

2000

Gherri Cooke v. Claude Seth Cooke : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

GHERRI COOKE,)	
)	
Petitioner/Appellant)	Appellate No. 990743-CA
)	
vs.)	
)	
CLAUDE SETH COOKE,)	
)	Argument Priority No. 15
Respondent/Appellee)	
)	

BRIEF OF APPELLANT

Appeal from the Order of the District Court of the Fifth Judicial District,
the Honorable G. Rand Beacham, Presiding,
entered July 28 1999

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134 North 200 East, #302
St. George, Utah 84770.

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FILED

JUN 26 2000

COURT OF APPEALS

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JURISDICTION OF THE UTAH COURT OF APPEALS

The Utah Court of Appeals has jurisdiction in this matter pursuant to §78-2a-3(2)(h), Utah Code Annotated 1953, as amended.

ISSUE PRESENTED FOR REVIEW

Did the evidence presented at the evidentiary clearly and convincingly rebut the presumption that the Proof of Service signed by the process server and filed in this matter is correct?

Standard of Review:

The issue presents questions of fact. An Appellate Court reviews the trial court's Findings of Fact, with regard to clear and convincing evidence, using a clearly erroneous standard which means, in essence, that the trial court's findings will be reversed when the findings are "against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made." *In the Interest of J.N. et al*, 960 P.2d 403 at 407 (Utah App. 1998)

When a motion to vacate a judgment is based on a claim of lack of jurisdiction the jurisdictional determination becomes a question of law upon which the Appellate Court does not defer to the trial court. *Classic Cabinets Inc. v. All American Life Insurance Company*, 978 P.2d 465 (Ut. App. 1999).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,

ORDINANCES AND RULES

Utah Rules of Civil Procedure, Rule 4(j):

If a person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

1. The Complaint for Divorce was filed in this matter on March 17, 1997.

(Record, hereinafter "R" at 1) On or about May 29, 1997, a Return of Service was filed.

(R at 9) The Return of Service, signed by Gary Stubbs, certified that he had personally served the Respondent, Claude S. Cooke, of 9642 East 7911 South, (Mile post 4.5 Highway 59) Apple Valley, Hurricane, Utah 84737 on May 28, 1997 at 9:40 A.M.

2. A Request for Default Judgment was filed by Petitioner's then counsel, Christopher W. Edwards, on September 29, 1997. (R at 17) A copy was mailed to the Respondent at 9642 HWY 59, 231-4, Canaan Gap, Utah 84737. (R at 18)

3. On September 29, 1997, the Petitioner, through counsel, requested an evidentiary hearing. (R at 15) A copy of that request was mailed to the Respondent at 9642 East 7911 South, Apple Valley, Hurricane, Utah 84737 on September 29, 1997. (R at 16)

4. Entry of Default was signed and entered in this matter on September 30, 1997. (R at 19) A copy of that document, apparently unsigned, had been mailed to the Respondent at 9642 Highway 59 231-4, Canaan Gap, Utah 84737 on September 29,

1997. (R at 20) A Certificate of Default was signed and entered on September 30, 1997.

(R at 21)

5. A Notice of Evidentiary Hearing, dated October 3, 1997 and filed in this matter on October 6, 1997, was mailed by the Clerk of the Court to the Respondent at 9642 East 7911 South, Apple Valley, Hurricane, Utah 84737 on October 3, 1997. (R at 24)

6. A second Notice of Evidentiary Hearing, dated October 31, 1997 and filed in this matter November 3, 1997, was mailed by the Clerk of the Court to the Respondent at 9642 East 7911 South, Apple Valley, Hurricane, Utah 84737 on October 31, 1997. R at 28) This notified the Respondent of an evidentiary hearing that would be held on December 4, 1997. (R at 27) At the evidentiary hearing the trial court declared the Respondent in default. The Petitioner was sworn and testified and the trial court directed that a final order be prepared for signature and entry. (R at 29)

7. An Order Waiving Divorce Education Class for the Respondent was signed by the trial court on January 9, 1998 and entered on January 13, 1998. (R at 34) An apparently unsigned copy was mailed to the Respondent at 9642 East 7911 South, Apple Valley, Hurricane, Utah 84737, on or about December 24, 1997. (R at 35)

8. The Decree of Divorce was entered in the matter on January 13, 1998. (R at 40)

9. At Petitioner's request an Order to Show Cause was issued in this matter on March 16, 1999 which required that the Respondent appear before the Court at a time certain to show cause why, among other things, a Judgment should not be entered against him for child support arrears. (R at 49-50)

10. At the hearing on the Order to Show Cause, initially held on April 16, 1999, Respondent's counsel moved to set aside the Default Decree of Divorce, alleging, for the first time, defective service. (R at 54) A Motion to Set Aside Default Decree of Divorce and Memorandum were filed with the Court on April 16, 1999. (R at 57) Petitioner filed a timely response to that Motion, supported by the Affidavit of Gary Stubbs, in which he provided additional detail relating to the service of the document. (R at 80-99) In that Affidavit Mr. Stubbs indicated that he had served Respondent at a neighbor's home by announcing his purpose, identifying the documents and offering to deliver a copy of the documents in response to which he claims the Respondent claimed that if Mr. Stubbs didn't touch him he wasn't served. (R at 81) Mr. Stubbs claimed that the Respondent left the residence and Mr. Stubbs left the documents at the neighbor's home. (R at 82

11. Following an evidentiary hearing on the Respondent's Motion to Set Aside Default Decree of Divorce, the trial court entered Findings of Fact and an Order setting aside the Default Decree of Divorce. (R at 146) In those Findings of Fact the Court determined, among other things that "by clear and convincing evidence . . . Respondent was not served with the Summons and Complaint for Divorce on May 28, 1997 . . . "

12. This appeal follows.

B. STATEMENT OF MATERIAL FACTS

1. With regard to the facts relating to service, the process server, Gary Stubbs, testified the Respondent was served at approximately 9642 East 7911 South. (Transcript of Hearing, held May 28, 1999, at page 9, hereinafter "T" at 9). However, that address was an estimate provided by the process server since there is no address specified at the

location where the service was completed. There is just a mile marker and a number on a rock in the area. (T at 10,15)

2. The process server testified that he went to the Defendant's trailer in order to effect service on May 28, 1997, but the Respondent was not there. (T at 11)

3. After the process server learned that the Respondent was not at his home, the process server learned that the Respondent was at the home of Barbara Hall, across the highway from the Plaintiff's home. (T at 11) The Respondent's vehicle was at the home of Barbara Hall. Petitioner told the process server that the Respondent was at Barbara Hall's residence. (T at 11, 32) Barbara Hall lives at 9433 E. Highway 59, Hurricane, Utah (T at 58)

4. The process server testified that he went to Barbara Hall's home, knocked on the door, and during a conversation with her at her front door, she informed him that the Respondent was at her residence. (T at 12)

5. The process server testified that he then went inside the building. (T at 12) He saw the Respondent "come out of the other side of the house in the house and [he] turned and left going out the other door." (T at 12)

6. The process server testified that, upon seeing the Respondent, he verbally notified him that he "had a summons for him and he could go ahead and run all he wanted." (T at 12, 33)

7. The process server testified that he then filled out the documents he typically fills out at the time of service. (T at 12)

8. According to the testimony of the process server, the Respondent then came back inside the house, on the other end of the building from where the process server was, and engaged in a verbal conversation with the process server. (T at 12)

9. The process server testified that the Respondent then made a statement that service had not been completed since the process server had not touched the Respondent. (T at 13) The process server then left the documents in Barbara Hall's home after having informed Respondent that the service was of a Complaint for Divorce. (T at 13)

10. The process server testified at the hearing that the address listed on the Return of Service is not intended to specify the exact address of service, but instead, was an address entered into the computer program he utilized from which the Return of Service was printed and was intended to indicate the address of the Respondent. (T at 17-18)

11. The Return of Service indicates that the Respondent was located at "9642 E. 7911 S. (Milepost 4.5 Highway 59), Apple Valley, Hurricane, Utah 84737." (R at 9). The Respondent testified at trial that his mailing address is 9624 E. Highway 59, Box 231-4, Canaan Gap, Utah 84737. (T at 56)

12. The Respondent testified at the hearing that he did see the process server, Gary Stubbs, on May 28, 1997. (T at 40)

13. He testified that he was at Barbara Hall's home sitting at a table when the process server drove up. (T at 40) He saw the process server through the front window as the Respondent was conversing with Barbara Hall. (T at 43)

14. The Respondent testified at the hearing that Barbara Hall had told him that she did not know who the person was who was approaching in a vehicle at that time, (the

process server). He also testified that Barbara Hall asked the Respondent if he knew who the person was, and he replied, "No". (T at 44)

15. The Respondent testified that he was leaving anyway, so when he saw that Barbara had other company coming, he left. (T at 45)

16. At the hearing Respondent testified that he did not know that Gary Stubbs, was the person approaching Barbara Hall's home. (T at 45) However, he did acknowledge that he had been served by Gary Stubbs on a prior occasion. (T at 45)

17. The Respondent denied that the process server, Gary Stubbs, came into the home, had a conversation with him, offered a copy of the Summons and Complaint, that he refused to accept the Summons and Complaint, and denied that he heard from Gary Stubbs, the purpose of the visit. (T at 46)

18. The Respondent acknowledged that it was possible to see Barbara Hall's home from the Petitioner's home, as had been claimed by the process server. (T at 48, 11)

19. The Respondent denied discussing the specific terms of the Complaint with the Petitioner after the date he was claimed to have been served. (T at 53)

20. Barbara Hall testified at the hearing that, process server, Gary Stubbs, arriving at her home, she and the Respondent were "chatting" in her home. (T at 59)

21. While Barbara Hall and Respondent were "chatting" they saw a car turn into her driveway and the Respondent stated, "That looks like Gary Stubbs". (T at 60)

22. Barbara Hall later changed that testimony and said that she was not sure the Defendant had identified Gary Stubbs (T at 71), but she still claimed that the Respondent recognized Stubb's vehicle. (T at 72)

23. Upon identifying the person and the vehicle approaching as looking like “Gary Stubbs”, the Respondent stated, “I’m out of here” and immediately left. (T at 61, 76)

24. Barbara Hall claimed that she came out of the home and spoke to the process server while he was still in his car (T at 62), that the process server asked her if the Respondent was there, and that she replied, “No. He’s not.” (T at 62)

25. Barbara Hall testified that she believed that the Respondent left because he saw the process server drive up. (T at 64) However, she later claimed that the Respondent did not say he recognized the person driving up. (T at 64)

26. Barbara Hall testified that she invited the process server to come to her house to see if the Respondent was there and he declined. (T at 65)

27. The Respondent testified that while she was on the porch of her home, the process server “pushed” papers at her (T at 65) and she would not take them. (T at 65) She claimed that the process server then threw the papers down. (T at 66) Barbara Hall said that she then laid a block of wood on the papers and they were gone the next day. (T at 66)

28. Barbara Hall claimed that both the Petitioner and the Respondent had a good reputation for honesty. (T at 69 and 74)

29. The Petitioner testified that she discussed the contents of the Complaint with the Respondent approximately two weeks after the process server delivered the documents. (T at 89-91), including specific terms and allegations of the Complaint. (T at 91, 97).

SUMMARY OF ARGUMENT

There was substantial conflict in the testimony presented at the hearing on the Respondent's Motion to Set Aside Default Decree of Divorce. Of substantial significance are the inconsistencies in the testimony offered by the Respondent regarding the events that occurred on the date the process server's return indicates service was complete. In light of the substantial inconsistencies in the testimony offered by the Respondent by both himself and Barbara Hall, the evidence presented did not rise to the level of clear and convincing evidence necessary to rebut the presumption of correctness which attaches to the proof of service filed in this matter.

ARGUMENT

THE EVIDENCE PRESENTED TO THE TRIAL COURT DID NOT CLEARLY AND CONVINCINGLY REBUT THE PRESUMPTION THAT THE PROOF OF SERVICE FILED IN THIS MATTER WAS CORRECT.

A. The return of service in this matter is entitled to the same presumption of correctness which attaches to a sheriff's return of service.

In *Carnes v. Carnes*, 668 P.2d 555 (Utah 1983) the Supreme Court of the State of Utah acknowledged that "a sheriff's return of service of process is presumptively correct and is prima facie evidence of the facts stated therein . . . " *Id.* at 557 The Court went on to state that "the invalidity or absence of service of process" needs to be shown by "clear and convincing evidence." *Id.*

In *Classic Cabinets Inc. v. All American Life Insurance Co.*, 978 P.2d 465 (Utah

App. 1999) the Utah Court of Appeals declined to afford a constable's return of service any less of a presumption of correctness. In that case the party challenging the validity of service argued that, "because a constable, rather than a sheriff, effectuated service, . . . the presumption [of correctness] did not apply." *Id.* at 468 The Court rejected the argument that "because a mere constable . . . earns his livelihood from the collection of service fees . . . and therefore has an inherent conflict of interest in any dispute over service" the presumption was not applicable. *Id.* at 468 The Court refused to "indulge the proposition that a constable would deliberately falsify a return and related affidavits to protect a service fee." *Id.* at 468

In *Classic Cabinets* the Court concluded that "a constable's return of service is entitled to the same deference as a sheriff's" and that "a constable's Affidavit of Service is prima facie evidence of proper service of process and is deemed presumptively correct." *Id.* at 468

At the evidentiary hearing in this matter the parties conceded that, in order to vacate service, the Respondent would need to prove that service had not been completed consistent with the Utah Rules of Civil Procedure and that the standard of proof was by clear and convincing evidence. (T at 111)

Just as constable's return of service is presumptively correct, in light of the absurdity in suggesting that a constable would deliberately falsify a return and related affidavits in order to protect a service fee, the return of service in this case, signed by Mr. Gary Stubbs who has served numerous documents over the years, is presumptively correct. That presumption of correctness shifts the burden of proof to the Respondent, the party attacking the validity of service, to prove, by clear and convincing evidence,

that service was not completed as established in the Proof of Service, completed by Mr. Stubbs on May 29, 1997, sworn to on that date and filed with the trial court. (R at 9)

B. The presumption of correctness was not rebutted by clear and convincing evidence, as required by the law in this state.

Determining the credibility of witnesses is normally a factor reserved for the trier of fact. For that reason, a party attacking the trial court's factual findings under the preponderance of the evidence standard must marshal the evidence in support of the challenged finding and then demonstrate that the evidence does not support the finding reached. The procedure in reviewing a finding under the clear and convincing evidence standard is different.

In *In the Interest of J.N. et al*, 960 P.2d 403 (Utah App. 1998) the Court acknowledged that, in reviewing a factual finding under the clear and convincing standard, the appellate court may reverse the finding if it "reaches a definite and firm conviction that a mistake has been made, . . ." *Id.* at 407 While this does not permit the appellate court to simply ignore the trial court's findings, it does require the appellate court to review the evidence in order to determine whether a mistake has been made.

In this matter the most significant discrepancy between the testimony offered by the witnesses involved the events that occurred from the time the process server approached Barbara Hall's home until he left.

Mr. Stubbs, the process server, was certain that he had spoken with the Respondent, had informed the Respondent of the documents being served, and left the documents at the location of service, consistent with Rule 4(j) of the Utah Rules of Civil Procedure.

Barbara Hall and the Respondent testified that Mr. Stubbs had not personally contacted the Respondent. While, at first blush, it might appear that the consistency of their testimony on that issue “clearly and convincingly” rebuts the presumptive correctness of the sworn Proof of Service, certain details of their testimony, which are substantially inconsistent, provide “definite and firm” support for a finding that such is not the case.

Barbara Hall testified that she and the Respondent had a specific conversation when Mr. Stubbs vehicle was seen approaching in which they discussed the identity of the person who was approaching her home. (T at 60) She volunteered that information without any prodding or suggestion as to the answer Respondent’s counsel expected her to give. She went on to say that, as soon as Respondent identified the person who was approaching the home, Respondent said, “I’m out of here . . .” (T at 61) and he left. (T at 63)

Later in her testimony, after acknowledging that Respondent had recognized Mr. Stubbs, Ms. Hall testified that she felt that Respondent had left because he saw Mr. Stubbs driving up. (T at 64) A compound question by the trial court elicited an ambiguous response and a leading question resulted in her agreement that Respondent had left because he saw a “car coming.” (See T at 64, lines 10-22) Although the witness attempted to retreat from her first statement that the Respondent had recognized the process server and was “out of here,” her initial statement is critical in assessing the credibility of Ms. Hall and of the Respondent.

Respondent attempted to give the impression that he simply left when the process server arrived because he saw that Barbara Hall was receiving another visitor. He even

testified that they discussed who the visitor might be and neither could identify the person, in absolute conflict with the testimony offered by Barbara Hall on that subject. (T at 44) One of them was not telling the truth.

The discrepancy regarding discussions between Ms. Hall and the Respondent regarding the identity of the person approaching Ms. Hall's home on the morning of May 29, 1997 is not so critical because of what occurred, even though Respondent's obvious attempt to avoid being "touched" because he believed that he could thereby avoid service of process should not be countenanced in any regard. The discrepancy is more significantly relevant in demonstrating that the witnesses, Ms. Hall and the Respondent, were not being truthful.

The Proof of Service completed and signed by Gary Stubbs, under oath, is presumptively correct. Service should be set aside only if that presumption is rebutted by clear and convincing evidence. In light of the discrepancy between the testimony offered by the two witnesses who testified in an effort to rebut that presumption, the evidence is not clear and convincing. If their testimony is to be believed, the picture is even more blurred.

In addition to receiving service of the Summons and Complaint, consistent with Rule 4(j) of the Utah Rules of Civil Procedure, Respondent received notice of additional proceedings in the matter, including the Respondent's Motion for Default Judgment, Request for an Evidentiary Hearing and Request and Notice of Evidentiary Hearing. He knew the proceedings were pending. He discussed specific terms of the Complaint with the Petitioner and with her counsel. (See R at 15, Petitioner's Request for Evidentiary Hearing, in which it is alleged that the Petitioner's prior counsel had had contact with the

Respondent on a few occasions.) The Respondent simply waited until Petitioner sought to enforce the terms of the Decree (See R at 47, the Petitioner's Motion for Order to Show Cause) and he then sought to avoid the entire proceedings, apparently because he intended to claim that, because he had not been touched (T at 13) he had not been served. As this Court is well aware, touching is not required to serve process. Rule 4(j) provides for service in situations like this where the party being served refuses to receive the process.

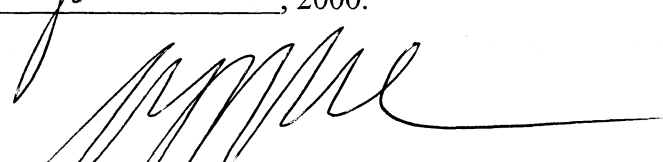
The presumptive correctness of the Proof of Service signed by Mr. Stubbs under oath has not been rebutted by clear and convincing evidence. The trial court's Order Setting Aside Default Decree of Divorce, entered on July 28, 1999, should be reversed and the original Decree of Divorce, entered on January 13, 1998, reinstated.

CONCLUSION

The Respondent did not, by clear and convincing evidence, rebut the presumption of correctness which attaches to the Proof of Service filed in this matter. The trial court's

Order should be reversed and the original Decree of Divorce reinstated.

DATED this 26 day of June, 2000.



G. Michael Westfall

Of and for

GALLIAN, WESTFALL, WILCOX & WRIGHT

I, G. Michael Westfall, certify that on the 26 day of June, 2000,
I served two copies of the above Brief of Appellant upon Lewis P. Reece, counsel for the
Appellee in this matter, by mailing it to him by first class mail with sufficient postage
prepaid to the following address:

Lewis P. Reece
SNOW & JENSEN
134 North 200 East, #302
St. George, Utah 84770



G. Michael Westfall, Attorney for Appellant

ADDENDUM

Proof of Service

Section I

Findings of Fact and Order Setting Aside Decree of Divorce

Section II

ADDENDUM

SECTION I

I Process Services
Box 603

ington, Utah 84780

nt Info: GHERRI COOKE vs CLAUDE S. COOKE

Court Case Number: 974500183

97 MAY 29 PM 1 51

WASHINGTON COUNTY

I Served: CLAUDE S. COOKE

BY

Located at: 9642 EAST 7911 SOUTH (MILE POST 4.5 HWY. 59)
APPLE VALLEY, HURRICANE, UTAH 84737

On the: 28 th day of: MAY 1997
t the hour of: 0800 A.M. (Mountain Standard Time)

ments Served;

-) Small Claims Affidavit and Order (:) Summons and Complaint
-) Summons, Complaint, ADR packet and/or OPT out statement.
-) Supplemental Proceedings (Judgement Debtor Hearing)
-) Writ of Continuing Garnishment (Wage) (:) Garnishee Order
-) Writ of Garnishment (Non-Wage) (:) Writ of Garnishment (std. time)
-) Order to Show Cause (:) Subpoena:
-) Summons, Complaint,: ADR PACKET, DIVORCE EDUCATION FOR PARENTS NOTICE.

er of Service Completed;

2) Personally Served: CLAUDE S. COOKE

-) At the dwelling, house or usual place of abode, with some person of able age and discretion there residing. Being:
-) By delivering a copy to an agent authorized or by appointment or by law receive process. Being:
-) By POSTING in a conspicuous manner. (Upon the main entry point)

5/26/97 0940 AM

2: 05/28/97 0800 AM/SERVED
4:

nt Information: GHERRI COOKE vs
AN D. BOYACK, ESQ. ATP. (801-628-2676)

ng been duly sworn, I hereby depose and say that I am a citizen of the
ed States, a resident of State of Utah,: 46 years of age at the time of
ice and not a party to or interested in this action. That at the time of
ice I did endorse upon the copy left for the person to be served, the date
which same was served and did endorse my name thereto in accordance
the Utah Judicial Code.

Dated this: 29 th day of: MAY

1997

Process Server

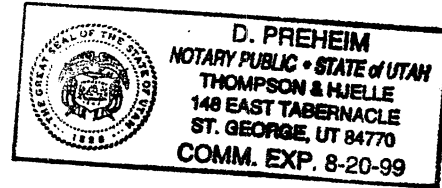
CRIBED & SWORN before me this: 29 th day of: MAY

1997

Notary Public

ice Fees

er of Attempts : 2
er of Miles :
age Fee \$: 48
e Base Fee \$ 6.00
or Locate Fee \$:
L SERVICE FEE \$: 54.00



ADDENDUM

SECTION II

FILED
FIFTH DISTRICT COURT
'99 JUL 28 AM 10 02
WASHINGTON COUNTY
BY PA

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IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

GHERRI COOKE, Petitioner, v. CLAUDE SETH COOKE, Respondent.	FINDINGS OF FACT AND ORDER SETTING ASIDE DEFAULT DECREE OF DIVORCE Civil No. 974500183 Judge G. Rand Beacham
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This matter came before the Court on May 28, 1999, pursuant to Respondent's Motion to Set Aside Default Decree of Divorce. Petitioner was present and represented by counsel, Jeffrey D. Bursell, of the law office of Hughes & Associates. Respondent was present and represented by counsel, Lewis P. Reece of the law office of Snow & Jensen, P.C. Having reviewed the parties' briefs and oral arguments, and having heard the testimony presented at the hearing, the Court hereby enters the following findings and order.

FINDINGS OF FACT

1. The issue before this Court focuses on whether Respondent was served with a copy of the Summons and Complaint on May 28, 1997, as shown by the Proof of Service filed with this Court on May 29, 1997. The Court finds that under *Garcia v. Garcia*, 712 P.2d 288 (Utah 1986), Respondent must be served pursuant to Rule 4 of the Utah Rules of Civil Procedure; otherwise this Court lacks jurisdiction over the Respondent, and the January 13, 1998 Decree of Divorce is void.

2. This Court further finds that Respondent waived all other theories for setting aside

the Decree of Divorce at the hearing in this matter that were pursued in his Memorandum Supporting his Motion to Set Aside Default Decree of Divorce, except for the lack of jurisdiction theory on the basis of no service of process under Utah R. Civ. P. 4. ~~This Court agrees with the Respondent, however, as explained in Point I of the Memorandum supporting his Motion, that there is a presumption at law that cases should be heard on their merits and not on a party's default.~~

3 3. At the May 28, 1999 hearing, Mr. Gary Stubbs testified regarding Respondent's refusal to accept service. Petitioner's theory was that service was effected pursuant to Utah R. Civ. P. 4(j), arguing that Respondent refused to accept service. The Court finds, however, that there were discrepancies between the facts testified to by Mr. Stubbs and the facts stated on Mr. Stubbs' Proof of Service. Similar discrepancies existed in Mr. Stubbs' subsequent Proof of Service on the order to Show Cause, which order resulted in Respondent's Motion to Set Aside. Specifically, Mr. Stubbs admitted on the stand that Respondent was not served at the location of service shown in the proofs of service that were referred to as Exhibits 1 and 2 at the May 28, 1999 hearing. The accuracy of these proofs of service ^{is} ~~are~~ a concern to this Court.

4. The Court is not convinced that Mr. Stubbs has an independent recollection of the facts surrounding service of Respondent on May 28, 1997. Mr. Stubbs has no particularly strong motive to testify falsely in this matter, and the Court does not find that Mr. Gary Stubbs testified falsely, knowingly. The Court notes as testified by Mr. Stubbs, that he performs several thousand services each year and that several thousand services were performed by Mr. Stubbs from the time of the purported service of the Complaint for Divorce and his testimony at the hearing in this matter.

5. Respondent Claude Seth Cooke testified from independent recollection that he was not served and did not speak with Mr. Gary Stubbs. Respondent's testimony directly contradicted Mr. Stubbs' testimony. Respondent does have some motive to fabricate evidence, but such is simply an assumption based upon Respondent's position in the lawsuit. It is not to be inferred from his testimony at the May 28, 1999 hearing.

6. Ms. Barbara Hall testified from independent recollection that Respondent was not served and that Mr. Gary Stubbs did not go into her home and did not speak with Respondent. Ms. Hall's testimony corroborated the testimony of Respondent in all material respects. Ms. Hall is a friend of both Petitioner and Respondent. The Court finds that Ms. Hall has no obvious motive to testify against either party, but only to tell the truth.

7. This Court concludes that Ms. Barbara Hall was the most objective witness which appeared and testified in this matter. Her testimony is the most credible.

8. The Court is satisfied that the testimony of Respondent, along with the corroborative testimony of Ms. Barbara Hall, is clear enough to meet the moving parties' burden of proof. The Court finds by clear and convincing evidence that Respondent was not served with the Summons and Complaint for Divorce on May 28, 1997, as stated in the Proof of Service or as required by Rule 4 of the Utah Rules of Civil Procedure.

9. Respondent has filed an Answer and Counterclaim which asserts a meritorious defense meeting the common law requirements of Rule 60(b), in that it is sufficient to raise issues that need to be resolved in this case.

10. It is reasonable and proper that Respondent's Motion to Set Aside Default Decree of Divorce be granted and that the Decree of Divorce, Findings of Fact and Conclusions of Law, and the Entry of Default, which have been filed in this matter, be set aside and vacated.

11. It is reasonable and proper, that service of Petitioner's initial Complaint be effected by mailing the same to the Respondent's counsel, who shall accept service in behalf of Respondent.

ORDER

Having entered the above Findings of Fact, and finding good cause therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Respondent's Motion to Set Aside Decree of Divorce is granted.

2. The January 13, 1998 Decree of Divorce entered in this matter is vacated and set aside.

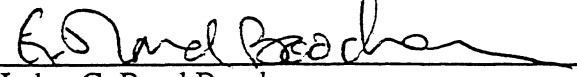
3. The January 13, 1998 Findings of Fact and Conclusions of Law entered in this matter are vacated.

4. The September 30, 1997 Entry of Default entered in this matter is vacated.

5. Service of Petitioner's initial Complaint and Respondent's Answer and Counterclaim shall be effected by mailing the same to the opposing party's counsel, who shall accept service on behalf of Respondent.

DATED this 27 day of ~~June~~^{July}, 1999.

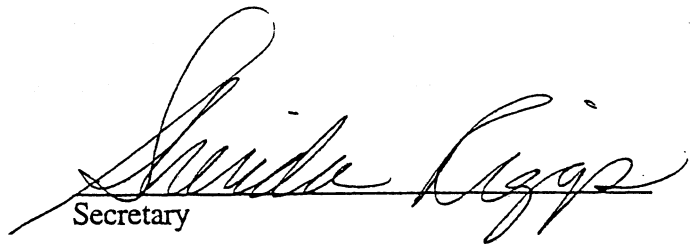
FIFTH JUDICIAL DISTRICT COURT


Judge G. Rand Beacham

CERTIFICATE OF MAILING

On this 15th day of June, 1999, I caused a true and correct copy of the unsigned FINDINGS OF FACT AND ORDER SETTING ASIDE DEFAULT DECREE OF DIVORCE to be mailed, U.S. mail, first class, postage pre-paid to the following:

Jeffrey D. Bursell, Esq.
HUGHES & ASSOCIATES
187 North 100 West
St. George, UT 84770


Secretary