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Lloyd D. Coley v. Nancy P. Coley : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 900446-CA IN UTAH COURT OF APPEALS

LLOYD D. COLEY,
PLAINTIFF/APPELLANT,

VS.

NANCY P. COLEY,
DEFENDANT/APPELLEE.

Priority #4

CASE NO. 900446-CA

REPLY BRIEF OF PLAINTIFF/APPELLANT

PLAINTIFF/APPELLANT'S REPLY TO DEFENDANT/APPELLEE'S
BRIEF IN OPPOSITION TO PLAINTIFF/APPELLANT'S BRIEF.

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FILED

JUN 21 1991

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

IN UTAH COURT OF APPEALS

LLOYD D. COLEY,	:	
PLAINTIFF/APPELLANT,	:	
VS.	:	
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JURISDICTION

THE APPELLEE'S ARGUMENT REGARDING JURISDICTION IS GROUNDLESS, IN THAT RULE 3 OF APPELLATE PROCEDURE WAS PROPERLY INVOKED IN THE BRIEF OF APPELLANT.

STATEMENT OF THE CASE

THE DEFENDANT/APPELLEE FAILS TO INCLUDE IN HER STATEMENT OF THE CASE THAT SHE FILED A AFFIDAVIT IN SUPPORT OF HER ORDER TO SHOW CAUSE ON MAY 7, 1990, IN WHICH SHE "REQUEST THAT THE COURT TERMINATE PLAINTIFF'S VISITATION RIGHTS WITH LAURA" (RECORD @ 224).

STATEMENT OF FACTS

THE APPELLEE'S STATEMENT # 4 CONTAINS THE WRONG DATE OF THE MENTIONED HEARING -INSTEAD OF DECEMBER 3, THE HEARING WAS HELD ON SEPTEMBER 18, 1988.

STATEMENT # 9 SHOULD REFLECT THE APPELLANT LEFT THE STATE FOR EMPLOYMENT AS A TRAVELING SALESMAN AND THAT THE APPELLANT WAS NOT CONTINUOUSLY OUT THE STATE DURING THAT TIME PERIOD SO DESCRIBED THEREIN.

STATEMENT # 11 IS MISLEADING IN THAT JUDGE SAWAYA "SUSPENDED PLAINTIFF'S VISITATION WITH THE PARTIES MINOR CHILD." WHEN IN FACT JUDGE SAWAYA ORDERED AT # 4 OF HIS ORDER, "PLAINTIFF'S VISITATION RIGHTS WITH THE MINOR CHILD, LAURA, ARE HEREBY TERMINATED UNTIL FURTHER ORDER OF THIS COURT. PLAINTIFF IS HEREBY RESTRAINED FROM HAVING ANY CONTACT WITH DEFENDANT OR HER DAUGHTER, LAURA." (RECORD @ 269-70).

STATEMENT # 12 IS MISLEADING AGAIN FOR THE SAME REASONS AS STATED ABOVE.

STATEMENT # 15 SHOULD REFLECT THE DATE OF JUDGE MURPHY'S ORDER TO BE AUGUST 7, AS STATEMENT # 16 SO STATES.

NOTE: APPELLEE RECOUNTS THE SEVERAL TIMES APPELLANT HAS BEEN SERVED WITH ORDERS TO SHOW CAUSE AND LIST THE SEVERAL JUDGEMENTS SHE HAS OBTAINED AGAINST APPELLANT, IT IS IMPORTANT TO NOTE THAT NEITHER JUDGE BANKS OR JUDGE FISHLER FOUND THE APPELLANT GUILTY OF CONTEMPT, AND THAT THE JUDGEMENTS OBTAINED BY APPELLEE WAS BY STIPULATION. ON APRIL 8, 1988, AT A HEARING APPELLEE'S ORDER TO SHOW CAUSE, JUDGE FISHLER ALLOWED THE APPELLANT FIVE DAYS IN WHICH TO FILE A PETITION TO MODIFY THE DIVORCE AND LOWER THE SUPPORT PAYMENTS, AND STAYED CONTEMPT PROCEEDING AGAINST APPELLANT UNTIL A HEARING COULD BE HELD AND IT COULD BE DETERMINED THE ABILITY OF APPELLANT TO PAY SUPPORT, (RECORD @ 84). APPELLANT DID FILE SAID PETITION AND ATTEMPTED TO PROCEED WITH THE ISSUE AND OBTAINED A PRE-TRIAL SETTLEMENT HEARING

ARGUMENT

(APPELLANT IS REFERRING TO APPELLEE'S ARGUMENTS BY NUMBER BECAUSE HE DOES NOT HAVE A CONVENIENT WAY TO RESTATE THE HEADING.)

APPELLEE'S ARGUMENT 1:

THE APPELLEE ATTEMPTS TO DRAW A DISTINCTION, IN HER FIRST ARGUMENT, BETWEEN THE TERMINATION OF PARENTAL RIGHT AND SUSPENSION OF THOSE RIGHTS. THE COURT SHOULD BE AWARE THE APPELLEE HAS SOUGHT THE "TERMINATION" OF THE APPELLANT'S VISITATION RIGHTS, (RECORD AT 232-233). BOTH THE JULY 13, 1990 AND THE JANUARY 9, 1991, ORDERS OF JUDGE SAWAYA, WRITTEN BY THE APPELLEE'S ATTORNEY, USE THE WORD "TERMINATED" AND NOT AS APPELLEE NOW WANTS FOR THIS ARGUMENT "SUSPENDED". EVEN IN THE FINDINGS OF FACT AND CONCLUSIONS OF

WITH WAS SET FOR FEBRUARY 13, 1987, (RECORD @ 104). THE APPELLEE OBJECTED TO THE HEARING, (RECORD @ 105). APPELLANT FELT THAT BECAUSE OF THE ORDER OF APRIL 22, 1986, THE APPELLEE WOULD HAVE TO FACE THE ISSUE BEFORE SHE COULD PROCEED AGAINST APPELLANT AND HE LET THE ISSUE RIDE. AS OF THE APRIL 22, 1986 ORDER THE APPELLANT HAD BEEN PAYING WHAT HE COULD IN SUPPORT, AND HAD BEEN PAYING BETWEEN \$200.00 AND \$400.00 PER MONTH FOR THE PRIOR YEAR, (RECORD @ 80-82). APPELLEE BROUGHT THE APPELLANT TO COURT, IN RESPONSE TO APPELLANT ORDER TO SHOW CAUSE FOR APPELLEE'S DENIAL OF VISITATION, FOR THE NON-PAYMENT SUPPORT AND

LAW, AGAIN WRITTEN BY THE APPELLEE'S ATTORNEY, HE USES THE TERM "TERMINATION" AND NOT "SUSPENSION". THE APPELLEE AND HER ATTORNEY CLEARLY WANTED AND SUCCEEDED IN HAVING JUDGE SAWAYA TERMINATE THE VISITATION RIGHTS OF THE APPELLANT, HOWEVER, APPELLEE NOW WANTS TO QUICKLY CHANGE HORSES AND CLAIM THOSE RIGHTS WERE ONLY "SUSPENDED". THE APPELLANT MAINTAINS THE DISTINCTION IS SEMANTICAL IN THAT THERE IS NO ARGUMENT THAT THERE IS ANY LEGAL DIFFERENCE BETWEEN THEE TWO AND THE EFFECT IS THE SAME -APPELLANT AND HIS DAUGHTER DO NOT HAVE THE BENEFIT OF EACH OTHER'S COMPANY.

THE UTAH SUPREME COURT STATED IN SWAYNE V. L.D.S. SOCIAL SERVICES, 795 P.2D 637 (1990): "THE FOURTEEN AMENDMENT TO THE UNITED STATES CONSTITUTION STATES IN PART: 'NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL...DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR THE PROPERTY WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.'" (EMPHASIS

CONTRARY TO THE APRIL 22, 1986 ORDER JUDGE SAWAYA FOUND THE APPELLANT GUILTY OF CONTEMPT AND SIGNED THE DECEMBER 16, 1988 ORDER COMMITTING THE APPELLANT TO SERVE 30 DAYS IN JAIL FOR CONTEMPT. DURING THE MONTHS OF FEBRUARY THOUGH APRIL THE APPELLANT ATTEMPTED TO NEGOTIATE A LOWER AMOUNT OF SUPPORT WITH THE APPELLEE AND THOSE NEGOTIATIONS FAILED. DURING THE ELEVEN YEARS OF THE DIVORCE THE APPELLANT HAS EITHER PAY OR ATTEMPTED NEGOTIATE TO PAY SUPPORT A LITTLE UNDER NINE YEARS.

ADDED.) THE TERMINATION OF PARENTAL RIGHTS IS THE DEPRIVATION OF A LIBERTY INTEREST WORTHY OF CONSTITUTIONAL PROTECTION." CLEARLY, THE UTAH SUPREME COURT BELIEVES THAT THE RELATIONSHIP BETWEEN FATHER AND DAUGHTER IS ONE THAT IS PROTECTED BY THE U.S. CONSTITUTION.

THE APPELLEE FAILS TO SHOW FROM THE RECORD OR BY ANY LOGICAL INFERENCE THAT THERE IS A DIFFERENCE BETWEEN "SUSPENSION" AND "TERMINATION" IN LAW. EVEN GRANTING THAT THERE MAYBE A DIFFERENCE BETWEEN THE TWO TERMS, THE APPELLEE HAS NOT SHOWN, SUPPORTED BY THE RECORD, THAT THE APPELLANT IS NOT PERMANENTLY BEING DEPRIVED OF HIS RELATIONSHIP WITH HIS DAUGHTER, LAURA. THE RECORD DOES NOT SHOW NOR DID THE JUDGE FIND THAT THE APPELLANT HAD THE ABILITY TO PAY THE AMOUNT REQUIRED TO REINSTATE HIS VISITATION WITH HIS DAUGHTER, AND IF THE APPELLANT CANNOT PAY THE AMOUNTS, WHICH THE APPELLANT CLAIMS, THE RIGHTS WILL NEVER BE REINSTATED.

THE APPELLEE FAILS TO SHOW EITHER IN LAW OR IN LOGIC THAT ONE CAN "SUSPEND" OR "TERMINATE" THE CIVIL RIGHTS OF ANOTHER WITHOUT VIOLATING THE CONSTITUTIONS OF THE UNITED STATES OR UTAH. THE SOUTHERN STATES WOULD LIKE TO BEEN ABLE TO SAY, "WE ARE NOT VIOLATING THE RIGHTS OF THE BLACKS BECAUSE SOMEDAY THEY WILL BE ABLE TO RIDE IN THE FRONT OF THE BUS, EAT AT THE RESTAURANT, OR BUY THIS HOUSE, ITS JUST THAT THEY CANNOT DO THOSE THINGS AT THE PRESENT TIME. BUT WHEN THEY CHANGE TO FIT OUR STANDARDS THEY MAY HAVE THESE RIGHTS THAT WE NOW DENY THEM."

THE APPELLEE NEXT ARGUES THAT BECAUSE THERE ARE CASES

THAT HAVE SUSPENDED PARENTAL RIGHTS THAT MAKES THIS INSTANCE OF TERMINATION CONSTITUTIONALLY CORRECT. THE APPELLANT NEVER ARGUES THAT THERE ARE NOT TIMES WHEN PARENTAL RIGHTS CANNOT BE TERMINATED, ONLY THAT THERE IS NOT A CASE IN LAW THAT HAS TERMINATED THOSE RIGHTS FOR THE REASON GIVEN BY THE TRIAL COURT IN THIS CASE. FOR THAT REASON, THE APPELLANT BELIEVES THIS TO BE UNUSUAL, THEREFORE QUALIFYING FOR PROTECTION UNDER THE CRUEL AND UNUSUAL PROVISION OF THE EIGHT AMENDMENT OF THE UNITED STATES CONSTITUTION.

THE APPELLANT TAKES PERSONAL OFFENSE IN THE STATEMENT OF THE APPELLEE THAT HE "PHYSICALLY ABANDONED HER", (HIS DAUGHTER, LAURA), "BETWEEN FEBRUARY. 1989 UNTIL AFTER NOVEMBER, 1989." THIS STATEMENT IS FALSE. THE APPELLEE FILED A AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S ORDER TO SHOW CAUSE IN THE DISTRICT COURT ON NOVEMBER 26, 1990, (EXHIBIT A OF APPENDIX). IN THAT AFFIDAVIT THE APPELLEE AND HER ATTORNEY STATES: "DEFENDANT ADMITS THAT DURING THE PERIOD OF FEBRUARY 1989 THROUGH NOVEMBER OR DECEMBER 1989 SHE REFUSED TO ALLOW PLAINTIFF TO HAVE VISITATION." IT IS DEPLORABLE THAT THE APPELLEE AND HER ATTORNEY, WHO ALSO SIGNED THE ABOVE AFFIDAVIT, CAN DENY APPELLANT HIS VISITATION WITH HIS DAUGHTER AND THEN LAY CLAIM THAT HE ABANDONED HER!

THE APPELLEE AND HER ATTORNEY NEXT SUGGEST THAT "THE DISTRICT COURT IS NOT PUNISHING PLAINTIFF FOR HIS BELIEFS BUT ONLY TRYING TO IMPRESS UPON PLAINTIFF HIS PROPER BEHAVIOR AND RESPONSIBILITY TO HIS DAUGHTER." THERE IS NOTHING IN THE RECORD TO SUPPORT THIS STATEMENT AT ALL. THE

FACTS ARE CLEAR, JUDGE SAWAYA CERTAINLY INTENDED TO PUNISH THE APPELLANT, THE RECORD IS FULL OF CITES WHERE JUDGE SAWAYA STATED JUST THAT. HOWEVER, THE APPELLANT WILL REFER THIS COURT TO HEARING ON JUNE 18, 1990 WHERE JUDGE SAWAYA ORIGINALLY TERMINATED APPELLANT VISITATIONS, WHERE JUDGE SAWAYA STATES: "YOU MAKE NO REAL EFFORT, AS I SEE IT, TO PAY ANY MONEY TO THIS WOMAN TO HELP SUPPORT YOU 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 JUNE 18, 1990).

IT IS IMPORTANT TO NOTE AT THIS POINT THAT THE ENTIRE PROCEEDING WAS COMMENCE BY AN ORDER TO SHOW CAUSE TO PUNISH THE APPELLANT FOR HIS NON-PAYMENT OF CHILD SUPPORT.

APPELLEE'S ARGUMENT 2:

APPELLEE ARGUES THAT JUDGE SAWAYA FOUND THAT PLAINTIFF'S NON-PAYMENT OF CHILD SUPPORT WAS WILLFUL AND CONTUMACIOUS, BUT APPELLEE FAILS TO SHOW ANY EVIDENCE IN THE RECORD OF THE ABILITY OF THE APPELLANT TO PAY SAID SUPPORT PAYMENT EITHER IN WHOLE OR IN PART. JUDGE SAWAYA'S FINDING OF WILLFULNESS IN NOT PAYING HIS COURT-ORDER CHILD SUPPORT BY THE APPELLANT IS NOT SUPPORTED BY ANY CITES FROM THE RECORD, THERE IS NOT ANY EVIDENCE IN THE RECORD TO SUPPORT SUCH A FINDING. NOWHERE DID THE APPELLEE PRESENT TO THE TRIAL COURT ANY FACTS TO SUPPORT THE ABILITY OF THE

APPELLANT TO PAY SAID SUPPORT IN THE AMOUNT OF \$250.00 PER MONTH OR THAT THE APPELLANT HAD THE ABILITY TO PAY ANY OF THE BACK CHILD SUPPORT. THE ONLY EVIDENCE OF THE FINANCIAL CAPABILITY OF THE APPELLANT WAS THAT HE SPENT MONEY ON HIS DAUGHTER THAT APPELLEE CLAIMED SHOULD HAVE BEEN GIVEN TO HER AS CHILD SUPPORT, AND EVEN THE AMOUNT SPENT ON HIS DAUGHTER DID NOT EQUAL THE AMOUNT OF THE CHILD SUPPORT.

APPELLEE CLAIMS THAT APPELLANT CITES CASES OUT OF CONTEXT. APPELLEE DOES NOT SPECIFY WHAT PARTS OF THE DECISIONS HAVE BEEN TAKEN OUT OF CONTEXT - THE ARGUMENT OF THE APPELLEE SEEMS TO BE THAT THE CASES ARE IRRELEVANT TO THE ISSUE AT BAR.

IN SLADE V. DENNIS, 594 P.2D 898, CITED BY APPELLANT STANDS FOR THE PROPOSITION THAT ONLY UNDER EXTRAORDINARY CIRCUMSTANCES WHERE THE WELFARE OF THE CHILD IS JEOPARDIZED WILL A FATHER BE DENIED VISITATION RIGHTS. HERE THE UTAH SUPREME COURT DISCUSSES WHAT IS MEANT BY THE JEOPARDIZING THE WELFARE OF THE TO POINT THAT IT BECOMES NECESSARY TO TERMINATE VISITATION RIGHTS:

"COURTS HAVE BEEN RELUCTANT TO FIND THAT THE PRESENCE OF SOME EMOTIONAL UPSET BY ITSELF, RESULTING FROM EXERCISE OF VISITATION RIGHTS, SUFFICIENTLY JEOPARDIZES A CHILD WELFARE SO AS TO REQUIRE THE DRASTIC ACTION OF DENYING ITS PARENTS VISITS WITH THE CHILD, ALTOGETHER."

THE RECORD IN THIS CASE DOES NOT SHOW ANY EMOTIONAL DISTRESS OF THE CHILD. THERE IS NO EVIDENCE EITHER DIRECT OR INDIRECT THAT MY DAUGHTER, LAURA, HAS BEEN AFFECTED, IN A

NEGATIVE WAY, BY OUR VISITS TOGETHER OR THAT THEY CAUSE LAURA ANY EMOTIONAL UPSET. THEREFORE, JUDGE SAWAYA'S ORDER TERMINATING OUR VISITATION TOGETHER IS SIMPLY UNSUPPORTED BY FACTS OR ANY EVIDENCE IN THE RECORD. JUDGE SAWAYA'S ORDER FAILS TO MEET THE REQUIREMENT OF SLADE.

JUDGE SAWAYA WAS REVERSED BY THIS COURT ON A SIMILAR ISSUE FOR DENYING A FATHER VISITATION RIGHTS, BECAUSE, AS HE FOUND THAT IT WAS IN THE "BEST INTEREST OF THE CHILD". IN T.R.F. v FELAN, 760 P.2D 906 (UTAH APP. 1988), THIS COURT STATED AT 914 (5) "PARENTAL RIGHTS CANNOT BE TERMINATED BY MERELY APPLYING THE 'BEST INTERESTS' OF THE CHILD STANDARD BUT, RATHER, THERE MUST BE A SHOWING OF THE PARENT'S UNFITNESS, ABANDONMENT, OR SUBSTANTIAL NEGLECT.

IN RE J.P., 648 P.2D AT 1375.

[T]HE RIGHT OF A PARENT NOT TO BE DEPRIVED OF PARENTAL RIGHTS WITHOUT SUCH A SHOWING IS SO FUNDAMENTAL TO OUR SOCIETY AND SO BASIC TO OUR CONSTITUTIONAL ORDER...THAT IT RANKS AMONG THOSE RIGHTS REFERRED TO IN ARTICLE I, § 25 OF THE UTAH CONSTITUTION AND THE NINTH AMENDMENT OF THE UNITED STATES CONSTITUTION AS BEING RETAINED BY THE PEOPLE.

THIS RECOGNITION OF DUE PROCESS AND RETAINED RIGHTS OF PARENTS PROMOTES VALUES ESSENTIAL TO THE PRESERVATION OF HUMAN FREEDOM AND DIGNITY AND TO THE PERPETUATION OF OUR DEMOCRATIC SOCIETY."

THE WEST v WEST, 487 P.2D 96, CASE INVOLVED CHILD SUPPORT AND AN ORDER TO PAY \$7.50 FOR EXPENSES TO BRING THE CHILD TO A NEUTRAL VISITATION SITE. THE OREGON APPEALS COURT

SAID THAT YOU CANNOT CONDITION VISITATION ON CHILD SUPPORT BUT YOU CAN REQUIRE THE "NOMINAL" PAYMENT OF THE \$7.50 EXPENSE. THE IMPRESSION CREATED BY APPELLEE IN HER BRIEF WAS THAT THE OREGON COURT LET STAND A LOWER COURT DECISION CONDITIONING VISITATION UPON PAYMENT OF CHILD SUPPORT.

THE APPELLEE CITED REARDON V. REARDON, 415 P.2D 574, A ARIZONA APPEALS COURT DECISION FROM OVER 25 YEARS AGO. THE APPELLEE HAS FAILED TO NOTE THAT IN 1973 THE ARIZONA LEGISLATORS BY STATUE MODIFIED THE EFFECT OF REARDON, WHEN THEY PASSED A.R.S. § 25-337 (A):

"A PARENT NOT GRANTED CUSTODY OF THE CHILD IS ENTITLED TO REASONABLE VISITATION RIGHTS UNLESS THE COURTS FINDS, AFTER A HEARING, THAT VISITATION WOULD ENDANGER SERIOUSLY THE CHILD'S PHYSICAL, MENTAL, MORAL OR EMOTIONAL HEALTH."

IN 1981 THE ARIZONA APPEALS COURT USED THIS LANGUAGE IN REFERRING TO THE REARDON CITE:

"GENERALLY, THE QUESTION OF WHETHER TO LIMIT THE VISITATION RIGHTS OF THE NON-CUSTODIAL PARENT IS COMMITTED TO SOUND DISCRETION OF THE TRAIL COURT BUT THE POWER IS TO BE EXERCISED WITH CAUTION AND RESTRAINT. ONLY UNDER EXTRAORDINARY CIRCUMSTANCES SHOULD A PARENT BE DENIED THE RIGHT OF VISITATION. REARDON V. REARDON." SHOLTY V. SHERRILL, 632 P.2D 268 (ARIZ. APP. 1981). OBVIOUSLY, THE ARIZONA COURT NOW HOLDS THAT EXTRAORDINARY CIRCUMSTANCES MUST NOW EXISTS BEFORE A COURT CAN DENY VISITATION RIGHTS, AND THE LEGISLATURE OF ARIZONA DEFINES BY STATUE WHAT THOSE "EXTRAORDINARY CIRCUMSTANCES" ARE AS THOSE THAT WOULD

SERIOUSLY ENDANGER THE CHILD'S PHYSICAL, MENTAL, MORAL OR EMOTIONAL HEALTH. THE APPELLEE RELIANCE ON REARDON, FAILS TO MEET THOSE REVISED STANDARD.

APPELLANT CALLS THE COURT ATTENTION TO THE FACT THAT IT WAS THE APPELLANT NONPAYMENT OF CHILD SUPPORT THAT THE TRIAL COURT DENIED HIS VISITATION (PARTIAL TRANSCRIPT OF JUNE 18 HEARING) AND THAT ALL THAT IS REQUIRED TO REINSTATED HIS VISITATION AGAIN IS THE PAYMENT OF \$450.00 PER MONTH AND THE CONTINUED \$ 450.00 TO KEEP THE COURT FROM NOT SUSPENDING THE VISITATION AGAIN, (JANUARY 9, ORDER). CLEARLY THAT IS CONDITIONING VISITATION UPON THE PAYMENT OF CHILD SUPPORT AND NOTHING ELSE. THE APPELLEE'S ARGUMENT TO THE CONTRARY IS JUST LEGAL SOPHISTRY NOT FOUNDED IN FACT AND CERTAINLY NOT SUPPORTED BY ANY PART OF THE RECORD.

THE APPELLANT LEAVES TO THIS COURT THE DETERMINATION OF WHETHER OR NOT THOSE CASES CITED BY APPELLANT HAVE ANY APPLICABILITY TO THIS CASE. THE APPELLANT ASKS THIS COURT TO TAKE INTO CONSIDERATION THE LIST IN THE APPENDIX OF OVER 40 OTHER CASES WHERE THE COURTS HAVE UNIVERSALLY HELD THAT IT IS WRONG TO DENY VISITATION FOR THE REASON USED IN THIS CASE.

THE APPELLEE'S REVIEW OF ROHR IS INFERRED AND DOES NOT FAIRLY REPRESENT ROHR. THE APPELLEE'S CONCLUSION "PLAINTIFF'S VISITATION WAS SUSPENDED TO IMPRESS A SENSE OF RESPONSIBILITY FOR THE WELFARE OF HIS CHILD" IS SIMPLY A FABRICATION OF THE APPELLEE AND HER ATTORNEY AND IS NOT

SUPPORTED BY THE RECORDED NOR IS IT FOUND ANYWHERE IN THE RECORD.

APPELLEE'S ARGUMENT # 3.

JUDGE SAWAYA ORDERED AT ONE HEARING ON JULY 16, 1990 THAT THE APPELLANT PAY \$ 50.00 PER WEEK TO STAY HIS IMPRISONMENT AND THEN IN THE ORDER OF JANUARY 9, 1991 ORDERED THE APPELLANT TO PAY \$ 450.00 PER MONTH FOR FOUR CONSECUTIVE TO REINSTATE HIS VISITATION AND THEN MAINTAIN SAID PAYMENT OR AUTOMATICALLY LOSE VISITATION AGAIN. THERE WAS NO CHOICE GIVEN TO APPELLANT EXCEPT TO PAY THE ABOVE ORDERS.

APPELLEE'S ARGUMENT # 4.

APPELLEE'S RELIANCE UPON REARDON IS INAPPROPRIATE FOR THE REASON DISCUSSED EARLIER IN THIS REPLY. APPELLANT DOES NOT CONTEND THAT THE TRIAL COURT CANNOT LIMIT VISITATION BUT THAT TO DO SO IN A HEARING FOR CONTEMPT IS NOT WITHIN THE TRIAL COURT CONTEMPT POWERS, THOSE POWERS ARE ENUMERATED IN U.C.A. § 78-32-10. THERE ARE PROCEDURES THAT ARE AVAILABLE FOR THE COURT TO USE TO LIMIT VISITATION RIGHTS, THOSE PROCEDURES ARE IN PLACE TO ENSURE THE NON-CUSTODIAL PARENT DUE PROCESS OF LAW BEFORE LOSING THEIR VISITATION RIGHTS. TO SHORT CIRCUIT THOSE PROCESS DENIES THE NON-CUSTODIAL PARENT HIS CONSTITUTIONAL RIGHTS.

APPELLEE'S ARGUMENT # 5.

APPELLEE'S ARGUMENT FAILS TO CITE ANY AUTHORITY FOR THEIR POSITION AND AS STATED IN # 4 THE APPELLEE'S ARGUMENTS VIOLATES THE UTAH STATUTES AND THE DUE PROCESS OF APPELLANT.

APPELLEE'S ARGUMENT # 6.

APPELLEE'S ARGUMENT IS NONSENSIBLE. WHAT IS THE PURPOSE OF A RULE GOVERNING A PROCEDURE THAT CAN BE IGNORED BY THE TRIAL COURT. APPELLEE STATES THAT PLAINTIFF CITES NO EVIDENCE THAT JUDGE SAWAYA FAILED TO REVIEW PLAINTIFF'S OBJECTION. OTHER THAN THE APPELLEE STATING IN COURT THAT THE TIME HAD EXPIRED FOR THE PLAINTIFF TO OBJECT AND WHEN PLAINTIFF ATTORNEY OBJECTED TO JUDGE SAWAYA, STATING THAT OBJECTIONS HAD BEEN FILED, JUDGE SAWAYA DID NOT BELIEVE PLAINTIFF'S ATTORNEY UNTIL IT WAS VERIFIED BY THE COURT COMPUTER, THERE IS NO EVIDENCE THAT JUDGE SAWAYA CONSIDERED THOSE OBJECTIONS BEFORE SIGNING SAID ORDER. APPELLANT CALLS THE ATTENTION TO THIS COURT THAT A COURT REPORTER WAS NOT PRESENT DURING THE JULY 16, 1990, HEARING AND THEREFORE A TRANSCRIPT IS NOT AVAILABLE TO VERIFY EITHER THE ACCOUNT OF APPELLANT OR APPELLEE. IT SHOULD BE NOTED AT THE TIME APPELLANT FILED HIS OBJECTION TO SAID ORDER HE CALLED FOR A HEARING ON SAID OBJECTIONS, AND IT IS THE NORMAL PROCEDURE FOR THE TRIAL COURT TO WAIT UNTIL AFTER A HEARIN ON THOSE OBJECTIONS TO SIGN THE PROPOSED ORDER. I BELIEVE THAT FACT ALONE TENDS TO SUPPORT THE APPELLANT'S POSITION.

APPELLEE'S ARGUMENT # 7.

APPELLEE'S ARGUMENT THAT JUDGE SAWAYA ACTIONS ARE ONLY THAT OF A JUDGE PERFORMING HIS DUTY. IT SHOULD BE NOTED THAT THE APPELLANT NEVER CLAIMED BECAUSE HE LOST IN A FAIR HEARING ON THE MERITS THAT JUDGE SAWAYA WAS PREJUDICE BUT BECAUSE OF ALL THE NON-APPROPRIATE ACTIONS OF JUDGE SAWAYA, AS LISTED IN NUMEROUS DOCUMENTS BEFORE THIS COURT, AND AS EXHIBITED IN THE NOVEMBER 26, 1990 HEARING WHICH CAN BE FOUND IN THE APPENDIX OF THIS REPLY, CLEARLY SHOWS HIS PREJUDICES AGAINST THE APPELLANT AND THAT APPELLANT CANNOT HAVE A FAIR HEARING IN FRONT OF JUDGE SAWAYA WHO WILL AT ONE TIME STATE THAT THE DENIAL OF VISITATION IS VERY DAMAGING TO MY DAUGHTER (SEE PARTIAL TRANSCRIPT OF JUNE 18, 1990 HEARING) AND THEN WHEN THIS COURT REQUESTED THAT THE DENIAL OF VISITATION MUST BE IN THE BEST INTEREST OF THE CHILD, FLIP-FLOP 180 DEGREES AND FIND THE BEST INTEREST OF THE CHILD IS THE DENIAL OF ANY CONTACT WITH HER FATHER, WHAT WE ARE LEFT WITH IS THE CONCLUSION THAT THE BEST INTEREST OF LAURA IS VERY DAMAGING TO HER. SELF-CONTRADICTORY ?

A VERY TELLING POINT IS THAT IN JUNE 18 JUDGE SAWAYA BELIEVED THAT HE COULD DENY VISITATION FOR THE NON-PAYMENT OF CHILD SUPPORT ALONE (SEE JUNE 18, 1990 TRANSCRIPT AT PG 37 17-PG 38 4) AND THEN FOUND THE NON-PAYMENT WITHIN THAT CRITERIA AND TOOK NO EVIDENCE CONCERNING THE "BEST INTEREST OF THE CHILD", AND DENIED VISITATION TO APPELLANT. THEN IN THE NOVEMBER 26, 1990 HEARING JUDGE SAWAYA STATED AT PG 14

LINE 10. "THE COURT: I FOUND INITIALLY THAT THERE WERE SUFFICIENT FACTS UPON WHICH TO BASE THAT ORDER. I AM GOING TO PREPARE FINDINGS OF FACT THAT WILL SUPPORT THAT ORDER NOW. AND I AM GOING TO ENTER IT SO YOU WILL AGAIN BE DENIED VISITATION." CLEARLY, JUDGE SAWAYA IS NOT LETTING THE EVIDENCE DICTATED THE OUTCOME OF THE CASE BUT TRYING TO FIND EVIDENCE TO SUPPORT HIS PREDETERMINE OUT COME. THE RECORD DOES NOT SUPPORT HIS FINDINGS, HOW CAN ONE BELIEVE HE WILL BE FAIRLY HEARD WHEN THE JUDGE ALREADY HAS DETERMINED THE OUT COME BEFORE THE HEARING BEGINS.

**THE TRIAL COURT FINDINGS OF FACT ARE NOT
SUFFICIENTLY DETAILED AND DO NOT INCLUDE ENOUGH
SUBSIDIARY FACTS.**

THIS COURT IN RICHE V. RICHE, 784 P.2D 465 (UTAH APP. 1989) AT 469 : "SMITH V SMITH, 726 P.2D 423 (UTAH 1986). IN SMITH, THE UTAH SUPREME COURT STATED:

'THE IMPORTANCE OF COMPLETE, ACCURATE AND CONSISTENT FINDINGS OF FACT IN A CASE TRIED BY A JUDGE IS ESSENTIAL TO THE RESOLUTION OF DISPUTE UNDER THE PROPER RULE OF LAW. TO THAT END THE FINDINGS SHOULD BE SUFFICIENTLY DETAILED AND INCLUDE ENOUGH SUBSIDIARY FACTS TO DISCLOSE THE STEPS BY WHICH THE ULTIMATE CONCLUSION ON EACH FACTUAL ISSUE WAS REACHED.'

Id. AT 426 (QUOTING RUCKER V. DALTON, 598 P.2D 1336, 1338 (UTAH 1979)). THE COURT EXPLAINED THAT THE REASON FOR

REQUIRING SUCH FINDING IS TO ENSUE THAT THE DECISION OF THE TRIAL COURT IS RATIONALLY BASED."

JUDGE SAWAYA'S FINDINGS OF FACT DOES NOT MEET THE REQUIREMENT OF UTAH'S SUPREME COURT AND JUDGE SAWAYA'S FINDINGS WERE WRITTEN PURPOSELY TO BE VAGUE AS HE STATED IN THE NOVEMBER 26, 1990 HEARING:

"MR. COLEY: WHEN YOU DO YOUR FINDINGS, COULD I ASK YOU TO IDENTIFY WHERE THEY COME FROM?

THE COURT: YOU CAN ASKED ME TO BUT I AM CERTAINLY NOT GOING TO." (NOVEMBER 26, 1990 HEARING TRANSCRIPT).

JUDGE SAWAYA FOUND THE APPELLANT'S NON-PAYMENT OF CHILD SUPPORT TO BE WILLFUL, BLACK'S LAW DICTIONARY DEFINES "WILLFUL" AS "A ACT OR OMISSION IS 'WILLFULLY' DONE, IF DONE VOLUNTARILY AND INTENTIONALLY AND WITH THE SPECIFIC INTENT TO FAIL TO DO SOMETHING THE LAW REQUIRES TO BE DONE; THAT IS TO SAY, WITH BAD PURPOSE EITHER TO DISOBEY OR TO DISREGARD THE LAW." (PG. 1599). JUDGE SAWAYA FINDINGS ONLY STATED THE APPELLANT FAILED TO PAY SUPPORT BUT REMAINS SILENCE IN REGARDS TO THE BAD PURPOSE DISTINCTION, WHEN HIS FINDINGS DOES NOT MEET THE LEGAL DEFINITION OF WILLFUL HOW CAN THE FINDINGS BE SUPPORTED.

JUDGE SAWAYA ALSO FOUND:

PLAINTIFF DOES NOT RESPECT THE LEGAL SYSTEM OR THE LAW REQUIRING PAYMENT OF CHILD SUPPORT.

PLAINTIFF'S ATTITUDES AND BEHAVIORS ARE ANTI-SOCIAL AND CONSTITUTE A SUBSTANTIAL DEVIATION FROM THE MORAL NORMS OF SOCIETY.

JUDGE SAWAYA CITES NO SUBSIDIARY FACTS, AND NOT WITH SUFFICIENTLY DETAIL, TO DISCLOSE HOW HE CAME TO THIS CONCLUSIONS. THERE ARE NO FACTS OF ANY KIND IN THE RECORD TO SUPPORT THESE FINDINGS. THE RECORD SHOWS THE APPELLANT TO HAVE RESPECT FOR THE LEGAL SYSTEM, A FACT WITH IS CLEAR IN THE WAY THE APPELLANT IS PROCEEDING WITH THIS CASE AND NOT TRYING TO CIRCUMVENT THE LEGAL SYSTEM ALONE.

CONCLUSION

IF YOU BELIEVE THE APPELLEE'S ARGUMENTS THE APPELLANT DOES NOT CARE FOR HIS DAUGHTER AND WOULD NOT BE HARMED BY THE TERMINATION OF VISITATION RIGHTS. WHO THEN IS BEING HARMED BY THIS ORDER? MY DAUGHTER, LAURA, WHO JUDGE SAWAYA HAS, IN EFFECT, LEGAL KILLED HER FATHER. IT IS LAURA WHO DOES NOT HAVE A FATHER FOR HER FATHER-DAUGHTER PARTIES, IT IS LAURA WHO DOES NOT HAVE A FATHER AT HER GRADUATION FROM ELEMENTARY SCHOOL, IT IS LAURA THAT HAS NO FATHER TO SHARE HER LIFE WITH. I DON'T KNOW HOW A PARENT WHO LOVES HER CHILD CAN STANDBY AND ALLOW THE PUNISHMENT TO TAKE PLACE. I CANNOT AND THEREFORE I ASK THIS COURT TO REVERSE JUDGE SAWAYA'S ORDER AND ALLOW LAURA TO HAVE CONTACT WITH HER FATHER. SINCE I DO NOT HAVE THE INCOME TO RESTORE VISITATION THOUGH JUDGE SAWAYA REQUIREMENT NOR THE INCOME TO CONTINUE THOSE PAYMENTS ONCE RESTORED, I HAVE NO CHOICE BUT TO APPEAL TO THIS COURT TO RESTORE MY VISITATION, NOT ONLY BECAUSE IT IS THE ONLY OPTION REALISTICALLY THAT I HAVE BUT BECAUSE I HAD SHOWNED THAT IT LEGALLY CORRECT TO DO SO.

ALTHOUGH NOT ARGUED, APPELLANT CONTENDS THAT THE RIGHTS AND WISHES OF HIS DAUGHTER, LAURA, ARE BEING SEVERELY ABRIDGED WITHOUT A CHANCE FOR HER TO BE REPRESENTED AND THAT THE EMOTIONAL HARM BEING DONE IS INCAPABLE OF RESTORATION.

RESPECTFULLY SUBMITTED.

LLOYD COLEY, APPELLANT.

LLOYD D. COLEY, PRO SE,
1065 LAKE STREET
SALT LAKE CITY, UTAH 84105
TELEPHONE: 359-5704

IN THE UTAH COURT OF APPEALS

LLOYD D. COLEY,
PLAINTIFF/APPELLANT,

VS.

NANCY P. COLEY,
DEFENDANT/RESPONDENT,

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 REPLY BRIEF TO THE OFFICE OF:

RANDALL HOLGREM
50 WEST BROADWAY
SALT LAKE CITY, UTAH

LLOYD D. COLEY

APPENDIX

A

CASES THAT HELD THAT IT IS IMPROPER
TO DENY A FATHER'S VISITATION MERELY FOR
HIS FAILURE TO PAY SUPPORT

COLORADO

KANE V. KANE, (1964) 154 COLO 440, 390 P.2D 361.

FLORIDA

HOWARD V. HOWARD, (1962, FLA APP D3) 143 SO 2D 502 (BY IMPLICATION); CHAFFIN V GRIGSBY, (1974, FLA APP D4) 293 SO 2D 404 (BY IMPLICATION); HECHLER V HECHLER, (1977, FLA APP D3) 351 SO 2D 1122 (BY IMPLICATION); ACKER V ACKER, (1978, FLA APP D2) 365 SO 2D 180; FRAZIER V FRAZIER, (1981, FLA APP D2) 395 SO 2D 590; OLSON V OLSON, (1981, FLA APP D3) 398 SO 2S 491; MADDUX V MADDUX, (1986, FLA APP D4) 495 SO 2D 863, 11 FLW 2129.

GEORGIA

PRICE V DAWKINS (1978) 242 GA 41, 247 SE 2D 844.

IDAHO

WILSON V WILSON (1953) 73 IDAHO 326, 252 P.2D 197.

ILLINOIS

COMISKEY V COMISKEY (1977, 1ST DIST) 48 ILL APP 3D 17, 8 ILL DEC 925, 366 NE2D 87, APP DEN 66 ILL 2D 629, LATER PROCEEDING (1ST DIST) 125 ILL APP 3D 30, 80 ILL DEC 541, 465 NE2D 653, LATER PROCEEDING (1ST DIST) 146 ILL APP 3D 804, 100 ILL DEC 364, 497 NE2D 342 (BY IMPLICATION); HESS V HESS (1980, 3D DIST) 87 ILL APP 3D 947, 42 ILL DEC 882, 409 NE2D 497.

IOWA

SWEAT V SWEAT (1974) 238 IOWA 999, 29 NW2D 180; SMITH V SMITH (1966) 258 IOWA 1315, 142 NW2D 421 (APPARENTLY RECOGNIZING RULE); KLOBNOCK V ABBOTT (1981, IOWA) 303 NW2D 149.

LOUISIANA

ROSHTO V ROSHTO (1949) 214 LA 922, 39 SO2D 344 (BY IMPLICATION). CROOKS V CROOKS (1982, LA APP 3D CIR) 425 SO2D

344 (BY IMPLICATION).

MARYLAND

RADFORD V RADFORD (1960) 223 MD 483, 164 A2D 904, 88 ALR2D 140; STANCIL V STANCIL (1979) 286 MD 530, 408 A2D 1030.

MICHIGAN

STEVENSON V STEVENSON (1977) 74 MICH APP 656, 254 NW2D 337.

MINNESOTA

VAN ZEE V VAN ZEE (1974) 302 MINN 371, 226 NW2D 865; ENGLAND V ENGLAND (1983, MINN) 337 NW2D 681 (BY IMPLICATION).

MONTANA

STATE EX REL. WILLIAMS V WILLIAMS (1983, MO APP) 647 SW2D 590.

NEW JERSEY

WAGNER V WAGNER (1971) 165 NJ SUPER 553, 398 A2D 918 (BY IMPLICATION); RE ADOPTION OF P. (1980) 175 NJ SUPER 420, A2D 1135 (BY IMPLICATION).

NEW YORK

FARHI V FARHI (1978, 4TH DEPT) 64 APP DIV 2D 840, 407 NYS2D 840; CHIRUMBOLO V CHIRUMBOLO (1980 4TH DEPT) 75 APP DIV 2D 992, 429 NYS2D 112; ENGRASSIA V DI LULLO (1982, 2D DEPT) 89 APP DIV 957, 454 NYS2D 103. SOUTH CAROLINA DEPT. OF SOCIAL SERVICES ON BEHALF OF SALLIE M.H. V JAMES C.D. (1983) 119 MISC 2D 649, 464 NYS2D 942.

OHIO

JOHNSON V JOHNSON (1977, SUMMIT CO) 52 OHIO APP 2D 180, 6 OHIO OPS 3D 170, 368 NE2D 1273; FLYNN V FLYNN (1984, MADISON CO) 15 OHIO APP 3D 34, 15 OHIO BR 57, 472 NE2D 388.

OKLAHOMA

RE MCMENAMIN (1957, OKLA) 310 P2D 381 (BY IMPLICATION).

PENNSYLVANIA

COMMONWEALTH EX REL. LOTZ V LOTZ (1958) 188 PA SUPER 241, 146 A2D 362, AFFD 396 PA 287, 152 A2D 663.

SOUTH CAROLINA

GARRIS V MCDUFFIE (1986, APP) 288 SC 637, 344 SE2D 186.

TEXAS

GANI V GANI (1973, TEX CIV APP TEXARKANA) 500 SW2D 254.

1 2:00 p.m. NOVEMBER 26, 1990

2 THE COURT: Mr. Holmgren, Mr. Coley is present.
3 He's requested that I put this to the end of the calendar.
4 Do you have any objection?

5 MR. HOLMGREN: Only that I would just like to be
6 first.

7 THE COURT: Why will this take any more time than
8 I think it will take. Shouldn't take very long.

9 MR. COLEY: There are three or four matters, Your
10 Honor, there's a motion to strike objections to the orders
11 and two orders to show cause. Each one is going to require
12 some testimony. I anticipate it will take some time.

13 THE COURT: I doubt that it will take as much
14 time as he anticipates. I think he has some apprehension
15 about all these attorneys watching his performance. Why
16 don't we put it over to the end.

17 (4 o'clock p.m.)

18 THE COURT: What are we doing?

19 MR. COLEY: I believe it is my motions.

20 THE COURT: Pardon?

21 MR. COLEY: I believe it is my motion, objections
22 to order to show cause, to proposed minute order and order
23 to show cause and motion to strike the proposed order.

24 THE COURT: Well, okay, I guess the first thing
25 we need to do is consider your objections to the proposed

1 order.

2 MR. COLEY: What I would like to first do is do
3 the motion to strike.

4 THE COURT: To strike what?

5 MR. COLEY: To strike the proposed order.

6 THE COURT: That's denied. That didn't take
7 long, now do you want to to talk about your objections,
8 too?

9 MR. COLEY: Yes. I don't get a chance to argue
10 on those objections?

11 THE COURT: Strike the order, why do you want to
12 strike the order?

13 MR. COLEY: There's several reasons. There's a
14 motion to strike it.

15 THE COURT: You have to speak up.

16 MR. HOLMGREN: It's not an order yet. We have
17 submitted a proposed amended order to the court and I
18 suppose that -- so I am standing in here to speak in favor
19 of that proposed amended order. I submitted it to the
20 judge -- to the court a few weeks ago, I believe and--

21 THE COURT: I have been holding it, waiting for
22 his objections and did you file objections?

23 MR. COLEY: Sure did, Your Honor.

24 THE COURT: Okay. Are they in the file? I have
25 never seen them.

1 MR. COLEY: I believe so. I don't know if they
2 are in the court file or not.

3 CLERK: They were filed October 29.

4 THE COURT: Have I signed these orders to show
5 cause? Who stamped them?

6 MR. COLEY: I believe Anita did.

7 CLERK: And you approved the hearing.

8 THE COURT: Okay. Objections to proposed order
9 and findings of fact, is that what you are --

10 MR. COLEY: Prior to that is a motion to strike
11 those, I think simply stating just a couple things, there's
12 no authority to amend the order right now. Rule 52A says
13 that there has to be findings of fact and conclusions of
14 law. Mr. Holmgren in his proposed order still doesn't have
15 conclusions of law. The Court of Appeals said immediately
16 that Rule 52B provides that they have ten days in which to
17 modify, 59B and E gives you ten days in which to modify
18 orders. He's had ten days after the order was vacated, the
19 order is way past the time. That's the basis of the motion
20 to strike, plus number four, the motion to strike his
21 inflammatory statements made in there. I can address
22 those.

23 THE COURT: Okay, the Court of Appeals, as I
24 understand it, referred this back to me to make findings of
25 fact as a basis for the order that I made and you have

1 submitted proposed findings of fact.

2 MR. HOLMGREN: Yes, that is what that is.

3 Contained within that proposed amended order are proposed
4 findings of fact.

5 THE COURT: Amended order on order to show cause,
6 okay, findings of fact. You are saying that he has to make
7 conclusions of law?

8 MR. COLEY: That is correct. I think it is a
9 case--it is one of of your cases, to have findings of fact
10 and conclusions of law.

11 THE COURT: I don't know, do you want to make
12 some conclusions of law, as well, counsel? All it would
13 would be based on is the findings that -- the findings
14 would be the same as the -- the conclusions would be the
15 same as the order.

16 MR. HOLMGREN: Yes. On the next to the last
17 page, Your Honor, of the proposed amended order it says
18 that based upon the above findings of fact, it is hereby
19 ordered and adjudged and decreed, that is, simply to put
20 conclusions in there would simply be a duplication of the
21 conclusion that you have reached and the order.

22 THE COURT: That's what the conclusions would be.

23 MR. COLEY: I am sure that probably the
24 conclusions need to be itemized and how can I argue against
25 them? How can I say, no, the facts don't bear that out?

1 He needs to itemize it.

2 THE COURT: I disagree, I don't think he needs to
3 make specific conclusions of law, when he's concluded--

4 MR. COLEY: Okay, the second point of the thing,
5 we had the same discussion prior to this when I filed my
6 first objections. He said there was no findings. He said
7 he didn't need to have findings. You gave the same
8 argument you just gave. They were incorporated. The Court
9 of Appeals said, no, they were not incorporated, I think we
10 are at the same point again.

11 THE COURT: Mr. Holmgren.

12 MR. HOLMGREN: I don't understand what he is
13 trying to say there.

14 THE COURT: He said you haven't made findings of
15 fact as required by the Court of Appeals, as I understand
16 it.

17 MR. HOLMGREN: In this amended order?

18 MR. COLEY: That is correct. There's no
19 conclusions. That's here in Salzetti vs. Backman.

20 MR. HOLMGREN: You have already said that you
21 agreed with my point on the conclusions of law. If he is
22 saying I haven't proposed any findings of fact, there they
23 are identified on page two as findings of fact.

24 MR. COLEY: Okay, in Salzetti vs. Backman out of
25 638 P2d at 543, the Supreme Court of Utah states "failure

1 to memorialize judgment of contempt by entering written
2 findings of fact and conclusions was fatal to the
3 enforceability of the contempt order--"

4 THE COURT: Counsel, I want to you redo these,
5 make specific findings of fact and conclusions of law and
6 then a separate order, okay?

7 MR. HOLMGREN: Yes.

8 THE COURT: That should satisfy that objection.

9 MR. HOLMGREN: I will do that.

10 THE COURT: What else.

11 MR. COLEY: This motion is -- this proposed order
12 is not stricken, so I don't have to argue the objections to
13 this proposed order.

14 THE COURT: We will wait until you get his new
15 findings and conclusions then you can--I am not going to--

16 MR. HOLMGREN: Otherwise we'll go through this
17 again.

18 THE COURT: Let's hear what the objections --
19 what are your objection to the findings?

20 MR. COLEY: I would like to stand up here. I
21 apologize to the court for being back in front of it so
22 many times.

23 THE COURT: Well, I suppose you are trying to
24 stay out of jail. That's what you are trying to do. I
25 don't blame you for that at all, Mr. Coley.

1 MR. COLEY: And the file is growing. It's now
2 getting a little large.

3 THE COURT: You will have to speak up, I have
4 trouble--

5 MR. COLEY: I believe what's happened here since
6 I am doing this case pro se, Mr. Holmgren, as he told the
7 Court of Appeals he would give me great latitude decided
8 that that latitude allowed him to do many things that he's
9 never done before.

10 THE COURT: I think what Mr. Holmgren said I was
11 giving you great latitude. I haven't been giving him great
12 latitude but giving you latitude to let you stay out of
13 jail in order to let you do all of this, letting you stay
14 out of jail. What's wrong with the findings?

15 MR. COLEY: The findings of fact number one, I
16 don't have -- well, I do, the amount of the figure in
17 number one the amount of 27,305, that's the amount that he
18 argued for in --

19 THE COURT: Well let's not waste a lot of time
20 Mr. Coley, I haven't got the time to waste, you disagree
21 with the amount?

22 MR. COLEY: I disagree with the amount.

23 THE COURT: How much do you owe?

24 MR. COLEY: I think an accounting needs to be
25 done.

1 THE COURT: You tell me how much you owe. If you
2 don't have a figure then I am going to accept his figure.

3 MR. COLEY: I don't have a figure. I would like
4 to do an accounting. I would like the opportunity to do
5 that.

6 THE COURT: That's fine, do your own accounting,
7 but until then I am accepting this as the amount you owe.

8 MR. COLEY: Let me make this point then, this is
9 the same amount he said I owed at the June 18 hearing,
10 1990--June 18, 1990.

11 THE COURT: You will be given credit for whatever
12 amount you have paid subsequent to the determination of
13 this amount.

14 MR. COLEY: Number two, he mentions a four
15 hundred and five hundred dollar payment. However, the
16 figure in number one does not change, and in this hearing
17 he's denied ever -- the existence of these two payments
18 that he now gives me credit.

19 THE COURT: What's wrong with number two? Says
20 with the exception of a \$400 payment in November of '88 and
21 a hundred dollars payment in December of '88, you have not
22 paid any support for four years.

23 MR. COLEY: One of the things that's wrong, I
24 admit makes no sense is to say this one part, for some four
25 years not because defendant didn't try to collect. I don't

1 know what that means.

2 THE COURT: It means that the defendant has been
3 making efforts to collect her child support. Do you deny
4 that.

5 MR. COLEY: No, I don't deny that. What he is
6 trying to say I have not made any payments because--I don't
7 know what he's trying to say. He shouldn't say that that
8 is not the reason payments have not been made because she
9 is trying to collect, I don't think that makes sense.

10 THE COURT: Go ahead.

11 MR. COLEY: Now, I believe the court
12 probably--number three is probably correct or what's --

13 THE COURT: Are you planning to go through all of
14 these one by one?

15 MR. COLEY: Not all of them, because it's not
16 important to do all of them. However, there's some things
17 that are very important to talk about. Number four, Mr.
18 Coley, starting in the middle, Mr. Coley is much more
19 intent on resisting his ex-wife's attempts to collect
20 support and the court's directives than he is in raising
21 money to support." And you have a copy. I don't see it
22 anywhere where any of that is ever said by you and any of
23 it was ever entered into--

24 THE COURT: I wouldn't have found you in contempt
25 of court if I would not have felt that way.

1 MR. COLEY: I will not argue what you would not
2 have done or would have done. I can't argue that.

3 THE COURT: What I have found, Mr. Coley, to make
4 it very simple to you, that you are educated, you are
5 healthy, you are capable and you have the ability to get a
6 job and earn money, that's what I have found.

7 MR. COLEY: And I have no objections to that,
8 Your Honor. I have objections to him saying the other
9 things he said in here, and I think that you have not found
10 them in the court transcript. They are not in the court
11 transcript. That's why I had it made up. No conclusions
12 were made. What Mr. Holmgren is trying to do is trying to
13 take a hearing that had already occurred and then take the
14 Court of Appeals vacation of your order and say we'll make
15 the hearing fit this Court of Appeals vacation. It is not
16 done.

17 THE COURT: I will tell what you I am going to
18 do, I will take these findings and I am going to amend them
19 to suit my satisfaction. I will make my own findings and
20 Mr. Holmgren will be satisfied with them as will you.

21 MR. COLEY: Okay, I appreciate that. You know
22 there are things --

23 THE COURT: You may not like what I end up doing.
24 These are going to be the findings that the court makes,
25 and usually counsel prepares findings and submits them to

1 the court.

2 MR. COLEY: I understand.

3 THE COURT: I go over them, look them over. If I
4 like them, I sign them. If not, I amend them. I intend to
5 amend these findings to to suit my own feel of what the
6 evidence supports in terms of findings of fact and
7 conclusions of law.

8 MR. COLEY: I appreciate that. I have no
9 argument.

10 THE COURT: If you wait before preparing the next
11 set, Mr. Holmgren, I will get this back to you with my
12 amendments.

13 MR. HOLMGREN: Okay.

14 MR. COLEY: The other two matters, I have served
15 orders to show cause--

16 THE COURT: What do you want -- what kind of
17 relief are you asking with regard to those?

18 MR. COLEY: First relief--several reliefs.

19 THE COURT: You want her to show cause why--

20 MR. COLEY: For denying visitation.

21 THE COURT: She was doing that pursuant to the
22 order of the court.

23 MR. COLEY: I am not talking about last time.

24 THE COURT: What is the original order regarding
25 visitation?

1 MR. COLEY: There's no order regarding
2 visitation.

3 MR. HOLMGREN: Every other weekend. On the
4 weekends when he doesn't have visitation, he has it every
5 Friday -- in other words every other weekend and then over
6 on these weekends he has it every Friday.

7 THE COURT: Alternate weekends he has it on --
8 every other weekend he has visitation, then on alternate
9 weekends he has visitation on Fridays only.

10 MR. COLEY: That is right.

11 MR. HOLMGREN: Then I think he has three weeks in
12 the summer.

13 THE COURT: And what is your contention regarding
14 that?

15 MR. COLEY: Okay. Simply that since the order
16 was signed--this is an amended order giving me three weeks
17 visitation. I never received it except the first time in
18 August I had it. The next six times--or for six years
19 consecutively she's found an excuse why not to give it to
20 me, she very seldom gives me visitation on alternate
21 Fridays. She said it is inconvenient. She's filed
22 motions. She said it is inconvenient for her. She doesn't
23 want to have it anymore. She denied my visitation from
24 February 8, '89 to January or December of 1989.

25 THE COURT: When did you last visit with your

1 child?

2 MR. COLEY: I had her on Thanksgiving. What I
3 wanted to bring up since this order was vacated, it's taken
4 me seven to ten phone calls each time to arrange for
5 visitation. What I would really like is a couple things.
6 I would like to have a place where I could pick up my
7 daughter certain every week so that I can know I can be
8 there. So I don't have to go up there and wait three or
9 four hours. I would like to have more time in the
10 summertime to be with my daughter--she's denied me for the
11 seven years or six years that she's denied my summer
12 visitation. And then the other thing I would like, Your
13 Honor, is I have had to prepare because of this order, this
14 proposed order I have had expenses of preparing the
15 transcripts so that we could find out what really went on
16 and I would like to be credited with the cost of the
17 transcripts and the cost that it's cost me which is about a
18 hundred fifty dollars towards payments.

19 THE COURT: You know, what is going to happen
20 here, Mr. Coley, I guess you don't realize what is
21 happening. The Court of Appeals didn't deny my right to
22 order you not to have visitation with your child, what they
23 did is say that the order wasn't supported by proper
24 findings.

25 MR. COLEY: I understand that.

1 THE COURT: What is going to happen, I am going
2 to make proper findings and again enter an order denying
3 you visitation.

4 MR. COLEY: But, Your Honor, may I ask this
5 question? If there are no facts, if in this transcript
6 here there's no evidence that shows that it is in the best
7 interest of my daughter to be denied my visitation, can you
8 now enter in in findings of fact in a hearing that didn't
9 have evidence in it?

10 THE COURT: I found initially that there were
11 sufficient facts upon which to base that order. I am going
12 to prepare findings of fact that will support that order
13 now. And I am going to enter it so you will again be
14 denied visitation.

15 MR. COLEY: I think the court will vacate it as
16 soon as you enter that.

17 THE COURT: I guess you will have to keep going
18 back through that.

19 MR. COLEY: I will go back. And it has to be
20 done in the best interests of the child. That's what the
21 law says. There's no findings in here, no evidence of the
22 best interests of the child being served by my being
23 denied--

24 THE COURT: I found differently. Apparently, you
25 and I see the evidence quite differently.

1 MR. COLEY: The transcript is here.

2 THE COURT: There's the issue of your contempt.

3 When do we get to that?

4 MR. COLEY: I asked for a review hearing. I was

5 told as long as I kept the payment up--

6 THE COURT: Have you kept them up?

7 MR. COLEY: If you give me credit for the hundred

8 fifty dollars, I have a hundred dollars to pay her today,

9 that will --

10 THE COURT: What I am talking about is payments

11 made to your wife for the support of your child.

12 MR. COLEY: That's what I am talking--

13 THE COURT: Did you make a payment today?

14 MR. COLEY: I have it with me to make today, a

15 hundred dollars today. I would like credit for the hundred

16 fifty dollars because I had to --

17 THE COURT: What's the present order, Mr.

18 Holmgren, I can't -- I can't keep track of this.

19 MR. HOLMGREN: Well--

20 THE COURT: With regard to support payments what

21 he's supposed to be doing.

22 MR. HOLMGREN: Two hundred fifty dollars

23 on-going. But to stay out of jail, you told him fifty

24 dollars a week, and I have provided you with an exhibit

25 that shows that he has not done that. It is Mr. Coley's

1 of Appeals but I do need a foundation in which for me to
2 appeal your order.

3 THE COURT: All you need to do is--there's
4 nothing in the record in this case that would support a
5 finding whether from one hearing or another.

6 MR. COLEY: When you do your findings, could I ask
7 you to identify where they come from?

8 THE COURT: You can ask me to but I am certainly
9 not going to.

10 MR. COLEY: All right.

11 THE COURT: We will recess.

12 (recess)

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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
)	

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S VERIFIED
MOTION FOR ORDER TO SHOW CAUSE

COME NOW the undersigned and, in response to Plaintiff's
Verified Motion for Order to Show Cause, respond to each numbered
paragraph of Plaintiff's Motion as follows:

1. Parag. 1. Admit.
2. Parag. 2. Admit the existence of the order but deny
Plaintiff's representation of its contents. The precise wording
of the Order is:

a. Plaintiff shall be entitled to visitation on
Friday evenings from 5:00 p.m. until 7:30 p.m. on those
weekends on which Plaintiff has not already been granted
rights of visitation.

orders to pay child support. Plaintiff has generally had visitation over the years when he wanted it. His calls requesting visitation have been sporadic at best. On those infrequent occasions when he has called to arrange visitation, sometimes Laura has been available to go with him and sometimes she has not. It is the rule, and not the exception, that when Plaintiff does call he calls just a few hours or maybe a day before he wants visitation. Sometimes when Plaintiff has called on such short notice Laura has already made plans with her friends or has previously scheduled activities. As for Plaintiff's allegation concerning the filing, in April 1988, of a petition to modify the visitation, the petition requested termination of alternating Friday visitations, but Defendant and her counsel are not aware whether there was a ruling on that issue and, in fact, do not believe there was a ruling.

7. Parag. 7. Defendant did file a petition to modify the decree in the spring of 1986 to adjust the visitation schedule to allow Laura to attend her church meetings on Sundays. What Plaintiff thinks Judge Fishler thought of that request is incompetent evidence and is based on hearsay and is not proper for purposes of an affidavit/verified motion.

8. Parag. 8. Defendant admits that during the period of February 1989 through November or December 1989 she refused to

allow Plaintiff to have visitation. It was Defendant's understanding as well as her counsel's understanding that Plaintiff had been sentenced to jail for his contempt of court for not paying court-ordered child support. Plaintiff failed to report for jail as ordered and was evading justice. It was the belief of Defendant and her counsel that if Plaintiff was in the State of Utah and available to have visitation, that he should be serving his jail sentence. However, Defendant did not know whether Plaintiff was in the state or not because he just placed phone calls to Laura and Defendant did permit Laura to have phone conversations with Plaintiff during that time period. Defendant was particularly frightened of Plaintiff during this time period because she believed that, with the jail sentence hanging over his head, Plaintiff might conclude that he "had nothing to lose" and might try to either kidnap Laura or harm Defendant out of anger toward Defendant for her obtaining the jail sentence against him. Defendant is informed and believes, and thereon alleges, that throughout most of 1989 a constable hired by her attorney tried to track Plaintiff down to serve the arrest warrant on him. For much of the year Plaintiff could not be located, but toward the end of the year the constable did locate Plaintiff at a residence in Salt Lake City but Plaintiff would not open the door to be served with the warrant. In fact, Defendant is advised that the constable made

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NANCY P. COLEY

Personally appeared before me NANCY P. COLEY and signed the foregoing document in my presence on this ____ day of _____, 19__.

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RANDALL J. HOLMGREN

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Notary Public

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

Judge James S. Sawaya

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..

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:

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District Court Judge