

1990

Lloyd D. Coley v. Nancy P. Coley : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

BRIEF

UTAH
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AND

DOCKET NO.

Appellant's Brief

900446 IN THE COURT OF APPEALS

LLOYD D. COLEY,

PLAINTIFF/APPELLANT,

vs.

NANCY P. COLEY,

DEFENDANT/RESPONDENT.

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CASE NO. 900446 CA

Priority #4

BRIEF OF APPELLANT

APPEAL FROM A FINAL ORDER OF DATED JULY 13, 1990, AND
AMENDED JANUARY 9, 1991, BEFORE JAMES S. SAWAYA, JUDGE
OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH.

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FILED

MAR 19 1991

Mary T. Noonan

IN THE COURT OF APPEALS

LLOYD D. COLEY,

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PLAINTIFF/APPELLANT,

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vs.

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CASE NO. 900446 CA

NANCY P. COLEY,

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SUMMARY OF THE ARGUMENT

THE APPELLANT CONTENDS THAT THE ORDERS OF JUDGE SAWAYA VIOLATE THE U. S. CONSTITUTIONS' FIRST, EIGHT AND FOURTEEN AMENDMENTS.

THE APPELLANT CONTENDS THAT ORDERS OF JUDGE SAWAYA WRONGFULLY DENY HIS VISITATION RIGHTS WITH HIS DAUGHTER.

THE APPELLANT CONTENDS THAT JUDGE SAWAYA ABUSED THE POWERS OF CONTEMPT IN DENYING APPELLANT VISITATION RIGHTS.

THE APPELLANT CONTENDS THAT JUDGE SAWAYA WRONGFULLY SIGNED ORDER OVER THE TIMELY FILED OBJECTIONS OF APPELLANT AND THEN DID NOT ALLOW APPELLANT TO OBJECT TO THE AMENDED ORDER.

STATEMENT OF ISSUES ON APPEAL

THE TRIAL COURT ERRED IN SIGNING AN ORDER THAT IS UNCONSTITUTIONAL.

THE TRIAL COURT ERRED IN TERMINATING VISITATION FOR THE SOLE REASON OF NON-PAYMENT OF CHILD SUPPORT.

THE TRIAL COURT ERRED IN CONDITIONING THE RESTORATION OF VISITATION RIGHTS UPON THE PAYMENT AND COMPLIANCE WITH SUPPORT ORDERS.

THE TRIAL COURT ERRED IN USING IT'S CONTEMPT POWER TO DENY AND TERMINATE VISITATION.

THE TRIAL COURT ERRED IN DENYING VISITATION BY NOT REQUIRING THE DEFENDANT TO FILE A PETITION TO MODIFY.

THE TRIAL COURT ERRED IN SIGNING A ORDER OVER THE TIMELY FILED OBJECTIONS TO SAID ORDER.

JURISDICTION

THIS IS AN APPEAL FROM THE FINAL ORDER OF JULY 13, 1990 AND THE FINAL ORDER OF JANUARY 9, 1991, BEFORE JAMES S. SAWAYA, JUDGE OF THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE CITY, STATE OF UTAH.

THIS APPEAL WAS FILED BY NOTICE OF APPEAL ON AUGUST 13, 1990, TO THE Z
ABOVE COURT.

THIS COURT HAS JURISDICTION OVER THIS APPEAL BY VIRTUE OF UTAH CODE ANNOTATED 77-35-26 (2A) AND (B), AND RULE 3 OF THE RULES OF THE UTAH COURT OF APPEALS.

STATEMENT OF FACTS

ON FEBRUARY 24, 1990, RESPONDENT FILED A AFFIDAVIT AND ORDER TO SHOW CAUSE AGAINST THE APPELLANT, ASKING THE COURT TO HOLD THE APPELLANT IN CONTEMPT AND DENY ANY CONTACT WITH HIS DAUGHTER TO HIM.

ON JUNE 18, 1990, JUDGE SAWAYA HEAR RESPONDENT ORDER TO SHOW CAUSE AND FOUND THE APPELLANT GUILTY OF CONTEMPT; SENTENCED HIM TO 30 IN THE COUNTY JAIL; DENY HIM ALL CONTACT WITH HIS DAUGHTER.

ON AUGUST 13, 1990, APPELLANT FILED A NOTICE OF APPEAL TO THIS COURT.

ON OCTOBER 10, THIS COURT VACATED THE DENIAL OF APPELLANT'S VISITATION RIGHTS.

ON JANUARY 9, 1991, JUDGE SAWAYA SIGNED A AMENDED ORDER AGAIN DENYING APPELLANT ALL CONTACT WITH HIS DAUGHTER.

STATEMENT OF CASE

THE PETITIONER FILED FOR DIVORCE ON THE 31ST DAY OF DECEMBER, 1981, (DISTRICT COURT INDEX #2,, HEREAFTER REFERRED TO AS DCI). ON THE 26TH DAY OF AUGUST, 1982 THE DIVORCE WAS GRANTED TO BECOME EFFECTIVE AFTER THE 3-MONTH INTERLOCUTORY PERIOD (DCI# 12-14). PETITIONER AGREED BY STIPULATION TO PAY TO RESPONDENT, THE SUM OF \$250.00 PER MONTH AS CHILD SUPPORT, A SUM THAT WAS EQUAL TO 75% OF PETITIONER GROSS INCOME (DCI#7-10).

ON THE SEPTEMBER 29, 1982 PETITIONER FILED FOR PROTECTION UNDER CHAPTER 7 OF THE FEDERAL BANKRUPTCY ACT.

ON THE OCTOBER 12, 1982, RESPONDENT FILED A ORDER TO SHOW CAUSE, (DCI# 20). IN SAID ORDER RESPONDENT ASKED THE COURT TO HOLD THE PETITIONER IN CONTEMPT. THIS WAS DONE BEFORE THE DIVORCE BECAME FINAL AND WHILE THE PETITIONER WAS UNDER THE PROTECTION OF THE FEDERAL BANKRUPTCY ACT.

AFTER THE PETITIONER'S BANKRUPTCY WAS DISCHARGED HE PAID THE RESPONDENT ALL PAST DUE CHILD SUPPORT.

ON THE SEPTEMBER 27, 1982, RESPONDENT FILED A ORDER TO SHOW CAUSE (DCI# 40), ASKING THE COURT AGAIN TO FIND RESPONDENT IN CONTEMPT. THE CONTEMPT INVOLVED THE PROPERTY SETTLEMENT AND WAS PREVIOUSLY DISCHARGED IN THE BANKRUPTCY. SAID O.S.C. WAS STRICKEN ON THE 8TH DAY OF DECEMBER, 1983 (DCI# 47). PETITIONER AGREED TO PAY THE PAST DEBT AND A

ORDER CONFORMING TO THE AGREEMENT BETWEEN PARTIES WAS SIGNED BY THE COURT ON THE 7TH DAY OF FEBRUARY 1984 (DCI# 53-55).

ON THE APRIL 20, 1984 PETITIONER FILED A MOTION TO AMEND THE DIVORCE DECREE TO ALLOW THE PETITIONER TO EXPAND HIS VISITATION BECAUSE RESPONDENT UNREASONABLY WAS DENYING HIM REASONABLE VISITATION (DCI# 60). SAID MOTION WAS STIPULATED TO AND THE ORDER GRANTING SAID REQUEST WAS SIGNED ON THE 21ST OF JUNE 1984 (DCI# 65-67)

ON AUGUST 6, 1985 PETITIONER FILED A ORDER TO SHOW CAUSE BECAUSE RESPONDENT WAS DENYING HIM VISITATION WITH HIS DAUGHTER (DCI# 68). RESPONDENT AGREED TO ALLOW VISITATION TO RESUME AND THE O.S.C. WAS STRICKEN.

ON MARCH 27, 1986, RESPONDENT FILED A ORDER TO SHOW CAUSE AND PETITION FOR MODIFICATION (DCI# 71 & 74-83). IN THESE MOTIONS AND ORDERS RESPONDENT WANTED THE COURT TO HOLD THE PETITIONER IN CONTEMPT AND TO DENY HIS VISITATION WITH HIS DAUGHTER, UNTIL HE PAID THE PAST DUE CHILD SUPPORT PAYMENTS, AND THEN TO RESTRICT PETITIONERS'S FUTURE VISITATION. JUDGE FISHLER DENIED RESPONDENT REQUESTS AND ALLOWED THE PETITIONER TO FILE A PETITION TO REDUCE CHILD SUPPORT PAYMENT AND STAYED ANY CONTEMPT PROCEEDING AGAINST PETITIONER UNTIL A REVIEW OF THE ABILITY OF THE PETITIONER TO PAY SUPPORT IS ACCESSED. THE PETITIONER WAS PAYING THE RESPONDENT BETWEEN \$200.00 AND \$400.00 PER MONTH WHEN THE RESPONDENT FILED HER O.S.C. (DCI# 81-82).

JUDGE FISHLER WAS SO OFFENDED BY THE RESPONDENT AND HER ATTORNEY THAT HE RECUSED HIMSELF AND ASSIGNED THIS CASE TO JUDGE SAWAYA (DCI# 84).

ON APRIL 14, 1986, PETITIONER FILED HIS COUNTER-PETITION FOR MODIFICATION OF DIVORCE DECREE (DCI# 87-88).

ON APRIL 22, 1986, JUDGE SAWAYA SIGNED THE ORDER OF JUDGE FISHLER IN WHICH #2 OF THE JUDGEMENT STATES "THE ISSUED OF CONTEMPT AGAINST PLAINTIFF FOR HIS FAILURE TO PAY JUDGEMENTS AND OBLIGATION IS RESERVED UNTIL THE HEARING ON A PETITION BY PLAINTIFF FOR MODIFICATION OF THE DECREE OF DIVORCE WHICH WILL ADDRESS THE ISSUE OF THE PLAINTIFF'S ABILITY TO PAY SAID JUDGEMENTS." (DCI# 95-9)

ON OCTOBER 14, 1986 THE PETITIONER ATTEMPTED TO PROCEED WITH HIS PETITION TO MODIFY BY FILING A REQUEST FOR TRIAL SETTING. (DCI# 101).

COMMISSIONER SANDRA PEULAR SET A PRE-TRIAL SETTLEMENT FOR FEBRUARY 13, 1987. (DCI# 104)

RESPONDENT RESISTED ANY SETTLEMENT AND FILED OBJECTION TO REQUEST FOR TRIAL SETTING. (DCI# 105).

ON MARCH 17, 1988 PETITIONER WAS BEING DENIED HIS VISITATION AND FILED A ORDER TO SHOW CAUSE TO FORCE RESPONDENT TO ALLOW HIS VISITATION WITH HIS DAUGHTER. (DCI# 111-2).

RESPONDENT CLAIMED IT WAS UNFAIR THAT SHE COULD BE CALLED TO COURT TO ANSWER FOR DENYING VISITATION WHEN PETITIONER WAS DELINQUENT IN HIS CHILD SUPPORT PAYMENTS. (DCI# 125).

ON 18, APRIL, 1988 COMMISSIONER PEULER FOUND NO CONTEMPT OF THE PETITIONER AT THIS TIME AND RESPONDENT

PROMISED TO ALLOW PETITIONER HIS VISITATION FROM NOW ON. (DCI# 129).

ON MAY 6, 1988, RESPONDENT FILED A ORDER TO SHOW CAUSE AND REQUESTED THAT THE PLAINTIFF PAY THE FULL AMOUNT OF HER ATTORNEY FEES, BEGIN MAKING CHILD SUPPORT PAYMENTS WITH A WEEKLY REDUCTION OF THE JUDGEMENT, AND THAT PLAINTIFF BE ADVISED THAT IF HE DOES NOT COMPLY HE WILL BE ARRESTED AND JAILED UNTIL HE IS WILLING TO COMPLY. (DCI# 135). RESPONDENT FILED AT THE SAME TIME A PETITION TO DENY PETITIONER ALTERNATE FRIDAY VISITS. (DCI# 140)

AFTER SEVERAL DELAYS AND CONTINUANCES RESPONDENT'S O.S.C. CAME BEFORE JUDGE SAWAYA ON OCTOBER 3, 1988. PETITIONER AND HIS ATTORNEY WERE WILLING TO STIPULATE TO THE CONDITIONS OF THE O.S.C.. HOWEVER JUDGE SAWAYA MADE HIS OWN MOTION AND ORDERED IT BE HEARD AT THE END OF HIS LAW AND MOTION CALENDER THAT DAY. JUDGE SAWAYA THEN FOUND THE PETITIONER GUILTY OF CONTEMPT, SENTENCED HIM TO SERVED 30 DAY IN THE COUNTY JAIL, STAYED IMPOSITION OF JAIL SENTENCE FOR 60 DAYS TO ALLOW THE PETITONER TO PURGE THE CONTEMPT BY PAYING THE RESPONDENT A SIGNIFICANT AMOUNT OF MONEY. (DCI# 170)

DURING THE MONTH OF NOVEMBER OF 1989 THE PETITIONER SERVED HIS JAIL SENTENCE.

ON FEBRUARY 24, 1990 RESPONDENT FILED A ORDER TO SHOW CAUSE, IN THIS O.S.C. RESPONDENT REQUESTED THE SUSPEND VISITATION OF PETITIONER UNTIL HE IS NOT IN CONTEMPT OF COURT AND PAYING HER SUPPORT. (DCI# 214)

ON APRIL 13, 1990 THE COURT CANCELED THE HEARING ON RESPONDENT'S O.S.C. AND RESPONDENT FILED A NOTICE OF CONTINUANCE. (DCI# 258)

ON APRIL 24, 1990, THE PETITIONER APPEARED AT THE O.S.C. HEARING AND WAS TOLD BY THE COURT CLERK THAT THE HEARING HAS BEEN CANCELLED AND THAT THE RESPONDENT WOULD HAVE TO SERVED THE PETITIONER WITH A NEW O.S.C. BEFORE SHE COULD HAVE HER O.S.C. HEARD BY THE JUDGE.

ON MAY 21, 1990 THE RESPONDENT, THOUGH HER ATTORNEY, ASKED JUDGE SAWAYA TO ISSUE A BENCH WARRANT FOR THE ARREST OF THE PETITIONER BECAUSE HE HAD NOT SHOWN FOR THE O.S.C.. THE PETITIONER HAD NOT BEEN SERVED WITH A NEW O.S.C. AND THEREFORE FELT HE DID NOT HAVE TO ATTEND, HOWEVER, PETITIONER KNEW OF JUDGE SAWAYA BIAS AGAINST HIM AND SENT RAY STODDARD, A ATTORNEY THAT HAD REPRESENTED HIM EARLY IN THIS CASE, TO INFORM JUDGE SAWAYA THAT PETITIONER HAD NOT BEEN SERVED WITH THE O.S.C. AND THAT THE PETITIONER AND HIS ATTORNEY COULD BE IN JUDGE SAWAYA COURT ROOM WITHIN 15 MINUTES IF JUDGE SAWAYA WANTED TO HOLD THE HEARING. JUDGE SAWAYA STATED THAT HE KNEW WHAT WAS GOING ON AND THEN ISSUED A NO BAIL BENCH WARRANT AGAINST PETITIONER. (DCI# 254)

WHEN MR. STODDARD TOLD THE PETITIONER OF JUDGE SAWAYA ACTIONS HE DIRECTED HIS ATTORNEY TO CONTACT JUDGE SAWAYA AND HAVE THE WARRANT RECALLED. ONLY AFTER JUDGE SAWAYA WAS SHOWN THE DOCKET PRINTOUT SHOWING THE CANCELLING OF THE O.S.C. HEARING DID JUDGE SAWAYA RECALL THE WARRANT, HOWEVER HE RULED THAT RESPONDENT DID NOT HAD TO SERVE THE PETITIONER

WITH A O.S.C. AND SET THE HEARING FOR JUNE 18, 1990. (DCI# 256-9)

ON JUNE 18, 1990 JUDGE SAWAYA FOUND THE PETITIONER GUILTY OF CONTEMPT, DENIED ALL CONTACT BETWEEN PETITIONER AND HIS DAUGHTER, SENTENCED THE PETITIONER TO SERVE 30 DAY IN THE COUNTY JAIL AND STAYED THE IMPOSITION OF THE JAIL SENTENCE FOR 30 DAY TO ALLOW THE PETITIONER TO PAY THE RESPONDENT SOME MONEY. (DCI# 262)

ON JULY 13, 1990 JUDGE SAWAYA SIGNED A ORDER OVER THE TIMELY FILED OBJECTIONS OF THE PETITIONER, THOSE OBJECTIONS WERE NOT FRIVOLOUS NOR WERE FILED FILED AS A DELAYING TACTIC. (DCI# 268-71)

ON JULY 16, 1990, PETITIONER FILED A AFFIDAVIT OF BIAS DIRECTED TOWARD THE BIAS CONDUCT OF JUDGE SAWAYA. AT THE HEARIN LATER THAT SAME DAY PETITIONER TOLD JUDGE SAWAYA THAT HE HAD FILED A AFFIDAVIT OF BAIS EARLIER AND ACCORDING THE THE RULES OF CIVIL PROCEDURES HE COULD NO LONGER PROCEED UNTIL THE AFFIDAVIT OF BIAS WERE REVIEW BY THE PRESIDING JUDGE. JUDGE SAWAYA ACCEPT A COPY TO THE AFFIDAVIT BUT STATED HE WAS NOT BIAS AND THEN WHEN ON TO HOLD THE REVIEW HEARING. (DCI# 298)

ON AUGUST 7, 1990, JUDGE MURPHY DENIED PETITIONER AFFIDAVIT OF BIAS. (DCI# 298)

ON AUGUST 13, 1990 PETITIONER FILED A NOTICE OF APPEAL FOR BOTH THE JULY 13 ORDER OF JUDGE SAWAYA AND THE AUGUST 7 ORDER DENYING THE AFFIDAVIT OF BIAS BY JUDGE MURPHY. (DCI# 316)

ON OCTOBER 10, 1990, THE COURT OF APPEALS VACATED JUDGE SAWAYA ORDER AS IT RELATES TO VISITATION.

ON JANUARY 9 1991 JUDGE SAWAYA SIGNED A AMENDED ORDER AGAIN DENYING PETITIONER VISITATION RIGHTS.

PETITIONER THEN ASKED THE COURT OF APPEALS TO REVIEW THE JANUARY 9TH ORDER AND STAY THE EFFECT OF SAID UNTIL THE CASE COULD BE GIVING A FAIR HEARING.

ON FEBRUARY 4, 1991, THE COURT OF APPEALS DENIED THE PETITIONER'S REQUEST FOR STAY.

ARGUMENTS

THE TRIAL COURT ERRED IN SIGNING AN ORDER THAT IS UNCONSTITUTIONAL.

THE APPELLANT CONTENDS THAT THERE IS A CONSTITUTIONAL RIGHT OF A PARENT TO MAINTAIN A PERSONAL AND CLOSE RELATIONSHIP WITH THEIR CHILDREN.

A PARENT HAS A "FUNDAMENTAL RIGHT, PROTECTED BY THE CONSTITUTION, TO SUSTAIN HIS RELATIONSHIP WITH HIS CHILD." STATE IN RE WALTER B., UTAH, 577 P.2ND 119, 124 (1978).

IN MEYER V. NEBRASKA, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), THE SUPREME COURT INCLUDED FAMILY RELATIONSHIPS IN THE "LIBERTY" OF WHICH A STATE CANNOT DEPRIVE ANY PERSON WITHOUT DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

THE RIGHTS INHERENT IN FAMILY RELATIONSHIPS-HUSBAND-WIFE, PARENT-CHILD AND SIBLING-ARE THE MOST OBVIOUS EXAMPLES OF RIGHTS RETAINED BY THE PEOPLE. THEY ARE "NATURAL," "INTRINSIC," OR "PRIOR" IN THE SENSE THAT OUR CONSTITUTIONS PRESUPPOSE THEM,...IN RE J.P., UTAH 648 P.2D 1373. THIS PARENTAL RIGHT TRANSCENDS ALL PROPERTY AND ECONOMIC RIGHTS. IT IS ROOTED NOT IN STATE OR FEDERAL STATUTORY OR CONSTITUTIONAL LAW, TO WHICH IT IS LOGICALLY AND CHRONOLOGICALLY PRIOR, BUT IN NATURE AND HUMAN

INSTINCT. SUPRA.@ 1373. "...TERMINATION OF PARENTAL RIGHTS SOLELY ON THE BASIS OF THE CHILD'S BEST INTEREST AND WITHOUT ANY FINDING OF PARENTAL UNFITNESS, ABANDONMENT, OR SUBSTANTIAL NEGLECT, VIOLATES THE PARENT'S LIBERTY RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION." SUPRA @ 1375

THE ORDER OF JANUARY 9TH DID NOT FIND, AS REQUIRED ABOVE, ANY FINDING OF UNFITNESS, ABANDONMENT OR SUBSTANTIAL NEGLECT AND THEREFORE MUST BE FOUND IN CONTRADICTION WITH THE UNITED STATES CONSTITUTION AND BE OVERTURNED.

THE APPELLANT NEXT CONTENDS THAT THE ORDER VIOLATES THE EIGHT AMENDMENT, OF THE UNITED STATES CONSTITUTION IN THAT IT CALL FOR CRUEL AND UNUSUAL PUNISHMENT. IT IS UNUSUAL BECAUSE NO OTHER COURT HAS EVER DENIED ALL CONTACT BETWEEN PARENT AND CHILD FOR THE REASON STATED IN THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THIS ORDER. IT IS CRUEL BECAUSE IT DESTROYS A LOVING RELATIONSHIP BETWEEN PARENT AND CHILD AND IT ALLOWS THE CUSTODIAL PARENT TO TELL THE CHILD THAT HER FATHER DOES NOT LOVE HER ANYMORE BECAUSE IT DOES NOT WANT TO SEE HER ANYMORE, A FACT ALLEGED IN PETITIONER SUPPORTING AFFIDAVIT FOR STAY BEFORE THE COURT OF APPEALS AND LEFT UNCHALLENGED BY RESPONDENT AT THE HEARING OR ANY OTHER PLACE.

THE APPELLANT CONTENDS THAT THE ORDER VIOLATES THE FOURTEEN AMENDMENT OF THE UNITED STATES CONSTITUTION, IN THAT HE HAS BEEN DENIED DUE PROCESS. UTAH LAW REQUIRES "A SUBSTANTIAL CHANGE IN CIRCUMSTANCES MUST BE FOUND BEFORE A

CUSTODY DECREE IS MODIFIED." SMITH V. SMITH, 793 P.2d 409. ALSO IN HODGGE V. HODGEE, 649 P.2d 51 (UTAH 1982), HODGEE HELD THAT A PARENT SEEKING A CHANGE IN CUSTODY OF A CHILD MUST FIRST ESTABLISH THAT THERE HAS BEEN A SUBSTANTIAL AND MATERIAL CHANGE IN THE CIRCUMSTANCES UPON WHICH THE ORIGINAL CUSTODY AWARD WAS BASED.

IN ALL CASE, EXCEPT FOR THIS ONE, THE COURT HAS REQUIRED A PETITION TO MODIFY BEFORE CHANGING CUSTODIAL ARRANGEMENT, RESPONDENT HAS TRIED AND FAILED IN SEVERAL ATTEMPTS TO LIMIT THE VISITATION OF APPELLANT, THOUGH THE REGULAR PETITIONS TO MODIFY, NOW WITH ORDER TO SHOW TO CAUSE AS PUNISHMENT TO THE APPELLANT JUDGE SAWAYA HAS DENIED VISITATION RIGHTS AND IN EFFECT MODIFIED THE DIVORCE DECREE, DENYING THE APPELLANT HIS DUE PROCESS OF CHALLENGING THE ASSERTIONS AND PRESENTING HIS DEFENSES.

JUDGE SAWAYA STATED IF HE FOUND THE NONPAYMENT OF CHILD WAS WILLFUL HE COULD TERMINATE VISITATION, (TRANSCRIPT OF JUNE 18, 1990, PAGES 37 LINES 23-25, PAGE 38 LINES 1-4). JUDGE TOOK NO EVIDENCE CONCERNING THE BEST INTEREST OF THE CHILD HOWEVER, IN THE JANUARY 9TH ORDER JUDGE SAWAYA FOUND IT WAS IN THE BEST INTEREST OF THE CHILD NOT TO HAVE ANY CONTACT WITH HER FARTHER, "BECAUSE THE FAILURE TO PAY CHILD SUPPORT HAS BEEN WILLFUL, THE COURT FINDS THAT PLAINTIFF DOES NOT, IN PART, RESPECT THE LEGAL SYSTEM OR THE LAW REQUIRING PAYMENT OF CHILD SUPPORT. FOR THAT REASON, THE COURT FINDS THAT PLAINTIFF'S ATTITUDES AND BEHAVIORS ARE ANTI-SOCIAL AND CONSTITUTES A SUBSTANTIAL DEVIATION FROM THE

MORAL NORMS OF SOCIETY". (FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: JANUARY 9, 1991 ORDER). THUS JUDGE SAWAYA BY NOT REQUIRING THE RESPONDENT TO FOLLOW THE STATUTORIAL PROCEDURE AND PRESENT HER EVIDENCE AND ALLOW THE APPELLANT TO COUNTER WITH HIS DEFENSES AND EVIDENCE DENIED APPELLANT HIS DUE PROCESS OF LAW.

THE APPELLANT CONTENDS THAT THE ORDER OF JANUARY VIOLATES THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION. "BECAUSE THE FAILURE TO PAY CHILD SUPPORT HAS BEEN WILLFUL, THE COURT FINDS THAT PLAINTIFF DOES NOT, IN PART, RESPECT THE LEGAL SYSTEM OR THE LAW REQUIRING PAYMENT OF CHILD SUPPORT. FOR THAT REASON, THE COURT FINDS THAT PLAINTIFF'S ATTITUDES AND BEHAVIORS ARE ANTI-SOCIAL AND CONSTITUTES A SUBSTANTIAL DEVIATION FROM THE MORAL NORMS OF SOCIETY. A PARENT INFLUENCES A CHILD FOR GOOD OR BAD; SOME OF THAT INFLUENCE COMES FROM THE CHILD'S OBSERVATIONS OF THE PARENT'S BEHAVIOR. FOR THESE REASONS, THE COURT FINDS THAT PLAINTIFF'S BEHAVIORS AND ATTITUDES, WITH RESPECT TO NOT PAYING CHILD SUPPORT, ARE NOT A PROPER EXAMPLE FOR HIS CHILD AND THAT UNTIL PLAINTIFF ADOPTS AN ATTITUDE, MANIFEST BY APPROPRIATE BEHAVIOR, THAT HE RESPECT THE LEGAL SYSTEM AND INTENDS TO CONFORM WITH THE LAWS OF THIS STATE AND THE DIRECTIVES OF THE COURT, HE SHOULD NOT HAVE PERSONAL CONTACT WITH HIS DAUGHTER.". (FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: JANUARY 9, 1991 ORDER).

IT IS CLEAR FROM THIS PORTION OF THE FINDING OF FACT THAT JUDGE SAWAYA IS PUNISHING THE APPELLANT FOR HIS

DISRESPECT AND ATTITUDES TOWARDS THE GOVERNMENT, COURTS AND LEGAL SYSTEM. HOW AN ORDER CAN MORE CLEARLY VIOLATE THE CONSTITUTIONAL RIGHT TO PROTEST AGAINST THE GOVERNMENT IS IMPOSSIBLE TO DETERMINE. ALTHOUGH APPELLANT CONTENDS HE DOES NOT HAVE SUCH ATTITUDES AND BEHAVIORS, IF HE DID, IT IS HIS CONSTITUTIONAL RIGHT TO HAVE SUCH AND TO DEMONSTRATE THOSE BELIEF AND ATTITUDES AGAINST THE GOVERNMENT AND TEACH HIS CHILDREN THOSE SAME ATTITUDES AND BELIEFS. TO PUNISH FOR SUCH ATTITUDES AND BEHAVIORS ARE UNACCEPTABLE IN THIS COUNTRY! THEREFORE, ANY ORDER THAT PUNISHES FOR SUCH REASON MUST BE OVERTURNED.

THE APPELLANT CONTENDS THAT REASONING USED BY JUDGE SAWAYA IS ERRONEOUS IN THAT HE COMMIT THE LOGICAL FALLACY OF HASTY GENERALIZATION. "TO INFER THAT ALL A IS B FROM ONE INSTANCES OF A BEING B IS FALLACIOUS UNLESS THE A IS KNOWN TO REPRESENTATIVE OF ALL A'S". FUNDAMENTALS OF LOGIC, JAMES D. CARNEY AND RICHARD K. SCHEER, PAGE 41. JUDGE SAWAYA ARGUMENT IS PLAINTIFF DOES NOT PAY CHILD SUPPORT, THEREFORE HE DOES NOT INPART RESPECT THE LEGAL SYSTEM OR THE LAW REQUIRING PAYMENT OF CHILD SUPPORT, THEREFORE HIS ATTITUDES AND BEHAVIORS ARE ANTI-SOCIAL, THEREFORE HIS SHOULD NOT HAVE ANY CONTACT WITH HIS CHILD. THERE ARE SEVERAL REASON FOR NOT PAYING CHILD SUPPORT THAT HAVE NOTHING TO DO WITH RESPECT FOR THE GOVERNMENT. NOT HAVING RESPECT FOR THE GOVERNMENT DOES NOT MAKE ONE ANTI-SOCIAL. NO WHERE DOES JUDGE SAWAYA CONTENDS THAT THE CHILD HAS ANY KNOWLEDGE OF HER FATHER NONPAYMENT OF CHILD SUPPORT NOR THAT SUCH KNOWLEDGE IS

EFFECTING HER. SIMPLY PUT JUDGE SAWAYA LOGIC DOES NOT SUPPORT HIS ORDER AND THEREFORE FOR THAT REASON ALONE IT SHOULD BE OVERTURNED.

THE TRIAL COURT ERRED IN TERMINATING VISITATION FOR THE SOLE REASON OF NON-PAYMENT OF CHILD SUPPORT.

THE APPELLANT CONTENDS THAT ALTHOUGH THE JANUARY 9, 1991 ORDER APPEARS TO HAVE THE BEST INTEREST OF THE CHILD AS THE CAUSE FOR TERMINATING VISITATION, THE LOGIC OF JUDGE SAWAYA IS CLEARLY FOUNDED ONLY ON THE NON-PAYMENT OF CHILD SUPPORT. THE PRIMARY PREMISES IS "BECAUSE THE NON-PAYMENT OF CHILD SUPPORT HAS BEEN WILLFULL..." JUDGE SAWAYA THEN GOES ON TO DEDUCES THAT IT IS IN THE BEST INTEREST OF THE CHILD NOT TO SEE HER FATHER AGAIN.

JUDGE SAWAYA STATED AT THE JUNE 18 HEARING "YOU MAKE NO REAL EFFORT, AS I SEE IT, TO PAY ANY MONEY TO THIS WOMAN TO HELP SUPPORT YOUR OWN CHILD. SO I FIND YOU IN CONTEMPT OF COURT. I AM GOING TO TAKE AWAY YOUR VISITATION PRIVILEGES FOR THAT." PARTIAL TRANSCRIPT OF HEARING DATED 18, 1990.

IN LUNSFORD V. WALDRIP, 493 P.2D 789, THE WASHINGTON COURT OF APPEALS, IN A CASE VERY SIMILAR TO THE CASE AT BAR, STATES THAT THE TRIAL COURT FINDINGS WERE NO MORE THAN A ATTEMPT TO DISGUISE THE NON-PAYMENT OF CHILD SUPPORT PAYMENT. "WE RECOGNIZED THAT THERE CAN BE GOOD AND SOUND REASON TO REGULATE OR DENY VISITATION PRIVILEGES, BUT THE ORDER WHICH IS UNDER REVIEW HERE DOES NOT CITE ANY REASON

OTHER THAT THE FAILURE TO PAY MONEY THAT IS DUE. WITHHOLDING VISITATION FOR THE SOLE REASON THAT MONEY IS UNPAID AND OWING IS AN IMPROPER EXERCISE OF JUDICIAL DISCRETION."

THE UTAH SUPREME COURT IN SLADE V. DENIS, 594 P.2D 898 STATED "THE GENERAL POLICY OF THE LAW IS THAT A PARENT WILL BE DENIED VISITATION RIGHTS ONLY UNDER EXTRAORDINARY CIRCUMSTANCES. THIS COURT IS RELUCTANT TO DENY ALL VISITATION RIGHTS, UNLESS THE CHILD'S WELFARE IS JEOPARDIZED THEREBY."

THE OREGON COURT OF APPEALS IN WEST V. WEST, 487 P.2D 96, STATED "THE RULE THAT VISITATION MAY NOT BE CONDITIONED UPON PAYMENT OF SUPPORT OR SUPPORT MAY NOT BE CONDITION UPON COOPERATION IN ALLOWING VISITS IS INVOKED TO PREVENT TRIAL COURT FROM PUNISHING THE RECALCITRANT PARENT THROUGH THE CHILDREN.....RIGHT OF VISITATION CANNOT BE MADE DEFENDANT UPON PAYMENT OF SUPPORT FOR CHILDREN, IN PART BECAUSE THE WELFARE OF THE CHILDREN UNDERLIE THE ALLOWANCE OF VISITATION WITH CHILDREN BY THE PARENT NOT HAVING CUSTODY."

THE IDAHO SUPREME COURT IN SODERBURG V. SOLDERBURG, 299 P.2D 479, STATED "IT IS ONLY UNDER EXTRAORDINARY CIRCUMSTANCES THAT A PARENT SHOULD BE DENIED THE RIGHT OF VISITATION OF A CHILD."

THIS COURT IN SMITH V. SMITH, 135 UTAH ADV. REP. 33 STATED "MODIFICATION OF CUSTODY DECREE MUST SERVE THE BEST INTEREST OF THE CHILD" YOU WENT ON TO SAY THE BEST INTEREST OF THE CHILD ARE "PROMOTED BY HAVING THE CHILD RESPECT FOR AND LOVE OF BOTH PARENTS. 'FOSTERING THE CHILD RELATIONSHIP

WITH A NON-CUSTODIAL HAS IMPORTANT BEARING ON THE CHILD'S BEST INTEREST.' DANA V. DANA, 131 UTAH ADV. REP. 76, 78."

THE UTAH SUPREME COURT IN ROHR V. ROHR, 709 P.2D 382, STATED "...THE PARAMOUNT CONCERN IN CHILDREN VISITATION MATTERS IS THE WELFARE OF THE CHILD."

THE APPELLANT CONTENDS THAT JUDGE SAWAYA BELIEVED AT THE JUNE 18 HEARING THAT HE COULD TERMINATE THE APPELLANT VISITATION FOR THE SOLE REASON OF NON-PAYMENT OF CHILD SUPPORT, AS THE TRANSCRIPT CLEARLY SHOWS. HOWEVER, WHEN HIS ORDER WAS VACATED BY THIS COURT AND TOLD THAT HE MUST CONFORM TO THE RHOR DECISION OF THE BEST INTEREST ON THE CHILD, JUDGE SAWAYA, WHO'S JUNE 18 HEARING DID NOT CONTAIN ANY TESTIMONY OF EVIDENCE OF THE CHILD'S BEST INTEREST, USED GENERALITIES AND ATTITUDES TO SHOW THE BEST INTEREST WAS NOT TO HAVE VISITATION OF PARENT-CHILD. IT IS INTERESTING TO READ THE COMMENTS OF JUDGE SAWAYA WHEN HE AGREED WITH THE APPELLANT THAT "NOT BEING ABLE TO VISIT HER, NOT BEING ABLE TO SAY THAT, IT IS VERY DAMAGING TO HER AS WELL AS ME." WHEN HE SAID "I AM SURE THAT IT IS." PARTIAL TRANSCRIPT OF JUNE 18, 1990 HEARING AT PAGE 3. IT IS CLEAR THAT WHEN THE BIAS ACTIONS OF JUDGE SAWAYA IS VIEW IN OVERVIEW OF THIS CASE THERE CAN BE NO OTHER CONCLUSION THAT JUDGE SAWAYA DOES NOT CARE ABOUT ANYTHING BUT PUNISHING THE APPELLANT, EVEN AT THE EXPENSE HIS CHILD. APPELLANT ATTITUDES ARE THAT HE DOES NOT ACCEPT JUDGE SAWAYA HANDLING OF THIS CASE, SINCE JUDGE SAWAYA ENTER THIS CASE THE MATTERS HAS JUST DETERIORATED TO THE DETRIMENT OF ALL INVOLVED, PARTLY BE CAUSE MR. HOLGREM,

DEFENDANT' ATTORNEY KNOWS, AS HE ADMITTED IN THE MOTION FOR STAY HEARING BEFORE THIS COURT, JUDGE SAWAYA WILL GIVE HIM ALL THE LATITUDE HE NEED TO PURSUE THE APPELLANT. THEREFORE IN STEAD OF NEGOTIATING A SOLUTION TO THIS CASE, HE MAINTAINS A POSITION THAT APPELLANT CANNOT PERFORM.

THE TRIAL COURT ERRED IN CONDITIONING THE RESTORATION OF VISITATION RIGHTS UPON THE PAYMENT AND COMPLIANCE WITH SUPPORT ORDERS.

THE UTAH SUPREME COURT OF UTAH IN ROHR, SUPRA, SAID "... CONDITIONING ANY FUTURE MODIFICATIONS OF DIVORCE UPON FATHER'S PRIOR COMPLIANCE WITH SUPPORT ORDER IMPERMISSIBLY PREDICATED FATHER'S FUTURE RIGHTS TO MODIFICATION UPON HAPPENING OF ONE PREDETERMINED EVENT; MODIFICATION WOULD ALWAYS BE AVAILABLE CONTINGENT ONLY UPON MATERIAL CHANGE OF IN CIRCUMSTANCES."

JUDGE SAWAYA CLEARLY IS DETERMINING FUTURE VISITATION UPON COMPLIANCE WITH THE PAYMENT OF PAST DUE CHILD SUPPORT AND MAINTAINING CURRENT SUPPORT PAYMENT. SENSE THE JULY 18 REVIEW HEARING WHERE JUDGE SAWAYA ALLOW APPELLANT TO MAKE CHILD SUPPORT IN INSTALLMENT PAYMENTS APPELLANT HAS MAINTAIN HIS CHILD SUPPORT PAYMENT. JUDGE SAWAYA HAS CONTINUE TO REVIEW APPELLANT PAYMENTS AND KNEW THAT APPELLANT WAS CURRENT WITH HIS PAYMENT WHEN HE CONDITIONED RESTORATION OF VISITATION UPON THE PAYMENT OF \$450.00 FOR 4 MONTH CONSECUTIVE, AND THEN IF APPELLANT DOES NOT KEEP CURRENT THE

\$450.00 THEN THE RESPONDENT CAN WITHOUT A HEARING TERMINATE VISITATION RIGHT. THE SUM OF \$450.00 IS MORE THAN APPELLANT CAN PAY AND REPRESENTS MORE THAN 50% OF HIS INCOME.

THE TRIAL COURT ERRED IN USING IT'S CONTEMPT POWER TO DENY AND TERMINATE VISITATION.

UTAH CODE 78-32-10 STATES:

"UPON THE ANSWER AND EVIDENCE TAKEN THE COURT OR JUDGE MUST DETERMINE WHETHER THE PERSON PROCEEDED AGAINST IS GUILTY OF THE CONTEMPT CHARGE, AND IF IT IS ADJUDGED THAT HE IS GUILTY, OF CONTEMPT, A FINE MAY IMPOSED UPON HIM NOT EXCEEDING \$200.00 OR HE MAY BE IMPRISONED IN THE COUNTY JAIL NOT EXCEEDING THIRTY DAYS, OR MAY BE BOTH FINED AND IMPRISONED."

THE UTAH LEGISLATURE REALIZING THAT CONTEMPT OF COURT IMPLIES THAT THE RELATIONSHIP BETWEEN THE JUDGE AND PERSON CHARGE IS STRAINED AT BEST, LIMITS THE JUDGES POWER TO BE VINDICTIVE AND UNJUSTLY PUNISH THE OFFENDER. TO ALLOW JUDGE SAWAYA ABUSE HIS POWERS OF CONTEMPT POWERS BY TERMINATING VISITATION RIGHTS OF THE APPELLANT IS IN CONFLICT WITH THIS STATUE. A JUDGE CAN, IN SO MANY DIFFERENT WAYS, ABUSE A RIGHTS OF LITIGANT THAT THE LEGISLATURE MUST LIMIT HIS POWER TO PUNISH.

THE WASHINGTON COURT RECOGNIZED THAT IT IS WRONG TO PUNISH PARENTS BY DENYING VISITATION RIGHT WHEN IT STATED IN MATTER OF MARRIAGE OF CABALQUINTO, 669 P.2d 886, "CHILD

CUSTODY AND VISITATION PRIVILEGE ARE NOT TO BE USED TO PENALIZE OR REWARD PARENTS FOR THEIR CONDUCT."

THE TRIAL COURT ERRED IN DENYING VISITATION BY NOT REQUIRING THE DEFENDANT TO FILE A PETITION TO MODIFY.

THE APPELLANT CONTENDS THAT CASE LAW AS FAR BACK AS 1900'S HAVE UNIVERSALLY HELD, AND LATER STATE STATUES CONFIRMED, THAT VISITATION CANNOT BE MODIFIED OR RESTRICTED WITHOUT FILING A PETITION TO MODIFY. (U.C.A. 30-3-5)

IN THE ROHR, SUPRA, THE CASE WAS BROUGHT BEFORE THE COURT WITH A PETITION TO MODIFY, EVEN IN ROHR, THE COURT DID NOT DENY ALL CONTACT BETWEEN PARENT AND CHILD, A CASE NOT ONLY INVOLVING NONPAYMENT OF SUPPORT BUT ALSO VISITATION ABUSE.

THE APPELLANT CONTENDS THAT THE ISSUE WAS NOT PROPERLY BEFORE THE COURT AND IN OPPOSITION WITH STATE STATUES, THEREFORE THIS ORDER MUST BE OVERTURNED.

THE TRIAL COURT ERRED IN SIGNING A ORDER OVER THE TIMELY FILED OBJECTIONS TO SAID ORDER.

THE APPELLANT CONTENDS THAT UTAH CODE OF JUDICIAL ADMINISTRATION RULE 4-504 (2) GIVES THE PLAINTIFF FIVE (5) IN WHICH TO OBJECT TO ANY PROPOSED ORDER.

IN THE CASE AT BAR THE DEFENDANT'S ATTORNEY MAILED A COPY OF THE PROPOSED ORDER ON ORDER TO SHOW CAUSE TO THE PLAINTIFF'S ATTORNEY ON THE 3RD OF JULY, 1990. ALLOWING THE

STATUTORY TIME FOR MAILING AND THE FIVE DAY RESPONSE TIME, PLAINTIFF'S OBJECTION TO PROPOSED ORDER WAS RECEIVED BY THE CLERK OF THE COURT ON JULY 11, 1990 WELL WITHIN THE TIME LIMITS, PLAINTIFF ALSO FILED AT THE SAME TIME A NOTICE OF HEARING TO HEAR HIS OBJECTIONS.

JUDGE SAWAYA APPARENTLY DOES NOT BELIEVE THAT PLAINTIFF HAS A RIGHTS TO OBJECT TO ANY OF DEFENDANT PROPOSED ORDERS OR FINDINGS OF FACT AND CONCLUSION OF LAW, AS HE SIGNED THE JULY 13 ORDER OVER THE TIMELY FILED OBJECTIONS AND TOLD THE APPELLANT THAT HE WOULD NOT ALLOW OBJECTION TO THE JANUARY 9 1991 ORDER AND IN FACT PUNISH THE APPELLANT BY DOUBLING THE AMOUNT OF CONSECUTIVE PAYMENT NEEDED TO REINSTATE HIS VISITATION RIGHTS WHEN THE APPELLANT OBJECT TO DEFENDANT PROPOSED FINDING OF FACT AND ORDER, STATING "YOU MAY NOT LIKE WHAT I END UP DOING." "YOU CAN FILE OBJECTIONS THEREAFTER, BUT IT WON'T DO YOU ANY GOOD." TRANSCRIPT OF THE NOVEMBER 26, 1990 HEARING PAGES 10 AND 21.

THE APPELLANT CONTENDS THAT ALL THOUGH THESE HEARING AND LEGAL PROCESS JUDGE SAWAYA DEMONSTRATED HIS DISLIKE FOR THE APPELLANT AND URGES THIS COURT TO REVIEW THE WHOLE TRANSCRIPT OF THE NOVEMBER 26, 1990 HEARING TO SEE JUST HOW OUT OF HAND AND UNFAIR A JUDGE CAN BE.

RESPECTFULLY SUBMITTED,

CONCLUSION

THE APPELLANT URGES THIS COURT TO REVIEW THE ACTIONS OF THE PARTIES INVOLVED IN THIS CASE AND COMPARE THEM TO THE LAWS AND CONSTITUTION. THE CASE IS CLEAR, CAN A JUDGE DESTROY A LOVING RELATIONSHIP BETWEEN A FATHER AND HIS DAUGHTER SIMPLY TO PUNISH THE FATHER FOR NOT COMPLYING WITH THE JUDGES ORDER, WHEN THERE IS NOT A CENTILE OF EVIDENCE THAT THE NONCOMPLIANCE HAS ANY JEOPARDIZING EFFECT ON THE CHILD, AND THEN MAKE THE CONDITIONS OF REINSTATEMENT OF PERSONAL CONTACT WITH HIS DAUGHTER BEYOND HIS REACH.

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IN THE UTAH COURT OF APPEALS

LLOYD D. COLEY,
PLAINTIFF/APPELLANT,

vs.

NANCY P. COLEY,
DEFENDANT/RESPONDENT,

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CERTIFICATE OF
DELIVERY

CASE No.900446-CA

I, LLOYD D. COLEY, DO HEREBY CERTIFY THAT I DELIVER A
TRUE AND CORRECT COPY OF THE APPELLANT BRIEF TO THE OFFICE OF
RANDALL HOLGREM
50 WEST BROADWAY
SALT LAKE CITY, UTAH

LLOYD D. COLEY