

1997

Laurel W. Caldwell, personally and Nelda F Wall on behalf of the Estate of Hal E. Wall v. Steven D Caldwell : Brief of Appellant

Utah Court of Appeals

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Stephen G. Homer; Attorney for Appellant.

Delano S. Findlay; Attorneys for Appellees.

Recommended Citation

Brief of Appellant, *Caldwell v. Caldwell*, No. 970239 (Utah Court of Appeals, 1997).
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IN THE UTAH COURT OF APPEALS

DOCKET NO.

970239-CA

LAUREL W CALDWELL,)	
personally, and NELDA)	
F WALL on behalf of)	
the Estate of HAL E.)	
WALL,)	
)	
Plaintiffs-Appellees)	
)	
vs)	Court of Appeals
)	Docket No. 970239-CA
)	
STEVEN D CALDWELL,)	
)	
Defendant-Appellant)	Argument Priority 15

APPELLANT'S BRIEF

Appeal from the Third Judicial District Court
The Honorable Frank G Noel, District Judge

STEPHEN G HOMER
Attorney at Law
9225 South Redwood Road
West Jordan, Utah 84088
Attorney for Appellant
STEVEN D CALDWELL

DELANO S FINDLAY
Attorney at Law
923 East 5350 South, Suite E
Salt Lake City, Utah 84117
Attorney for Appellees

LAUREL W CALDWELL and NELDA F WALL

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JUL - 9 1997

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

LAUREL W CALDWELL,)	
personally, and NELDA)	
F WALL on behalf of)	
the Estate of HAL E.)	APPELLANT'S BRIEF
WALL,)	
)	
Plaintiffs-Appellees)	
)	
vs)	Court of Appeals
)	Docket No. 970239-CA
)	
STEVEN D CALDWELL,)	
)	
Defendant-Appellant)	

DESIGNATION OF THE PARTIES

The Defendant STEVEN D CALDWELL and the Plaintiff LAUREL W CALDWELL, formerly husband and wife, were divorced in 1983. The 1983 Decree of Divorce provided that the Defendant was to pay a portion of a then-outstanding mortgage indebtedness in favor of "Hal E Wall", who was (is) the father of Plaintiff LAUREL W CALDWELL. The Plaintiff NELDA F WALL is the surviving spouse of Hal E Wall and is the mother of Plaintiff LAUREL W CALDWELL. No cross appeal was taken by Plaintiff LAUREL W CALDWELL from the Order setting aside the 1993 judgment awarded to her. Thus, although she is a party to the original action, she [LAUREL CALDWELL] may not be a party to this appeal, in that the "judgment" which is the subject of this appeal only applies to Plaintiff NELDA F WALL.

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BECAUSE OF LACK OF PERSONAL SERVICE
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STATEMENT OF JURISDICTION OF THIS COURT

Jurisdiction of this Court is granted pursuant to the provision of Section 78-2a-3(2)(j), Utah Code, and the "pour over" Order of the Utah Supreme Court, dated as of 8 April 1997, transferring this case to the Court of Appeals.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This appeal presents the following issues:

1. That the entered default judgment is void because of lack of personal service upon the Defendant.
2. Whether a "default judgment" can be entered based upon "vicarious service" effected upon the spouse of the defendant, when in fact and when counsel for the plaintiff has reason to believe that the defendant is not regularly residing at that location and the "wife's" home is not the "usual place of abode" of the defendant at the time of service.
3. Whether a provision contained within a divorce decree pertaining to the payment of a then-outstanding mortgage indebtedness constitutes a "judgment", subject to "renewal" (through a new, independent action) brought by

a party who is a stranger to that original divorce action.

4. Whether a person---not legally appointed as the "personal representative" or "special administrator" of a deceased person---may bring an action "in behalf of the estate" of such deceased person.

5. Whether a default judgment may be entered when it is materially different from the original complaint allegedly "served" upon the defendant.

6. Whether, as a matter of law, the "default judgment" (and the original complaint) were so facially-flawed---for the reasons identified in subparagraphs 3, 5 and 5, above, herein---that the District Court would be prevented from entering said judgment, and, having done so, abused its discretion in refusing to set aside the judgment, when those fatal flaws were so identified to the Court.

7. Whether the trial court abused its discretion in refusing to set aside the Nelda Wall "judgment".

Ordinarily, the "standard of review" for the appellate court in examining the trial court's refusal to set

aside a previously-entered "default judgment" is an "abuse of discretion" inquiry. See **Larsen v Collins**, 684 P.2d 52 (Utah Supreme Court 1984). However, the trial court has no jurisdiction to enter a judgment which would be void because of lack of personal service upon the defendant; the trial court has no discretion to refuse to set such a judgment aside. See **Woody vs Rhodes**, 461 P.2d 465 (Utah Supreme Court 1969); **Garcia vs Garcia**, 712 P.2d 288 (Utah Supreme Court 1988). Thus, for that issue and the remaining issues, the standard of review is a "correction of error" standard, in which the Court of Appeals gives the trial court no particular deference in its legal analysis and conclusions. See generally **Aragon vs Clover Club Foods Company**, 857 P.2d 250 (Utah Court of Appeals 1993); **Rollins v Petersen**, 813 P.2d 1156 (Utah Supreme Court 1992).

The foregoing issues were raised to the District Court pursuant to the Defendant's Motion to Set Aside the Default Judgment. Record at pp. 37-46.

STATEMENT OF THE CASE

The Defendant STEVEN D CALDWELL and the Plaintiff LAUREL W CALDWELL, formerly husband and wife, were divorced in 1983. The 1983 Decree of Divorce provided

that the Defendant was to pay a portion of a then-outstanding mortgage indebtedness in favor of "Hal E Wall", who was (is) the father of Plaintiff LAUREL W CALDWELL. The Plaintiff NELDA J WALL is the surviving spouse of Hal E Wall and is the mother of Plaintiff LAUREL W CALDWELL. [No cross appeal was taken by Plaintiff LAUREL W CALDWELL from the Order setting aside the 1993 judgment awarded to her. Thus, although she is a party to the original action, she may not be a party to this appeal, in that the "judgment" which is the subject of the appeal only applies to Plaintiff NELDA J WALL.]

In December 1990---literally within a week of when the 8-year statute of limitation (per §78-12-22, UC) for "renewal" of judgments (assumed, by Plaintiffs' counsel, to be applicable to the 1983 divorce decree) would otherwise expire---the Plaintiff LAUREL CALDWELL and Plaintiff-Appellee NELDA WALL filed an action, purporting to "renew" the "judgment" (i.e. the 1983 divorce decree provisions, although not so specifically denominated as such in the Plaintiff's complaint) to collect from the Defendant his portion of the "Hal E Wall" mortgage indebtedness. The "renewal" action was not filed as part of the original divorce proceeding, but was an independent action in a new filing. Because

the Defendant was not served in a timely manner, the action was dismissed by the district court in June 1991. [See generally Transcript of 3 October 1996 garnishment hearing, pp. 6-7; Record at pp. 205-206]

In June 1992---exactly one year from the date of the former dismissal--- Plaintiff LAUREL CALDWELL and Plaintiff-Appellee NELDA WALL filed a second action, again seeking to "renew" the "judgment" against the Defendant. The claim of Plaintiff NELDA J WALL pertained to the "Hal E Wall" mortgage. The terse (one and one-half page) Complaint did not assert that the "mortgage" claim was brought by LAUREL CALDWELL; rather it asserted judgment was sought "in favor of the Estate of Hal E Wall". [Record at pp. 1-2; see APPENDIX A]

At that time the Defendant resided outside of the State of Utah: in Amarillo, Texas. [See Affidavit of Steven D Caldwell. Record at p. 31] His wife Nikki Caldwell, however, resided in Missouri. [That the Defendant was not regularly residing in Missouri at the time was known to Plaintiff's counsel.] In the very last week before the 120-day period for service of the summons and complaint in the new case---this action--- would expire, Plaintiff's counsel caused the summons and complaint to be served upon "Nikki Caldwell"---the wife of the Defendant---at HER residence in Missouri,

through a Missouri deputy sheriff. The Defendant filed an Affidavit averring he did not receive the summons and complaint. [Because the service---upon the spouse, but not upon the Defendant personally---was effected barely within the 120-day period provided by the Rules, a second opportunity to effect actual "personal service" upon him could not be made: Plaintiff's counsel---having waited until the last possible minute---had to go with what came back from Missouri: that "Nikki"---not Steven---was served.]

| In February 1993 a "default judgment" was entered against the Defendant based upon the Missouri deputy sheriff's "return" indicating that the service had been made upon "Nikki Caldwell". Record at pp. 13-14.

The actual "judgment" signed by the District Court experienced a significant evolution. The original cause of action was pleaded by "Nelda Wall on behalf of the estate of Hal E Wall"; by the time the judgment was prepared by Plaintiffs' counsel, the judgment was worded to be "in favor of Nelda Wall", with all references to the "estate of Hal E Wall" having been deleted. [Hal E Wall died in 1990. His estate was NOT probated. Nelda Wall was NOT appointed the Personal Representative or Special Administrator of his estate. [See Affidavit of Hal Ruekert. Record at pp. 88-89]

This fact should have been obvious from the face of the pleading (complaint) and/or the District Court's "judicial notice" of its own files. Hal Wall was a resident of Salt Lake County at the time of his death.]

In September 1996 the Defendant became aware that the 1993 default judgment had been entered against him when a writ of garnishment was served upon his employer. He promptly filed a motion to stay the garnishment proceedings and to set aside the default judgment under Rule 60(b). [Record at pp. 37 thru 46.] Hearings were held before the District Court on October 4, 1996 [concerning the stay of the garnishment proceedings, pending resolution of the Defendant's motion to set aside the default judgment] and on December 13, 1996 [concerning the merits of the Defendant's motion to set aside the default judgment].

At the December 13th hearing the District Court agreed to set aside the default judgment entered in favor of Plaintiff LAUREL CALDWELL (for delinquent child support), but refused to set aside the judgment in favor of Plaintiff-Appellee NELDA WALL. [Transcript of 13 December 1996 hearing at p. 16; Record at p. 227] Defendant filed a timely Motion for Reconsideration.

On February 6, 1997, the District Court signed and entered an Order, confirming its earlier announced

ruling regarding the default judgment in favor of NELDA WALL. [Record at 175-175.]

This appeal was timely filed and perfected. On 8 April 1997 the Utah Supreme Court exercised its jurisdiction to "pour over" the case to this Court.

SUMMARY OF ARGUMENTS

The Defendant-Appellants arguments are summarized:

1. The judgment entered against the Defendant is void because of the lack of personal service upon him. Service of the summons and complaint at the home where his wife was residing (Missouri) is not valid service upon him, "at his usual place of abode" (Texas) at the time service was actually made, per the **Lawrence vs Grant** (1910) decision.

2. Principles of equity and fairness dictate that the default judgment be set aside so that the Defendant---not having been validly served and not appearing at all in the proceeding---can have his "day in court" to challenge the claims brought against him. The inconvenience and burden upon the Plaintiffs---already having waited several years---is relatively minimal on the simplistic claims made.

3. The trial court erred in entering default judgment when the complaint was so facially flawed. The "mortgage" provision from the 1983 Divorce Decree was not a "judgment" at all, capable of "renewal", particularly in favor of Plaintiff NELDA F WALL who is a stranger to that original divorce action and was not a party to the original divorce "judgment". Furthermore, Plaintiff NELDA F WALL could not in her own personal capacity bring an action "in behalf of the estate" of a deceased person, unless she was legally authorized to do so pursuant to order of a probate proceeding.

4. The trial court abused its discretion in refusing to set aside the default judgment in favor of NELDA WALL (on the "mortgage" claim), while at the same time setting aside the default judgment awarded to LAUREL CALDWELL, who was THE PARTY to the original divorce and who possessed any rights under that "judgment".

ARGUMENT

I

THE DEFAULT JUDGMENT IS VOID BECAUSE OF LACK OF PERSONAL SERVICE UPON THE DEFENDANT

Proper service of process IS JURISDICTIONAL to the case! Without valid service, the court has NO JURISDICTION over the defendant and cannot enter a valid judgment. A default judgment---entered upon the non-appearance of an invalidly-served defendant---is VOID!

At the trial court below, the Plaintiffs asserted and were able to convince the District Court that the Plaintiffs are (were) required to exercise only "reasonable diligence and good faith" and that they used "reasonable means" to find and serve the Defendant. [If the Plaintiffs were unsure of the Defendant's out-of-state whereabouts, they arguably could have sought service "by publication"; they didn't attempt this method.] "Reasonable diligence", "good faith" and/or "reasonable means" are neither the legal standard nor the procedure by which a court obtains jurisdiction over a defendant!

Rule 4 of the Utah Rules of Civil Procedure provides in relevant part:

(e) Personal service shall be made as follows:

(1) . . . or by leaving a copy at the individual's dwelling house or **usual place of abode** with some person of suitable age and discretion there residing, . . .

Emphasis added.

In **Garcia vs Garcia**, 712 P.2d 288 (Utah 1986), the defendant was imprisoned in the Utah State Prison. Personal service of the summons and complaint was NOT effected upon him; instead, the summons was served upon an employee of the prison. The Supreme Court found the service to be not in compliance with Rule 4 and ordered the default judgment set aside! The Court wrote:

. . . the attempted service on appellant was fatally defective. **There being no effective service of process, the court was without jurisdiction** to enter the original decree of divorce.

. . . where the judgment is void because of a fatally defective service of process, **the time limitations of Rule 60(b) have no application.** Woody v. Rhodes, 23 Utah 2d 249, 461 P.2d 465 (1969).

This is consistent with holdings under the Federal Rules, after which our Rules were patterned. As noted in Wright & Miller, Federal Practice and Procedure . . .:

Rule 60(b)(4) [the equivalent to Utah Rule 60(b)(5)] authorizes relief from void judgments. Necessarily a motion under this part of the rule differs markedly from motions under the other clauses of Rule 60(b). **There is no question of discretion on the part of the court** when a motion is under Rule 60(b)(4). Nor is there any requirement, as there usually is when default judgments are attacked under Rule 60(b), that the moving party show that he has a meritorious defense. **Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act**

accordingly.

By the same token, there is no time limit on an attack on a judgment as void. The one-year [three-month, in Utah] limit applicable to some Rule 60(b) motions is expressly inapplicable, and even the requirement that the motion be made within a "reasonable time," which seems literally to apply to motions under Rule 60(b)(4), cannot be enforced with regard to this class of motion. **A void judgment cannot acquire validity because of laches on the part of the judgment debtor.**

Because we have concluded that **the trial court had no jurisdiction** to enter the divorce decree in the first instance, the order denying relief from judgment must be, and is, reversed. The case is remanded for entry of **judgment vacating the decree** of divorce because of the **ineffective service of process**. In view of our holding that **the decree is void for lack of jurisdiction**, we need not address points raised in the petition for modification.

Id. at _____. Footnotes omitted. All emphasis added.

In **Woody vs. Rhodes**, 461 P.2d 465 (Utah Supreme Court 1969), affirming the setting aside of the default judgment, the Utah Supreme Court wrote:

The service of summons being fatally defective, the judgment entered thereto is without force or effect and the court acted properly in setting it aside. The three-months provision provided for in Rule 60(b) has no application to this situation.

461 P.2d at _____. Emphasis added.

In **Grant vs. Lawrence**, 37 Utah 450, 108 Pac. 931 (1910), the Utah Supreme Court had opportunity to

examine the phrase "usual place of abode" within the statute---predecessor to Rule 4---governing service of process. The Court wrote:

Usual place of abode is sometimes referred to as being synonymous with domicile or permanent residence. **In our judgment there is a broad distinction between domicile and usual place of abode as the latter term is used in our statute. . . . That is, where a person lives--abides--at the particular time when the summons is served, constitutes his usual place of abode.**

108 Pac. at 933. Emphasis added.

The Utah Supreme Court quoted the New Jersey Supreme Court:

The statute does not direct service to be made at the 'residence' of the defendant, but at his dwelling house or usual place of abode, which is a much more restricted term. As was said in Stout v. Leonard, 37 N.J. Law, 492, many persons have several residences which they permanently maintain, occupying one at one period of the year and another at another period. Where such conditions exist, a summons must be served at the dwelling house in which the defendant is living at the time where the service is made." That is, where a person lives--abides--at the particular time when the summons is served, constitutes his usual place of abode.

Id at 933. Emphasis added. Finally, referring to a United States Supreme Court decision interpreting the phrase "usual place of abode", the Court wrote:

. . . where service of summons is required to be made at the "usual place of abode," such service, in order to constitute legal service, must be made at the defendant's "**then present residence.**" In other words, **at the place where the defendant then lives or abides.**

Id. at 933. Emphasis added.

The Defendant submitted to the trial court an affidavit [Record at pp. 31-32] averring the Missouri address was NOT his "usual place of abode" at the time the summons was served upon Nikki. The Plaintiffs did not successfully counter that affidavit. [That the Appleton, Missouri address is NOT the Defendant's "usual place of abode" is further evidenced by the fact that the service was made upon Nikki---not upon the Defendant---at that time!]

The default judgment entered upon the service of process upon the defendant's wife at the Appleton, Missouri address---which WAS NOT the Defendant's "usual place of abode at the time of such service of process"---is void and must be set aside.

The Missouri address at which the summons was delivered was NOT the Defendant's "dwelling house or usual place of abode". This fact was implicitly acknowledged by Plaintiff's counsel in his 15 September 1992 letter to the Missouri sheriff, in which he states that the Defendant can be found at that address only on weekends. [See RECORD at p. 73. A photocopy of this letter is attached hereto as APPENDIX C.] Mr Findlay wrote:

Mr. Caldwell is working out of town and can only be found at home on weekends.

[Record at p. 73. See APPENDIX D.] Emphasis added. September 28, 1992 was a MONDAY! The summons was served at 3:09 p.m. on Nikki. The Defendant did NOT receive the summons; it was NOT "served" at his "usual place of abode".

Consequently, the Plaintiffs have not complied with the requirements of Rule 4 and the "default judgment" cannot stand.

II

THE DEFAULT JUDGMENT SHOULD BE SET ASIDE

The Defendant---not having been "personally served" as Rule 4 requires---did not appear to challenge the instant proceeding. He became aware thereof only in September 1996 when his wages were garnished. It is only fair that the default judgment should be set aside. The Plaintiffs---having waiting eight years to initially file the "renewal" action, plus another year following the dismissal for failure to serve the defendant in a timely manner, plus over three years to institute garnishment proceedings---cannot be prejudiced by the delay which is largely of their own choosing!

In **Interstate Excavating, Incorporated vs Agla Development Corporation**, 611 P.2d 369 (Utah 1980), the Utah Supreme Court held that where the defendant did not receive notice of trial date from its attorney

after attorney's withdrawal from case and where, upon receipt of notice of default judgment, defendant immediately contacted its present counsel who thereafter proceeding with diligence to attack the default judgment, interests of justice would be best served by setting aside the default judgment. The facts pertinent to the appeal in **Interstate Excavating** are very similar to the instant case: the party-litigant received no notice of the trial date. The Utah Supreme Court wrote:

This is admittedly a perplexing case. From the standpoint of the plaintiff and its counsel, they appeal to have proceeded without any impropriety, including appearing on the trial date and presenting their case. **Defendant counters with the averments that it received no such notice.** Supportive of the defendant's position, are the fact that the justification for its default rests upon the assertion of service of notice by ordinary mail; and that **immediately upon learning of the judgment, it proceeded diligently with efforts to set it aside and contest the issues on the merits.**

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 setting aside 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. Consistent with the objective just stated, where there is doubt about whether a default should be resolved in favor of doing so, to the end that each party may have an opportunity to present his side of the controversy and that there may be a resolution

in accordance with law and justice.

611 P.2d at 371. Emphasis added. If, under **Interstate Excavating**, it is error for the trial court to refuse to set aside a default judgment entered against a party, without counsel, who actually received notification of the trial but failed to pay attention to that notification [see Chief Justice Hall's dissenting opinion], then certainly it is only proper for the Court to set aside the default judgment against a party who received no notification of the action, even if the summons had been delivered to his spouse at a residence in which he did not regularly reside.

In **Westinghouse Electric Supply Company vs Paul W Larsen Contractor, Incorporated**, 544 P.2d 876 (Utah Supreme Court 1975), the Utah Supreme Court held that the trial court's order dismissing the case was an abuse of discretion. The Supreme Court wrote:

It is indeed commendable to handle cases with dispatch and to move calendars with expedition in order to keep them up to date. But it is even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them. In conformity with that principle the courts generally tend to favor granting relief from default judgments where there is any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party.

544 P.2d at 879. Emphasis added. Citations in footnotes

omitted.

The Defendant has pleaded meritorious defenses. [The proffered Answer is included at the Record at pp. 63-69.] The default judgment should be set aside. The Defendant---first becoming aware of the default judgment when the garnishment was served upon his employer---has made timely and consistent efforts to resolve this issue. He has complied with the requirements of Rule 60(b) to set the default judgment aside.

The prejudice to the Defendant is substantial: a judgment in the face value of in excess of \$30,000 stands, when he has been deprived of "its day in court". On the other hand, the prejudice to the Plaintiff is minimal. Furthermore, the delay in the parties in her attempt to collect on the judgment further evidences that minimal prejudice.

III
THE COMPLAINT UPON WHICH THE JUDGMENT
IS BASED IS FACIALLY DEFECTIVE
AND CANNOT SUPPORT A JUDGMENT

In **Stevens vs Collard**, 837 P.2d 593 (Utah Court of Appeals 1992), this Court stated:

A trial court asked to render a **judgment by default** must conclude that the uncontroverted **allegations of an applicant's petition are, on their face, legally sufficient to establish a valid claim against the defaulting party.**

837 P.2d at 595. Emphasis added.

The Plaintiff NELDA F WALL was NOT the legally appointed "personal representative" or "special administrator" of "the Estate of Hal Wall" (who died in 1990). The Complaint does not even allege that she was! As a matter of law, she cannot bring an action "in behalf of the Estate of Hal Wall". A well-intentioned person---even the surviving spouse---cannot, absent a formal appointment by the probate court---bring an action "in behalf of the estate" of a deceased person! Her facially-defective complaint cannot be allowed to support a claim against the defendant.

Similarly, the "judgment" sought to be renewed is not a "judgment" which can be "renewed". This point---that the provisions from the 1983 divorce decree pertaining to the Hal Wall mortgage are not a "judgment" capable of "renewal", particularly by Nelda Wall, not a party to the original divorce---was acknowledged by Judge Noel at the October 4th hearing on the garnishment! [Transcript of 4 October 1996 hearing, pp. 5 thru 8; Record at pp. 204-208.]

There are two references in the 1983 Divorce Decree [found at Record at pp. 55-59; also included as an APPENDIX D, hereto] which have bearing on the "Hal E Wall mortgage" obligation, as follows:

[Paragraph 5]:

5. . . . with the express provision that defendant shall assume and pay and be totally responsible for the remaining balances of the second mortgage due Hal E. Wall in the sum of \$10,069.00 . . .

[Paragraph 9]:

9. Defendant be and he is hereby ordered to assume and pay the balance due to Hal E. Wall on the second mortgage in the sum of \$10,069.00; . . .

[Record at p. 0058. See APPENDIX D, herein]

Those provisions are in favor of LAUREL CALDWELL, not Hal E Wall! Those provisions (from the 1983 Decree) cannot be construed to be a "judgment" in favor of Hal E. Wall; Hal E. Wall was not a party to the 1983 divorce. Thus, the instant proceeding---purporting to "renew" that "judgment"---is flawed and facially defective ab initio.

If that portion of the 1993 judgment in favor of Plaintiff LAUREL CALDWELL (for delinquent child support) was set aside (ostensibly on res judicata grounds) by the District Court, it was an abuse of discretion for the trial court to refuse to set aside the NELDA WALL judgment on those same grounds! It is totally illogical---and almost ironic---that the trial judge's decision to set aside the judgment entered in favor of Laurel Caldwell---who WAS a party to the original divorce decree and, arguably entitled to enforce (or "renew") that judgment---and nevertheless

leave in place the judgment entered in favor of Nelda Wall, who WAS NOT a party (to the original divorce) and, consequently, cannot be entitled to "renew" the earlier judgment.

And it is similarly an "abuse of discretion" for the trial court to have refused to set aside the NELDA WALL default judgment on simply grounds of equitable fairness.

IV
THE DEFAULT JUDGMENT WAS MATERIALLY DIFFERENT
FROM THE RELIEF PRAYED FOR IN THE COMPLAINT
AND CANNOT STAND

The nature of the Plaintiff's claims experienced a significant evolution in the course of events. Nevertheless, Rule 54(c)(2), Utah Rules of Civil Procedure, specifies that

"a judgment by default shall not be different in kind from . . . that specifically prayed for in the demand for judgment."

The default judgment is materially different from the original complaint allegedly "served" upon the Defendant: Paragraph 1 of the "prayer for relief" portion of the terse complaint prays for

"judgment **in favor of the Estate of Hal E. Wall** in the amount of \$10,069.00 together with post judgment interest in the amount of \$12,034.24 for a total of \$22,103.47."

[Record at p. 002.] Emphasis added. In the February 1993 "Motion for Entry and Judgment by Default",

Defendant---living in Texas---was NOT personally served (vicariously, upon a person "residing at his usual place of abode" at the time service was effected). The judgment is void!

The default judgment should be set aside and the defendant should be allowed to defend thereon. It was an abuse of discretion for the trial court to set aside the LAUREL W CALDWELL portion of the judgment and refuse to set aside the NELDA F WALL portion of the judgment, for the same (or different) grounds.

The complaint upon which the judgment was based is facially flawed and legally defective. NELDA F WALL was not appointed the Personal Representative of the deceased Hal E. Wall; consequently, she has no legal right or authority to bring an action "in behalf of the Estate of Hal E Wall." Similarly, the District Court should have been aware that the provision from the 1993 Divorce Decree was not a "judgment" capable of "renewal" (as the complaint purports to do) or that the provision was not a "judgment" in favor of Plaintiff NELDA F WALL.

The default judgment entered against the Defendant must be set aside and the proceeding dismissed. In the alternative, the case should be remanded to the District Court so that the Defendant is afforded "his

Plaintiffs---through counsel---stated:

Judgment may be entered by the clerk of the court for the sums certain prayed for in the complaint against the defendant and **in the name of Hal E. Wall or Nelda F. Wall** for the principal amount . . .

Record at p. 0011] Emphasis added. By the time the "Judgment by Default" document was prepared and signed, all references to the "Estate of Hal E Wall" had been deleted, both in the caption of the case and in the operative text of the judgment, which provided in relevant part:

It is Hereby ORDERED that judgment is granted against the defendant Steven D. Caldwell **in favor of Nelda F. Wall** in the Principal amount . . .

Record at p. 0013. Emphasis added.


Such a judgment cannot be allowed to stand; it is proper for the judgment to be set aside. See **Russell vs Martell**, 681 P.2d 1193 (Utah Supreme Court 1984).

CONCLUSION

Black-letter law holds that proper service of process, in strict compliance with Rule 4, is a jurisdictional prerequisite to a valid judgment. **Woody** holds that the 3-month limitations of Rule 60(b) do not apply to a void judgment entered upon invalid service of process. **Lawrence** holds that the defendant's "usual place of abode" is the dwelling where he is living at the time of service. The simple fact remains that the

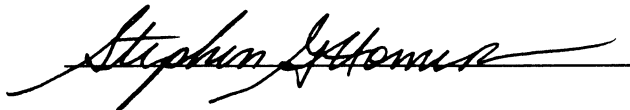
day in court".

Respectfully submitted this 9th day of July, 1997.


STEPHEN G. HOMER
Attorney for Appellant
STEVEN D CALDWELL

CERTIFICATE

I certify that I caused two copies of the foregoing APPELLANT'S BRIEF to be mailed to Mr Delano S Findlay, Attorney at Law, 923 East 5350 South, Suite E, Salt Lake City, Utah 84117, this 9th day of July, 1997.



ADDENDUM

APPENDIX A: Plaintiffs' Complaint [2 pages]

APPENDIX B: Return of Service [1 page]

APPENDIX C: 15 September 92 letter [1 page]

APPENDIX D: 1983 Divorce Decree [4 pages]

92/00228
75-00
Delano S. Findlay, #1074
Attorney for Plaintiff
923 East 53⁵⁰ South, Suite E
Salt Lake City, Utah 84117
Telephone: (801) 264-8040

FILED
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Brewster
CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LAUREL W. CALDWELL, Personally and :
NELDA WALL on behalf of the ESTATE :
of HAL E. WALL, :

COMPLAINT

Plaintiffs,

vs.

STEVEN D. CALDWELL,

Defendant.

Civil No. 920903224
Judge:

JUDGE FRANK G. NOEL

CV

Plaintiffs for a cause of action allege:

1. Plaintiffs reside in Salt Lake County and the original causes of action arose in Salt Lake County.
2. The judgments sought to be renewed are judgments of the Third District Court in and for Salt Lake County.
3. On December 31, 1982, this Court granted a Decree of Divorce in which the Court granted a judgment against the defendant and in the favor of Hal E. Wall in the sum of \$10,069.00.
4. Interest has accrued at the judgment rate of 12 percent (12%) per annum and now amounts to \$12,034.47.
5. Hal E. Wall is deceased and Nelda Wall, his spouse

APPENDIX A

000001

brings this action on behalf of his estate.

6. The defendant is indebted to the plaintiff for unpaid child support in the amount of \$9,640.65 together with interest thereon which has become and is a judgment against the defendant pursuant to Utah law.

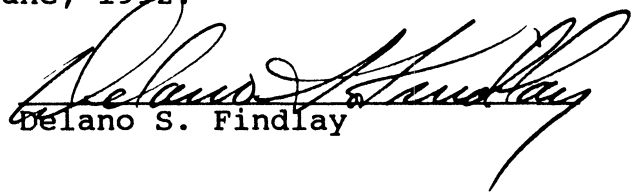
WHEREFORE, the plaintiff prays for:

1. Judgement in favor of the Estate of Hal E. Wall in the amount of \$10,069.00 together with post judgment interest in the amount of \$12,034.24 for a total of \$22,103.47,

2. Judgment for unpaid child support in the amount of \$9,640.65 together with interest thereon in such amount as the Court shall determine, and

3. Judgment for such other amounts as the court shall determine is and constitutes a judgment outstanding against the defendant and in favor of the plaintiffs.

Dated this 30th day of June, 1992


Delano S. Findlay

Delano S. Findlay, #1074
Attorney for Plaintiff
923 East 5375 South, Suite E
Salt Lake City, Utah 84117
Telephone: (801) 264-8040

SEP 22 1992 3 45 PM '92

Sina C. Ash

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LAUREL W. CALDWELL,

Plaintiff,

vs.

STEVEN D. CALDWELL,

Defendant.

AFFIDAVIT OF SERVICE OF
SUMMONS AND COMPLAINT

Civil No. 92093224 CV
JUDGE: FRANK G. NOEL

State of Missouri)
ss.
County of St. Clair)

On the 28 day of September, 1992, at 309 o'clock PM
m., I served the attached Summons and Complaint upon the defendant
Steven D. Caldwell by leaving copies at his residence at 611 North
Maple, Appleton, MO 64724 with Nikki Caldwell (wife), a
person of suitable discretion and age.

Notary Public for
Missouri
Deputy Sheriff
(Title)

Subscribed and sworn to me under penalty of perjury by
_____ who personally appeared before me and
displayed proper identification this _____ day of September, 1992.

Notary Public, residing in the State
of Missouri

My commission expires:

APPENDIX B

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46-2522 417

DELANO S. FINDLAY
Attorney At Law

923 East Executive Park Drive
Salt Lake City, Utah 84117
September 15, 1992

Telephone No.
(801) 264-8040

ST. CLAIR COUNTY SHERIFF -
P.O. Box 309
Osceola, MO 64776

Re: Caldwell v. Caldwell

Dear Sheriff:

Enclosed please find a the original and one copy of a Summons and two copies of a Complaint for service upon Steven D. Caldwell who resides at 611 North Maple Drive, Appleton, MO 64724. Also enclosed to be served with the Summons and Complaint is one copy each of a Motion For Default Judgment and affidavit of the plaintiff and of counsel.

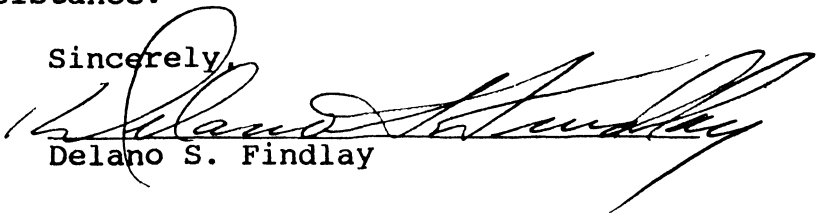
Please serve the Summons and Complaint by showing the original Summons and leaving the copy of the Summons and one of the Copies of the complaint with the defendant Steven D. Caldwell or a person of suitable age and discretion at the residence. Please return the original of the Summons and the other copy of the Complaint for filing with the court. I understand that Mrs. Caldwell does not work and may be found at home sometime during normal daytime hours. Mr. Caldwell is working out of town and can only be found at home on weekends.

Please have the officer making the service write his office and the date and time of service on the copy of the complaint and the Summons left with or for Mr. Caldwell. Please write the same information and the identity of the person with whom they are left at the residence on the copies returned for filing. Enclosed also are two affidavits of service; one to be completed and returned along with the original of the summons and the other copy of the complaint for filing with the court unless you have your own form which you wish to use. The other affidavit is to be returned showing service of the Motion and affidavits. There is no need to return a copy of the Motion or the affidavits so no extra copies are included.

I understand the fee for service is \$33.00 regardless of the number of documents. A check in that amount is enclosed. If more is needed please make the service, but let me know the additional amount and I will forward the amount by return mail.

Service of the Summons and Complaint must be accomplished before October 3, 1992. If you have any questions you may telephone me at the telephone number in the letterhead collect. Thank you for your assistance.

Sincerely,


Delano S. Findlay

APPENDIX C

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JUDGMENT

CLERK'S OFFICE
Salt Lake County, Utah

JAN -7 1983

FILMED

Evelyn Thompson
Evelyn Thompson

NOLAN J. OLSEN
OLSEN & OLSEN
Attorneys for Plaintiff
8138 South State Street
Midvale, Utah 84047
Telephone: 255 - 7176

BR. 175 NO. 1051

1-7-83 - 12:55 P.M.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LAUREL W. CALDWELL,	:	
Plaintiff,	:	DECREE OF DIVORCE
v.	:	
STEVEN D. CALDWELL,	:	Civil No. D82-1586
Defendant.	:	

The above-entitled matter having come on regularly for hearing on the 15th day of December, 1982, before this Court, the Honorable Timothy Rex Hanson, Judge presiding, plaintiff appearing in person and by her attorney, Nolan J. Olsen, and defendant appearing in person and by his attorney, Richard McKeown, and plaintiff and defendant having stipulated in open Court as to all matters, and each party having, in open Court, approved said Stipulation, and the Court having approved said Stipulation and the defendant having withdrawn his Answer and Counterclaim and the default of the defendant having been entered, and plaintiff having been sworn and testified concerning the allegations of her Complaint, and the Court having been fully advised in the premises, and the Court having heretofore made and entered its Findings of Fact and Conclusions of Law, and upon motion of Nolan J. Olsen, attorney for plaintiff,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the bonds of matrimony heretofore existing between the plaintiff, LAUREL W. CALDWELL, and the defendant, STEVEN D. CALDWELL, be, and the same are hereby dissolved, providing, however, that the Decree shall not become final until December 31, 1982, during which time neither of the parties hereto shall remarry, which Decree will become final without further notice or proceedings, unless either of the parties hereto or the Court, on its own motion, shall institute further proceedings herein.

APPENDIX D

2. Plaintiff be, and she is hereby awarded the care, custody and control of five (5) of the minor children of the parties, to wit: Jason Caldwell, born January 26, 1968; Jeremy Caldwell, born August 6, 1970; Jessica Caldwell, born March 28, 1975; Joshua Caldwell, born October 27, 1976; and Jina Caldwell, born July 4, 1978, subject to the right of reasonable visitation in the defendant, including, but not restricted to the following:

(a) Each Saturday from 9:00 a.m. until 7:00 p.m., with the express provision, however, that when defendant obtains suitable housing whereby he has adequate facilities for the children to stay overnight, and defendant is not unlawfully cohabitating, then the defendant shall have said children on Friday evening at 6:00 p.m. until Saturday evening at 7:00 p.m., with the express provision, however, that on one (1) weekend per month, plaintiff shall have the children during the entire weekend.

(b) Defendant shall have the children on the 24th of December from 9:00 a.m. to 6:00 p.m. and for two (2) hours on Christmas Day, or may be arranged by the parties.

(c) In addition, defendant shall have visitation with said children on alternating holidays and for two (2) weeks during the summer vacation period, if defendant has suitable housing to care for said children and if he is not unlawfully cohabitating.

(d) In addition, defendant shall have visitation with said children as may be agreeable between the parties.

3. Defendant be, and he is hereby awarded the temporary care, custody and control of the minor child, Jared Caldwell, born June 7, 1969, said custody to continue until the expiration of the present school year, at which time said child, his counselors and plaintiff and defendant shall determine which party shall be awarded the permanent care, custody and control of said child, with the express provision however that plaintiff shall have visitation with said child as may be reasonable and a minimum visitation allowed as provided for defendant with the children in the care, custody and control of plaintiff.

4. Defendant be and he is hereby ordered to maintain the minor child, Jared Caldwell, in such counseling as may be determined so as to provide said child with the necessary help for his emotional and mental well being.

5. Plaintiff be and she is hereby awarded the home and real property located at 176 West Durdham Lane, Sandy, County of Salt Lake, State of Utah, more particularly described as follows:

ALL OF LOT 44, WALLACE HEIGHTS SUBDIVISION
according to the official plat thereof as
recorded in the office of the Salt Lake
County Recorder.

subject to plaintiff assuming and discharging the first mortgage due First Security Bank of Utah in the approximate sum of \$14,000.00 and the sum of \$16,750.00 of the second mortgage due Hal E. Wall and no other liens, with the express provision that defendant shall assume and pay and be totally responsible for the remaining balances of the second mortgage due Ha. E. Wall in the sum of \$10,069.00 and any and all United States government, Internal Revenue Service liens, and/or any lien for taxes due the State of Utah.

6. Plaintiff be and she is hereby further awarded, as her sole and separate property, the furniture, furnishings and fixtures located in the home of the parties, the 1972 Pinto automobile and her personal belongings.

7. Defendant be and he is hereby awarded, as his sole and separate property, the 1969 Chevrolet pick-up, two (2) metal military desks, a barbeque grill, a pool cue, a wheelbarrow, his church and personal papers, as well as any and all personal belongings.

8. Plaintiff be and she is hereby ordered to assume and discharge the first mortgage on the home due First Security Bank of Utah; the sum of \$16,750.00 on the second mortgage due to Hal E. Wall; the obligations due Ironhorse Automotive, with the exception of \$200.00 due to Ironhorse to be paid by defendant; as well as any and all debts and obligations incurred in her own name since the filing of the Complaint herein.

9. Defendant be and he is hereby ordered to assume and pay the balance due to Hal E. Wall on the second mortgage in the sum of \$10,069.00; all Federal and State income tax claims which have become due prior to the

filing of the Complaint herein, including any and all liens of the United States of America Internal Revenue Service or the State of Utah, State Tax Commission, which may affect plaintiff's home, it being specifically ordered that defendant is totally responsible for said Federal and State taxes.

10. Defendant be and he is hereby ordered to assume and pay \$200.00 on the Ironhorse Obligation, as well as any and all other debts and obligations he may have incurred in his own name since the filing of the Complaint herein.

11. Defendant be and he is hereby ordered to pay to plaintiff, for the support and maintenance of the minor children in plaintiff's custody, the sum of \$400.00 per month, said sum to remain at \$400.00 per month as long as plaintiff has at least four (4) children in her care, custody and control. Any decrease below four (4) children shall decrease at the rate of \$100.00 per child per month. Defendant be and he is hereby ordered to pay said sums on the basis of \$200.00 on or before the 10th day of each month and \$200.00 on or before the 25th day of each month.

12. Defendant be and he is hereby ordered to maintain a medical insurance policy on the minor children of the parties, if a medical insurance plan is available at his place of employment. He is further ordered to maintain any group life insurance policy at his place of employment, naming the minor children as beneficiaries thereon.

13. Plaintiff and defendant are each hereby ordered to assume and discharge their individual Court costs and attorney's fees.

DATED this 7 day of January 1988

BY THE COURT

DISTRICT COURT JUDGE
ATTEST
H. DIXON HINDLEY

By Evelyn Thompson
Evelyn Thompson Deputy Clerk

APPROVED AS TO FORM:

Richard McKeown

RICHARD MC KEOWN
Attorney for Defendant

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.

DATE: JUNE 7 1991
Phil Kelley
CLERK