

2009

Anderson v. Anderson : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: 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.

Gregory B. Wall; Nathan B. Wall; Wall & Wall; Attorneys for Petitioner.

Brent D. Young; Attorneys for Respondent.

Recommended Citation

Brief of Appellant, *Anderson v. Anderson*, No. 20090741 (Utah Court of Appeals, 2009).

https://digitalcommons.law.byu.edu/byu_ca3/1855

This Brief of Appellant 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. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

DEBORAH ANDERSON

Petitioner and Appellant,

v.

KELLY ANDERSON,

Respondent and Appellee.

*
*
*
*
*
*
*
*
*
*

Appellate Case No. 20090741

Trial Court Case: 074402410

BRIEF OF APPELLANT

Appeal from an Order of the
Fourth Judicial District Court
Utah County, State of Utah
The Honorable Darold McDade, Presiding

GREGORY B. WALL (3365)
NATHAN B. WALL (11431)
WALL & WALL, apc
2168 E. Fort Union Blvd.
Salt Lake City, Utah 84121
Attorney for Petitioner and Appellant

Brent Young
226 West 2230 North
P.O. Box 657
Provo, Utah 84603
Attorney for Respondent/Appellee

Kelly M. Perterson, Guardian ad Litem
32 West Center Street, Suite 205
Provo, Utah 84601

Appellant Requests Oral Argument

**FILED
UTAH APPELLATE COURTS**

IN THE UTAH COURT OF APPEALS

DEBORAH ANDERSON

Petitioner and Appellant,

v.

KELLY ANDERSON,

Respondent and Appellee.

*
*
*
*
*
*
*
*
*
*

Appellate Case No. 20090741

Trial Court Case: 074402410

BRIEF OF APPELLANT

Appeal from an Order of the
Fourth Judicial District Court
Utah County, State of Utah
The Honorable Darold McDade, Presiding

GREGORY B. WALL (3365)
NATHAN B. WALL (11431)
WALL & WALL, apc
2168 E. Fort Union Blvd.
Salt Lake City, Utah 84121
Attorney for Petitioner and Appellant

Brent Young
226 West 2230 North
P.O. Box 657
Provo, Utah 84603
Attorney for Respondent/Appellee

Kelly M. Perterson, Guardian ad Litem
32 West Center Street, Suite 205
Provo, Utah 84601

LIST OF ALL PARTIES IN THE DISTRICT COURT

The following parties and attorneys appeared in the proceedings in the Fourth Judicial District Court in and for Utah, State of Utah:

1. Deborah E. Anderson, Petitioner/Appellant, is represented by Gregory B. Wall and Nathan B. Wall of Wall & Wall, apc, Salt Lake City, Utah.
2. Kelly L. Anderson, the Respondent and Appellee, is represented by Brent D. Young, of Ivie & Young, Provo, Utah.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii.
PRELIMINARY STATEMENT	1
JURISDICTION	1
ISSUES PRESENTED FOR REVIEW	2
APPLICABLE STATUTES AND RULES	3
STATEMENT OF THE CASE	5
STATEMENT OF THE FACTS.....	5
SUMMARY OF THE ARGUMENT.....	12
ARGUMENT.....	13
CONCLUSION	22
ADDENDUMS:	
1. Docket evidencing Appellant’s Objection, Order signed, and entry of Judgment.	
2. Worksheet Verification Affidavit and Statement of Compliance (In Support of Attorney General Memorandum in Support of Motion for Temporary Relief, filed March 26, 2009).	

TABLE OF AUTHORITIES

Court Cases	Page
<u>State v. Richardson</u> , 843 P.2d 517, 518 (Utah App. 1992).....	2, 3
<u>State v. Larsen</u> , 865 P.2d 1355 (Utah 1993).....	3
<u>Bailey v. Bayles</u> , 52 P.3d 1158 (Utah 2002).....	14
<u>Rhen v. Rhen</u> , 974 P.2d 306 (Utah App. 1999).....	16
<u>Wilde v. Wilde</u> , 969 P.2d 438 (Utah App. 1998).....	16
<u>Williamson v. Williamson</u> , 983 2P.d 1103 (Utah App. 1999).....	16
<u>Kallas v. Kallas</u> , 614 P.2d 641 (Utah 1980).....	16
<u>Coleman v. Coleman</u> , Utah, 664 P.2d 1155 (Utah 1983).....	17
<u>Boggs v. Boggs</u> , 824 P.2d 478 (Utah 1991).....	18
<u>Salzetti v. Backman</u> , 638 P.2d 543 (Utah 1981).....	19
<u>State v. Bartholomew</u> , 38 P.2d 753 (Utah 1934).....	20
<u>Utah Farm Prod. Credit Ass'n v. Labrum</u> , 762 P.2d 1070 (Utah 1988).....	20
<u>State v. Halverson</u> , 754 P.2d 1155, 1156 (Utah 1983).....	20
State Statutes	
Utah Code Ann. §78-2a-3	1
Utah Code Ann. § 30-3-3(2)	2, 4,15
Utah Code Ann. § 78B-6-310	5, 16

Utah Code Ann. § 78-32-10 5, 17

Rules

Utah Rules of Civil Procedure, Rule 60 (a) 5, 21

Utah Rules of Appellate Procedure, Rule 3 1

Constitutional Provisions

Utah Const. Art. I, § 7 4, 12

U.S. Const. Art. V..... 4, 12, 16

U.S. Const. XIV Amend. 4, 12, 16

IN THE UTAH COURT OF APPEALS

DEBORAH E. ANDERSON

Petitioner/Appellant,

v.

KELLY L. ANDERSON,

Respondent/Appellee.

*
*
*
*
*
*
*
*
*
*
*

Appellate Case No. 20090741

Trial Court Case: 074402410

PRELIMINARY STATEMENT

In this brief “R” refers to the record of the court, “Ex” refers to exhibit, followed by the exhibit number, and “TR” refers to transcripts of the court.

STATEMENT OF JURISDICTION

This court has jurisdiction to hear this matter pursuant to the provisions of Rule 3 of the Utah Rules of Appellate Procedure, and §78-2a-3, Utah Code Annotated.

STATEMENT OF ISSUES

ISSUE 1: Whether Appellant was denied due process of law for denial of the opportunity to present evidence regarding time periods for child support and whether monies she received followed the children.

STANDARD OF REVIEW: The trial court's interpretation of binding case law is viewed as presenting a question of law and is reviewed for correctness. State v. Richardson, 843 P.2d 517, 518 (Utah App. 1992). Also, this issue deals directly with common law fundamental and Constitutional rights of U.S. citizens, which is always preserved.

ISSUE 2: Did the court abuse its discretion in ordering Appellant to pay all attorney's fees for all parties at the January 20, 2009 hearing when Appellee could not have prevailed on his motion at said hearing due to his noncompliance with court orders and the rules of Civil Procedure even if Appellant's Motion to Strike had been denied.

STANDARD OF REVIEW: 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 fees upon determining that the party substantially prevailed upon the claim or defense. Utah Code Ann. §30-3-3 (2). Statutory interpretation by a trial court presents a question of law, which is reviewed for correctness. State v. Richardson, 843 P.2d 517, 518 (Utah App. 1992).

ISSUE 3: Whether a District Court Commissioner has the authority to hold someone in contempt for penalties greater than those of mere courtroom violations.

STANDARD OF REVIEW: Statutory interpretation by a trial court presents a question of law, which is reviewed for correctness. Similarly, the trial court's interpretation of binding case law is viewed as presenting a question of law and is reviewed for correctness. State v. Richardson, 843 P.2d 517, 518 (Utah App. 1992).

ISSUE 4: Whether the trial court erred in signing the Order from the August 18, 2009 hearing despite there being an Objection, and without ruling on or addressing the objection.

STANDARD OF REVIEW: Statutory interpretation by a trial court presents a question of law, which is reviewed for correctness. Similarly, the trial court's interpretation of binding case law is viewed as presenting a question of law and is reviewed for correctness. State v. Richardson, 843 P.2d 517, 518 (Utah App. 1992). Additionally, the trial court's interpretations of rules of procedure is a question of law that is reviewed for correctness. State v. Larsen, 865 P.2d 1355 (Utah 1993).

DETERMINATIVE AUTHORITIES

Appellant submits that the following Statutes, Rules, and Constitutional provisions may be determinative of certain issues in this Appeal:

U.S. Const. Art. V

[Amendment]

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Utah Const. Art. I, § 7 & U.S. Const. XIV Amend.

§ 7 [Due process of law]

No person shall be deprived of life, liberty, or property, without due process of law.

U.S. Const. Art. XIV, § 1

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Code Ann. §30-3-3(2)

§ 30-3-3 (2)

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

fees upon determining that the party substantially prevailed upon the claim or defense.

Utah Code Ann. § 78-32-10

§ 78-32-10

When contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily, for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against it thereby guilty of a contempt, and that he be punished.

Utah Code Ann. §78B-6-310

Contempt— Action by court

A justice court judge or court commissioner may punish for contempt by a fine not to exceed \$500.00 or by incarceration for five days or both.

Utah Rules of Civil Procedure

Rule 60(a) [Clerical mistakes]

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

STATEMENT OF THE CASE

This case presents an appeal from the final judgment of the Fourth District Court, Utah County, August 18, 2009, the Honorable Darold J. McDade presiding, as well as the final judgement from hearings stemming from recommendations made by the Honorable Thomas Patton, District Court

Commissioner, on or about December 15, 2009, January 20, 2009, and entered by the Honorable Claudia Laycock on February 6, 2009.

STATEMENT OF THE FACTS

1. On or about October 17, 2008, the minor children of the parties were removed from the custody of the Petitioner pursuant to an ex parte temporary restraining order sought by Appellee, the Office of the Guardian ad Litem, and the Special Master, Sandra Dredge, which temporarily placed the minor children in the custody of their father, the Appellee. R. 1367, 812, 809.

2. The parties had adopted numerous handicapped and special needs children, and as a result thereof, received benefits and payments from the various states that they adopted the children from, such as California and Nevada. R. 1366, 1365. As part of said ex parte temporary restraining, Appellee merely alleged that Appellant received \$7,000.00 from the State of California and placed within said ex parte temporary restraining order, an order entitling him to said amount of money, requiring Appellant to pay the same. R. 1105. A hearing was held on said ex parte temporary restraining order, before the Honorable Thomas Patton, District Court Commissioner instead of the presiding Judge Darold McDade. R. 1106.

3. Appellant had been served with hundreds of pages of pleadings, and exhibits, and requested a continuance due to the volume of material which she had been served with at the October 27, 2008 hearing and the short period time

between being served with said papers and the hearing on said ex parte order. R. 1149. The Court became angry at the parties for arguing over each other's failures and non-compliance with court orders, and inappropriately entered the temporary restraining order, denying the Appellant an evidentiary hearing on the merits of said restraining order. Shortly after the temporary restraining order was issued, the Fourth District Juvenile Court assumed jurisdiction over the issue of custody of the parties' minor children, and the allegations which made up the basis for the temporary restraining order were litigated there, which afforded Petitioner an opportunity to litigate said allegations. TR. January 20, 2009, P.4.

4. As pertaining to said \$7,000.00, the same remained an issue in the District Court, and the Court ordered that the monies were to follow the children. R. 1269. The Court further ordered, if it had it wrong and had ordered monies to one party during a time period that they weren't entitled to monies as they did not have custody of the children, or that monies had been spent for necessities for the children, that it would clean' it up at some later hearing. R. 1246.

5. The minor children were later removed by the State from Appellee's home on or about November 12, 2008 due to concerns over his parental fitness. Appellee had custody of the children only from October 17, 2008 until November 12, 2008. R. 1518, 1266.

6. The Appellee prepared an order which entitled him to a judgment against Appellant for said \$7,000.00 without ever having produced evidence of any receipt

of said monies. TR. August 18, 2009, P.60, L. 10-14. Appellant objected to said order, believing that the order of the Court was that the money was to follow the children, and Appellant had the children for 17 of the 31 days in October of 2008, entitling her to monies for the children for said month for necessities she incurred on their behalves, also objecting to such a judgment entering without her ever having been afforded a day in Court and without Appellee ever producing any evidence such sums were ever received by Appellant, prompting Appellant to timely request an evidentiary hearing on the same. R. 1266, TR. August 18, 2009, P. 60, L. 10-14. Additionally, Appellant has always maintained that said monies were paid 1 month behind, and that monies receiving in October of 2008 were for child support for the month of September 2008. R. 1266. Appellant also alleged and maintained that *inter alia*, she had incurred substantial obligations and expenses for the minor children during the 17 days she had custody of them in October of 2008, and that all of the monies received were for support during the month of September 2008, and were spent on expenses for the children for September 2008 and the 17 days in October 2008. R. 1105, 1266. As a result of the Court's order, Appellant was left having to pay many debts for the children as a result of the Court's orders which entitled Appellee to monies from the various states without the opportunity for Appellant to be heard, which have worked a significant/substantial hardship upon Appellant and which are not equitable. R. 1266.

7. Appellant timely filed an objection to the Court's ruling as to the substance of the Court's ruling and as to the form and content of Appellee's prepared order, and filed the same with the Court. R. 1268. The Court issued an order requiring counsel for the parties to each obtain a copy of the audio recording for the October 27, 2008 hearing, and then consult each other regarding the content of the order. R. 1269. Counsel for Appellant did so, and at a hearing in juvenile court regarding the State's attempt to find that Appellant had abused or neglected the minor children, requested of counsel for Appellee to have such a conference, which request was refused. R. 1221.

8. In the interim, Appellee filed a motion for issuance of an order to show cause on his interpretation of the Court's order. Said hearing was continued from January 20, 2009 until February 23, 2009. R. 1266-68.

9. At said hearing, the Court acknowledged that its' recommendation was not clear, and ordered that Appellee was entitled to \$7,000.00 which represented monies paid from some of the states the children were adopted from for their support, without ever producing any evidence that said monies were received, what amounts, whether or not said monies followed the children, or what time periods said child support/benefits represented. R. 1267, TR. August 18, 2009, P. 71, L. 5.

10. However, the Court indicated in its' ruling that it would be appropriate that an evidentiary hearing take place to determine the aforesaid issues raised by Appellant. TR. February 23, 2009, P. 37, L. 17. The Court as a result of its' prior

recommendation not being clear, refused to hold Appellant in contempt for nonpayment of said expenses and permitted Appellant time to re-file an objection in light of the Court's clarified recommendation. TR. February 23, 2009, P.37, L2.

11. Appellant filed said amended objection in March of 2009. An evidentiary hearing was held on Appellant's objection on August 18, 2009. However, the Court declined to allow Appellant to present evidence that the alleged \$7,000.00 received by her were paid for expenses for the minor children. Holding that said amount was an amount counsel previously agreed upon, and that "respondent's motion was well taken." R. 1266. Accordingly, the Court entered judgment. R. 1270. Appellant has never agreed that she owed \$7,000.00, nor did she agree that she owed said amount to Appellee for time periods he had custody of the minor children, nor did she do so at said August 18, 2009 hearing. Appellant repeatedly requested that she be allowed to present evidence, and that she disputed monies received in October of 2008 were for the support of the children during time periods when Appellee had custody of them, but was denied said opportunity. TR. February 23, 2009, P.37, L. 5-10. Said ruling deprived Appellant her rights of due process of law.

12. Appellant's pleadings had been stricken on December 15, 2008 for alleged non-compliance with prior court orders. Appellant filed a motion to reinstate her pleadings. The Court ruled at the February 23, 2009 hearing that it

would not hear said motion, unless/until Appellant complied with the following Court orders:

- a. Amend a prior tax return pursuant to previous Court order;
- b. Personal property of the children be provided to the Guardian ad Litem pursuant to previous Court order; and
- c. That said \$7,000.00 judgment be paid pursuant to the Court's clarifying order of that day. TR. 10-25, February 23, 2009.

13. Appellant does not have \$7,000.00 to pay Appellee, and it was inappropriate that such an order and judgment for said amounts enter, and continue to be in force, when Appellant has never had her day in Court. The issue of the \$7,000.00 must be settled before Appellant may seek her default being set aside. TR. February 23, 2009, P. 34, L.20-25.

14. Appellant was also ordered to pay the attorney's fees of all parties present at a January 20, 2009 hearing due to a lack of a transcript with an affidavit being filed so that a motion to strike filed by Appellant could be heard. R. 1221, 1268, TR. January 20, 2009, P.16. However, Appellee could not have proceeded with his motion *assuming arguendo*, that the motion to strike was denied on said date, as he had *inter alia*, produced no evidence that any \$7,000.00 had ever been received by Appellant, the Court had not clarified its' ruling regarding said \$7,000.00 which it later admitted was unclear, the Appellee's counsel had refused to have a conference with opposing counsel to rectify the disputed order as ordered

by the Court's minute entry, and his claims to substantiate said \$7,000.00 having been received by Appellant in his pleadings were based on impermissible hearsay which was objected to by Appellant in her relevant objection. R. 1268, 1267.

15. Appellant filed an Objection to Commissioner's Recommendation and Request for Evidentiary Hearing on March 9, 2009. R. 1270. The judge did not issue a decision on Appellant's objection, yet still signed and entered an Order based on the Commissioner's recommendation. Ex. "1."

SUMMARY OF THE ARGUMENT

The facts of this case are egregious and result in extreme injustice. Appellee merely alleged that Appellant received \$7,000.00 from the state of California, to cover the costs of care for the disabled children in her custody. The allegation was contained in the Appellee's Ex Parte Temporary Restraining Order, which the court inappropriately entered, denying the Appellant an evidentiary hearing on the merits of said restraining order, thereby violating her due process rights.

Furthermore, despite the Appellee's inability to proceed with his motion due to his lack of evidence that Appellant ever received \$7,000.00, and despite the court's later admission that its ruling regarding the \$7,000.00 was unclear, the court erroneously ordered that the Appellant was to pay all parties' attorney fees.

The commissioner further held the Appellant in contempt, which is not an authority reserved for a commissioner, but rather the responsibility of a judge. The commissioner's exercise of contempt power far exceeds the scope of his authority, and was in clear error in this case.

Additionally, the Appellant filed a timely and valid Objection to the form and content of the August 18, 2008 orders of the District Court. However, the judge did not issue a response to said Objection, and it is questionable whether he reviewed it at all, as the Appellee's Order was entered, despite said Objection, which was in error.

ARGUMENT

I. Appellant was denied due process of law for denial of the opportunity to present evidence regarding time periods for child support and whether monies she received followed the children.

Appellant was denied due process of law when she was denied her day in court and was not allowed to present evidence. In general, the due process clause of the Fifth Amendment is applicable to states via the Fourteenth Amendment, and in Article 1 of the Utah Constitution, and provides that the government shall not take a person's life, liberty, or property without due process of law. U.S. Const. XIV, Utah Const. Art. I, § 7. Due process entails fair process/procedure, which requires at least an opportunity to present objections and evidence to a fair and neutral decisionmaker. *Id.* The Appellant, Ms. Anderson was deprived of money in the amount of \$7,000.00, which is property, and she was not given an

opportunity to demonstrate that child support did not follow the children. TR.

August 18, 2009, P.71, L.5.

In his Ex Parte Temporary Restraining Order, the Appellee alleged that the Ms. Anderson had received \$7,000.00 from the state of California in support of the parties minor children. At the October 27, 2008 hearing, the court became angry at the parties for arguing over each other's failures and non-compliance with court orders, so it entered the Ex Parte Temporary Restraining Order, without allowing Appellant to have an evidentiary hearing on the merits of said Restraining Order. TR. February 23, 2009, P.37, L. 5-10. Ms. Anderson was denied her "day in court," otherwise known as her procedural due process rights, as required by both federal and state law, and evidenced by precedent of the Supreme Court. Bailey v. Bayles, 52 P.3d 1158, (Utah 2002).

Additionally, the court refused to hear Appellant's objection to the Restraining Order, completely ignoring the Appellee's lack of evidence of monies received by the Appellant, and disregarding the Order entered from a prior hearing regarding the monies following the children, and the amount of time Appellant had the children and was entitled to support. R. 1267.

The court disregarded the facts, and refused to allow Appellant to present evidence as to the 17 of 31 days she had custody of the children during October 2008, which would entitle her to more than half of the monies from the alleged \$7,000.00 received for the children's care in November 2008, on a pro rata basis

for the days she had the custody of the children for their care and maintenance, and ordered the money to be given to the Appellee. TR. 36-37, February 23, 2009, R. 1105. Additionally, the Appellee alleges that the entire \$7,000.00 amount received in October 2008, was actually for the support of the children for September 2008, which would then entitle the Appellant to the entire amount, as she is the parent who had custody of the children at that time.

By entering the Ex Parte Temporary Restraining Order, the \$7,000.00 that the Appellant alleged received, was awarded in total to the Appellee, even though he only had the children for 14 days in October 2008, and despite the prior Order of the court which stated that the monies follow the children. R. 1105. Therefore, Appellant's due process rights were severely denied, and she should get her day in court to object and present evidence thereupon.

II. The Court abused its discretion when it ordered Appellant to pay all attorney's fees for all parties at the January 20, 2009 hearing when Appellee could not have prevailed on his motion at said hearing due to his noncompliance with court orders and the rules of Civil Procedure even if Appellant's Motion to Strike had been denied.

At the hearing held January 20, 2009, the court entered an Order that Appellant pay for her own attorney fees, as well as the Appellee's attorney fees, GAL's fees, and Special Master's attorney fees, which was in error because the Appellant was not given the opportunity to present findings as to the Appellee's need for payment of such fees, the Appellant's ability to pay, and the reasonableness of such fees, which is required when entering such order, otherwise

remand for reconsideration is necessary. Rhen v. Rhen, 974 P.2d 306 (Utah App. 1999); Wilde v. Wilde, 969 P.2d 438 (Utah App. 1998); Williamson v. Williamson, 983 P.2d 1103 (Utah App. 1999). In this case, the court completely ignored, and did not even bother to inquire into the Appellant's ability to pay said fees.

In fact, the Appellant cannot afford to pay her attorney fees, let alone the Appellee's fees. According to the Worksheet Verification Affidavit and Statement of Compliance filed with the Attorney General's Memorandum in Support of Motion for Temporary Relief on March 26, 2009, the Appellee gross monthly income is believed to be \$5,605.00, while the Appellant's income is only \$1,138.00. R. 1330, 1331, Ex. "2." If anything, the Appellant shows a need of her Attorney fees being paid, rather than Appellee showing his fees need to be paid, because his income far exceeds her income. The Appellant should have been given an opportunity to present evidence of her inability to pay Appellee's attorney fees, and produce evidence of her financial need, anything less than such inquiry and opportunity to be heard is an abuse of discretion. Kallas v. Kallas, 614 P.2d 641 (Utah 1980).

In this case, the court did not consider any of the requisites for a finding of attorney fees to be paid by the Appellant, but instead ordered payment of such fees due to the Appellant's failure to file a transcript with an affidavit so that her Motion to Strike could be heard. However, the affidavit as to the miscalendaring,

would have been from Appellant's attorney, but could not be written because the court ruled that said attorney was not a witness, and could not file such affidavit. This is a clear abuse of discretion by the court.

Furthermore, the Appellee could not proceed on his motion because he produced no evidence of Appellant's receipt of \$7,000.00, which the court later admitted was in fact unclear. In this case, it would have been proper for the court to award costs and attorney fees if it determined that the party substantially prevailed upon the claim or defense. Utah Code Ann. § 30-3-3 (2). However, that did not happen in this case because the Appellee could not even proceed with his claim, let alone prevail.

Additionally, Appellee's counsel refused to have a conference with Appellant's counsel to rectify the disputed Order, as ordered, and noted in the minute entry, which led to claims of said \$7,000.00 being received by Appellant on impermissible hearsay, and causing further attorney fees to incur due to Appellee and his actions. R. 1221. Therefore, Appellee should be required to pay the parties' attorney fees, or in the alternative, each party be ordered to pay their own.

III. The District Court Commissioner did not have the authority to hold Appellant in contempt for penalties greater than those of mere courtroom violations.

The court's finding of Appellant, Ms. Anderson, in contempt was in error. In order to find contempt, the court must find from clear and convincing evidence that the person to be held in contempt knew what was required of her, had the

ability to comply, and willfully and knowingly failed and refused to so. Coleman v. Coleman, 664 P.2d 1155 (Utah 1983). The court commissioner—not the assigned judge—made a verbal ruling that the Appellant was in contempt because she had not followed the directives of the Special Master, rendering her in contempt of court orders. R. 1097. However, the hearing was before Commissioner Patton, rather than Judge McDade, and it is Appellant’s position in this appeal that a District Court commissioner’s contempt authority does not reach that of a judge’s authority on such matters. A commissioner may punish for contempt only by a fine not to exceed \$500.00 or by incarceration for five days or both. Utah Code Ann. §78B-6-310.

The due process provision of the federal constitution, U.S. Const. Amend. XIV, requires that in a prosecution for a contempt not committed in the presence of a court, the person charged should be advised of the nature of the action against him or her, have assistance of counsel, if requested, have the right to confront witnesses, and have the right to offer testimony on his or her behalf. Boggs v. Boggs, 824 P.2d 478 (Utah 1991). These protections are amplified upon in the Utah Code, which requires, *inter alia*, that in a case of indirect contempt, an affidavit must be presented to a court reciting the facts constituting the contempt in order to ensure that the court and the person charged are informed of the conduct alleged to be contemptuous. *Id.*

When contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily, for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as prescribed in Utah Code Ann. §78-32-10 hereof. *Id.* When contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators or other judicial officers. *Id.* In this case, the appellant was not held in contempt for acts committed in the immediate view of the court, but for those outside the presence thereof, yet there was no affidavit presented or statement of facts by the appropriate authorities to support such contempt holding.

In Order to determine a question of contempt, the trial court must memorialize its judgment by entering written findings of fact and conclusions. Salzetti v. Backman, 638 P.2d 543 (Utah 1981). The Appellant in this case was not allowed to enter such written findings of fact and conclusions.

Findings of fact are necessary to support judgment of contempt, so that where judgement of contempt was supported by no other finding except that defendant, who was found guilty in a separate proceeding, was guilty of contempt because of failure to comply with court order as to payments, and there was no

finding with respect to defendant's ability to pay, judgment of contempt was void. State v. Bartholomew, 38 P.2d 753 (Utah 1934).

Supreme Court's review of a contempt citation involves questions of whether the underlying order is lawful; and whether the party's conduct in violating the order constitutes contempt of court. Utah Farm Prod. Credit Ass'n v. Labrum, 762 P.2d 1070 (Utah 1988).

In State v. Halverson, 754 P.2d 1155 (Utah 1983), a modification hearing was converted into a contempt trial based on proffers, which creates a situation where conviction of indirect contempt must be reversed where evidentiary procedures were not followed. *Id.* at 1156. Similar to Halverson, evidentiary procedures were not followed in this case, and the court's finding of appellant in contempt should be reversed, as such finding was in error.

Hearings in front of a commissioner are brief, and parties are only afforded an opportunity to proffer testimony, present affidavits and oral argument, but do not get to present evidence by way of personal testimony, confront witnesses, nor cross examine as required by the rules of evidence. Furthermore, such procedures as occurred in this case have been historically practiced by Commissioner Patton in his courtroom, where people are immediately taken from his courtroom for incarceration, without an evidentiary hearing, without the filing of findings and conclusions, and without any of the other procedural safeguards established by appellate courts of this state and the United States Supreme Court.

We have been unable to find any case dealing with this issue in Utah where commissioners exercise contempt power beyond using it to maintain control in their courtrooms, nor do we find any authority that allows district court commissioners such far reaching contempt authority, including the right to avoid filing findings and conclusions in any case. However, it seems clear from the authorities cited that such actions by district court commissioners far exceeds their authority. Therefore, appellant respectfully submits that the commissioner's holding of the Appellant in contempt was in error.

IV. The trial court erred in signing the Order from the August 18, 2009 hearing despite there being an Objection, and without review of said Objection to proposed Order.

The trial court should not have signed and entered the Order from the hearing of August 18, 2009 because there was a pending Objection in need of review and response. Appellant filed a Motion to Vacate in the district court, requesting correction of the Order, to strike therefrom many inappropriate documents, argumentative language, and material the court requested not be included. R. 1103. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court. Utah R. Civ. P. Rule 60 (a).

The district court failed to issue a ruling on Appellant's objection regarding form and content of the Order. R. 1600. It is unknown whether the Appellant's

Objection was even read by the judge, or at least considered. Although there is a lack of relevant case or statutory law in regards to judges issuing responses to objections, it is equitable that the judge be required to issue a response to said objection, and within a reasonable amount of time. The Appellant filed numerous Motions to Stay Appeal, while waiting for review of her objection and entry of a Final Order. The Order was finally entered, yet there is still no ruling from the court to the Appellant's Objection. R. 1584.

As a matter of public policy procedure, the District Court should be required to offer a ruling on an objection to a commissioner's recommendation prior to entering a final Order in a matter. No such procedure was followed in this case, and as such, the trial court's entry of the Order prior to responding to the Appellant's meritorious objection was in error. Therefore, the Order should be vacated, and the district court should issue a ruling on the Appellant's objection.

CONCLUSION

An individual's right to due process is a fundamental Constitutional right. Ms. Anderson has been denied this right because she was not given an opportunity to present evidence and have her day in court before a judgment was entered against her, awarding Appellee \$7,000.00.

Furthermore, Appellant was ordered to pay all parties' attorney fees, but should not have been, because the Appellee was in violation of prior court Orders, and could not have proceeded with his action, as he has not complied with the rules

of civil procedure, and the court did not consider Appellant's lacking ability to pay such fees, or the reasonableness thereof.

Also, Appellant was held in contempt, which was beyond the scope of the commissioner's contempt authority.

Additionally, the final Order in this matter was entered without consideration of nor response to Appellant's Objection to the Order. Appellant, Ms. Anderson, respectfully asks this court to reverse the decision of the trial court, and remand the issue of the \$7,000.00 for an evidentiary hearing by the District Court.

RESPECTFULLY SUBMITTED this _____ day of April, 2010

Gregory B. Wall
Attorney for Petitioner/Appellant

CERTIFICATE OF DELIVERY

I, Gregory B. Wall, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and ^{two}~~four~~ copies to counsel for Appellee, Brent Young, 226 West 2230 North, P.O. Box 657, Provo, UT 84603, this _____ day of April, 2010.

And two copies to
Kelly M Peterson, Guardian Ad Litem
32 W Center St., suite 205
Provo, UT 84601

Gregory B. Wall

Delivered to the Utah Court of Appeals and the Appellant as indicated above this _____ day of April, 2010.

EXHIBIT 1

10-09-09 Filed: Objection to Proposed Order, Request for Sanctions & Award of Attorney Fees, & Request for Hearing (Hearing 8/18/09) [sic]
10-13-09 Filed: Certificate of Submission to Court Re Order and Judgment (Hearing Date Aug. 18, 2009)
10-14-09 Note: Order has been submitted and sent to Judge McDade.
10-27-09 Filed order: Order and Judgment (Hearing Date August 18, 2009)
Judge DAROLD MCDADE
Signed October 27, 2009
11-06-09 Filed: Court of Appeals Order (30 day stay of appeal)
11-12-09 Filed: Notice of Entry of Judgment
11-27-09 Filed: Directives from Anna Trump, Licensed Clinical Social Worker
12-15-09 Filed: Renewed Notice of Appeal
12-15-09 Filed: Motion to Vacate Order and Request for Hearing on Objection and Motion to Strike Attachments to Order
Filed by: ANDERSON, DEBORAH
12-15-09 Filed: Memorandum in Support of Motion to Vacate Order and Request for Hearing on Objection and Motion to Strike Attachments to Order and Motion for Sanctions
12-18-09 Note: Certified Copy of Renewed Notice of Appeal sent to Court of Appeals via state mail tracking no 55500042693
12-29-09 Filed: TRANSCRIPT for Hearing of 08-18-2009
01-04-10 Filed: Original Transcript of Evidentiary Hearing 8/18/09, Transcribed by Wendy Haws, CCT
01-26-10 Filed: Clerk's Certificate and Judgment Roll and Index

Printed: 04/13/10 11:07:37

Page 30

CASE NUMBER 074402410 Divorce/Annulment

01-26-10 Note: Sent certified copy of Judgment Roll & Index and Clerk's Certificate to Court of Appeals via state mail tracking no 55500042699.
02-17-10 Filed: TRANSCRIPT for Hearing of 01-06-2009
02-19-10 Note: Transcript for hearing 6/9/2009 received.
02-23-10 Note: The Court Of Appeals request for the JR&I by 3/15/10 was assigned to Kristin W.
03-08-10 Note: Appealed: Case #20090741
03-08-10 Filed: 1st Supplemental Clerk's Certificate and Judgment Roll and Index
03-08-10 Note: Sent certified copy of 1st Supplemental Judgment Roll and Index to Court of Appeals via State Mail tracking number 55500080182.
03-22-10 Filed: Certificate of Attorney to Temporarily Withdraw Record of Case on Appeal (Angilee K. Wright for Atty Gregory B. Wall) OUT: 7 Yellow Files, 4 Transcripts
03-25-10 Filed: Memorandum in Reply to Petitioner's Response to Motion for Order Requiring
03-25-10 Filed: Respondent's Objection to Stipulated Issues As Set Forth in Petitioner's Proposed Pretrial Order

EXHIBIT 2

IN THE FOURTH JUVENILE DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

<u>STATE OF UTAH</u> vs. <u>KELLY LLOYD ANDERSON</u> <u>DEBORAH ELIZABETH ANDERSON</u>	CHILD SUPPORT OBLIGATION WORKSHEET (SOLE CUSTODY AND PATERNITY) Civil No. _____
---	--

	MOTHER	FATHER	COMBINED
1. Enter the # of natural and adopted children of this mother and father for whom support is to be awarded.	//////////	//////////	10
2a. Enter the father's and mother's gross monthly income. Refer to Instructions for definition of income.	\$1138.00	\$5605.00	//////////
2b. Enter previously ordered alimony that is actually paid. (Do not enter alimony ordered for this case).	-0.00	-0.00	//////////
2c. Enter previously ordered child support. (Do not enter obligations ordered for the children in Line 1).	-0.00	-0.00	//////////
2d. OPTIONAL: Enter the amount from Line 12 of the Children in Present Home Worksheet for either parent.	-0.00	-0.00	//////////
3. Subtract Lines 2b, 2c, and 2d from 2a. This is the Adjusted Gross Income for child support purposes.	\$1138.00	\$5605.00	\$6743.00
4. Take the COMBINED figure in Line 3 and the number of children in Line 1 to the Support Table. Find the Base Combined Support Obligation. Enter it here.	//////////	//////////	\$3508.00
5. Divide each parent's adjusted monthly gross in Line 4 by the COMBINED adjusted monthly gross in Line 3.	16.9%	83.1%	//////////
6. Multiply Line 4 by Line 5 for each parent to obtain each parent's share of the Base Support Obligation.	\$593.00	\$2915.00	//////////
7. BASE CHILD SUPPORT AWARD: Bring down the amount(s) from Line 6 or enter the amount(s) from the Low Income table per U.C.A. 78-45-7.7. The parent(s) without physical custody of the child(ren) pay(s) the amount(s) all 12 months of the year.	\$593.00	\$2915.00	//////////

8. Which parent is the obligor? Mother Father Both
9. Is the support award the same as the guideline amount in line 7? Yes No
 If NO, enter the amount ordered: \$ _____ (Father) \$ _____ (Mother) and answer number 10.
10. What were the reasons stated by the Court for the deviation?
 property settlement
 excessive debts of the marriage
 absence of need of the custodial parent
 other: _____