

1988

Mary Ann Jensen v. Jay Lyle Jensen : Brief of Respondent

Utah Court of Appeals

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Cheryl A. Russell; attorney for respondent.

Jay Lyle Jensen; pro se.

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

880004-CA

MARY ANN JENSEN,

*

BRIEF OF RESPONDENT

Plaintiff and Respondent,*

v.

*

JAY LYLE JENSEN,

*

Defendant and Appellant. *

Case No. 880004-CA

BRIEF OF RESPONDENT MARY ANN JENSEN

Appeal from the First District Court of Cache County,
State of Utah, Judge VeNoy Christoffersen

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Defendant and Appellant

Argument Priority Classification: 7

IN THE UTAH COURT OF APPEALS

MARY ANN JENSEN, * BRIEF OF RESPONDENT
Plaintiff and Respondent,*
v. *
JAY LYLE JENSEN, *
Defendant and Appellant. * Case No. 880004-CA

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STATEMENT OF JURISDICTION

This an appeal by Appellant from a Decree of Divorce. Pursuant to Rule 10 of the Rules of the Utah Court of Appeals, Respondent prays this appeal be dismissed on the basis that the Court has no jurisdiction due to the fact that according to the court file herein on December 23, 1987, in the lower court, Appellant filed a motion entitled "Motion Of Response And Set Aside Decision". Said motion was never served on Respondent and therefore, no ruling on the same has been made by the lower court.

STATEMENT OF NATURE OF PROCEEDINGS

Respondent brought her action for divorce against the Appellant. Appellant was properly served with a copy of Respondent's Complaint, but never filed an Answer to Respondent's complaint. The time allowed by law for answering the Complaint expired, Appellant's default was entered, and Respondent was granted a divorce as prayed for in her complaint.

STATEMENT OF ISSUES

Whether or not the Appellant's default and the subsequent decree of divorce were properly entered by the lower court.

DETERMINATIVE STATUTES AND RULES

Utah Code Annotated (1953 as amended) Section 78-27-26, and Utah Rules of Civil Procedure 5(a) and (b), 12(a), 55(a) and (b)(2), and 58A(d).

STATEMENT OF THE CASE

NATURE OF THE CASE

Respondent brought her action for divorce against the Appellant. Appellant was properly served with a copy of Respondent's Complaint, but never filed an Answer to Respondent's complaint. The time allowed by law for answering the Complaint expired, Appellant's default was entered, and Respondent was granted a divorce as prayed for in her complaint. Although somewhat unclear from the brief of the Appellant, Appellant now seems to be requesting a new trial but would really like modification of the Decree of Divorce under the terms set forth in his brief filed herein.

COURSE OF PROCEEDINGS

See Statement of Facts below.

DISPOSITION OF TRIAL COURT

Respondent was granted a default divorce based upon her complaint.

STATEMENT OF FACTS

Respondent filed her complaint for divorce herein with the same having been served on Appellant on September 16, 1987 in the State of Washington (Return of Service in Cache County District Court file Civil No. 26000). Copy of Summons and Complaint attached in Addendum hereto.

On September 28, 1987, Appellant filed a Petition to Hold, and Respondent filed her Notice of Readiness for Trial and Response to Appellant's Petition to Hold on September 29, 1987.

with a copy of the same being mailed to Appellant on the same day. Appellant then filed on October 15, 1987 a Response of Respondent's Readiness for Trial and Motion to Refuse of Defense. On October 26, 1987, Respondent made a request for decision on said Petition to Hold. In a Memorandum dated November 4, 1987, the Court denied Appellants Petition to Hold and stated that there was not reason for delay -- the matter should be set for trial.

Meanwhile Appellant filed on Oct 20, 1987 an Order to Show Cause Order Re: Property and Affidavit. The same was never signed by the Court, but a copy was mailed to Respondent's attorney on November 2, 1987. Respondent filed a Motion to Quash Service to require personal service.

Appellant then filed a motion for Indigent Filing as Necessary and Appoint Counsel on November 2, 1987 and a motion for Restraint on November 4, 1987. Respondent's response was filed on November 6, 1987 with a copy of the same having been mailed to Appellant on November 4, 1987. On November 16, 1987, the Court in a memorandum decision ruled on said motion by granting Appellant the right to file papers without fee, denied appointment of counsel and motion of restraint. **The Court further ordered that the statutory provision and rules of practice time limits for responsive pleading would be adhered to.** Respondent's counsel was ordered to prepare the order. The memorandum decision was mailed to both parties on November 16, 1987. Copy of memorandum decision dated November 16, 1988

attached in Addendum hereto. Then the order was prepared and mailed to the Appellant on November 30, 1987. The order was signed by the Court on December 1, 1987.

On December 15, 1987 at the request of Respondent's counsel, Appellant's default was entered and a divorce was granted under the terms of the divorce complaint previously served on the Appellant. Copies of the Findings of Fact and Conclusions of Law as well as the Decree were mailed to the Appellant along with a Notice of Entry of Judgment on December 15, 1987.

Appellant never filed an answer to Respondent's complaint. The next document filed by Appellant was an appeal on December 23, 1987 along with a Motion of Response and Set Aside. Neither of which were mailed to Respondent. On January 12, 1988, Appellant filed a Notice of Appeal with the Court and Amendment to Notice of Appeal. The Notice of Appeal was mailed to Respondent's attorney on January 6, 1988.

All of the above date references are obtained from Cache County District Court file case No. 26000.

Appellant has not requested a transcript of the lower court proceedings nor filed his notice that the same will not be requested pursuant to Rule 11(e)(1) of the Rules of the Utah Court of Appeals. Appellant has not done so even though he has been instructed on numerous occasions by this court on how to obtain a transcript. (See letter from Court of Appeals Court Clerk dated January 22, 1988, letter from Court of Appeals Court

Counsel dated February 10, 1988, and Order on Pending Motion: dated February 26, 1988)

ARGUMENT

I. The Court ruled on Appellant's motion: presented prior to entry of the default.

From the court file herein the following appears:

(1) Appellant was personally served with a summons and a copy of Respondent's Complaint on September 16, 1987 in the State of Washington.

(2) On September 28, 1987, Appellant filed a Petition to Hold. Appellant then filed on October 15, 1987 a Response of Respondent's Readiness for Trial and Motion to Refuse of Defense. In a Memorandum dated November 4, 1987, the Court denied Appellant's Petition to Hold and stated that there was no reason for delay.

(3) Appellant then filed a motion for Indigent Filing as Necessary and Appoint Counsel on November 2, 1987 and a Motion for Restraint on November 4, 1987.

(4) A decision was rendered on Appellant's last petition and motion prior to entry of his default and the Divorce Decree in a memorandum decision dated November 16, 1987. The Court ruled that the statutory provision and rules of practice time limits for responsive pleading would be adhered to. An order on said memorandum decision entitled "Order on Defendant's Motion for Indigent Filing and Appoint Counsel, and Motion for Restraint" was signed by the lower court on December 1, 1987. A

copy of the former were mailed to Defendant on or about November 16, 1987, and a copy of the latter were mailed to Defendant on November 30, 1987.

(5) Appellant never filed an answer to Respondent's Complaint.

(6) On December 15, 1988, Appellant's default was entered and a default hearing held. Respondent was awarded Decree of Divorce based upon her complaint. Notice of Entry of the Judgment along with the Findings of Fact and Conclusions of Law, and Decree of Divorce were mailed to Appellant on December 15, 1987.

II. The Court was not prejudiced against appellant in refusing motions.

Appellant alleges that the lower court was prejudiced against him in refusing motions yet he gives no specifics as to the allegation of prejudice. From a review of the court file herein, it seems that the lower court went out of its way to accommodate Appellant in acting as his own counsel. The lower court considered and ruled on numerous motions from Appellant --Petition to Hold, Motion for Indigent Filing and Necessary and Appoint Counsel, Motion to Refuse of Defense and Motion to the Court for Restraint. Many of these motions Respondent feels were frivolous.

Furthermore, Appellant took no steps to file an affidavit of prejudice to disqualify the lower court judge as provided in Rule 63 of the Utah Rules of Civil Procedure.

The Utah Supreme Court in reviewing an affidavit of prejudice under Rule 63 in Christensen v. Christensen, 18 Utah 2d 315, 422 P.2d 534 (1967), found that there must be reasonable reasons for the belief that a bias or prejudice exists in order to disqualify the trial judge. In that case, the fact that the trial judge in the divorce action rejected the parties' alimony stipulation without pleading or testimony attacking stipulation was not justification for an affidavit of prejudice and did not require trial judge to transfer case to different judge.

III. Even though Appellant may be incarcerated in the Washington Penal System, he is not entitled to an appointed attorney in civil case.

There is no Constitutional right to appointed counsel in divorce proceedings. The guarantee of the Sixth Amendment to the United States Constitution does not extend to civil cases, and the extension of the right to counsel to such semi-criminal cases as juvenile delinquency hearings or hearings on revocation of probation, have involved a right to liberty, as opposed to a matter of purely civil nature. See "Appointment of Counsel for Indigent Husband or Wife in Action for Divorce or Separation", 85 ALR 3d 983-987.

IV. The Appellant's default and the subsequent decree of divorce were properly entered by the lower court.

Although Appellant was personally served with a summons and a copy of Respondent's Complaint on September 16, 1987 in the State of Washington, he never filed an answer to

Respondent's Complaint. Appellant having been served out-of-state have thirty days in which to file his answer as set forth in Section 78-27-26, Utah Code Annotated (1953 as amended).

Further in accordance with Utah Rules of Civil Procedure Rule 12 upon the service of the following motions: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, and (7) failure to join an indispensable party after service of complaint, the Defendant has ten days after the lower court's ruling on said motion's to file his answer.

None of the motions filed by Appellant in the lower court fell into the categories set forth in Rule 12 requiring Appellant to be given ten days after the lower court's ruling to file his answer. However, Appellant's default was not entered until after 10 days plus three days service by mailing of the court's memorandum decision of November 16, 1988 ruling on Appellant's motions filed prior to entry of his default.

Most importantly the Appellant's was advised by the lower court in a memorandum decision dated November 16, 1988 that the statute provisions and rules of practice would govern the time limits for responsive pleading and would to be adhered to.

Appellant, who was properly served with a summons and a copy of Respondent's complaint, never filed an answer to

Respondent's complaint within the time limits for filing a responsive pleading under either of the above cited rules.

In addition, Utah Rules of Civil Procedure Rule 55 provides it not to be necessary to serve any notice or paper otherwise required by the rules to be served on a party to the action in a default. Certain exceptions are listed the only one applicable to this case is a Entry of Judgment required under Rule 58A(d), which was mailed to Appellant on December 15, 1987 along with a copy of the Findings of Fact and Conclusions of Law and Decree. Although a default hearing was held, the lower court did not conduct the hearing with regard to determining the amount of damages of the non-defaulting party which under Rule 55(a)(2) would have required notice to the Appellant. The divorce decree was entered as prayed for in Respondent's Complaint.

In Heath v. Heath, 541 P.2d 1040 (Utah 1975), the Utah Supreme Court held that a Defendant who failed to file an answer in a divorce action was not entitled to a hearing or notice before entry of the default divorce decree even though the 90-day statutory period had not elapsed.

Further in Holt v. Holt, 672 P.2d 738 (Utah 1983), the Court noted that the relief granted in a judgment by default must not exceed or substantially differ from that sought in the complaint.

V. Appellant improperly requests this Court to consider facts arising after the Findings of Fact and Conclusions of Law and Decree of Divorce was entered by the lower court.

Appellant requests this Court to consider certain facts set forth in page 2 through 4 line 8 and Page 4 line 2 through Page 5 line 4 of his brief certain fact allegations or changes in the circumstances which Appellant acknowledges have occurred since entry of the Findings of Fact and Conclusions of Law and Decree of Divorce herein.

Utah Code Annotated (1953 as amended) Section 30-35(3) provides that "the court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support maintenance, health, and dental care, or the distribution of the property as is reasonable and necessary".

Further, Rule 11 of the First Judicial District Court Rules of Practice provides to commence an action to modify the terms of a divorce decree a petition for modification must be filed in the original divorce action with service of a copy of the petition on the party as provided in Rule 4 of the Utah Rules of Civil Procedure.

Appellant's request of this Court to consider the facts set forth in page 2 through 4 line 8 and Page 4 line 2 through Page 5 line 4 of his brief should be handled in the lower court by filing a petition for modification in the manner set forth in Rule 11 and not by this Court on appeal.

Furthermore, Rule 11(e)(2) of the Rules of the Utah Court of Appeals provides that "if the Appellant intends to urge on appeal that a finding or conclusion is unsupported by or is

contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion". The Appellant is improperly requesting this court to consider facts that occurred after entry of the Decree of Divorce.

VI. Appellant requests this Court to consider facts set forth in his brief not properly present by him prior to entry of the Decree of Divorce.

Appellant alleges in page 4 lines 12 through 20 of his brief the certain community property was hidden from Appellant was secreted at Respondent's parents' home from Appellant and court.

Respondent in her complaint paragraph 10 requested that she be awarded the property in her possession and also the 1972 International Pickup, Chevrolet Station Wagon and Beta Max. The lower court in paragraph 10 of the Decree of Divorce awarded the Respondent said property. The property alleged by Appellant to be secreted at Respondent's parents' home was awarded by the lower court to Respondent based upon her complaint.

Appellant having not filed his answer to Respondent's Complaint within the time limits set forth by statute and the Civil Rules of Procedure, and having his default entered cannot now on appeal set forth facts in his brief not previously properly presented to the lower court nor Respondent, and request this Court to change in the lower court's property settlement on appeal.

Rule 11(e)(2) of the Rules of the Utah Court of Appeals provides that "if the Appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion". The Appellant has failed to request a transcript and comply with this requirement.

Furthermore when a transcript is not furnished, the reviewing court is constrained to regard the findings and conclusions of the lower court as accurate and hence dispositive there being nothing beyond the Appellant's assertion to test their validity in light of the evidence. See Proudfit v. Proudfit, 598 P.2d 1318 (Utah 1979). Also see Bowman v. Bowman 462 P.2d 156 (Utah 1969), wherein the Utah Supreme Court held that affirmance of the lower court decision was justified where the brief urging reversal made no reference to specific supporting evidence in record other than self-serving assertions subject to dispute and that sufficient admissible, competent and substantial evidence supported judgment awarding property.

VII. Pursuant to Rule 33 of the Rules of the Utah Court of Appeal, Respondent is entitled to damages for delay and attorney fees due to Appellant's filing of a frivolous appeal.

In Eames v. Eames, 735 P.2d 395 (Utah App. 1987), the Utah Court of Appeals found a husband's appeal from the divorce court's property division and alimony award was

frivolous, for the purpose of awarding costs and attorney's fees to wife. There was no basis for argument presented and evidence and law was mischaracterized and misstated.

In the present case, Appellant was properly served with a copy of the Respondent's complaint and has never filed an answer to the same. Instead Appellant elected to file numerous motion and petitions in the lower court -- Petition to Hold, Motion for Indigent Filing as Necessary and Appoint Counsel, Motion to Refuse of Defense, Motion to the Court for Restraint, and Motion of Response and Set aside. The latter was never served on Respondent.

On appeal, Appellant has never filed a transcript of the lower court proceedings nor a certificate that he would not be obtaining one as required by Rule 11(e)(1) of the Rules of the Utah Court of Appeals. Appellant has not done so even though he has been instructed on numerous occasions by this Court on how to obtain a transcript. Further Appellant has been again instructed by the Court of Appeals as well as by the lower court that there is no statutory authority allowing appointment of counsel. (See letter from Court of Appeals Court Clerk dated January 22, 1988, letter from Court of Appeals Court Counsel dated February 10, 1988, and Order on Pending Motions dated February 26, 1988).

Appellant failed to mail copies of his docketing statement to Respondent as required by Rule 21 of the Utah Court of Appeals Rules. In the Order on Pending Motions dated February

26, 1988, noting Appellant's failure to so serve a copy of the docketing statement on Respondent, Appellant was ordered to serve a copy of all documents filed with this Court upon counsel for Respondent and pay all postage for filing documents with this Court and for service on Respondent's Counsel. Appellant disregarded the same and a copy of Appellant's brief was not served on Respondent by Appellant but received from the Court of Appeals with an accompanying letter from Case Manager Janice Hill of Utah Court of Appeals dated June 9, 1988.

Finally, Appellant in his brief page 7 lines 1 through 11 states "Appellant does not wish to appeal the actual divorce and feels that these stipulations would be most satisfactory, and would be happy with this settlement." Appellant is attempting to use the appeal process as a means of delay in implementation of the lower court order. Appellant is asking this court to consider facts alleged to have occurred after the decree was entered (See Argument V above) together with Appellant's proposed property settlement never presented to the lower court (See Argument VI above) and modify the lower court's order accordingly.

Appellant had his opportunity to be heard and failed to file his answer to Respondent's complaint within the time limits prescribed by law. The appeal process can not now be used by Appellant as a means to avoid the Decree of Divorce awarded upon Respondent's complaint, the consequences of Appellant's failure to answer Respondent's complaint.

CONCLUSION

WHEREFORE, Respondent moves the Court of Appeals for an order dismissing Appellant's appeal with prejudice, affirming the lower court's decision, and awarding Respondent her attorney fees, costs and damages herein.

Respectfully submitted this 7th day of July, 1988.


Cheryl A. Russell
Attorney for Plaintiff and
Respondent

ADDENDUM

Rule 5(a), Utah Rules of Civil Procedure.

(a) Service: When Required.

Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery require to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice of appearance, demand, offer of judgment, notice of signing or entry of judgment under Rule 58A(d), and any similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except as provided in Rule 55(a)(2) (default proceedings) or pleading asserting new or additional claims for relief against them which shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no person need be or is named as a defendant, and service required to be made prior to the filing of an answer, claim, or appearance shall be made

upon the person having custody or possession of the property at the time of its seizure.

Rule 12(a) and (b), Utah Rule of Civil Procedure.

(a) A defendant shall serve his answer within twenty days after the service of the summons is complete unless otherwise expressly provided by statute or order of the court. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these period of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action; (2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the

responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material matters pertinent to such a motion by Rule 56.

Rule 55(a) and (b)(2), Utah Rule of Civil Procedure.

(a) Default

(1) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these Rules and that fact is made to appear the clerk shall enter his default.

(2) Notice to Party in Default. After the entry of default of any party, as provided in subdivision (a) (1) of this rule, it shall not be necessary to give such party in default any notice of action taken or to be taken or to serve any notice or paper otherwise required by these rules to be served on a party to the action or proceeding, except as provided in Rule 5(a), in Rule 58A(d) or in the event that it is necessary for the Court to conduct a hearing with regard to the amount of damages of the non-defaulting party.

(b) Judgment

(2) In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may

conduct such hearings or order such references as i
deems necessary and proper.

Rule 58A(d), Utah Rules of Civil Procedure.

The prevailing party shall promptly give notice of th
signing or entry of judgment to all other parties an
shall file proof of service of such notice with th
clerk of the court. However, the time for filing
notice of appeal is not affected by the notic
requirement of this provision.

Section 78-27-26, Utah Code Annotated (1953 as amended).

No default shall be entered until the expiration of a
least thirty days after service. A default judgmen
rendered on service may be set aside only on a showin
which would be timely and sufficient to set aside
default judgment rendered on personal service withi
this state.

Attached hereto for the Court's consideration are copies of th
following documents and excerpts from the District Court file:

Respondent's Summons and Complaint

Memorandum decision dated November 16, 1987

Cheryl A. Russell
Attorney for the Plaintiffs
256 North First West
Logan, Utah 84321
Telephone: (801)753-0012

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

| | | |
|------------------|---|------------------------|
| Mary Ann Jensen, | * | SUMMONS |
| Plaintiff, | * | |
| vs. | * | |
| Jay Lyle Jensen, | * | |
| Defendant. | * | Civil No. <u>26006</u> |

THE STATE OF UTAH TO THE ABOVE-NAMED DEFENDANT(S):

You are hereby summoned and required to file an answer in writing to the attached complaint with the Clerk of the above-entitled Court, and to serve upon, or mail to Cheryl A. Russell, Plaintiff's Attorney, 256 North First West, Logan, Utah 84321, a copy of said answer, within 20* days after service of this summons upon you.

If you fail so to do, judgment by default will be taken against you for the relief demanded in said complaint, which has been filed with the Clerk of said Court and a copy of which is hereto annexed and herewith served upon you.

DATED this 10 day of September, 1987.

Cheryl A. Russell
Cheryl A. Russell
Attorney for the Plaintiff

*30 days if served outside the State of Utah

Defendant's address: Prison, Shelton, Washington

Cheryl A. Russell (2828)
Attorney at Law
256 North First West
Logan, Utah 84321
Telephone: (801) 753-0012

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

| | | |
|------------------|---|------------------------|
| Mary Ann Jensen, | * | |
| Plaintiff, | * | VERIFIED COMPLAINT |
| vs. | * | |
| Jay Lyle Jensen, | * | |
| Defendant. | * | Civil No. <u>26000</u> |

PLAINTIFF COMPLAINS AGAINST DEFENDANT AND ALLEGES AS FOLLOWS:

1. That the Plaintiff or Defendant has been an actual and bona fide resident of this state and of the county where this action is brought for three months prior to the commencement of this action.
2. That Plaintiff and Defendant are husband and wife having married on October 29, 1968, at Renton, King County Washington.
3. During the course of the marriage, Defendant and Plaintiff have had irreconcilable differences, causing breakdown of the marriage. Further Defendant has treated Plaintiff cruelly during this marriage, thereby causing Plaintiff great mental and physical distress and making it impossible for Plaintiff to remain married to Defendant due to Defendant's sexual abuse of the parties' child. Said the acts of Defendant give rise to the irreconcilable differences and mental and physical cruelty arose in the State of Utah.
4. That the following children have been born as a result of this marriage, to-wit:

Chantelle born March 16, 1971, Jeremy born February 21, 1974, Thayne Jay born August 19, 1977, Jeffery born October 10, 1979 and Serrena born April 19, 1983.

No further children are expected as issue of this marriage.

5. That Plaintiff is a fit and proper person to be awarded the care, custody and control of the minor children named herein, subject to limited rights of visitation by the Defendant due to his past acts of sexual abuse on the parties' oldest child. Said limited rights of visitation should be as recommended by the children's counsels, and supervised by the State of Plaintiff's residence Division of Social or Family Service. Further that an order should issue restraining the Defendant from removing the children from Plaintiff's custody except for authorized visitation and the county of Plaintiff's residence due to the past acts of child abuse, and Defendant having previous unauthorized taking of the children from Plaintiff's care, control and custody. Said award of custody and limited visitation would be in the best interest of said children.

6. That Defendant should be required to pay to Plaintiff as child support the sum of \$100.00 per month per child beginning immediately and continuing thereafter until the child reaches the age of majority or obtains majority by marriage prior thereto or until further order of the court. Plaintiff believes that Defendant is employed but his exact status is unknown. Plaintiff is currently on welfare receiving \$500.00 per month.

7. That Defendant should be ordered to name the children as beneficiaries of any of his current as well as future life insurance policies.

8. Plaintiff should be allowed to claim the children as dependents for income tax purposes.

9. That Defendant should be required to maintain health and accident insurance if available at his employment on the minor children, and pay all uninsured medical and dental

expenses of the minor children. Furthermore, Defendant should be ordered to pay all counseling and so forth fees related to his sexual abuse of the parties' oldest child.

10. That during the course of marriage the parties have acquired various items of property, which should be divided between the parties as follows:

a. Each party awarded their own personal property.

b. Defendant awarded the 1965 Buick Riviera and the property in his possession except that specifically awarded to Plaintiff below in c.

c. Plaintiff awarded the property in her possession and also the 1972 International Pickup, 1969 Chevrolet Station Wagon, Beta Max.

11. That during the course of marriage, the parties incurred miscellaneous debts and obligations, and the Defendant should be assumed and paid said debts and obligations as well as indemnify Plaintiff as payment of the same. The Defendant's payment of debts listed herein is in the nature of maintenance to his spouse or child in connection with this separation agreement and is actually part of the maintenance and support to his family provided by this agreement and as such all debts listed herein to be paid by Defendant are Exceptions to Discharge under 11 U.S.C. Section 523(a)(5), and will not be discharged in any subsequent bankruptcy filing by the Defendant.

12. That Plaintiff be awarded \$100 per month as alimony.

13. That Plaintiff has been required to obtain legal counsel herein, to represent her in this action, and is entitled to a judgment against Defendant for \$377.00, plus costs of Court, in this action if uncontested. In the event this action is contested, Plaintiff asks such further sums as the Court shall find reasonable.

14. That the marriage has deteriorated and there is no possibility of reconciliation, therefore, the three month waiting

period after filing this Complaint before the Court can hear the Complaint for divorce, should be waived.

WHEREFORE, Plaintiff prays for judgment waiving the three month waiting period after filing the Complaint herein before the Court can hear the Complaint, for a Decree of Divorce dissolving this marriage, and for all such further relief as petitioned for herein.

DATED this 10 day of September, 1987.

[Signature]
Plaintiff

[Signature]
Cheryl A. Russell
Attorney for the Plaintiff

STATE OF UTAH)
: ss
COUNTY OF CACHE)

Plaintiff being first duly sworn, deposes and says that Plaintiff has read the complaint herein, knows the contents thereof and that the same is true of Plaintiff's own knowledge, except as to those matters therein stated on information and belief and as to those matters Plaintiff believes them to be true.

[Signature]
Plaintiff

SUBSCRIBED and SWORN to before me this 10 day of September, 1987.

[Signature]
Notary Public

Commission expires: Oct 21, 1988

Residing at: Sagehen, Utah

Plaintiff's address: 108 South 100 West, Hyrum, Utah

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE
STATE OF UAH

MARY ANN JENSEN,

)

Plaintiff

)

MEMORANDUM DECISION

v.

)

Civil No. 26000

JAY LYLE JENSEN,

)

Defendant

)

The defendant has filed a Motion for Indigent filing and to appoint counsel.

The Court will grant the Motion allowing the defendant to file any papers in connection with this matter without fee. There is no provision for appointment of counsel in a civil case and this portion will be denied.

As to the defendant's request for a Motion for Restraint, this will be denied, since the statutory provisions and rules of practice govern the time limits for responsive pleading and these will be adhered to so that Motion is denied.

Counsel for plaintiff to prepare the appropriate order.

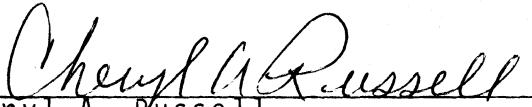
Dated this 16th day of November, 1987.

BY THE COURT:


Venoy Christoffersen
District Judge

PROOF OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Respondent's Brief to the Defendant and Appellant, Jay Lyle Jensen, at 15314 N.E. Dole Valley Road Yacolt, Washington 98675, postage prepaid on this 7 day of July, 1988.


Cheryl A. Russell
Attorney for the Plaintiff and
Respondent