

2007

# Linda Anderson fka Linda Thompson v. Glenn Hunter Thompson : Brief of Appellee

Utah Court of Appeals

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LINDA ANDERSON,  
(f.k.a. Linda Thompson)

**VS.**

Respondent/Appellant.

BRIEF OF APPELLEE

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IN THE UTAH COURT OF APPEALS

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LINDA ANDERSON,  
(f.k.a. Linda Thompson)  
  
Petitioner/Appellee,

**vs.**

GLENN HUNTER THOMPSON,  
  
Respondent/Appellant.

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Appellate Case No. 20070514

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**JURISDICTIONAL STATEMENT**

Jurisdiction is proper pursuant to Rule 3(a) of the Utah Rules of Appellate Procedure.

**STATEMENT OF ISSUES**

1. Respondent/Appellant did not properly marshal the evidence pursuant to Chen v. Stewart, 100 P.3d 1177(Utah 2004) and Utah Rules of Appellate Procedure, Rule 24(a)(9).8,9,10,11,12,13,14
2. The Court was justified in its several findings of contempt against the Respondent. . . . . . 14,15,16,17,18

3.	<u>The Trial Court did not err in awarding Petitioner/Appellee her attorney fees and in denying Respondent/Appellant his attorney fees.</u> . . . . .	18,19
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### **STANDARDS OF REVIEW**

The Utah Supreme Court has held that, “Trial Courts are given primary responsibility for making determinations **of fact**. Findings of fact are reviewed by an appellate court under the clearly erroneous standard. For a reviewing Court to find clear error, it must decide that the **factual findings** made by the trial court are not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court’s determination.” State of Utah v. Pena, 869 P.2d 932 (Utah 1994).

The appellate court’s standard of review with regard to issues of **law are**, “that all applications of law to findings of fact that produce conclusions of law are reviewed under a nondeferential standard, i.e., for correctness.” State v. Ramirez, 817 P.2d 774, 781-82 (Utah 1991).

In reviewing marshaled evidence, “the appellate court standard of review requires the appellate court to defer to the trial court’s judgment and not to disturb it so long as the Court finds that the trial court has exercised its discretion in

accordance with the standards set by this state's appellate courts." Rudman v. Rudman, 812 P.2d 73, 79, (Utah App. 1991).

If the appellate court does not have marshaled evidence, "there is no reason to disturb the trial court's findings." Ashton v. Ashton, 733 P.2d 147, 150 (Utah 1987). Most important for the purposes of this appeal, the Utah Supreme Court outlined in very detailed fashion in Chen v. Stewart 100 P.3d 1177 (Utah 2004), "In order to challenge a Court's factual findings, an appellant must first marshal all of the evidence in support of the findings and then demonstrate that the evidence is legally insufficient to support the findings even when viewed in the light most favorable to the Court below."

### **DETERMINATIVE RULES**

Utah Rules of Appellate Procedure, Rule 24(a)(9): . . . a party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

### **STATEMENT OF THE CASE**

The Court of Appeals should dismiss this appeal due to the Findings of Fact and Conclusions of Law and Order supporting the trial record of the several



contempts entered against the Respondent as well as the Courts' assessment of attorney fees.

Appellant's lack of marshaling the evidence warrant this matter's summary dismissal pursuant to well established caselaw.

### **STATEMENT OF FACTS/NATURE OF THE CASE**

The parties divorced in April, 1999 (Record @ 54). Petitioner filed a Petition to Modify in March, 2005 (Record @ 61). Petitioner filed an Order to Show Cause and a hearing was held on April 4, 2005 (Record @ 85). Petitioner filed a second Order to Show Cause in September, 2006 (Record @ 167).

At a hearing held October 16, 2006, a trial was scheduled by Judge Mark S. Kouris to handle the respective Petitions to Modify and the second Order to Show Cause (Record @ 169) and Respondent was ordered to produce tax records showing his gross receipts for the past several years.

After a half day trial held on October 26, 2006 the Court entered respective Findings of Fact and Conclusion of Law and an Order. Respondent appealed the Findings and Order entered by the Court, Case No. 20070176, and the Utah Court of Appeals upheld all of the Trial Court's findings with the exceptions that the Trial Court's award of attorney fees to the Petitioner was remanded back to the Trial Court

for additional findings. Further, the Court of Appeals found that the Trial Court exceeded its discretion by allowing a letter to be submitted into evidence that was part of settlement negotiations, but the Utah Court of Appeals also found that the error was harmless.

### **ARGUMENT: POINT ONE**

#### **WAS THE TRIAL COURT JUSTIFIED IN ITS FINDINGS AND ORDER OF SEVERAL CONTEMPTS AGAINST THE RESPONDENT?**

“The decision to hold a party in contempt of court rests within the sound discretion of the trial court and will not be disturbed on appeal unless the trial court’s action is so unreasonable as to be classified as capricious and arbitrary, or a clear abuse of discretion.” Marsh v. Marsh, 1999 UT App 14, 973 P.2d 988 (Utah App. 1999) (quoting Bartholomew v. Bartholomew, 548 P.2d 238, 240 (Utah 1976)).

“Under Utah law, in order to prove contempt for failure to comply with a ‘Court order it must be shown that the person cited for contempt knew what was required, had the ability to comply, and intentionally failed or refused to do so.’” Homeyer v. Stagg & Assocs., 2006 UT App 89, 132 P.3d 684 (quoting Von Hake v. Thomas, 759 P.2d 1162 (Utah 1988)).

The Trial Court found that there had been non-compliance by Respondent of a previous Court order (Record @ 395 and 396). Specifically, paragraph three of the Decree of Divorce states in part that,... “The parties shall work together to resolve issues involving the children...” (Record @ 53). The Trial Court specifically found that ... “Respondent was aware of the Decree and certainly had the capacity to follow the Decree” (Record @ 396). The Court further found that, “Respondent’s actions of calling a family meeting with the children was deplorable for involving the children of the parties” (Record @ 396).

Petitioner states that a Court order mandating that the parties work together regarding issues involving the children is the same as giving the parties instructions that they will not work against one another when dealing with children issues. This is not to go as far as to say that the parties must be in agreement with each other. The parties may have genuine disagreements, but the operative words that the parties “will work together to resolve issues involving the children” means that they will literally work together when dealing with parenting issues. Of course, the actions of the Respondent of calling a family meeting without Petitioner being involved and telling the children:

1. due to the actions (recent Court litigation) of your Mother the Court has said that I have not paid your Mother a lot of money;

2. they needed to forgive their mother for the actions she had taken against Respondent;

3. because of your Mom I can't buy you a big Christmas any more and I can't take you on vacations and trips any more (Record @ 396).

Respondent would have the Court believe that the Trial Court and Petitioner argue that there is something inherently wrong with holding a family meeting. Of course, that is not the case. Respondent is free to hold daily family meetings to discuss plans and activities of whatever nature Respondent so desires. However, Respondent is not free to hold family meetings with the children to explain Respondent's problems with Petitioner or to berate the children's mother and to try and inform the children that due to actions of the children's mother, the children will be directly impacted in a huge way.

In fact, Petitioner's testimony at the hearing was that the reaction of the children immediately after the family meeting, when returning to Petitioner, was that they were extremely upset and began taking their anger and frustration out on Petitioner. That is why the Trial Court made very specific findings of fact that

Respondent's actions "were deplorable" (Record at 396). Additionally, the Trial Court stated in its findings that the Court was "upset that the Respondent told the children to forgive their Mother" (Record @ 395).

Further, Respondent's appeal brief defends Respondent's action by stating that, "the Court does not necessarily police such actions" (Page 20, third full paragraph). Respondent also claims in the same paragraph that, "An act that may not be mannerly or inappropriate in a general social setting does not become contempt because a divorced party is involved" (Respondent's brief at page 20, paragraph 3).

The second separate contempt found by the Trial Court involved two separate child support checks from Respondent that had the letter "B" and "B!" handwritten in the lower left hand corner of each of the checks in the "Memo" or "For" section of the check. Petitioner submitted copies of the checks in her Affidavit in Support of Order to Show Cause (Record @ 236 and 237 and Appendix A). Respondent testified that he did not personally write either of these checks, but that his current wife wrote out both checks. However, Respondent did testify that he was aware of the checks and the second check he personally saw what was written on the check and that he

personally hand delivered the check to one of the minor children to have the child give the check to Petitioner.

Once again, Respondent tries to down-play and defend his actions claiming that, “consider the same checks being delivered to a landlord or a creditor. This action would not be illegal” (Brief at page 20). Not only is Respondent’s argument or justification wrong (individuals have been prosecuted to the full extent of the law for writing denigrating language on their checks in traffic citation cases and others) but in both situations of writing denigrating language on checks and in calling family meetings to discuss what the children’s mother has done, the Respondent is putting the minor children in the middle of the divorce and is telling the children what Respondent thinks of their Mother. This flies in the face of the Court order that the parents shall work together for the welfare of the children. This has a literal poisoning effect upon the children and even reaches issues of abuse and self worth problems for the children to grapple with.

Taken literally, Respondent would have this Court believe that the only way that Respondent could be found to be in contempt of Court for non-compliance is if the language in the Decree prohibited the writing of denigrating language on checks written by Respondent. Likewise, the argument on the other contempt finding would

be that the Court could only find contempt if the Court order prohibited any family meetings. Respondent has not understood Petitioner's position that family meetings are fine, just not family meetings that discuss what the mother of the children has done that is wrong and how the children are going to be impacted.

Finally, the Court must consider the cumulative effect that must have been the mindset of the Trial Court as the evidence unfolded. Less than six months earlier, October 26, 2006 the Court had held a trial between these exact same parties regarding different issues. The Court had entered findings (Record @ 210-213) for contempt against Respondent for:

1. failing to pay the proper amount of child support to Petitioner;
2. failing to pay the proper amount of alimony to Petitioner;
3. failing to produce his tax records; and,
4. failing to pay the necessary non-school extra curricular activities of the children.

Further, the Court had found that Respondent was not credible in his testimony and that Petitioner was credible in her trial testimony (Record @ 212).

The cumulative effect of Respondent not complying with numerous Court orders in the October 26, 2006 trial and then the Trial Court finding that Respondent

was engaging in additional actions that the Court found to be contemptible is best described by the Court itself at the close of trial on October 26, 2006 wherein Judge Kouris specifically told Respondent, "I'm ordering Mr. Thompson to understand that today in this courtroom you've been found in contempt of Court. There's a couple of things that judges can do when people are found in contempt, most notably, they can put them in jail for a month or they can fine them up to a thousand dollars....Based on the fact that you knew what all of these requirements are, I expect you to follow through with them now...the next time that you are found in contempt of my Court, I will consider seriously jail time (Record @ 352 Trial transcript, page 158). Finally, it is important to note that the findings of contempt by the Trial Court were recently upheld by the Utah Court of Appeals in Case No. 20070176CA in a decision recently rendered on January 4, 2008.

### **ARGUMENT: POINT TWO**

DID RESPONDENT PROPERLY MARSHAL ALL OF THE EVIDENCE AS IS MANDATED BY THE RULES AND THE COURT IN CHEN v. STEWART, 2004 UT 82, 100 P.3D 1177?

Petitioner has already listed under her Standards of Review section of this brief the problems that are evident due to Respondent's refusal to marshal the



evidence as is outlined in Chen. Further, Petitioner has set forth the determinative rule found in the Utah Rules of Appellate Procedure, Rule 24(a)(9).

The Utah Supreme Court in Chen not only found that Defendant's had failed to marshal evidence, the Court also handed down specific "requirements" that Respondent must meet. An in depth analysis of these requirements brings to light the serious deficiencies in Respondent's brief. As is stated in Chen, "In order to challenge a Court's factual findings an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to a Court below" (quoting Wilson Supply, Inc. v. Fraden Mfg. Corp., 2002 UT 94, 54 P.3d 1177). The Court admitted in Chen that the requirements to properly marshal were both rigorous and strict.

The first two issues identified by Respondent in his brief include whether the Trial Court committed reversible error in finding the Respondent in contempt of Court. At page ten of Respondent's brief he claims just after the Summary heading that, "The facts as marshaled to support the District Court's findings are stated below." Respondent then takes the next three pages of his brief to outline his marshaled facts. The first two pages of Respondent's attempt to marshal are totally

irrelevant to the very issues that Respondent raised in the appeal with the exception that he could argue that the attorney fee issue is impacted. Page twelve and thirteen under the headings of Family Meeting and Checks with “B!” are the only attempts that Respondent makes to marshal the facts.

There are precisely seventeen references to the record that Respondent identifies in his brief on the two issues regarding contempt. The Utah Supreme Court elaborated in Chen that more recently the Utah Court of Appeals explained that, “In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very finding that appellant resists” (quoting Neely v. Bennett, 2002 UT App 189, 51 P.3d 724).

The Court in Chen gave additional direction to appellants by stating, “This does not mean that the party may simply provide an exhaustive review of all evidence presented at trial. Rather, appellants must provide a precisely focused summary of all the evidence supporting the findings they challenge. This summary must correlate all particular items of evidence with the challenged findings and then convince us that the Trial Court erred in the assessment of that evidence to its findings” (quoting W. Valley City v. Majestic Inv., Co., 818 P.2d 1311, 1315 (Utah Ct.

App.1991)). “What appellants cannot do is re-argue the factual case they presented in the Trial Court” (quoting Ondera/SLIC v. Ondera Cold Storage & Warehouse Inc., 872 P.2d 1051, 1053 (Utah Ct App. 1994)).

In its findings the Trial Court outlined the facts that it relied on to enter the findings of contempt of Court against the Respondent. This included the following facts that were not addressed by the Respondent:

1. the Decree states that the parties shall work together to solve issues involving the children;
2. the children are not to be involved;
3. the Respondent had several options available to involve the children;
4. the Respondent was significantly behind in his child support;
5. Respondent told the children to forgive their mother; and,
6. the second check with denigrating language was personally handed by Respondent to the parties’ oldest child (who was 16 years old).

Additionally, the Court in Chen stated, “to properly marshal the evidence the challenging party must demonstrate how the Court found the facts from the evidence and then explain why those findings contradict the clear weight of evidence” (citing Ondera at 1054).

Here, the Trial Court's findings were clearly supported by the evidence. As in Chen, Respondent has merely ignored damaging findings and avoided confronting problematic facts.

Hence, with Respondent not properly marshaling the evidence, the facts as found by the Trial Court stand and the rulings of contempt are proper or as the Court stated in Chen, "if the marshaling requirement is not met, the Appellate Court has grounds to affirm the Court's findings on that basis alone" (quoting Wilson).

### **ARGUMENT: POINT THREE**

DID RESPONDENT CITE AND APPLY THE CORRECT AND PROPER STANDARDS OF REVIEW IN HIS BRIEF?

In the first two issues as set forth by Respondent in his "Statement of Issues" he claims that the Standard of Review for contempt cases is clear and convincing evidence. This claim actually pertains to the burden of proof and not the standard of review. The standard of review for a civil contempt finding that is being challenged is that of "clear abuse of discretion" or are the Trial Court's actions so unreasonable as to be classified as capricious and arbitrary. Marsh v. Marsh, 1999 UT App 14, 973 P.2d 988 (quoting Bartholomew v. Bartholomew, 548 P.2d 238, 240 (Utah 1976)).

The last two issues raised by Respondent in his appeal deal with attorney fees. Respondent claims that the standard of review for attorney fees in divorce cases involves the interpretation of a divorce decree as set forth in Hawkins v. Peart, 2000 Utah 94, 37 P.3d 1062 (Utah 2001). Hawkins is a personal injury contract indemnity case. The Court held in Hawkins that, “the Supreme Court reviews the lower Court’s contractual interpretation of a release form for correctness, affording the District Court no deference.”

Petitioner sets forth that the standard of review in relation to attorney fees has nothing to do with a contractual interpretation. If Respondent argues that a divorce decree is a contract, Petitioner counters that that is incorrect. A marriage may be an enforceable contract between two individuals but the resulting Decree of Divorce is not a contract, it is an order of the Court.

Since Respondent has not given the Court of Appeals adequate or correct standards of review, and since there has not been adequate marshaling of the facts, Respondent’s appeal must fail.

#### **ARGUMENT: POINT FOUR**

HAS RESPONDENT PROPERLY REQUESTED AFFIRMATIVE RELIEF IN THE ARGUMENT SECTION OF HIS APPEAL BRIEF, POINT SIX, WITHOUT RAISING OR IDENTIFYING THE REQUEST IN HIS STATEMENT OF ISSUES?

It is not until argument six of Respondent's brief that Respondent claims that the Court erred in not ordering a refund of the overpaid child support in the amount of \$455.08. Throughout the brief Respondent claims that he prevailed on the controlling issue of the Order to Show Cause hearing (page 27, second full paragraph). In fact, this was only one of several issues with a focus by Petitioner on the improper family meeting and denigrating checks that were being received by Petitioner from the Respondent.

Respondent should not be allowed to argue that he receive a refund since it was not properly reserved nor was it properly raised in the brief. The Trial Court was fully aware of this overpayment yet choose not to order Petitioner to refund it nor give Respondent credit probably due to the multitude of contempts found by the Court and the fact that Respondent still owed Petitioner over \$50,000.00 that had yet to be paid.

Petitioner requests that the Court deny this improper request.

### **ARGUMENT: POINT FIVE**

WAS IT PROPER FOR THE TRIAL COURT TO AWARD PETITIONER HER ATTORNEY FEES AND COSTS AND DENY RESPONDENT HIS ATTORNEY FEES?

The Trial Court found that Petitioner was ultimately victorious in her motion in terms of the contempt. Therefore, her attorney fees and costs were granted (R@ 395).

Respondent argues that no attorney fees should be allowed even though the Decree sets forth an award of fees against a party if they are found in contempt (Record @46). The Trial Court did not base the award of attorney fees on this provision in the Decree, but on the fact that Petitioner had prevailed and Respondent had yet again been found to have demonstrated contemptuous behavior regarding the orders of the Court.

Further, Respondent argues that he prevailed on the controlling issue of the hearing, this being whether child support should be raised. Even though the Court did not enter another contempt of Court against Respondent on this issue, the Court found that Respondent's actions were upsetting and Respondent's behavior was deplorable and therefore awarded Petitioner all of her attorney fees and costs.

## **ARGUMENT: POINT SIX**

### **PETITIONER SHOULD BE AWARDED HER ATTORNEY FEES**

#### **AND COURT COSTS ON APPEAL**

The Utah Court of Appeals noted in Wells v. Wells, 871 P.2d 1036, 1038 (Utah Ct. App. 1994) that, “An award of attorney fees in divorce actions rests within the sound discretion of the trial court, which we will not disturb absent an abuse of discretion.” Additionally, the court stated in Childs v. Childs, 967 P.2d 942, 947 (Utah Ct. App. 1998) that, “in divorce proceedings when a trial court has awarded attorney fees below to the party who then prevails on the main issues on appeal, we generally award fees on appeal.” Petitioner requests that her attorney fees and court costs be awarded for the necessity of responding to Respondent’s appeal and that a judgment enter against the Respondent.

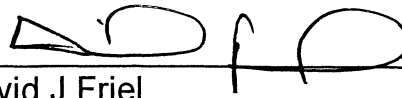
## **CONCLUSION**

Clearly the Trial Court had an abundant record to determine those issues outlined in Respondent’s brief and Petitioner’s response. The Trial Court carefully weighed the evidence with respect to each of the issues and considered the testimony of the witnesses at the hearing. Finally, because Respondent did not marshal the evidence and has not properly identified the Standards of Review,



Respondent's appeal should be denied and the Trial Court's ruling should be affirmed. Petitioner should be awarded attorney fees on appeal.

DATED THIS 22 day of January, 2008

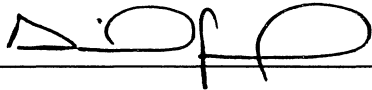
A handwritten signature in black ink, appearing to read 'D J Friel', is written over a horizontal line.

David J Friel  
Attorney for Appellee

## CERTIFICATE OF MAILING

I hereby certify that I caused to be sent by U.S. mail, first class, postage pre-paid, a true and correct copy of the foregoing document on this 22 day of January, 2008, to:

Bruce L. Richards, Esquire  
P.O. Box 25786  
Salt Lake City, UT 84125



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C AndersonL appbrief2

**ADDENDUM**  
**CONTENTS OF ADDENDUM**

Two child support checks from Respondent with denigrating language.

GLENN H. THOMPSON  
LISA K. THOMPSON  
4384 LODGE LN.  
ERDA, UT 84074-8501

01-04

1052

31-13-1240  
AT

Pay to the  
order of

*Linda Anderson*

*\$2516.08*

*Two thousand five hundred sixteen and 08/100*



RealBank National Association  
Toll-free 1-800-840-7777  
1-800-840-2700

Copy

*B1*

*Glenn Thompson*

⑆ 64000 737 ⑆

GLENN H. THOMAS JR. 01-04  
LISA K. THOMAS JR.  
4364 LODELL LN.  
ERDM, UT 84074-9501

1000  
10-20/1240  
25

Pay to the  
Order of

Linda Anderson \$200  
Lisa Anderson \$100



KeyBank National Association  
FDIC, Utah 84074  
1-800-KEY2YOU

For \$

⑆124000737⑆