved by Plaintiff's Motion for Relief from Order and Judgment filed with the Court on or about May 2, 1996.

## TEXT OF AUTHORITIES

1. Utah R. Civ. P. 37 is set forth in full in the addendum.

2. Utah R. Civ. P. 60(b) is set forth in full in the addendum.

## STATEMENT OF THE CASE

### A. Nature of the Case.

The instant matter was brought before the lower court by a Petition to Modify Decree of Divorce filed by Defendant, which was responded to by Plaintiff. Plaintiff also filed a Counter-Petition to Modify Decree of Divorce. The Petition to Modify sought to change the custody of the parties' minor child from Plaintiff to Defendant. The Counter Petition sought to increase child support.

### B. Course of Proceedings.

Defendant filed and served the Petition to Modify Decree of Divorce in or about August 1995. Plaintiff, by and through her counsel of record, filed an answer to the Petition and Counter-Petition on or about September 15, 1995. On or about October 19, 1995, Defendant served Defendant's First Set of Discovery Requests to Plaintiff, which constituted various interrogatories and requests for production of documents. R. 181-85; 188-90; 197-98.

Before answering the requests for discovery, Plaintiff's counsel withdrew on or about January 24, 1996. On March 29, 1996, Defendant filed a Motion to Strike "Answer to Petition to Modify Decree of Divorce", "Counter-Petition", and for Judgment (hereinafter "Motion for Sanctions"). Plaintiff did not respond to the Motion and on April 23, 1996 the District Court entered an Order Striking "Answer to Petition to Modify Decree of Divorce", and Striking "Counter-Petition" and Granting Judgment in Favor of Defendant, which, inter alia, ordered a change of custody from *Plaintiff to Defendant and dismissed Plaintiff's claims* for increased child support. R. 200; 213-15; 232-35.

On or about May 2, 1996, after obtaining new counsel, Plaintiff filed a Motion for Relief from Order and Judgment and Motion for Stay and Request for Expedited Hearing and Decision. The parties presented oral argument in the matter on May 15, 1996. R. 270-71; 304.

D. Disposition of the Court.

The lower court denied the motion of Plaintiff and on June 7, 1996 entered an Order formally denying the Motion for Relief from Order and Judgment. R. 317-18. See Course of Proceedings, above.

D. Statement of Facts.

In or about August, 1995, Defendant filed and served a Petition to Modify Decree of Divorce requesting, inter alia, a change of custody from Plaintiff to Defendant. Plaintiff immediately obtained counsel, Michael W. Park, and filed an Answer

to the Petition and a Counter Petition to increase child support on or about September 15, 1995. R. 181-85; 188-90.

On or about October 19, 1995, Defendant mailed and served Defendant's First Set of Discovery Requests to Plaintiff, which Plaintiff's attorney immediately mailed to Plaintiff. Likewise, on or about October 31, 1995, Plaintiff's counsel served Plaintiff's First Set of Interrogatories and Production of Documents upon Defendant and a copy of those was mailed to Plaintiff as well. After receiving copies of both the Defendant's and Plaintiff's discovery requests, Plaintiff did not hear anything further from her attorney and, based upon information Plaintiff had obtained from others, that Defendant was having difficulty in his current marriage, believed that the matter had been dropped. Without hearing further from her counsel, in late January, 1996, Plaintiff received a Notice of Withdrawal of Counsel from Mr. Park and shortly thereafter received a Notice to Appoint Counsel or Represent Self from counsel for Defendant. Nothing further occurred until early April 1996 when Plaintiff received Defendant's Motion for Sanctions. R. 197-98; 199; 278-279.

Immediately upon receipt of the aforesaid Motion for Sanctions, Plaintiff contacted Mr. Park to determine whether he would agree to reenter an appearance in her behalf. When Plaintiff was finally able to speak with Mr. Park, he advised her that, in order for him to reenter the case, he would require a retainer, which Plaintiff was unable to pay. Mr. Park also suggested that Plaintiff contact Utah Legal Services, who had earlier represented

Plaintiff in her divorce. Plaintiff contacted Utah Legal Services in Salt Lake City where she then resided, but was later advised to contact the Cedar City office. Plaintiff was finally able to contact the Cedar City office of Utah Legal Services in mid-April. On or about April 24, 1996, Plaintiff received a letter dated April 18, 1996 from Utah Legal Services advising her that although she was financially eligible for its services, it would not be able to handle her case. Immediately thereafter, Plaintiff contacted her present counsel, Floyd W Holm, who agreed to handle the case. R. 279-80.

By the time Mr. Holm was able to receive Plaintiff's file and review the matter, the lower court had already granted the Motion for Sanctions and entered judgment against Plaintiff changing custody. Plaintiff did file a timely Motion for Relief from Judgment on the ground of excusable neglect, which was denied by the lower court. R. 270-71; 280; 317-18.

## SUMMARY OF ARGUMENT

POINT I:

Plaintiff's failure to respond to discovery, although technically improper, did not sufficiently frustrate the ends of justice to justify the lower court's striking her pleadings and entering default judgment against her. Such action by the lower court constituted a clear abuse of discretion by the lower court.

POINT II:

Based upon Plaintiff's belief that the case had been dropped, her difficulty in obtaining new counsel when the Motion of

Defendant was filed, and the lack of any affirmative or deliberate attempts at frustrating prosecution of the case, the lower court should have set aside the default judgment and allowed the matter to proceed on its merits. To not allow the action to proceed on its merits, which is favored in the law, constituted an abuse of discretion.

## ARGUMENT

### POINT I

### THE TRIAL COURT'S ENTRY OF DEFAULT JUDGMENT AS A SANCTION FOR FAILURE TO PROVIDE DISCOVERY WAS AN ABUSE OF DISCRETION

Rule 37(b) of the Utah Rules of Civil Procedure provides that if a party fails to timely respond to discovery requests such as those made by Defendant here, he can move the court for sanctions pursuant to Rule 37(b)(2), including the sanction of striking of pleadings and entering a default judgment against the disobedient party. Utah R. Civ. P. 37(b)(2)(C) & (d). Furthermore, it is not necessary that the aggrieved party first file a motion to compel discovery under Rule 37(a). W.W. & W.B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734, 737 (Utah 1977).

The Utah Supreme Court affirmed the ultimate sanction of default judgment under the circumstances of Gardner. Id. at 738. The court, however, stated as follows:

> The extreme sanction of default or dismissal must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited.... The sanction of default judgment is justified where there has been a frustration of the judicial process,

> viz., where the failure to respond to discovery impedes trial on the merits and makes it impossible to ascertain whether the allegations of the answer have any factual merit.

Id. (footnotes omitted)(citing Vac-Air, Inc. v. John Mohr & Sons, Inc., 471 F.2d 231, 234 (7th Cir. 1973); Bollard v. Volkswagen of America, Inc., 56 F.R.D. 569, 582-585 (W.D. Mo. 1971)).

In Gardner, defendant was served with interrogatories in October of 1975 and again in July and August of 1976. Not until having been served a Motion for Default Judgment did defendant respond to the request on September 15, 1976, some ten and one-half months after the first set of interrogatories was propounded. In addition, defendant had failed to answer requests for admissions or to even request that they be withdrawn after the time for answering them had passed. There is no evidence that the Defendant was not represented by competent counsel during all stages of the proceedings. Id. at 736.

In Darrington v. Wade, 812 P.2d 452, 456 (Utah Ct. App. 1991), this court agreed that default judgment as a sanction for discovery failures is a harsh remedy that "should be meted out with caution", and despite grievous acts of delay and avoidance, upheld the lower court's determination to set aside its earlier sanction of default judgment for failure to comply with discovery. In Darrington, despite repeated orders compelling discovery, an earlier default judgment which was set aside, failure to appear at scheduled depositions and other uncooperative acts by the defendants, this court held that the lower court's setting aside

the default for a second time was not an abuse of discretion. In regard to the tactics of the Defendant, this court stated as follows:

> It has now been almost eight years since Troy Darrington's injury first occurred in this fairly straightforward personal injury case. Despite the Plaintiff's dogged, albeit sometimes overzealous, pursuit of a judgment, Wades employed what appeared to be dilatory tactics at every turn. We find such litigation strategies most obnoxious.
>
> For all the defendants knew, the case may have been susceptible to a quick and easy resolution in their favor. Regardless of how the merits of the case may eventually be resolved, however, if the defendants had shouldered their obligation to face up to the claims against them, and resolve the issue as to their liability, the case could have been concluded much sooner, thereby avoiding a great deal of wasted time and expense. If litigants in every case acted as these have, the justice system would quickly come to a standstill.

Id. at 456 n. 2.

In the instant case, unlike Gardner, the Plaintiff was not represented by counsel at the time the Motion for Sanctions was made by Defendant. Further, unlike Gardner, only slightly over five months had passed since the request for discovery was first propounded on Plaintiff. In the meantime, at least to Plaintiff, there was no meaningful activity in the case. Indeed, Defendant had not responded to the discovery propounded upon him less than two weeks after the request for discovery from Plaintiff. In this case, their is not evidence of any dilatory tactics on the part of

Plaintiff to avoid answering discovery or delay the proceedings.[1] Furthermore, as more thoroughly discussed below, there is no evidence of any meaningful frustration of the judicial process by Plaintiff. It is thus a clear abuse of discretion for the lower court to impose the sanction of default judgment and dismissal of the counter petition when this court in Darrington held that the lower court did not abuse its discretion in setting aside such a sanction despite all of the allusive, uncooperative, dilatory and obstructive tactics of the defendants there.

## POINT II

### THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO SET ASIDE THE DEFAULT JUDGMENT

Rule 60(b) of the Utah Rules of Civil Procedure provides that a party is entitled to relief from a judgment or order of the court on the grounds of mistake or excusable neglect and it is "in the furtherance of justice." Utah R. Civ. P. 60(b). Generally, the appellate courts of this state have held that default judgments are disfavored and should be entered only rarely when circumstances permit so that, "in the furtherance of justice", cases can be heard on their merits. Interstate Excavating, Inc. v. Agla Development Corp, 611 P.2d 369, 371 (Utah 1980); Heathman v. Fabian and Clendenin, 14 Utah 2d 60, 377 P.2d 189, 190 (1962); Mayhew v. Standard Gilsonite Co., 14 Utah 2d 52, 376 P.2d 951 (1962); Locke

[1]As will be discussed below, Plaintiff did not believe the proceedings were being actively prosecuted until she received Defendant's Motion for Sanctions.

v. Peterson, 3 Utah 2d 415, 285 P.2d 1111 (1955); Darrington v. Wade, 812 P.2d 452, 456 (Utah Ct. App. 1991).

The facts of Interstate Excavating are similar to those at bar. There, the lower court entered a default judgment as a result of the defendant's failure to appear at trial. The defendant had originally been served with a summons and complaint and its counsel filed an answer in response thereto. At a pretrial conference, counsel for defendant was allowed to withdraw and counsel for plaintiff was instructed to advise defendant of the same so that it could obtain new counsel and appear at the trial scheduled some three weeks later. When defendant or its representative did not appear at the trial, the court entered a default judgment against it. Upon learning of the default judgment approximately one week later, defendant, through new counsel, immediately filed a motion to set aside the default judgment. Defendant claimed that he had never received notice of the trial, that some confusion may have been caused by the fact that its former counsel had withdrawn from several cases simultaneously, and the notice to appoint successor or appear in person and trial may have been misplaced with numerous other papers. Interstate Excavating, 611 P.2d at 370. Based upon the above-stated circumstances, the Utah Supreme Court held that it was an abuse of discretion for the lower court to deny the motion to set aside default judgment and stated as follows:

> It is not to be questioned that in appropriate circumstances default judgments are justified; and when they are, they are invulnerable to attack. However, they are not

> favored in the law, especially where a party has timely responded with challenging pleadings. When that has been done some caution should be observed to see that the party is not taken advantage of. Speaking generally about such problems, it is to be kept in mind that access to the court for the protection of rights in the settlement of disputes is one of the most important factors in the maintenance of a peaceable and well-ordered society. This of course must be done in obedience to the rules; and it is to be conceded that there is a possibility that the defendant was less than diligent in attending to its interest in this lawsuit. But no evidence was taken, nor did the court make any findings other than the order denying defendant's motion.
>
> ....
>
> The uniformly acknowledged policy of the law is to accord litigants the opportunity for a hearing on the merits, where that can be done without serious injustice to the other party. To that end the courts are generally indulgent toward the setting aside of default judgments where there is a reasonable justification or excuse for the defendant's failure to appear, and where timely application is made to set it aside.

Id. at 371 (footnotes omitted).

In the instant case, as in Interstate, Plaintiff's counsel had withdrawn at the time the Motion for Sanctions was filed. Plaintiff has given a reasonable and justifiable excuse as to why she neglected to answer the discovery: That she believed the case to have been dropped. Also, as in Interstate, through her counsel she had filed challenging pleadings. As in Interstate, it seems that Defendant was taking advantage of Plaintiff's lack of

counsel and thereby preventing Plaintiff from having a very important issue of child custody determined on its merits.[2]

As in Interstate, the court did not take any evidence nor did it make any findings other than to simply deny Plaintiff's motion.[3] Finally, as in Interstate, to set aside the default judgment would not have done any serious injustice to Defendant. Now that Plaintiff had new counsel, the judge could have ordered that she respond to the discovery within a time certain. Certainly ten days would have been acceptable. Then if Plaintiff failed to respond, default judgment may be more appropriate. No trial date had been set in the case. Indeed, Defendant had not even responded to Plaintiff's requests for discovery. It is difficult to see any injustice that could have resulted to Defendant to by setting aside the default, let alone serious injustice.[4]

---

[2]The priority classification of this case should be some indication of the importance of the issues involved. Utah R. App. P. 29(b).

[3]Defendant may argue that default judgment was appropriate because Plaintiff had wrongfully withheld visitation of the minor child from Defendant. However, the court had only the bald allegations of Defendant's affidavit to substantiate this fact, and Plaintiff was not allowed to present evidence to controvert the affidavit. Of course, the matter of withheld visitation was one of the key issues to be determined on the merits.

[4]Again, Defendant may argue that Defendant suffered serious injustice because he had been denied visitation of his child; however, Defendant was not without a remedy. He could have immediately filed order to show cause proceedings or a motion for temporary order regarding custody, and such matters could have been heard on the merits immediately. In fact, contemporaneous with his Motion for Sanctions, Defendant requested and received an Order to Show Cause on the issue of visitation. R. 221-27. Defendant could have served and prosecuted the Order to Show Cause at any time.

## CONCLUSION

Based upon the above discussion, this court should reverse the order of the lower court entering default judgment and dismissing the Counter Petition and/or the order denying the motion to set aside default judgment. The matter should then be remanded to the district court for disposition of the issues presented by the Petition to Modify and Counter Petition on their merits.

RESPECTFULLY SUBMITTED this 7th day of November, 1996.

FLOYD W HOLM
Attorney for Plaintiff-Appellant

MAILING CERTIFICATE

I hereby certify that I mailed a two (2) true and correct copies of the above and foregoing BRIEF OF APPELLANT to Willard R. Bishop, P.O. Box 279, 6330, Cedar City, UT 84720, this 7th day of November, 1996, first class postage fully prepaid.

FLOYD W HOLM

# A D D E N D U M

**Rule 37. Failure to make or cooperate in discovery; sanctions.**

(a) **Motion for order compelling discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) **Appropriate court.** An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) **Motion.** If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) **Evasive or incomplete answer.** For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) **Award of expenses of motion.** If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) **Failure to comply with order.**

(1) **Sanctions by court in district where deposition is taken.** If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) **Sanctions by court in which action is pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) **Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) **Failure to participate in the framing of a discovery plan.** If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

(Amended effective Jan. 1, 1987.)

**Rule 60. Relief from judgment or order.**

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void, (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application, or (7) any other reason justifying relief from the operation of the judgment The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action

**WILLARD R. BISHOP, P. C.**
Willard R. Bishop - #0344
Attorney for Defendant
P. O. Box 279
Cedar City, UT 84721-0279
Telephone: (801) 586-9483

**IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY**

**STATE OF UTAH**

| | |
|---|---|
| PAULA JEAN WRIGHT, and the STATE OF UTAH, by and through Utah State Department of Social Services,<br><br>Plaintiffs,<br><br>**vs.**<br><br>JOHNNY FRANK WRIGHT,<br><br>Defendant. | **ORDER STRIKING "ANSWER TO PETITION TO MODIFY DECREE OF DIVORCE", AND STRIKING "COUNTER-PETITION", AND GRANTING JUDGMENT IN FAVOR OF DEFENDANT**<br><br>Case No. 904500236DA<br>Honorable James L. Shumate |

This matter having been presented to the Court pursuant to Defendant's "Motion to Strike 'Answer to Petition to Modify Decree of Divorce', 'Counter-Petition', and for Judgment", supported by the "Affidavit of Johnny Frank Wright" and by Defendant's "Memorandum in Support of Motion to Strike 'Answer to Petition to Modify Decree of Divorce', 'Counter-Petition', and for Judgment", and the Court having reviewed the same, and having noted that no opposition to said motion was filed by Plaintiff Paula Jean Wright, and it clearly appearing from the Court's review of the files and records of this case that Plaintiff Paula Jean Wright has failed to respond to discovery propounded by

Defendant, and that such failure on the part of Plaintiff Paula Jean Wright has impeded and frustrated the judicial process, in that it has hindered trial of this matter upon its merits, and has made it impossible to determine the factual basis for any allegations made by Plaintiff in her "Answer to Petition to Modify Decree of Divorce" and in her "Counter-Petition", and good cause appearing,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. That Plaintiff's "Answer to Petition to Modify Decree of Divorce" in this matter should be and it hereby is, stricken from the files and records of this case.

2. That Plaintiff's "Counter-Petition" should be and it hereby is, stricken from the files and records of this case.

3. That the default of Plaintiff Paula Jean Wright, with respect to Defendant's "Petition to Modify Decree of Divorce" should be and it hereby is, entered.

4. That default judgment should be and it hereby is, entered in favor of Defendant Johnny Frank Wright and against Plaintiff Paula Jean Wright, with respect to Defendant's "Petition to Modify Decree of Divorce".

5. That Defendant Johnny Frank Wright should be and he hereby is, awarded the care, custody, and control of the parties' minor child, Brandi Jean Wright, born November 2, 1989, subject to visitation rights in Paula Jean Wright.

6. That the visitation rights of Plaintiff Paula Jean Wright should be and hereby are, decreed to include those set forth in the provisions of UCA 30-3-35 (1953, as amended), provided, however, that such rights of visitation should be and hereby are, made subject to the provision and requirement that Plaintiff Paula Jean Wright not remove Brandi Jean Wright from Iron County, Utah, without first obtaining written permission of Defendant Johnny Frank Wright, or without first obtaining written orders from this Court approving such removal for visitation.

7. That any obligation of Defendant Johnny Frank Wright to pay child support to Plaintiff Paula Jean Wright should be and it hereby is, terminated.

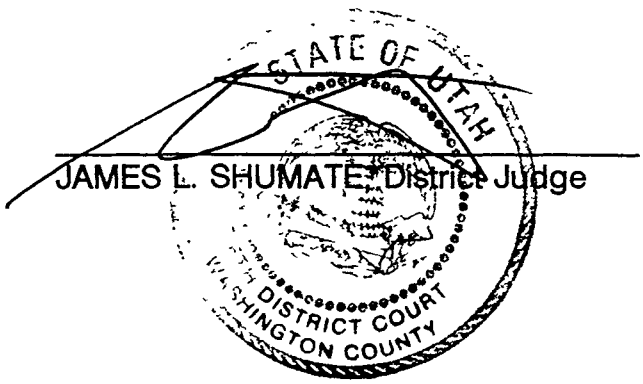
8. That Defendant Johnny Frank Wright should be and he hereby is, awarded child support, and that Plaintiff Paula Jean Wright should be and she hereby is, required to pay child support, in accordance with the applicable guidelines now in effect, said award of child support to be determined in accordance with applicable law, with the assistance of the State of Utah, Department of Social Service, Office of Recovery Services.

9. That Defendant Johnny Frank Wright should be and hereby is, awarded his costs of court and attorney fees incurred in connection with these proceedings, such award to be evidenced by a subsequent "Judgment for Attorney Fees" to be granted to

Johnny Frank Wright, upon Defendant Johnny Frank Wright furnishing an affidavit of his costs and attorney fees incurred in connection with these proceedings, to this Court.

DATED this 23 day of April, 1996.

BY THE COURT:




JAMES L. SHUMATE, District Judge

**WILLARD R. BISHOP, P. C.**
Willard R. Bishop - #0344
Attorney for Defendant
P. O. Box 279
Cedar City, UT 84721-0279
Telephone: (801) 586-9483

**IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY**

**STATE OF UTAH**

| | |
|---|---|
| PAULA JEAN WRIGHT, and the STATE OF UTAH, by and through Utah State Department of Social Services,<br><br>Plaintiffs,<br><br>vs.<br><br>JOHNNY FRANK WRIGHT,<br><br>Defendant. | **ORDER**<br><br>Case No. 904500236DA<br>Honorable James L. Shumate |

The above-entitled matter came on regularly before the Honorable James L. Shumate, District Judge, pursuant to the Court's "Order for Expedited Hearing", in connection with Plaintiff Paula Jean Wright's "Motion for Relief from Order and Judgment, Motion for Stay, and Request for Expedited Hearing and Decision". Plaintiff Paula Jean Wright, now "Tisdell", appeared personally and was represented by her attorney of record, Mr. Floyd W. Holm. Defendant State of Utah, by and through the Utah State Department of Social Services, appeared in the person of its attorney, Mr. Paul F. Graf, Esq., Assistant Attorney General Defendant Johnny Frank Wright appeared personally,

and was represented by his attorney of record, Mr. Willard R. Bishop. The Court reviewed the files and records of the case. Oral argument was had. the Court being fully advised in the premises, and good cause appearing,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff's "Motion for Relief from Order and Judgment", and Plaintiff's "Motion for Stay" should be and they hereby are, overruled and denied.

DATED this 5 day of ~~May~~ Jan, 1996.

BY THE COURT:

JAMES L. SHUMATE, District Judge

APPROVED AS TO FORM

FLOYD W. HOLM
Attorney for Plaintiff PAULA JEAN TISDELL
(formerly WRIGHT)

WILLARD R BISHOP
Attorney for Defendant JOHNNY FRANK WRIGHT

FLOYD W HOLM (1522)
965 South Main, Suite 3
P.O. Box 765
Cedar City, UT 84720
Telephone: (801) 586-6532

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY

STATE OF UTAH

| | |
|---|---|
| PAULA JEAN WRIGHT, and the STATE OF UTAH, by and through Utah State Department of Social Services,<br><br>Plaintiff,<br><br>vs.<br><br>JOHNNY FRANK WRIGHT,<br><br>Defendant. | **AFFIDAVIT OF PAULA J. TISDALE**<br><br>Civil No. 904500236<br>Judge James L. Shumate |

STATE OF UTAH )
ss.
COUNTY OF UTAH )

I, Paula J. Tisdale being first duly sworn upon oath, depose and say as follows:

1. I am the Plaintiff in the above-entitled action and have personal knowledge regarding the facts stated herein.

2. In or about August, 1995 I was served with the pending Petition to Modify Decree

of Divorce.

3. I immediately obtained counsel to represent me, Mr. Michael W. Park, and filed an Answer to the Petition and a Counter Petition on or about September 15, 1995.

4. Sometime after October 19, 1995, my counsel mailed to me, Defendant's First Set of Discovery Request to Plaintiff, Paula Jean Wright. Also, I received a copy of Plaintiff's First Set of Interrogatories and Request for Production of Documents that were served by counsel on Defendant on or about October 30, 1995. After receiving copies of those documents I did not hear anything further from my counsel and, based on information I obtained from others that Defendant was having difficulty in his current marriage, I believed that the matter had been dropped.

5. In late January, 1996, I received a Notice of Withdrawal of Counsel from Mr. Park and shortly thereafter received a Notice to Appoint Counsel or to Represent Self.

6. Again, nothing occurred in the case until early April, 1996 when I received Defendant's Motion to Strike "Answer to Petition to Modify Decree of Divorce", and for Judgment.

7. Immediately upon receipt of the aforesaid Motion, I again contacted Mr. Park to see if I could again obtain his assistance in the case. When I finally spoke to Mr. Park, he advised me that he would require a retainer that I was unable to pay in order to re-enter his appearance in the case and, suggested that I contact Utah Legal Services Corporation.

8. I contacted Legal Services Corporation in Salt Lake City and after contacting them was advised that since the case was pending in Washington County I should contact the Cedar City Office of Legal Services.

9. I finally contacted the Cedar City office of Legal Services in mid April and on or about April 24, 1996 received a letter, dated April 18, 1996 from Utah Legal Services, advising me that, although I was financially eligible for Legal Services, it could not handle my case. I then immediately contacted Mr. Floyd W Holm who has now agreed to represent me.

10. By the time Mr. Holm was able to review the case, this Court had already granted the aforesaid motion and entered Judgment against me.

11. The subject minor child is presently 6½ years of age and is enrolled in public school, Kindergarten. She last had visitation with her father approximately one (1) year ago. I believe it would be very traumatic if my daughter were removed from school and placed in the custody of Defendant while my Motion to for Relief from Order and Judgment is pending.

DATED this 2 day of May, 1996.

Paula J. Tisdell

PAULA J. ~~TISDALE~~ TISDELL

SUBSCRIBED and SWORN to before me this 2 day of May, 1996.

Christine L Salmon

NOTARY PUBLIC
Residing at: UTAH
My Commission Expires: Jan, 8, 2000

CHRISTINE L SALMON
Notary Public
State of Utah
My Comm. Expires Jan 8, 2000
[illegible] University Ave Provo UT 84601



280