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IN THE SUPREME COURT OF THE STATE OF UTAH

In the matter of the Adoption of PETER KELLY McKINSTRAY and MELODY DAWN McKINSTRAY, Minors.	: : : : : : :	Case No. 17035

BRIEF OF APPELLANT

Appeal from the Judgment of the Third Judicial District in and for Salt Lake County, State of Utah
Honorable David B. Dee, District Judge

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FILED

SEP 8 1980

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

In the matter of the Adoption of PETER KELLY McKINSTRAY and MELODY DAWN McKINSTRAY, Minors.	: : : : : : :	Case No. 17035

NATURE OF THE CASE

This is an action seeking a determination that the Appellant, Dale R. McKinstray, has abandoned his natural children Peter Kelly McKinstray and Melody Dawn McKinstray and that he should therefore be deprived of all parental rights and responsibilities arising from his fatherhood and that the petition for adoption by the children's step-father should be granted without the consent of the Appellant.

DISPOSITION IN THE LOWER COURT

The Third Judicial District Court, Hon. David B. Dee, Judge, heard this matter without jury and adjudged that the Appellant natural father has abandoned his two natural children, that Appellant be deprived of all parental rights of every kind regarding his children, and that the adoption sought by the petitioners in this matter, the children's natural mother and step-father, proceed without the consent of the children's natural father.

In a post-judgment motion the Appellant sought amendment to the Findings of Fact, Conclusions of Law and Judgment and

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sought the taking of additional testimony in behalf of Appellant, or in the alternative sought a new trial, all of which were denied by the trial court.

RELIEF SOUGHT ON APPEAL

Appellant seeks first a remand to the trial court for the taking of addition testimony as prayed in Appellant's post-trial motion and for the amendment of the Findings of Fact particularly as would relate to the credibility of witnesses appearing. Appellant further seeks a reversal of the judgment of the court below such that Appellant not be adjudged to have abandoned his children and that he has the the rights and responsibilities attendant to his status as the non-custodial natural father of the children.

STATEMENT OF THE FACTS

The natural parents of the children involved in this action, Dale R. McKinstray and Nadine Ann McKinstray Suesserman, were married in 1965, had born as issue of their marriage Peter (b. Feb. 28, 1968) and Melody (b. Aug. 15, 1967), and were divorced January 6, 1970 (R. 5; Exhibit 1). Nadine subsequently married Irwin Raymond Suesserman (R. 5). Under the terms of the McKinstray divorce (R. 7-9; Exhibit 1), custody of the children was granted to their mother "subject to the right of reasonable visitation at reasonable times and places by the [Appellant] Dale R. McKinstray including the right to have said minor children visit with him at reasonable times and places" (R. 8). Mr. McKinstray was placed under an

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obligation of support for the children on a graduated basis, i.e., $30 per month per child for the year 1970, $35 per month per child for 1971, $40 per month per child for 1972, $45 per month per child for 1973, adn $50 per month per child for all years thereafter (R. 8-9).

From late 1972 until February, 1973, the children and their mother lived in California (Trans. 9). Mr. Mc-Kinstray did not know their location until just before they moved (Exhibit 7), which turned out to be to Jackson, Wyoming. Mrs Suesserman admitted that Mr. McKinstray needed the services of an attorney to extract from her the location of the children (Trans. 36). According to Mr. McKinstray's understanding she was to therafter supply him with a current address upon moving (Exhibit 7; Trans. 166-167). Mr. McKinstray's parents were also to be informed (Exhibit 12). Mrs. Suesserman admitted (Trans. 35) to having never supplied an address other than the California address from which she was moving and the post office box number (Trans. 35) which was not her address at all but was her parents' mailing address (Trans. 38).

Prior to the children moving with their mother to California in late 1972 and while the children were still in Jackson, Mr. McKinstray called the McGuire home (the maternal grandparents) and visited with the children there (Trans. 10, 44). Visitation had come to be required of the Appellant to be at the paternal grandparents' home (Trans. 179).

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Sometime before Easter, 1973, Mr. McKinstray and his second wife, Margie, moved to Worland, Wyoming, about 200 to 250 miles from Jackson (Trans. 80). The move was necessitated by the removal of his employer from Jackson to Worland (Trans. 87). He began working as a long-haul over-the-road truck driver there and has lived in Worland to the present (Trans. 80). In spite of the necessity of taking two days off of work to visit his children for a few hours in Jackson (Trans. 161) Mr. McKinstray, having recently paid just over $1,000 to bring his child support up to date, or nearly so, went with his wife to Jackson to visit the children just before Easter of 1973 (Trans. 161; Exhibits 1-3). From Jackson he telephoned his ex-wife Nadine to request a visit with his children. Nadine claims not to recall the telephone call (Trans. 33) but Mr. McKinstray testified that she told him that she didn't think that it was a good idea for him to visit the children (Trans. 161). Mr. McKinstray then went to their school to visit them and give them Easter baskets (Trans. 161-162, 110). That visit turned out to be the last visit Mr. McKinstray had with the children prior to the hearing of the present action (Trans. 14). In september, 1973, Mrs. Suesserman and the children moved to Denver, Colorado, for ten months, from which they moved to St. Louis, Missouri, where they lived for the five years prior to their move to Salt Lake City in October, 1979 (Trans. 20). The children were said to have spent summers

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in Jackson in 1973, '74, '75, '76, and '77 with their maternal grandparents, the McGuires (Trans. 21) but neither Nadine Suesserman (Trans. 37) nor her mother, Nadine McGuire (Trans. 21, 49-50) ever notified Mr. McKinstray nor the other members of the McKinstray family that the children made summer visits to Jackson (re father, Trans. 163; grandmother, 135-136; uncle, 100) nor did they have any independant knowledge of the summer visits. In all those summers while the children were growing and developing, Peter from age 5 through 10 and Melody from age 6 through 11, when Mrs. McGuire had the children living with her, she did not stop at the McKinstray family home for any reason (Trans. 50), never contacted the McKinstrays regarding the children being in town (Trans. 49-50, 100, 135-136), didn't stop for visits for the children when they claimed to have seen the McKinstray family members (Trans. 53), nor even talk with any McKinstray family members (Trans. 53). Neither Dale, the Appellant herein, nor any McKinstray family member was informed of the Mcuire family move to Montana in 1978 (Trans. 53). Nadine's remarriage, to Mr. Suesserman, in 1975 (Trans. 5) was not mentioned to the McKinstrays (Trans. 53) and Mr. McKinstray did not learn of his ex-wife's new married name "Suesserman" until the service of the pleadings in this case upon him (Trans. 164) in October, 1979 (R. 13). There was no mention to any McKinstray of the children being in Jackson in the summer of 1978, even though they were there

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periodically in moving the McGuires to Montana during that summer (Trans. 21-22). The McKinstray family home has been at the same address for 36 years (Trans. 124), which was known to the McGuire family (Trans. 34, 43) and which was driven past on occasion by the McGuires (Trans. 45). Yet the McGuires, the custodial family of the children, failed and refused over those many years to take any minimal steps whatever to inform the KcKinstrays or Dale McKinstray of the presence of the children so that visitation could take place. This was all in keeping with an antagonistic attitude held on the part of Mrs. McGuire, the maternal grandmother. She had a dislike of Dale McKinstray because "he got her pregnant," didn't want Nadine to marry Dale nor indeed to have anything to do with him (Trans. 51).

Gladys McKinstray, the paternal grandmother, last had visitation with the children in November, 1972 (Trans. 126). It was the last visit because of an incident (Trans. 133-135) involving Mrs. McGuire and the children's visit to the McKinstray home. That afternoon when the time came for the children to return to the McGuire residence Melody did not want to go and wanted to and did call Mrs. McGuire on the telephone to ask to stay longer. Melody was heard by Mrs. McKinstray to say over the telephone "I hate you". Mrs. McKinstray picked up the telephone to be told by Mrs. McGuire, "Gladys, you're trying to turn those kids against me and I'm coming after them,"

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which she did. Mrs. McGuire's treatment of the children upon her arrival to pick them up from the McKinstray residence was such that Mrs. McKinstray resolved to "not put those little kids through that any more." (At this time Melody would have been 5 years old and Peter 4.) The next month when Mrs. McKinstray had Christmas gifts for the children (Exhibits 15, 16, 17 and 18, which were on the court's motion returned to Mrs. McKinstray at the conclusion of the trial, Trans. 180) she did not know where to send them (Trans. 127). The children were in fact in Ontario, California with their mother (Trans. 9) which was the time when Mrs. Suesserman referred to in admitting that Mr. McKinstray had to use an attorney to get the address of the children (Trans. 36) and which address was received by Dale McKinstray (Exhibit 7) and his by his parents (Exhibit 12) sometime in February, 1973, as mentioned above. Again in 1973 Mrs. McKinstray had Christmas gifts for the children but did not know where to sent them (Trans. 127). At this time the children were living in Denver (Trans. 20) without the McKinstrays or any of them having been informed.

Mr. McKinstray sought counsel in late 1972 and early 1973 as to what he should do regarding Nadine and his problems in visiting the children, even after having paid over $1,000 in child support, and was advised by his attorney to wait for Nadine to calm down and to let more time go by before he did anything (Trans. 166). This was three years after the divorce and at a time when he had to engage the services of

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an attorney to get an address that was to be current for only a brief period. Shortly thereafter, at Easter in 1973, Mr. McKinstray did try again to visit but was rebuffed and he then sought out the children at their school. He believed after seeing that time, however, that it would be in their best interests not to contact them (Trans. 171) because of the hostility of the maternal family (Trans. 177). He believed also that after they moved from Jackson, which he had heard about after the Easter visit (Trans. 176) his ex-wife would not tell him where the children were even if he paid his child support obligations up to date (Trans. 168), which was a reasonable belief given his recent experience of paying and still having to resort to an attorney for an address, even though that address was temporary. During the entire period from 1970 though the date of the trial Mr. McKinstray kept in force two insurance policies on his life with premiums of $136 per year paid up to date with the children as the sole beneficiaries (Trans. 159; Exhibits 9, 10 & 11) since 1970 (Trans. 166). Mr. McKinstray testified that he never in the time since seeing his children had an intent to relinquish his responsibilites regarding the children nor to give up any rights (Trans. 171) and wants to establish a parental relationship with the children (Trans. 171).

The evidence shows that Nadine and the McGuire family knew of how to get in touch with Dale McKinstray and further that they knew specifically of where he lived, namely in

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Worland. Dale had come from Worland to Jackson for the Easter 1973 visit, Melody had earlier called their Worland telephone number (Trans. 119) and the Summons and Complaint were served personally upon Mr. McKinstray at his home in Worland (R. 12; Trans. 168). Upon being served Mr. McKinstray contacted the attorney for his ex-wife and told him that he wanted to talk with his children (Trans. 169-170).

Of great significance are Mr. McKinstrays personality traits of being quiet and reserved, a person who kept his troubles to himself (Trans. 108, 111, 124) and who grieved for his lack of contact with his children. Mr. McKinstray becomes particularly quiet and withdrawn on Melody's and Peter's birthdays and on children-oriented holidays, such as Easter, Christmas and Halloween (Trans. 111-112). He is so because he misses his children (Trans. 123) and has done so every year 'til now (Trans. 121) as testified to by the members of his family, his wife, his brother, his mother, and wants to "see his kids" (Trans. 107). He even withdraws when he drives past the street the McGuires and his children lived on (Trans. 121). Mr. McKinstray's wife testified that Dale told her sometime not long after the 1973 Easter visit that he didn't want to have any more children because he didn't want to risk the pain and agony of not having his children (Trans. 117-118), of losing them as well.

Upon learning of his children's whereabouts with the instigation of this action, Mr. McKinstray sent Christmas

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gifts to his children (Trans. 22) which were refused by the Suessermans as was the child support payment of December, 1979 (Exhibit 19). Nadine had several years ago told Dale that she did not want support money (Trans. 165) and Dale had also heard that the children had already been adopted (Trans. 144) several years ago.

Shirley Baldwin is a mutual acquaintance of Dale and Nadine. She was referred to in testimony by witnesses as being one who occasionally knew about the children (Trans. 104, 106, 127) and could tell McKinstrays about them. The Appellant made diligent inquiry as to her whereabouts prior to the time of trial. She was located in Cornville, Arizona, several weeks after the conclusion of the trial (Transcript of Hearing dated April 16, 1980, p.4). The substance of her testimony was unknown until counsel for Appellant spoke with her by telephone after the trial's conclusion which was to the effect that Nadine had spoken with her, Shirley Baldwin, and told her that Dale would never see the children, was angry that Dale had paid up the back child support at the end of 1972 because here expressed intention was to get Dale so far in arrears in child support and that she would not let him see the children and thus have a gradual abandonment (Transcript of Hearing, p. 4). Counsel for Appellant offered to submit supporting affidavits regarding the above matters and the others referred to in arguments to the court, especially regarding Nadine's representations that neither Dale nor Gladys McKinstray would

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see the children again, but was not required by the court to do so. The court ruled against the taking of the said additional testimony. Appellant also sought Findings by the court regarding credibility of witnesses. All of Appellant's requests to the court were denied.

ARGUMENT

POINT I: THIS MATTER SHOULD BE REMANDED TO THE TRIAL COURT FOR THE TAKING OF ADDITIONAL TESTIMONY OF SHIRLEY BALDWIN.

Appellant offered to provide the court with his supporting affidavit regarding the newly discovered evidence in the form of testimony from Shirley Baldwin. The Appellant showed or offered to show that the evidence was discovered since the trial, that Appellant exercised due diligence in seeking it out prior to the trial but did not discover the evidence before the trial, that the evidence was material to the issues of the Appellant's defenses to the Complaint and Petition and was such that it probably would have changed the result of the trial. As stated in the facts, the testimony was of a specific plan on the part of Nadine Suesserman of hindrance to the Appellant in exercising his parental rights from an early date. The witness was willing to travel from Arizona to Salt Lake City should the court have allowed her testimony. In a trial wherein the standard of proof is "clear and convincing evidence" and where that burden has been held to have been met in a matter so serious as the termination of

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all parental rights and the elements necessary for the taking of additional testimony have been met, it is incumbent upon the court to hear additional evidence, especially where as here the testimony will be from a disinterested witness. This case should be remanded forthe taking of the proffered additional testimony.

POINT II. THIS MATTER SHOULD BE REMANDED TO THE TRIAL COURT FOR THE MAKING OF ADDITIONAL FINDINGS REGARDING THE CREDIBILITY OF WITNESSES OR OF OBVIATING THE NECESSITY THEREFORE.

This point is concededly a novel one and one which Appellant recognizes may be without merit. No case law has been found in support of it and, indeed, it seems many cases have treated it by implication. Nevertheless, the Constitution of Utah, Article VIII, Section 9, states "In equity cases the appeal may be on questions of both law and fact...." This being an equity case the reviewing court will give consideration to the findings of fact of the trial court and will not disturb those findings unless it appears that the trial judge made findings against the weight of the evidence. Peterson v. Peterson, 112 U. 554, 190 P.2d 135.

The credibility or lack thereof of the witnesses is an issue necessarily precedent to the finding of facts based upon the testimony of witnesses. The court below was specifically requested to make findings regarding the credibility of witnesses (Transcript of Hearing, April 16, 1980, pp. 5-6). While this

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present case is reviewable on the facts and the law, its review is circumscribed by the traditional rules regarding the review of evidence, e.g., that the reviewing court will not disturb findings unless it appears that the trial judge made findings against the weight of the evidence, or, for another example, the reviewing court will assume that the trial court believed those aspects of the evidence which support its findings and judgment, Robertson v. Hutchison, 560 P.2d 1110 (Utah 1977).

The foregoing examples are different standards for reviewing evidence in seeming to require different quanta for the reversal or modification of a lower court decision. In cases up for review wherein the degree of proof required at trial is a mere preponderance of the evidence there is a substantial leeway built in to the trial court's evidence-weighing and decision-making such that broad discretion is granted and few, if any, judgment reversals will be made, regardless of the merits of the losing party's case. In cases wherein the degree of proof is more stringent, however, such as by "clear and convincing" evidence, there is much less leeway or discretion in the evidence-weighing and decision-making discretion of the trial court in which it may take refuge. The present matter seems to be such a case. The degree of proof required is "clear and convincing" evidence Robertson v. Hutchison, supra, at 1112. The elements which need to be proved in this case, set out in Point III below,

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seem to be subject to differing standards of proof. It seems to Appellant that where a more stringent standard of proof is required the decision should be subject to a more stringent standard of proof. This indeed is the case when comparing criminal case review with civil case review in general. But this court in Robertson adopted for that case a rather lax standard for review, that of assuming that the trial court believed those aspects of the evidence which support the findings. While it appears that a lax standard for review is not appropriate for a case with a stringent standard for trial proof, in the present case we should concern ourselves with a situation where there is a stringent standard of trial proof and a specific request for specific findings regarding the credibility of witnesses, the very foundation for the findings of fact. It appears that inconsonant standards for trial and for review is a denial of due process of law in violation of the Constitution of Utah, Article I, Section 7, and of the Constitution of the United States, Amendment XIV, Section 1, and further of the equal protection of laws guaranteed by the Consitution of Utah, Afticle I, Section 7, and of the Constitution of the United States, Amendment XIV, Section I. Without a consistent application of review standards consonant with trial standards arbitrariness tends to enter the review process, or at least there may not be a rational relationship between the standards of trial and the standards of review. In either case justice tends to become

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less than just. Without findings regarding credibility in a case such as this one does not know whether one lost on the facts or on the law, and if on the facts upon which facts. Given the high standard at trial required and the great personal loss to an individual deprived of his parental rights it appears that the standards for findings, and hence for review, should be stringent when requested. Surely little administrative burden is added and a step nearer ideal or true justice will be taken. This court should remand to the trial court for the entry of findings on credibility of the witnesses or other findings obviating the necessity thereof such as by the finding of specific facts supporting each element of the prevailing party's required proofs.

POINT III. THE EVIDENCE UNDER APPLICABLE STATUTORY AND CASE LAW WAS INSUFFICIENT TO SUPPORT THE JUDGMENT OF THE TRIAL COURT AND THE JUDGMENT SHOULD THEREFORE BE REVERSED.

A. Statutory Law:

The applicable Utah Code provision under which the petitioner sought to have a declaration of abandonment is Section 78-30-5, which states as follows;

> Consent unnecessary where parent failed to support or communicate with child.--
> The child may be adopted without the consent of the parent or parents, when the district court in which the proceedings are pending determines, after notice to such parent or parents in a manner determined by the court, that the parent or parents, having the ability and duty to do so, have not provided support and have made no effort or only token effort without good cause to maintain a parental relationship with the child. It is a rebuttable presumption that no

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effort has been made if the parent or parents have failed to support and communicate with the child for a period of one year or longer.

The Utah legislature has set out several elements to be shown in order to find that a parnet has "abandoned" his child in such a manner as would allow an adoption to be made over his objection. For illustrative purposes these are set forth below in separately numbered elements.

A child may be adopted without the consent of the parent

a. when the district court in which the proceedings are pending determines

b. after notice to such parent or parents

c. in a manner determined by the court

d. that the parent having the ability to provide support, and

e. having the duty to provide support

f. has not provided support

g. and has made no effort or only token effort

h. without good cause

i. to maintain a parental relationship with the child.

This Supreme Court has been called on in the past to review cases such as this and has added further criteria which must be met in order for a parent to be deemed to have "abandoned" his child. In a unanimous opinion this court in upholding a finding of no abandonment applied the following considerations:

j. It is and should be the policy of the law to support and give strength to the family by encouraging the

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preservation of the parent child relationship and by being reluctant to interfere with or destroy it.

The court will find an abandonment

k. only when the evidence is clear and convincing
l. that the parent has either expressed an intention
m. or so conducted himself
n. as to clearly indicate
o. an intention
p. to relinquish parental rights
q. and reject parental responsibilities of his child

Subsequent to the Robertson case this court in another unanimous decision affirmed the Robertson case stating that

> It is nevertheless necessary that it be shown that there was an intent coupled with acts or conduct constituting a desertion or an abandonment. Hall v. Anderson, 562 P.2d 1250 at 1251. (Emphasis added)

In Robertson and Hall this court also reviews the

r. best interests of the child (Robertson at 1113; Hall at 1251)

In these cases the Court looked at the interests of the children and in them found that the children were loved, wanted, and well-cared-for in their living circumstances and determined that the "only thing actually involved is the technical legal status as to [the child] and the proposed adoption is mostly a matter of the psychological affect because of that status." Robertson at 1113. Later, in the Hall case

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the court found that the failure to find an abandonment by the parent "does not involve any actual 'disruption' of the child living in or here adjustment in that home. As we stated in the Roberson case, supra:

> [s.] We do not see any likelihood that there will be a change of custody or any substantial interference with the desireable circumstances in which she is living. Hall at 1251.

In the present case we have before the court a situation where the parties resided in Jackson, Wyoming, and became divorced. The father's work took him to a new residence 200 miles away in Wyoming while the mother took the children to California, Colorado, Missouri and Utah, the last three without the knowledge of the father until well after the fact. The children were apparently in Wyoming for several summers but that fact was not known to the father nor the members of his family, although they could have easily been apprised of that fact by the custodial family. The father was not allowed to visit with his children unless child support were paid, and then in the later days only at the house of the maternal grandmother, who admitted antipathy towards the father, and still later after support was paid still no visitation was cooperated in nor addresses of the children provided. The father had been waging a losing battle against the mother and her family by the time the mother and children moved out of the state. The father had been advised by his attorney to allow the mother time to cool

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down, a time three years after the divorce. The question in this case comes down to How much does a father have to bear in his relationship to his children; is the mother to be rewarded for her wrongful behaviour and the father punished for caring for the children enough to back away and avoid conflicts in their lives, a man who believed it in their best interests not to contact them it would raise with their mother? It seems that a prima facia case for "good cause" (item # 'h', supra) has been made and that the burden and presumption should then shift back to the petitioners to show abandonment. Even if the burden or presumption does not shift back, the Appellant nevertheless has not "clearly indicated" (item # 'n') an "intention" (item # 'o') to "relinquish parental rights" (item # 'p'), etc.

The only evidence regarding the "best interests of the children" (item # 'r') was from the prospective adopting father who testified that although married to the children's mother in 1975 (Trans. 5) he had lived in the same home as the children since 1973 (Trans. 95) and that he loves the children, intends to care for them and that his relationship with the children will not be changed should an adoption not be granted (Trans. 96), a circumstance similar to the Robertson and Hall cases. There was not a clear and convincing proof made as to the elements necessary as set forth in the statute and the cited cases.

Other elements wherein Appellant sees a less-than-sufficient quantum, particularly in light of the uncontradicted nature of most of the facts cited above, are to be found in items:

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e. <u>duty to privide support</u>--Nadine told the Appellant that she did not want child support and Appellant may not therefore be held to as high a standard as would otherwise obtain, even if he did in fact have a continuing obligation. Under the law ("Ignorance of the law is no excuse") the Appellant may have had a continuing duty but his attempts at visitation became frustrated and had precious little recognizable leverage to use in maintaining his parental relationship.

f. <u>has not provided support</u>--Throughout these many years Appellant paid insurance premiums in behalf of the children as beneficiaries in spite of having remarried and thus with a new wife to support. His attempts at visitation were frustrated and he had reasonable cause to believe that Nadine and family were guilty of bad faith in their dealings with him regarding the children and his family.

g. <u>has made no effort or only token effort</u>--To the extent Appellant's efforts were token or non-existent, they were a result of difficulties between Appellant and his former wife and her family and which Appellant wanted to protect his children from. Appellant relied upon the counsel of his attorney to give Nadine time, which, as it turned out with Nadine's moving, was not well taken

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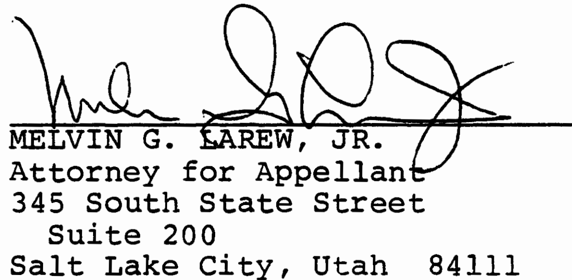
Appellant Dale McKinstray respectfully submits that he is entitled to have his family ties to his children strengthened rather than destroyed, that his rights of visitation and responsibilities as he may have, be confirmed and that he be declared not to have abandoned his children.

Respectfully submitted this 5 day of September, 1980.



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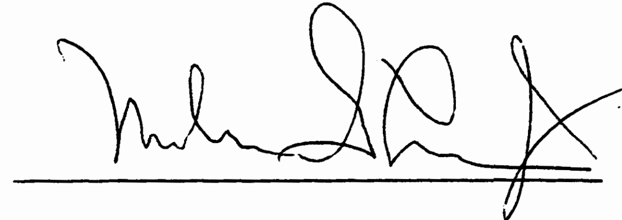
CERTIFICATE OF SERVICE

I hereby certify that I caused two copies of the foregoing Appellant's Brief to be hand-delivered to the offices of Gary L. Paxton, STEWART, YOUNG, PAXTON & RUSSELL, 220 South 200 East, suite 450, Salt Lake City, Utah 84111, this 5 day of September, 1980.



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