

2007

# Linda Anderson fka Linda LaRee Thompson v. Glenn Hunter Thompson : Reply Brief

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David J. Friel; Attorney for Petitioner.

Bruce L. Richards; Dean A Stuart; Bruce L. Richards and Associates; Attorneys for Respondent.

---

## Recommended Citation

Reply Brief, *Anderson v. Thompson*, No. 20070514 (Utah Court of Appeals, 2007).

[https://digitalcommons.law.byu.edu/byu\\_ca3/333](https://digitalcommons.law.byu.edu/byu_ca3/333)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

[http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

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

Appellate Case No. 20070176

 $\gamma$ 

Respondent.

## REPLY BRIEF OF APPELLANT

Bruce L. Richards  
Dean A. Stuart  
Bruce L. Richards and Associates  
Attorneys for Respondent  
1805 South Redwood Road  
P.O. Box 25786  
Salt Lake City, UT 84125-0786  
Telephone (801) 972-0307

ORAL ARGUMENT IS REQUESTED

FILED  
UTAH APPELLATE COURTS

FEB 29 2008

---

IN THE UTAH COURT OF APPEALS

---

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

Petitioner,

v.

GLENN HUNTER THOMPSON,

Respondent.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)

Appellate Case No. 20070176

---

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
FOR TOOELE COUNTY, UTAH  
JUDGE MARK S. KOURIS

---

REPLY BRIEF OF APPELLANT

---

David J. Friel  
Attorney for Petitioner  
f.k.a. Linda LaRee Thompson  
2875 South Decker Lake Dr. #225  
Salt Lake City, UT 84119  
Telephone: (801) 975-8611

Bruce L. Richards  
Dean A. Stuart  
Bruce L. Richards and Associates  
Attorneys for Respondent  
1805 South Redwood Road  
P.O. Box 25786  
Salt Lake City, UT 84125-0786  
Telephone (801) 972-0307

---

ORAL ARGUMENT IS REQUESTED

---

## TABLE OF CONTENTS

	<u>Page</u>
Table of Contents .....	.2
Table of Authorities .....	.3
Argument, Point I .....	.4
Point II .....	.5
Point III .....	.6
Point IV .....	.7
Point V .....	.9
Point VI .....	.10
Conclusion .....	.11
Mailing Certificate .....	.12

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>Anderson v. Thompson</u> , 594 U. Adv. Rep. 3 (Utah Ct. App. 2008) . . . . .	6, 9
<u>Bettinger v. Bettinger</u> , 793 P.2d 389 (Utah Ct. App. 1990) . . . . .	8
<u>Ford v. Intermountain Farmers Ass.</u> , 907 P.2d 264 (Utah 1995) . . . . .	7
<u>Kelly v. Kelly</u> , 9 P.3d 171 (Utah App. 2000) . . . . .	5
<u>Marsh v. Marsh</u> , 973 P.2d 988 (Utah Ct. App. 1999) . . . . .	4, 5
<u>Moon v. Moon</u> , 973 P.2d 431 (Ut. App. Ct. 1999) . . . . .	7
<u>Taylor v. Hansen</u> , 958 P.2d 923 (Utah Ct. App. 1998) . . . . .	7
<u>Web Bank v. American General Annuity Service Corp.</u> 54 P.3d 1139 (Utah 2002) . . . . .	7, 8
<u>Utah Code Ann.</u> §30-3-3 . . . . .	10, 11
Rule 24(a)(9) <u>Utah Rules of Appellate Procedure</u> . . . . .	10

## ARGUMENT

### POINT I

THE DISTRICT COURT'S FINDING OF  
CONTEMPT IS CONTRARY TO LAW. THE  
DISTRICT COURT DID NOT HAVE  
DISCRETION TO FIND APPELLANT IN  
CONTEMPT.

Appellee argues that a decision to hold a party in contempt is discretionary with the trial court. (Brief of Appellee Pg. 8). Marsh v. Marsh, 973 P.2d 988 (Utah Ct. App. 1999) is cited by Appellee regarding the discretionary nature of holding a party in contempt. Marsh involved a trial court's refusal to find the wife in a divorce related proceeding in contempt. The wife violated a divorce decree by not making mortgage payments resulting in the property being lost to foreclosure.

The husband argued wife should be held in contempt because wife failed to hold husband harmless on the mortgage. The divorce decree specifically required wife to hold husband harmless on the mortgage. The wife argued she was not able to make the payments because the husband failed to pay child support. The District Court refused to hold the wife in contempt.

The Brief of Appellant specifies the requirements for contempt. These requirements are not limited to discretion of a trial court. (Brief of Appellant Arguments Point I, through V, Pgs. 15-25). Marsh supports Appellant's position stating:

... To find contempt, the court must find from clear and convincing proof that the contemnor knew what was required, had the ability to comply, and willfully and knowingly failed and refused to do so. (Citation omitted.)

973 P.2d 988 @ 990.

The legal standard established by the cases cited by Appellee support Appellant's position. The District Court did not have discretion to find Appellant in contempt. The District Court was required to find by clear and convincing evidence that an Order of Court was violated. The specific knowledge, ability to comply and willful and knowing requirements must be met. If discretion is to be exercised it is after the legal requirements have been met.

## POINT II

### THE DISTRICT COURT FAILED TO MAKE FINDINGS ON THE THREE ELEMENTS REQUIRED FOR A FINDING OF CONTEMPT.

Appellee argues that the Court finding that Respondent was aware of the Decree and had the capacity to follow the Decree is sufficient. (Brief of Appellee Pgs. 9-14.) However, Kelly v. Kelly, 9 P.3d 171, (Utah App. 2000), requires clear and convincing proof of all three elements of contempt. Marsh v. Marsh, *infra* as cited in Point I establishes the same requirement. The District Court's findings do not include these three elements.

Being aware that there was a Decree of Divorce does not meet the requirement that the Appellant knew what was required. While the Appellee argues that the District Court found that the Respondent had the ability to comply with the Decree, there is no finding as to what was required by the Decree itself. The ability to comply requirement isn't met unless what is required is established and the ability to comply is then determined. Finally, there is no finding that the Appellant acted willfully. Consequently, the Appellee's position that the trial court made the proper findings and properly applied the law is wrong. The Appellee does not address the error with the Court's findings being found by clear and convincing evidence.

Appellant points out the errors by the District Court without Appellee addressing the errors. For example, Finding of Fact 3 by the Court is not responded to by Appellee. This

Finding suggests Appellant should have lied to his children. This is not a basis for finding the Appellant had the ability to comply with the Decree.

### POINT III

#### APPELLEE IMPROPERLY ATTEMPTS TO UTILIZE FINDINGS RESPECTING PRIOR EVENTS AS THE BASIS FOR FINDING A SUBSEQUENT EVENT TO CONSTITUTE CONTEMPT.

Appellee argues that the District Court's finding of contempt is justified by non-compliance by Appellant of a previous Court Order. (Brief of Appellee Pgs. 13-14.) The previous proceedings involved unrelated issues. The previous issues related to additional child support based on business gross receipts and similar matters. The District Court's ruling involving these prior issues does not replace legal requirements for finding contempt. The statutory, constitutional and judicial requirements that Appellant knew what was required, had the ability to comply and intentionally failed or refused to do so are not based on prior proceedings.

Appellee also argues that a judgment remained unpaid. Not only does the judgment from the prior proceedings not relate to the current issues, the judgment is not subject to payment. The Appellant posted a supersedeas bond upon the filing of the appeal. A party cannot be held in contempt while exercising the party's right to appeal.

As Appellee noted, this Court issued an opinion in the appeal of the earlier proceedings on January 3, 2008. This decision, *Anderson v. Thompson*, 594 Ut. Adv. Rep 3 (Ut. Ct. App. 2008), reversed the District Court regarding evidence wrongly admitted from settlement documents, affirmed the District Court regarding the amounts owed by Appellant and reversed and remanded the case regarding attorney's fees. The remand is still before the District Court.



This prior appeal is not a basis for the District Court's finding of contempt in the second proceeding. There is no finding by the District Court that these factors, the unpaid but bonded for judgment or additional child support had not been paid formed the basis for the District Court's finding of contempt in the second proceeding. If this were the case, such a position would be an abuse of discretion by the Court. The basis for the action was a family meeting and two checks. Prior findings of contempt on unrelated issues are not at issue in this case. If they were identified, they are not allowable bases for finding contempt.

#### POINT IV

#### A DIVORCE DECREE IS INTERPRETED USING CONTRACT INTERPRETATION RULES.

Appellee argues that the Decree of Divorce is to be interpreted as an Order of Court. (Brief of Appellee Pg. 19.) Without citing authority, Appellee states, "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." An Order of Court is interpreted using the same rules as interpretation of a contract. In Moon v. Moon, 973 P.2d 431 (Ut. App. 1999), the Court stated: "we interpret a divorce decree according to established rules of contract interpretation." See also, Taylor v. Hansen, 958 P.2d 923, 928 (Ut. App. 1998) and Ford v. Intermountain Farmers Association, 907 P.2d 264, 268 (Utah 1995).

In Web Bank v. American General Annuity Service Corp., 54 P.3d 1139 (Ut. 2002), the Utah Supreme court stated the fundamental rules of construction applicable to a contract. The Court stated:

In interpreting a contract, "we look to the writing itself to ascertain the parties' intentions, and we consider each contract provision... in relation to all of the others, with a view toward giving effect to all and ignoring none." (Citations omitted.)

The Appellee acknowledges that the Order of Court Appellee relies on is one phrase from one sentence in one paragraph related to joint custody. (Brief of Appellee Pg. 9.) The interpretation rules applicable to such a phrase as explained in the Brief of Appellant and as stated in Web Bank require giving all provisions of an Order effect. Appellee's interpretation is wrong. A phrase contained in a sentence contained in a paragraph related to joint custody cannot be singled out and given separate meaning apart from the rest of the paragraph.

In Bettinger v. Bettinger, 793 P.2d 389 (Utah App. 1990), the Court faced an issue of interpretation regarding a divorce decree. The Court stated:

A judgment must be enforced as written if the language is clear and unambiguous. However, ambiguous judgments are subject to the same rules of construction that apply to all written instruments and "the entire record may be resorted to for the purpose of construing the judgment". The determination of whether a contract is ambiguous is, at the outset, a question of law. "If a trial court finds the agreement unambiguous and interprets its meaning by examining only the words of the agreement, this interpretation also presents a question of law." Therefore, we are not required to give the trial court interpretation of an unambiguous judgment any particular weight, but review its interpretation under a correctness standard. However, if the trial court determines the language is ambiguous and finds facts based upon extrinsic evidence, appellate review of such findings is limited to determining whether they are based on substantial, competent, admissible evidence.

The language of Paragraph 3 of the Decree of Divorce is clear and unambiguous when the entire Paragraph is considered. This Paragraph establishes joint custody. To reach Appellee's interpretation as adopted by the District Court, one single phrase is given effect and the rest of the Paragraph is ignored. At best, the Appellee's argument suggests there is

ambiguity as to what Paragraph 3 means. The District Court, however, did not rule, as a matter of law, that Paragraph 3 was ambiguous.

#### POINT V

THIS COURT, IN THE FIRST APPEAL OF THIS MATTER, ESTABLISHED THE BASIS FOR AWARDING ATTORNEY'S FEES. FEES MUST MEET THE REQUIREMENTS OF UTAH CODE ANN. §30-3-3. FINDINGS MEETING THE REQUIREMENTS OF THE STATUTE MUST BE MADE.

In Anderson v. Thompson, 594 U. Adv. Rep. 3, the Court addressed attorney's fees in circumstances where the Court found Appellant owed additional child support and other amounts and was in contempt of court. This Court ruled that the requirements of Utah Code Ann. §30-3-3 must be met in order for attorney's fees to be awarded and that the District Court had not made the necessary findings. This Court stated:

Under Utah Code section 30-3-3, a trial court "may order a party to pay the costs, attorney's fees, and witness fees... of the other party to enable the other party to prosecute or defend the action." "In doing so, however, the trial court must base its award of attorney's fees "on evidence of the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees" further, "the decision to award attorney's fees" must be based on sufficient findings regarding these factors." (Citations omitted.)

Anderson v. Thompson, 594 U. Adv. Rep. 3, @ par. 40 (Ut Ct. App 2008).

The District Court in this proceeding did not apply Utah Code Ann. §30-3-3. The District Court did not make the findings required by Anderson v. Thompson. The District court further refused to award fees to Appellant or reduce Appellee's fees based on the Appellant

prevailing on the significant issue in this proceeding. This issue was Appellee's claim that Appellant owed more child support in January, February and March, 2007.

The District Court's refusal to award fees to Appellant or reduce Appellee's fees is specifically addressed by Utah Code Ann. §30-3-3. The requirements of Utah Code Ann. §30-3-3(2) apply to this proceeding. Utah Code Ann. §30-3-3(2) provides:

In any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may award costs and attorney's fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against the party if the court finds the party is impecunious or enters in the record the reasons for not awarding fees.

In this case, the trial court did not apply this statute. The Court did not consider that the Appellant was the prevailing party on the claim that the Appellant had not paid the correct child support for January, February and March, 2007. The Appellant, the prevailing party, should have been able awarded his costs attorney's fees with respect to the issue of child support. This fee award would apply unless the District Court found the Appellee impecunious or entered reasons for not awarding fees.

#### POINT VI

#### THE REQUIRED FACTS FOR DECIDING THIS APPEAL HAVE BEEN PRESENTED.

Appellee argues that how the appeal should be dismissed because the facts were not marshaled. (Brief of Appellee Argument: Point Two.) Appellee argues that a Finding of Fact is being challenged and all record evidence supporting the finding has not been marshaled. See Utah Rules of Appellate Procedure Rule 24(a)(9).

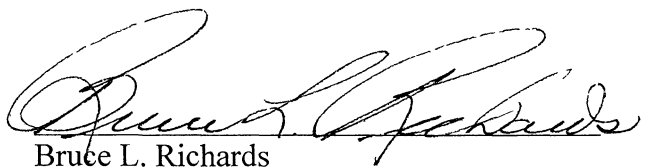
The issues in this appeal involve errors of law by the District Court and the Findings of the District Court that do not meet the requirements of law. The issues in this appeal are matters of law. The issues of law are the constitutional requirement that a party be afforded due process in a contempt proceeding; the statutory requirement that an Order of the Court be violated; the making of Findings of Fact meeting the three requirements for contempt; finding that the required Findings were found by clear and convincing evidence; and complying with Utah Code Ann. §30-3-3 regarding attorney's fees.

### CONCLUSION

Appellant is entitled to reversal of the District Court decision. There is no violation of an Order of Court meeting the constitutional, statutory and judicial requirements for a finding of contempt. There has been no finding by clear and convincing evidence of any violation of a legally sufficient Court Order. Attorney's fees should have been awarded to the Appellant. This case should be remanded for an award of the Appellant's attorney's fees including fees on appeal.

Dated this 25<sup>th</sup> day of February, 2008.

BRUCE L. RICHARDS & ASSOCIATES



Bruce L. Richards  
Attorney for Respondent

## MAILING CERTIFICATE

I hereby certify that on the 25<sup>th</sup> day of February, 2008, a copy of Appellant's Brief was mailed via First Class Mail, postage-prepaid to:

David J. Friel  
Attorney for Petitioner  
2875 South Decker Lake Dr. #225  
Salt Lake City, UT 84119

A handwritten signature in cursive script, reading "Lynn B. Nelson.", is written over a horizontal line. The signature is fluid and stylized, with a long vertical stroke extending downwards from the end of the line.