

1990

# Lloyd D. Coley v. Nancy P. Coley : Petition for Writ of Certiorari

Utah Court of Appeals

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Lloyd D. Coley; Appellant Pro Se.

Randall J. Holmgren; Attorney for Appellee.

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**910449 900446-CA**

DOCKET NO.            IN THE SUPREME COURT OF THE STATE OF UTAH

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LLOYD D. COLEY,	:	
	:	
PETITIONER,	:	
	:	SUPREME COURT
vs.	:	CASE NO. <u>910449</u>
	:	
NANCY P. COLEY,	:	COURT OF APPEALS
	:	
RESPONDENT.	:	CASE NO. 900446-CA
	:	

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PETITION FOR WRIT OF CERTIORARI

Petition for A Writ of Certiorari by Lloyd Coley from that Certain Decision and Opinion dated August 15th, 1991, by the Honorable Judges: Gregory K. Orme, Judith Billings, and Pamela T. Greenwood all concurring in the Utah Court of Appeals in Lloyd D. Coley vs. Nancy P. Coley, Case no. 900446-CA

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**FILED**

SEP 16 1991

CLERK SUPREME COURT  
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

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PETITIONER,	:	
	:	SUPREME COURT
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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	2
ISSUES PRESENTED FOR REVIEW.....	3
JURISDICTION.....	4
STATEMENT OF FACTS.....	4
ARGUMENTS.....	11
CONCLUSION.....	20
APPENDIX.....	22

## TABLE OF AUTHORITIES

CASES CITED	Page
<u>STATE in re WALTER B. UTAH</u> 577 P.2d 119, 123 (1978)....	11
<u>MEYER v. NEBRASKA</u> , 262 U.S. 390, 399, 43 S.Ct. 625, 67 L. Ed. 1042 (1923).....	11
<u>In Re J.P.</u> , UTAH 648 P.2d 1373.....	12
<u>Lunsford v. Waldrip</u> , 493 P.2d 789.....	14
<u>Slade v. Denis</u> , 594 P.2d 898.....	14
<u>West v. West</u> , 487 P.2d 96.....	14
<u>Soderburg v. Soderburg</u> , 299 P.2d 479.....	14
<u>Smith v. Smith</u> , 135 Ut. Adv. Rep. 33 .....	15
<u>Dana v. Dana</u> , 131 Ut. Adv. Rep. 78 .....	15
<u>Rohr v. Rohr</u> , 709 P.2d 382.....	15
<u>Matter of Marriage of Cabalquinto</u> , 669 P.2d 886.....	17
OTHER	
UNITED STATES CONSTITUTION, FOURTEEN AMENDMENT.....	11
UNITED STATES CONSTITUTION, EIGHT AMENDMENT.....	12
UTAH CODE 30-3-5.....	18
UTAH CODE OF JUDICIAL ADMINISTRATION 4-504 (2)(5).....	18
UTAH RULES OF APPELLATE PROCEDURES 31.....	19

## ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals did not properly consider the constitutionally impaired order of the Trial Court denying visitation for nonpayment of child support.

2. The Trial Court erred in termination visitation for the sole reason of nonpayment of child support.

3. The Trial Court erred in conditioning the restoration of and the continuation of visitation upon the payment and compliance with support orders.

4. The Trial Court erred in using it's contempt powers to deny and terminate visitation.

5. The Trial Court erred in denying visitation by not requiring the defendant to file a petition to modify.

6. The Trial Court erred in signing a order over the timely filed objection to said order.

7. Should the Court of Appeals use Rule 31 of the Utah Rules of Appellate Procedures to preclude a written opinion on issues that are unique and substantial ?

### **JURISDICTION**

The Opinion of the Utah Court of Appeals sought to be review is attached hereto as Exhibit "A", dated August 15th, 1991.

Rule 45 and Rule 46 of the Utah Courts of Appellate Procedure gives the Supreme Court the right to review the above decision of the Court of Appeals.

This petition is filed according to Rule 48 of the Rules of Appellate Procedure.

### **STATEMENT OF FACTS**

The petitioner filed for divorce on the 31st day of December, 1981, (Record at # 2). On the 26th day of August, 1982 the divorce was granted to become effective after the 3-month interlocutory period (Record at # 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 (Record at #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, (Record at # 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 (Record at # 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 (Record at # 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 (Record at # 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 (Record at # 60). Said motion was stipulated to and the Order granting said request was signed on the 21st of June 1984 (Record at # 65-67)

On August 6, 1985 petitioner filed a Order to Show Cause because respondent was denying him visitation with his daughter (Record at # 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 (Record at # 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 petitoners'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. (Record at # 81-82).

On April 14, 1986, petitioner filed his counter-petition for Modification of Divorce Decree (Record at # 87-88).

On April 22, 1986, Judge Sawaya signed the Order of Judge Fishler in which at #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." (Record at # 95-9)

On October 14, 1986 the petitioner attempted to proceed with his petition to modify by filing a Request for Trial Setting. (Record at # 101).

Commissioner Sandra Peular set a pre-trial settlement for February 13, 1987. (Record at # 104)

Respondent resisted any settlement and filed Objection to Request for Trial Setting. (Record at # 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. (Record at # 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. (Record at # 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. (Record at # 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. (Record at # 135). Respondent filed at the same time a petition to deny petitioner alternate Friday visits. (Record at # 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 petitioner to purge the contempt by paying the respondent a significant amount of money. (Record at # 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. (Record at # 214)

On April 13, 1990 the Court canceled the hearing on respondent's O.S.C. and respondent filed a notice of continuance. (Record at # 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. (Record at #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 have to serve the petitioner with a O.S.C. and set the hearing for June 18, 1990. (Record at # 256-9).

On June 18, 1990 Judge Sawaya found the petitioner guilty of contempt, denied all contact between the petitioner and his daughter, sentenced the petitioner to serve 39 days in the county jail and stayed the imposition of the jail sentence for 30 days to allow petitioner to pay the respondent some money. (Record at #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 they filed as a delaying tactic. (Record at #268-71).

On July 16, 1990, petitioner filed a Affidavit of Bias directed toward the conduct of Judge Sawaya. At the hearing

later that same day petitioner informed Judge Sawaya that he filed a Affidavit of Bias earlier and according to the Rules of Civil Procedures he could no longer proceed until the Affidavit of Bias were reviewed by the presiding judge. Judge Sawaya accepted a copy of the Affidavit but he stated he was not bias and then when on the review hearing. (Record at #298)

On August 7, 1990, Judge Murphy denied petitioner affidavit of bias. (Record at #298)

On August 13, 1990 petitioner filed a notice of appeal for for both the July 13 Order of Judge Sawaya and the August 7 Order denying the Affidavit of Bias by Judge Murphy. (Record at # 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 order until the case could be giving a fair hearing.

On February 4, 1991, the Court of Appeals denied the petitioner's request for a stay.

On March 19, 1991, petitioner filed for a Writ of Certiorari to this Court to review the denial of the request for the stay.

On August 14, 1991 the Court of Appeals held oral arguments on the appeal of this case under Rule 31 of the Rules of Appellate Procedures.

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

It should be noted at this point that respondent has admittedly abandoned the claim that the petitioner is unfit in anyway or degree except nonpayment of child support, (p. 23 lines 14-21 of Transcript of Oral Argument of August 14, 1991).

The petitioner 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 than 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 dependant 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 petitioner contends that Judge Sawaya believed at the June 18 hearing that he could terminate the petitioner visitation for the sole reason of non-payment of child support, as the transcript clearly shows. However, when his order was vacated by the Court of Appeals 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 petitioner 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 petitioner, 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 petitioner. Therefore in stead of negotiating a solution to this case, he maintains a position that petitioner cannot perform.

**THE TRIAL COURT ERROR 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. Since the July 18 review hearing where Judge Sawaya allow petitioner to make child support in installment payments petitioner has maintain his child support payment. Judge Sawaya has continue to review petitioner payments and knew that petitioner was current with his payment when he conditioned restoration of visitation upon the payment of \$450.00 for 4 month consecutive, and then if petitioner 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 petitioner can pay and represents more than 50% of his income.

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

The petitioner has found no cases in any jurisdiction allowing the termination of visitation for contempt for failure to pay child support.

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 petitioner contends that case law as far back as 1900's have universally held, and later state statutes 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 petitioner contends that the issue was not properly before the court and in opposition with state statutes, therefore this order must be overturned.

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

The petitioner 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 petitioner that he would not allow objection to the January 9 1991 Order and in fact punish the petitioner by doubling the amount of consecutive payment needed to reinstate his visitation rights when the petitioner 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 petitioner contends that all though these hearing and legal process Judge Sawaya demonstrated his dislike for the petitioner 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.

**SHOULD THE COURT OF APPEALS USE RULE 31 OF UTAH RULES  
OF APPELLATE PROCEDURES TO PRECLUDE A WRITTEN OPINION  
ON ISSUES THAT ARE UNIQUE AND SUBSTANTIAL ?**

The Court of Appeals, sua sponte, ordered this case heard under Rule 31 of the Utah Rules of Appellate Procedure and afterwards, upon Motion of the Petitioner, futher declined to issue a written opinion. If Utah Rule is meant for anything, it is for frivolous, unsubstantiated appeals where a written decision is unnecessary. In the case at bar

petitioner has promulgated serious constitutional issues and on the issue of contempt he cannot find one case in any Western jurisdiction allowing a cessation of visitation for non payment of child support alone.

The petitioner contends that after careful research there are only four Court of Appeals cases under Rule 31 and that those cases each found the facts or issues too complicated to proceed and did not proceed under said rule. There are no other similar Rules in the other Western States researched with the exception of Washington. That rule (18.16) of Washington Rules of Appellate Procedures provides only for a joint petition for Expedited Review.

### CONCLUSION

Petitioner urges that the constitutional issues raised and the issues of contempt power limitations are substantial and that the Court Of Appeals erred in not issuing a written opinion.

Petitioner urges that there is no authority anywhere that all visitation and all contact may be forbidden solely for nonpayment of child support.

Petitioner urges that contrary to the Court of Appeals oral discussion there must be some limits on the civil contempt power.

Petitioner urges that the trail court's order of conditioning of visitation and contact between father and his child upon payment of current and past due child support payment is wrong and not supported by any authority.

Petitioner urges that contrary to the oral discussion of the Court of Appeals that in order for Rohr to have any meaning the best interest of the child must be the controlling criteria in limiting or denying visitation. Not just taking the best interest of the child into consideration or that the best interest criteria is fulfilled by the fact that the more money paid in support payments the better it is for the child.

Respectfully submitted,

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## APPENDIX

**RULE 18.15 ACCELERATED REVIEW OF ADULT SENTENCINGS**

(a) **Generally.** A sentence which is beyond the standard range may be reviewed in the manner provided in the Rules for other decisions or by accelerated review as provided in this Rule.

(b) **Accelerated Review by Motion.** After the notice of appeal has been filed, any party may seek accelerated sentence review and must do so by motion. The motion must include (1) the name of the party filing the motion; (2) the offense; (3) the disposition of the trial court; (4) the standard range for the offense; (5) a statement of the disposition urged by the moving party; (6) copies of the findings of fact, conclusions of law and judgment and sentence; (7) an argument for the relief sought with reference to that portion of RCW 9.94A.210(4) relied upon by the moving party.

(c) **Service on Court Reporter or Clerk.** A copy of the motion for accelerated review must be served upon the court reporter in attendance at the sentencing, or, in the case of electronic recording, upon the clerk of the superior court.

(d) **Time for Hearing.** The hearing will be conducted no later than 28 days following filing of the record required by RCW 9.94A.210(5). The court will notify the parties of the hearing date.

(e) **Motion Procedure Controls.** The motion procedure, including a party's response, is governed by Title 17.

(f) **Accelerated Review of Other Issues.** The decision of issues other than those relating to the sentence may be accelerated only pursuant to Rules 18.8 and 18.12.

[Adopted effective July 1, 1984]

**RULE 18.16 EXPEDITED APPEAL REVIEW**

(a) **Purpose.** This temporary rule provides for expedited review of certain cases on appeal. The purpose of establishing an expedited procedure is to reduce the time between the filing of an appeal and the rendering of an opinion in those cases where the parties and the court agree that the case can be handled in an accelerated manner.

(b) **Application of Rule.** This rule applies only to an appeal to the Court of Appeals from a trial court decision in a civil or criminal case. No more than two issues can be raised in an expedited appeal. Each Division of the Court of Appeals may adopt procedures to implement the provisions of this rule.

(c) **Petition for Expedited Appeal Review.** Parties must jointly petition for expedited review by filing a Petition for Expedited Review within 15 days after the appeal is filed. Extensions of time can be granted only by order of the court. The clerk of the appellate court

will make the standard form of petition available to persons who request it.

(d) **Acceptance by the Court.** After review by the court, each petition for expedited review will be granted or denied. Petitions that are denied will be reviewed as provided in the Rules of Appellate Procedure. The time limits provided in RAP 9.2, 9.5, 9.6 and 10.2 will begin as provided by the clerk.

(e) **Agreed Report of Proceedings.** Within 30 days of notice that the petition was granted, the parties must file an agreed report of proceedings as provided in RAP 9.4. The report is limited to five pages.

(f) **Briefs Allowed.** All briefs are limited to 10 pages and two issues. For the purpose of determining compliance with this rule, appendices are included. The title sheet, table of contents, table of authorities, excerpts from the clerk's papers, and copy of the court order or memorandum decision are not included. The brief of an appellant or petitioner must be filed with the appellate court within 15 days after the agreed report of proceedings is filed. The brief of a respondent must be filed within 15 days after service of the brief of appellant or petitioner. No reply brief is allowed. Content of the briefs must comply with RAP 10.3(a), (b), and (g).

(g) **Filing Brief.** The original of each brief must be filed with the appellate court in accordance with the provisions in RAP 10.4, except those portions of the rule relating to length of brief.

(h) **Sanctions for Late Filing.** Failure to timely file the petition for accelerated review, the agreed report of proceedings or the brief will result in the case being transferred out of the expedited appeal program and on to the regular docket. The time limits provided in RAP 9.2, 9.5, 9.6 and 10.2 will begin the next day after a party has missed an expedited appeal deadline.

(i) **Oral Argument.** Oral argument will be allowed and limited to 15 minutes for each side. Parties may request to waive oral argument.

(j) **Rendering of a Decision.** Except in extraordinary circumstances or when a panel recommends that the opinion be published, a decision shall be rendered within 30 days after oral argument or, if all parties have waived oral argument, within 30 days after waiver has been approved by the panel.

(k) **Court's Authority to Accelerate Cases.** The court can also select cases for accelerated review as provided in RAP 18.12.

(l) **Conformance to Rules of Appellate Procedure.** Except when inconsistent with the provisions of this rule, the Rules of Appellate Procedure are applicable to cases on expedited appeal.

(m) **Termination.** This rule will automatically terminate 24 months from the date of adoption, unless extended by the Washington Supreme Court.

[Adopted effective September 23, 1988]



FILED  
Third Judicial District

DEC 11 1990

SALT LAKE COUNTY  
By Susan Gray  
Deputy Clerk

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---

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

---

LLOYD D. COLEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. D 81 5126
	)	
NANCY P. COLEY,	)	
	)	
Defendant.	)	Judge James S. Sawaya
	)	

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW**  
**(Re: Amended Order on Order to Show Cause)**

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The above-entitled matter came on regularly for hearing before Judge James S. Sawaya on May 21, 1990 at 2:00 p.m. and was subsequently continued to June 18, 1990 at the hour of 2:00 p.m..

Defendant appeared in person with her attorney of record, Randall J. Holmgren.

Plaintiff appeared in person with his attorney of record, John R. Bucher.

The Court having reviewed the file, the Defendant's Motion, supporting Memorandum and Affidavit and the Plaintiff's Brief in

Opposition thereto, and the Defendant's Brief in Response to the Plaintiff's Opposing Brief, and being fully advised, entered its Order on or about July 13, 1990. On appeal, the Utah Court of Appeals, in considering Plaintiff's Motion to Stay certain aspects of the Order, vacated the provisions of the Order dealing with the denial of child-visitation privileges and remanded the matter to the District Court, Judge James S. Sawaya, for entry of findings of fact supportive of the Order denying child-visitation. Consistent with the directive of the Court of Appeals, this Court does now make, adopt and find the following:

#### FINDINGS OF FACT

1. That these findings are based upon the evidence presented at two hearings September 1988 and June 1990. The Court has further considered all of the pleadings, affidavits and memoranda on file herein and has considered the attitude and demeanor of the Plaintiff as the Court has observed it on numerous occasions in court proceedings pertaining to this matter.

2. That Plaintiff is in arrears in his child support, including interest, in the amount of \$27,305.00.

3. That nothing has changed since the Court previously (i.e., September 1988) found that Defendant had the present capability to earn money to pay child support and, if anything, it is more grievous than it was before.

4. That Plaintiff made a \$400 payment in November 1988 and a \$100 payment in December 1988 but has not made any payments since those dates.

5. That the aforesaid payments were made at a time when the Court had sentenced Plaintiff to jail for contempt for not making child support payments but also during a time period when the sentence was stayed for the purpose of giving Plaintiff an opportunity to purge himself of the contempt. Therefore, since the \$500 in payments were made under such circumstances, and since no payments were made during the 15-16 months (approx.) since that time, and since no payments were made during the 3-4 years prior to that time, the Court finds that Plaintiff's only motivation in making the \$500 in payments was to avoid going to jail and that he was not motivated out of an interest in his daughter's welfare.

6. That Plaintiff has the capability to earn money to pay child support.

7. That Plaintiff is articulate and intelligent and well-educated. His prior work experience includes being a licensed real-estate broker and doing private investigatory work for local attorneys.

8. That Plaintiff maintains a reasonable lifestyle. He has a residence which he rents. The residence is furnished with furniture and other furnishings. He has power and heat in his

residence. The Court has observed his manner of dress and he dresses reasonably well.

9. That Plaintiff has purchased material goods for his daughter (i.e., ski equipment, ski-lift tickets, etc.) so, at least at times, his income has been sufficient to indulge his daughter in such sports and/or luxuries and yet during such times he has not paid child support.

10. That Plaintiff has earned money during the periods of time that he has not paid child support.

11. For the foregoing reasons, the Court finds that Plaintiff's failure to pay child support has been willful.

12. 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 constitute 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 respects 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. In that regard, the Court finds that in the event that the Plaintiff pays his ongoing child support in the amount of \$250 per month, and makes a monthly reduction of \$200 toward the reduction of the judgments (child support, interest, and attorney fees) and makes both payments every month for a period of four (4) consecutive months, he may thereby reinstate his visitation rights with his daughter.

As Conclusions of Law from the foregoing Findings of Fact, the Court finds:

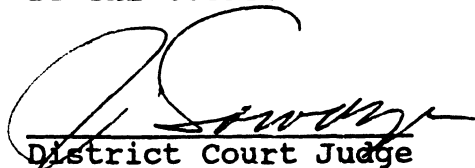
#### CONCLUSIONS OF LAW

1. The Plaintiff's conduct, in not paying child support, as stated in the aforesaid Findings of Fact, is willful and contumacious within the meaning of Rohr v. Rohr, 709 P.2d 382 (Utah 1985). Based on the foregoing Findings of Fact, the Court concludes that it is not in the best interest of the minor child to have visitation with the Plaintiff until such time as Plaintiff shows to this Court that he is concerned about the child's financial support and expresses that concern by paying his ongoing child support in the amount of \$250 per month and making a monthly reduction of \$200 toward the reduction of the judgments (child support, interest, and attorney fees) and makes both payments every

month for a period of four (4) consecutive months. The Court believes that if the Plaintiff makes a serious effort to support his child financially and sustains that effort over a period of time, he will thereby demonstrate rehabilitation of the attitude and behavior defects, identified above, that led this Court to deny Plaintiff visitation and contact with the minor child. If Plaintiff thereafter fails to make such payments, without making a clear showing of changed circumstances, the Court shall, without further hearing, suspend visitation.

DATED this 11 day of Dec., 1990.

BY THE COURT:

  
District Court Judge

COPY

RANDALL J. HOLMGREN, #4054  
Attorney at Law  
The Valley Tower, 9th Floor  
50 West Broadway  
Salt Lake City, Utah 84101  
Telephone: (801) 328-4703

Attorney for Defendant

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

---

LLOYD D. COLEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. D 81 5126
	)	
NANCY P. COLEY,	)	
	)	
Defendant.	)	Judge James S. Sawaya
	)	

---

AMENDED ORDER ON ORDER TO SHOW CAUSE  
(June 18, 1990)

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The above-entitled matter came on regularly for hearing before Judge James S. Sawaya on May 21, 1990 at 2:00 p.m. and was subsequently continued to June 18, 1990 at the hour of 2:00 p.m..

Defendant was represented by counsel, Randall J. Holmgren.

Plaintiff was represented by counsel, John R. Bucher.

The Court having reviewed the file, the Defendant's Motion, supporting Memorandum and Affidavit and the Plaintiff's Brief in Opposition thereto, and the Defendant's Brief in Response to the Plaintiff's Opposing Brief, and being fully advised, entered its

Order on or about July 13, 1990. On appeal, the Utah Court of Appeals, in considering Plaintiff's Motion to Stay certain aspects of the Order, vacated the provisions of the Order dealing with the denial of child-visitation privileges and remanded the matter to the District Court, Judge James S. Sawaya, for entry of findings of fact supportive of the Order denying child-visitation. On December 11, 1990, Judge James S. Sawaya signed the Findings of Fact and Conclusions of Law and based upon those Findings of Fact and Conclusions of Law

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

1. Judgment is granted against Plaintiff and in favor of Defendant in the principal amount of \$27,305.00. This judgment includes all child support arrearages (\$5,500.00: (9/30/88-5/30/90), pre-judgment interest (10%) on said delinquent child support (\$481.03: 9/30/88-5/30/90) and all former judgments against Plaintiff and in favor of Defendant (\$16,234.48: 4/30/86-1/9/89) and the same are hereby merged herein, together with post-judgment interest (12%) on said judgments (\$5,089.49: 4/30/86-1/9/89).

2. Plaintiff LLOYD D. COLEY is hereby ordered in contempt of this Court and the orders of this Court and he is ordered to serve a term of not less than 30 days in the Salt Lake County Jail. However, the jail sentence is suspended for thirty (30) days at which time the court will review the Plaintiff's efforts in making



a substantial payment to Defendant for the above judgments.

3. Plaintiff's visitation rights with the minor child, Laura, are hereby terminated until such time as Plaintiff shows to this Court that he is concerned about the child's financial support and expresses that concern by paying his ongoing child support in the amount of \$250.00 per month and making a monthly reduction of \$200.00 toward the reduction of the judgments (child support, interest, and attorney fees) and makes both payments every month for a period of four (4) consecutive months.

4. If Plaintiff thereafter fails to make such payments, without making a clear showing of changed circumstances, the Court shall, without further hearing, again terminate visitation.

5. Plaintiff is hereby restrained from having any contact with Defendant or her daughter, Laura.

6. This matter is continued to July 16, 1990 at 2:00 p.m. and will be continued by the court periodically for the next six months or a year.

7. Judgment is granted against Plaintiff and in favor of Defendant in the amount of \$400.00 for attorney fees and \$30.00 in costs incurred by Defendant in bringing this proceeding before the Court.

Date: \_\_\_\_\_, 19\_\_\_\_.

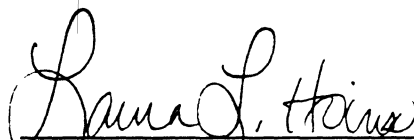
BY THE COURT:

\_\_\_\_\_  
District Court Judge

**CERTIFICATE OF MAILING**

I hereby certify that I personally caused to be mailed a true and correct copy of the foregoing AMENDED ORDER ON ORDER TO SHOW CAUSE (June 18, 1990), postage prepaid, to the following, on January 8, 1991.

Lloyd D. Coley, Pro Se  
1065 Lake Street  
Salt Lake City, Utah 84105

  
\_\_\_\_\_  
Laura L. Hoins

FILED

FEB. 4 1991

*Mary Noonan*

Mary T. Noonan  
Clerk of the Court  
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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Lloyd D. Coley,	)	MEMORANDUM DECISION
	)	(Not For Publication)
Plaintiff and Appellant,	)	
	)	
v.	)	Case No. 900446-CA
	)	
Nancy P. Coley,	)	F I L E D
	)	(February 4, 1991)
Defendant and Appellee.	)	

Before Judges Orme, Garff and Bench (on Law and Motion).

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This matter is before the court on a Motion To Stay Pending Review seeking a stay of a trial court's order dated January 9, 1991 denying appellant visitation with his minor child pending satisfaction of specified conditions. We deny the motion. In October, 1990, this court heard argument and issued an order on a previous motion to stay the July 13, 1990 order of the Third District Court that denied appellant visitation with the minor child until further order of the trial court. This court entered the following orders, dated October 10, 1990:

1. That those provisions of the July 13, 1990 order denying appellant visitation and contact with the parties' minor child are vacated, subject to the further order of the trial court entered pursuant to this order.

2. That [the] case is temporarily remanded to the trial court for entry of an order on visitation supported by (1) factual findings as to the welfare of the child, as required by Utah Code Ann. § 30-3-5(4) (1989) and Rohr v. Rohr, 709 P.2d 382, 383 (Utah 1985), and (2) provisions as to the specific acts required of appellant to obtain an order reinstating visitation and contact privileges.

3. That this court retains jurisdiction to review any order of the trial court entered pursuant to this order during the pending appeal and appellant shall not be required to file an additional notice of appeal or pay additional filing fees.

On December 11, 1990 the trial court entered Findings of Fact and Conclusions of Law pursuant to the provisions of this court's October 10, 1990 order set forth above. The findings are based upon the evidence presented at the hearings in September 1988 and June 1990, the trial court record and the attitude and demeanor of appellant in court proceedings. The findings specify the trial court's factual basis for denying visitation and set forth the prerequisites for reestablishing visitation. The court found that appellant is in arrears in child support in the amount of \$27,305.00. Based upon the factual findings, the trial court concludes:

The plaintiff's conduct, in not paying child support . . . is willful and contumacious within the meaning of Rohr v. Rohr, 709 P.2d 382 (Utah 1985). Based on the foregoing Findings of Fact, the court concludes that it is not in the best interest of the minor child to have visitation with the plaintiff until such time as plaintiff shows to this court that he is concerned about the child's financial support and expresses that concern by paying his ongoing child support in the amount of \$250 per month and making a monthly reduction of \$200 toward the reduction of the judgments (child support, interest, and attorney fees) and makes both payments every month for a period of four (4) consecutive months. The court believes that if the plaintiff makes a serious effort to support his child financially and sustains that effort over a period of time, he will thereby demonstrate rehabilitation of the attitude and behavior defects, identified above, that led this court to deny plaintiff visitation and contact with the minor

child. If plaintiff thereafter fails to make such payments, without making a clear showing of changed circumstances, the court shall, without further hearing, suspend visitation.

Appellant now seeks a stay of the December, 1990 order as supported by the findings of fact and conclusions of law entered pursuant to this court's temporary remand. The issue before this court is whether appellant is entitled to a stay pending appeal under the criteria set forth in Jensen v. Schwendiman, 744 P.2d 1026 (Utah Ct. App. 1987). Under Rule 8(a) of the Utah Rules of Appellate Procedure as interpreted in Jensen v. Schwendiman, a party seeking a stay must (a) make a strong showing that he is likely to succeed on the merits of the appeal; (b) establish that unless a stay is granted he will suffer irreparable injury; (c) show that no substantial harm will come to other interested parties; and (d) show that a stay would do no harm to the public interest. Jensen, 744 P.2d at 1027.

Appellant first argues that the trial court erred in amending its July order because such amendment must have been done within ten days under Utah R. App. P. 52(b) and 59. This argument is wholly meritless since the amendment was pursuant to a specific remand of this court. Appellant further claims that the amended order is not in conformity with this court's October 1990 order or Rohr v. Rohr, disputes the factual findings, asserts that the trial court was required to hold a further evidentiary hearing, and apparently claims that the finding that he has shown disrespect for the court system inhibits appellant's constitutional right of free speech. Appellant argues generally that this case is distinguishable from Rohr.

Based on our review of the findings of fact and conclusions of law and appellant's arguments summarized above, we conclude that appellant has failed to make an adequate showing that he is likely to succeed on the merits and is not entitled to a stay on that basis. Appellant has failed to specifically address the remaining criteria of Jensen, and we do not address them in detail. This court recognizes that deprivation of visitation for failure to provide financial support is an extreme remedy requiring a trial court to conform with the criteria set forth in Rohr v. Rohr and to balance the potential harm to the parent/child relationship with the potential harm to the child from the willful failure to provide

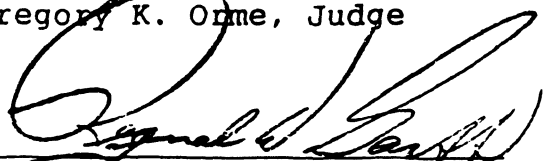
financial support. The ultimate determination of whether the trial court in this case has satisfied those requirements is reserved for plenary presentation and consideration of this case. We rule, however, that appellant has failed to satisfy the burden of establishing his entitlement to a stay pending appeal under the circumstances of this case, which include the availability of a mechanism for purging contempt and reestablishing contact and visitation. The motion for further stay pending appeal is denied.

One additional point requires clarification. Appellant asserts that this court held that "appellant may review subsequent orders in these proceedings without a new notice of appeals or additional filing fees." The October 10, 1990 order provided only that this court retained jurisdiction to review orders entered pursuant to the temporary remand. Appellant is, accordingly, not required to file a notice of appeal or additional filing fee to obtain review of the December, 1990 order entered pursuant to remand. Any subsequent appeals of unrelated orders, including judgments for arrearages or contempt, are subject to all appellate rules and requirements.

ALL CONCUR:



Gregory K. Orme, Judge



Regnal W. Garff, Judge



Russell W. Bench, Judge

I, LLOYD D. COLEY, DO HEREBY CERTIFY THAT I DELIVER A  
TRUE AND CORRECT COPY OF THE PETITION FOR WRIT OF CERTIORARI  
TO THE OFFICE OF:

RANDALL HOLGREM  
50 WEST BROADWAY  
SALT LAKE CITY, UTAH

DATED THIS            DAY OF            1991.

LLOYD D. COLEY



**FILED**

IN THE UTAH COURT OF APPEALS

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Lloyd D. Coley,  
Plaintiff and Appellant,  
v.  
Nancy P. Coley,  
Defendant and Appellee.

ORDER

Case No. 900446-0

AUG 15 1991

*Gary T. Noonan*  
Gary T. Noonan  
Clerk of the Court  
Utah Court of Appeals

Before Judges Billings, Greenwood, and Orme (Rule 31).

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This matter is before the court pursuant to Utah R. App. P. 31.

IT IS HEREBY ORDERED that the judgment of the trial court, contained in the Amended Order on Order to Show Cause entered on January 9, 1991 and based upon findings of fact and conclusions of law entered on December 11, 1990, is affirmed, and

IT IS FURTHER ORDERED that a hearing on the appellant's petition for modification of divorce decree filed April 14, 1986, insofar as it seeks a reduction in child support, shall be scheduled at the earliest available date, and

IT IS FURTHER ORDERED that, pending disposition by the trial court of the request to modify child support, all orders of the trial court pertaining to visitation and child support shall remain in full force and effect and, in particular, appellant's obligation to pay child support in the amounts and on the schedule set forth by the trial court shall not be altered or suspended by this order.

DATED this 14<sup>th</sup> day of August, 1991.

ALL CONCUR:

*Judith M. Billings*  
Judith M. Billings,  
Associate Presiding Judge

*Pamela T. Greenwood*  
Pamela T. Greenwood, Judge

*Gregory K. Orme*  
Gregory K. Orme, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 15th day of August, 1991, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the party listed below:

Lloyd D. Coley  
1065 Lake Street  
Salt Lake City, UT 84105

Randall J. Holmsgren  
Attorney for Appellee  
50 West Broadway, Suite 1111  
Salt Lake City, UT 84101

Dated this 15th day of August, 1991.

By Shari Knighton  
Deputy Clerk