

1990

# Lloyd D. Coley v. Nancy P. Coley : Brief in Opposition to Certiorari

Utah Supreme Court

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Randall J. Holmgren; Attorney for Respondent.

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UTAH COURT OF APPEALS

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DOCKET NO.

900446-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

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LLOYD D. COLEY,	)	
Plaintiff and Petitioner,	)	Case No. 910120
vs.	)	
	)	Case No. 900446-CA
NANCY P. COLEY,	)	
Defendant and Respondent,	)	

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BRIEF OF RESPONDENT IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI  
FROM THE UTAH COURT OF APPEALS' DECISION  
AND OPINION DATED FEBRUARY 4, 1991

-----

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MAY 20 1991  
CLERK SUPREME COURT,  
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

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## TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . . .	1
JURISDICTION . . . . .	2
STATEMENT OF THE CASE . . . . .	2
STATEMENT OF FACTS . . . . .	4
ARGUMENT . . . . .	9
APPENDIX . . . . .	13

## TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page(s)</u>
<u>Burt vs. Burt</u> , 145 Utah Adv. Rep. 29, 30 (Utah App. 1990). . . . .	11
<u>Hurt vs. Hurt</u> , 793 P.2d 948, 951 (Utah App. 199). . . .	11
<u>Jensen vs. Schwendiman</u> , 744 P.2d 1026 (Utah App. 1987). .	9, 10
 <u>STATUTES:</u>	
<u>Utah Rules of Appellate Procedure</u> , Rule 8(a). . . . .	10, 11
<u>Utah Code Ann.</u> , §78-27-56 (1988). . . . .	11

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI  
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AND OPINION DATED FEBRUARY 4, 1991

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COMES NOW Defendant and Respondent, by and through counsel,  
and responds to Petitioner's Petition for Writ of Certiorari as  
follows.

PETITIONER'S QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in not finding that the  
Order of January 9th is prima facie unconstitutional?

2. Did the Court of Appeals err in not finding that the Order of January 9th, is prima facia fallacious?

3. Did the Court of Appeals err in requiring Petitioner to fulfil the criteria of Jensen vs. Schwendiman?

4. Did the Court of Appeals err in finding that the Petitioner did not make a strong showing that he is likely to succeed on the merits of the case?

5. Did the Court of Appeals err in not granting Petitioner's Request for Stay?

#### **JURISDICTION**

Respondent states that jurisdiction is not proper in that Respondent does not believe that Rules 45 and 46 of the Utah Rules of Appellate Procedure gives the Supreme Court the authority to review a Court of Appeals decision on a Motion to Stay. Rule 45 allows for review of judgments, orders, and decrees of the Court of Appeals there is nothing contained in that Rule for review of the denial of a Motion to Stay.

#### **STATEMENT OF THE CASE**

Nature of the Case. Defendant instituted this action by filing a "Verified Motion for Order to Show Cause" against

Plaintiff on or about February 21, 1990 (Record at 213). In the "Verified Motion" Defendant alleged:

- a) That numerous judgments had been entered against Plaintiff for failure to pay child support.<sup>1</sup> (Record at 213).
- b) That Plaintiff had been held in contempt of court and had served 30 days in the Salt Lake County Jail for his contempt.<sup>2</sup> (Record at 214).
- c) That Plaintiff still demanded his visitation rights with the parties' minor daughter after his release from jail. (Record at 214).
- d) That the trial court should again sentence Plaintiff to serve time in the Salt Lake County Jail for his continued failure to pay child support and his continued contempt of court. (Record at 214).
- e) That the trial court should suspend Plaintiff's visitation rights with the parties' minor daughter for his continued contempt of court. (Record at 214).

Disposition in the Lower Court. A hearing was held on Defendant's Order to Show Cause on June 18, 1990 in the Third

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<sup>1</sup> At the time of the "Verified Motion", the Plaintiff had not made any payment of child support since November or December, 1988 and was over \$27,000.00 in arrears.

<sup>2</sup> On or about November, 1989.

District Court. Evidence was proffered by counsel for Defendant and Plaintiff was called to testify. Judge James S. Sawaya found that Plaintiff was in contempt and ordered Plaintiff's visitation terminated until further order of the court and sentenced Plaintiff to serve thirty (30) days in the Salt Lake County Jail, however, the jail sentence was suspended. (Record at 262). An Order was signed by Judge Sawaya on July 13, 1990, (Record 268-271), and an Amended Order was entered by Judge Sawaya on January 9, 1991.

#### **STATEMENT OF FACTS**

1. The Plaintiff's "Statement of Case" (p. 6 of Brief of Appellant), consists of approximately 34 paragraphs that, collectively, are somewhat true but are generally misleading and slanted according to Plaintiff's pro-se and non-lawyer approach to his own case. Rather than challenge the truth and veracity of Plaintiff's representations of fact, Defendant elects to set forth her own version of the pertinent facts as follows.

2. Plaintiff and Defendant were divorced on September 8, 1982 in the Third Judicial District Court, Salt Lake County, State of Utah. (Decree, Record at 12-14). Plaintiff was ordered to pay child support in the amount of \$250.00 per month for the parties' minor child until said child reached age 21. (Record at 13).

3. Since the entry of the Decree, Defendant has brought numerous motions for orders to show cause against Plaintiff for child support arrearages, payment of medical expenses, for the timely payment of child support, etc..<sup>3</sup>

4. On December 3, 1988, an evidentiary hearing was held before the Honorable James S. Sawaya, Third District Court, on the issue of Plaintiff's contempt of court for failing to pay court ordered child support.

5. On December 16, 1988, an Order was entered finding Plaintiff in contempt of court and sentencing Plaintiff to thirty (30) days in the Salt Lake County Jail. Imposition of the sentence was reserved for sixty (60) days to give Plaintiff time to purge himself of the contempt. (Record at 188-193).

---

<sup>3</sup> November 17, 1982, judgment entered in the amount of \$1,750.00. (Record at 24-25).

February 7, 1984, judgment entered in the amount of \$1,880.14. (Record at 53-55, 65-67)

April 22, 1986, judgment entered in the amount of \$5,471.00, combining all previous judgments. (Record at 95-99)

October 27, 1988, judgment entered in the amount of \$10,001.24. (Record at 173-177)

July 13, 1990, judgment entered in the amount of \$27,365.76 combining all previous judgments plus interest. (Record at 268-271)

6. On January 24, 1989, Plaintiff, having failed to purge the contempt, was ordered (in court) to surrender himself to the Salt Lake County Jail on January 27, 1989 for a period of thirty (30) days. (Record at 212).

7. On January 27, 1989, Plaintiff failed to report at the jail as ordered.

8. On February 6, 1989 a bench warrant was issued against Plaintiff after he failed to appear on January 27, 1989 as ordered. (Record at 211).

9. Plaintiff left the State of Utah for several months (Hearing Transcript, June 18, 1990, pg. 10-12, 15-21) and upon his return to Utah he was arrested and served his jail sentence during November, 1989.

10. On February 21, 1990, Defendant filed a Verified Motion for Order to Show Cause, (Record at 213-215), requesting judgment for child support arrearages, for Plaintiff to be sentenced to jail for continued contempt and for Plaintiff's visitation with the parties' minor child to be suspended. On May 7, 1990, Defendant filed an Affidavit in Support of said Motion. (Record at 222-233).

11. On June 18, 1990, Defendant's Order to Show Cause was heard by Judge Sawaya. Plaintiff testified and Defendant's testimony was proffered by counsel. Based upon the evidence presented, Judge Sawaya found Plaintiff in continuing contempt of

court and ordered Plaintiff to serve thirty (30) days in jail and suspended Plaintiff's visitation with the parties' minor child. (Record at 262).

12. On July 13, 1990, an Order was entered against Plaintiff for child support arrearages<sup>4</sup>, for continued contempt of court, and suspending Plaintiff's visitation with the parties' minor child. (Record at 268-271).

13. On July 16, 1990, Plaintiff filed an Affidavit of Bias or Prejudice (Record at 272-284) and on July 20, 1990 Plaintiff filed a Supplemental Affidavit of Bias or Prejudice (Record at 299-304).

14. On August 1, 1990, Judge Sawaya entered a Minute Entry stating "the Court having reviewed the Affidavit of Bias or Prejudice in the above entitled matter and questions its sufficiency and orders the same referred to Judge Murphy for his determination." (Record at 313).

15. On August 1, 1990, Judge Michael R. Murphy entered an Order stating Plaintiff's Affidavit of Bias or Prejudice lacked legal sufficiency and that Judge Sawaya would remain assigned to the case. (Record at 314-315).

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<sup>4</sup> Judgment was entered for \$27,365.76.

16. On August 13, 1990 Plaintiff filed a Notice of Appeal of the July 13, 1990 Order of Judge Sawaya and the August 7, 1990 Order of Judge Murphy. (Record at 316).

17. On October 10, 1990, this Court vacated the July 13, 1990 Order denying Plaintiff contact with the parties' minor child and temporarily remanded to the district court for additional findings on the issue of the best interest of the child. This Court retained jurisdiction to review any new orders. (Record at 332-333).

18. On December 11, 1990, Findings of Fact and Conclusions of Law were signed by Judge Sawaya pertaining to the July 13, 1990 Order.

19. On January 9, 1991 an Amended Order<sup>5</sup> was entered by Judge Sawaya in accordance with the Findings and Conclusions of December 11, 1990.

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<sup>5</sup> Amending the June 18, 1990 Order on Order to Show Cause.

## ARGUMENT

1. THE CRITERIA SET FORTH IN JENSEN VS. SCHWENDIMAN, 744 P.2d 1026 (UTAH CT. APP. 1987) IS BASED ON RULE 8(a) OF THE UTAH RULES OF APPELLATE PROCEDURE AND THEREFORE THE CRITERIA IS APPROPRIATE IN DETERMINING ALL MOTIONS TO STAY.

Plaintiff contends that because the facts of Jensen are not similar to the case at hand, the criteria set forth in Jensen is not appropriate in this matter. The Court of Appeals in Jensen was interpreting Rule 8(a) of the Utah Rules of Appellate Procedure which governs the denial or granting of stays of lower court judgments or orders. Jensen at 1027 states:

[I]t is generally required that (a) the applicant make a strong showing that he is likely to succeed on the merits of the appeal; (b) the applicant establish that unless a stay is granted he will suffer irreparable injury; (c) no substantial harm will come to other interested parties, and (d) a stay would do no harm to the public interest.

In the Court of Appeals February 4, 1991 Decision (attached herewith in the Appendix) states that:

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 it not entitled to a stay on that basis.

The Court found that Plaintiff did not address any of the remaining criteria set forth in Jensen and Rule 8(a) of the Rules of Appellate Procedure.

Defendant agrees with the Court of Appeals that Plaintiff failed to make an adequate showing that he will succeed in his appeal. In support, Defendant attaches a copy of her Brief in the Court of Appeals matter herewith in the Appendix. Defendant believes that the content of her Court of Appeals Brief reaches and addresses all of the arguments and authorities presented by Plaintiff in his Petition for Writ of Certiorari.

Finally, Defendant believes that the Court of Appeals properly denied Plaintiff's Motion to Stay for the reason that Plaintiff failed to file an appropriate motion with the District Court following the January 9, 1991 Order. In Jensen at 1027 the Court of Appeals stated:

The Advisory Committee Note to Utah Rule of Appellate Procedure 8 (identical to R.Utah Ct.App. 8) provides that the rule must be read in conjunction with Rule 62 of the Utah Rules of Civil Procedure, concerning the power of the district court to grant stays pending appeal. A stay may be sought in the appellate court only if it has been first denied by the trial court.

Plaintiff's failure to first file a motion to stay with the district court is further cause for the motion to have been denied

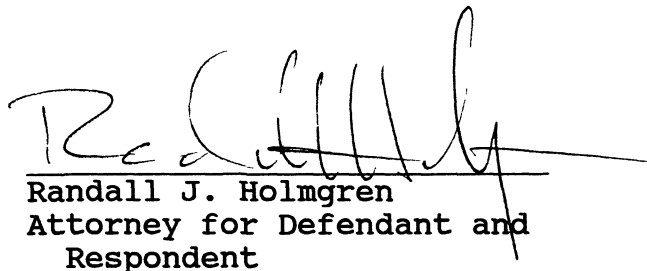
by the Court of Appeals. Therefore, there was no error by the Court of Appeals in denying Plaintiff's Motion to Stay.

**2. DEFENDANT IS ENTITLED TO AN AWARD OF ATTORNEY FEES ON APPEAL.**

Defendant does not believe that this Petition has been initiated in good faith for the reason that Plaintiff has not presented a plausible position. Defendant can only conclude that Plaintiff's motive has been to "wear down" Defendant's resolve and continue to avoid having to pay child support. If Plaintiff truly wanted to continue his relationship with his daughter, he would use the time and energy involved in this appeal and put it towards making an effort to support his child and help provide for her.

Based upon Utah Code Ann. §78-27-56 (1988), Plaintiff should be required to pay the attorney's fees and costs incurred by Defendant in this appeal. (See Burt vs. Burt, 145 Utah Adv. Rep. 29, 30 (Utah App. 1990); Hurt vs. Hurt, 793 P.2d 948, 951 (Utah App. 1990)).

Date: May 20, 1991.

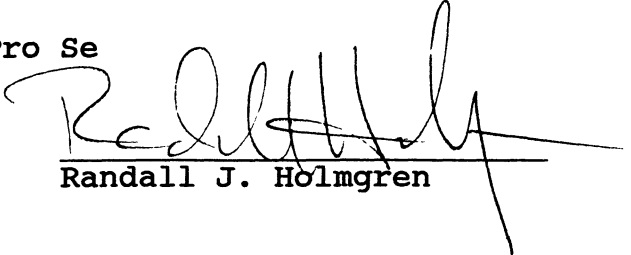
  
Randall J. Holmgren  
Attorney for Defendant and  
Respondent

**CERTIFICATE OF MAILING**

I hereby certify that I personally caused to be mailed a true and correct copy of the foregoing BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, postage prepaid, to the following, on May 20, 1991.

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

Petitioner Pro Se

  
Randall J. Holmgren

## **APPENDIX**

**When filed.**

Court has discretion to allow the bond to be filed after the procedural time if no prejudice is

shown to the respondent. *Mountain states Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258 (Utah 1984).

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 4 Am. Jur. 2d Appeal and Error §§ 323 to 344.

**C.J.S.** — 4A C.J.S. Appeal and Error §§ 499 to 573.

**A.L.R.** — Measure and amount of damages

recoverable under supersedeas bond in action involving recovery or possession of real estate, 9 A.L.R.3D 330.

**Key Numbers.** — Appeal and Error ⇐ 369 to 395

**Rule 7. Security: Proceedings against sureties.**

Whenever these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety must consent therein to the exercise of personal jurisdiction by the trial court and must irrevocably appoint the clerk of that court as an agent upon whom any papers affecting liability on the bond or undertaking may be served. The sureties' liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the trial court prescribes may be served on the clerk of the trial court, who shall forthwith mail copies to the sureties if their addresses are known.

**Rule 8. Stay or injunction pending appeal.**

(a) **Stay must ordinarily be sought in the first instance in trial court; motion for stay in appellate court.** Application for a stay of the judgment or order of a trial court pending appeal, or disposition of a petition under Rule 5, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the trial court. A motion for such relief may be made to the appellate court, but the motion shall show that application to the trial court for the relief sought is not practicable, or that the trial court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the trial court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be considered by a single justice or judge of the court.

(b) **Stay may be conditioned upon giving of bond.** Relief available in the appellate court under this rule may be conditioned upon the filing of a bond or other appropriate security in the trial court.

(c) **Stays in criminal cases.** Stays in criminal cases pending appeal are governed by Rule 27, U.R. Crim.P.

(2) "Injury" means any personal injury or property damage or loss

(3) "Skier" means any person present in a ski area for the purpose of engaging in the sport of skiing

(4) "Ski area" means any area designated by a ski area operator to be used for skiing

(5) "Ski area operator" means those persons, and their agents, officers, employees or representatives, who operate a ski area 1979

**78-27-53. Inherent risks of skiing — Bar against claim or recovery from operator for injury from risks inherent in sport.**

Notwithstanding anything in Sections 78-27-37 through 78-27-43 to the contrary, no skier may make any claim against, or recover from, any ski area operator for injury resulting from any of the inherent risks of skiing 1986

**78-27-54. Inherent risks of skiing — Trail boards listing inherent risks and limitations on liability.**

Ski area operators shall post trail boards at one or more prominent locations within each ski area which shall include a list of the inherent risks of skiing, and the limitations on liability of ski area operators, as defined in this act 1979

**78-27-55 Repealed.** 1980

**78-27-56. Attorney's fees — Award where action or defense in bad faith — Exceptions.**

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2)

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court

(a) finds the party has filed an affidavit of impecuniosity in the action before the court, or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1) 1988

**78-27-56.5. Attorney's fees — Reciprocal rights to recover attorney's fees.**

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees 1986

**78-27-57. Attorney's fees awarded to state funded agency in action against state or subdivision — Forfeiture of appropriated monies.**

Any agency or organization receiving state funds which, as a result of its suing the state, or political subdivision thereof, receives attorney's fees and costs as all or part of a settlement or award, shall forfeit to the General Fund, from its appropriated monies, an amount equal to the attorney's fees received 1981

**78-27-58. Service of judicial process by persons other than law enforcement officers.**

Persons who are not peace officers, constables, sheriffs, or lawfully appointed deputies of such officers or authorized state investigators in counties of 400,000 persons or more are not entitled to serve any

forms of civil or criminal process other than complaints, summonses, and subpoenas 1983

**78-27-59. Immunity for transient shelters.**

(1) As used in this section, "transient shelter" means any person which provides shelter, food, clothing, or other products or services without consideration to indigent persons

(2) Except as provided in Subsection (3), all transient shelters, owners, operators, and employees of transient shelters, and persons who contribute products or services to transient shelters, are immune from suit for damages or injuries arising out of or related to the damaged or injured person's use of the products or services provided by the transient shelter

(3) This section does not prohibit an action against a person for damages or injury intentionally caused by that person or resulting from his gross negligence 1986

**CHAPTER 27a**

**SMALL BUSINESS EQUAL ACCESS TO JUSTICE ACT**

Section	Short title
78-27a-1	Legislative findings — Purpose
78-27a-2	Definitions
78-27a-3	Litigation expense award authorized in actions by state
78-27a-4	Litigation expense award authorized in appeals from administrative decisions
78-27a-5	Payment of expenses awarded — State-ment required in agency's budget

**78-27a-1. Short title.**

This act shall be known and may be cited as the "Small Business Equal Access to Justice Act " 1983

**78-27a-2. Legislative findings — Purpose.**

The Legislature finds that small businesses may be deterred from seeking review of or defending against substantially unjustified governmental action because of the expense involved in securing the vindication of their rights. The purpose of this act is to entitle small businesses, under conditions set forth in this act, to recover reasonable litigation expenses 1983

**78-27a-3. Definitions.**

As used in this act

(1) "Prevail" means to obtain favorable final judgment, the right to all appeals having been exhausted, on the merits, on substantially all counts or charges in the action and with respect to the most significant issue or set of issues presented, but does not include the settlement of any action, either by stipulation, consent decree or otherwise, whether or not settlement occurs before or after any hearing or trial.

(2) "Reasonable litigation expenses" means court costs, administrative hearing costs, attorney's fees, and witness fees of all necessary witnesses, not in excess of \$10,000, which a court finds were reasonably incurred in opposing action covered under this act

(3) "Small business" means a commercial or business entity, including a sole proprietorship, which does not have more than 250 employees, but does not include an entity which is a subsidiary or affiliate of another entity which is not a small business

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

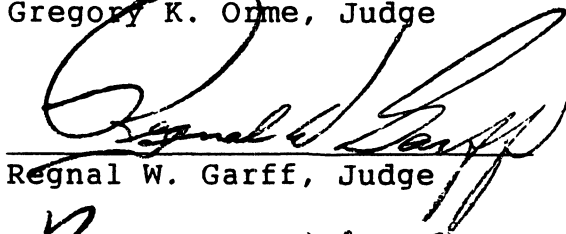
financial support. The ultimate determination of whether the trial court in this case has satisfied those requirements is reserved for plenary presentation and consideration of this case. We rule, however, that appellant has failed to satisfy the burden of establishing his entitlement to a stay pending 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

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IN THE UTAH COURT OF APPEALS

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LLOYD D. COLEY,	)	
	)	
Plaintiff/Appellant,	)	No. 900446-CA
	)	
vs.	)	
	)	
NANCY P. COLEY,	)	
	)	
Defendant/Appellee.	)	

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BRIEF OF APPELLEE

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APPEAL FROM AN ORDER ON ORDER TO SHOW CAUSE  
JULY 13, 1990 AND AN AMENDED ORDER JANUARY 9, 1991  
OF THE THIRD DISTRICT COURT IN AND FOR SALT LAKE  
COUNTY, THE HONORABLE JAMES S. SAWAYA, AND AN ORDER  
AUGUST 7, 1990 OF THE THIRD DISTRICT COURT IN AND  
FOR SALT LAKE COUNTY, THE HONORABLE MICHAEL R. MURPHY

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES . . . . .	iii
JURISDICTION . . . . .	1
NATURE OF PROCEEDINGS . . . . .	1
STATEMENT OF THE CASE . . . . .	2
A. Nature of the Case . . . . .	2,3
B. Disposition in the Lower Court . . . . .	3,4
STATEMENT OF FACTS . . . . .	4,5,6,7,8
SUMMARY OF ARGUMENT . . . . .	8,9
ARGUMENT . . . . .	10
1. THE ORDER SIGNED BY JUDGE SAWAYA DOES NOT VIOLATE THE FIRST, EIGHTH, OR FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AS ARGUED BY PLAINTIFF. . . . . .	10
2. JUDGE SAWAYA FOUND THAT PLAINTIFF'S NON-PAYMENT OF CHILD SUPPORT WAS WILLFUL AND CONTUMACIOUS AND THAT IT WAS NOT IN THE BEST INTEREST OF THE PARTIES' MINOR CHILD NOT TO HAVE VISITATION WITH PLAINTIFF. . . . . .	13
3. THE DISTRICT COURT DID NOT ERR IN CONDITIONING THE RESTORATION OF VISITATION RIGHTS UPON COMPLIANCE WITH SUPPORT ORDERS. . . . . .	20

4.	U.C.A. §78-32-10 DOES NOT PREVENT THE DISTRICT COURT FROM RESTRICTING A PARENT'S VISITATION PRIVILEGES IF THE COURT FINDS THAT THE RESTRICTION IS IN THE BEST INTERESTS OF THE CHILD.	24
5.	AN ORDER TO SHOW CAUSE PROCEEDING IS PROPER FOR THE PURPOSE OF SUSPENDING AND/OR TERMINATING PLAINTIFF'S VISITATION.	26
6.	THE DISTRICT COURT CAN SIGN AN ORDER EVEN THOUGH OBJECTIONS HAVE BEEN FILED IF THE DISTRICT COURT FINDS THE OBJECTIONS HAVE NO MERIT.	27
7.	PLAINTIFF FAILS TO SUPPORT HIS CONTENTION THAT JUDGE SAWAYA IS BIASED.	28
8.	DEFENDANT IS ENTITLED TO AN AWARD OF ATTORNEY FEES ON APPEAL.	28
ADDENDUM		31

## TABLE OF CITED AUTHORITIES

<b>CASES CITED</b>	<b><u>Page(s)</u></b>
<u>Burt vs. Burt</u> , 145 Utah Adv. Rep. 29, 30 (Utah App. 1990)	29
<u>Dana vs. Dana</u> , 131 Utah Adv. Rep. 76 (Utah App. 1990)	14,15
<u>Hurt vs. Hurt</u> , 793 P.2d 948, 951 (Utah App. 1990)	29
<u>In Re J. P.</u> , 648 P.2d 1364 (Utah 1982)	10
<u>Interest of Walter B.</u> , 577 P.2d 119 (Utah 1978)	10
<u>Lunsford vs. Waldrip</u> , 493 P.2d 382, 383 (Wash. App. 1972)	14
<u>Meyer vs. Nebraska</u> , 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923)	10
<u>Reardon vs. Reardon</u> , 415 P.2d 571, 574 (Ariz. App. 1966)	16,24,25
<u>Rohr vs. Rohr</u> , 709 P.2d 382, 383 (Utah 1985)	14,17,18,20,21
<u>Slade vs. Slade</u> , 594 P.2d 898 (Utah 1978)	14
<u>Smith vs. Smith</u> , 135 Utah Adv. Rep. 33 (Utah App. 1990)	14,15
<u>Soderburg vs. Soderburg</u> , 299 P.2d 479 (Idaho 1956)	14,15
<u>West vs. West</u> , 487 P.2d 96 (Or. App. 1971)	14,15

#### **STATUTES CITED**

Utah Code Ann., §77-35-26 (repealed 1989)	1
Utah Code Ann., §78-3a-2(14) (1989)	10
Utah Code Ann., §78-27-56 (1988)	29
Utah Code Ann., §78-32-10 (1990)	24

#### **COURT RULES CITED**

Utah Code of Judicial Administration Rule 4-504(2) (1991)	27
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**IN THE UTAH COURT OF APPEALS**

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LLOYD D. COLEY,	)	
	)	
Plaintiff/Appellant,	)	No. 900446-CA
	)	
vs.	)	
	)	
NANCY P. COLEY,	)	
	)	
Defendant/Appellee.	)	

---

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**BRIEF OF APPELLEE**

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**JURISDICTION**

The Jurisdiction Section of "Brief of Appellant" (p. 4) is defective for the following reasons:

1. Utah Code Annotated §77-35-26 (2)(a) and (b) is part of the Utah Code of Criminal Procedure; this is a civil matter.
2. Utah Code Annotated §77-35-26 was repealed in 1989.

**NATURE OF PROCEEDINGS**

This is an appeal from an Order, on an Order to Show Cause dated, July 13, 1990 (Record at 268-271). Plaintiff filed a Notice of Appeal (Record at 316). On October 10, 1990 the Court of Appeals vacated and remanded the Order to the district court for further findings of fact with respect to the restriction of

Plaintiff's visitation with the parties' minor daughter. (Record at 332-333). The Court of Appeals retained jurisdiction to review any amended order of the district court. An Amended Order was entered on January 9, 1991.

Plaintiff is also appealing (See "Supplemental Brief of Appellant") a final Order, August 7, 1990, of Judge Michael Murphy<sup>1</sup> denying Plaintiff's Affidavit of Bias or Prejudice. (Record at 314-315).

#### STATEMENT OF THE CASE

Nature of the Case. Defendant instituted this action by filing a "Verified Motion for Order to Show Cause" against Plaintiff on or about February 21, 1990 (Record at 213). In the "Verified Motion" Defendant alleged:

- a) That numerous judgments had been entered against Plaintiff for failure to pay child support.<sup>2</sup> (Record at 213).

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<sup>1</sup> Presiding Judge of the Third Judicial District Court.

<sup>2</sup> At the time of the "Verified Motion", the Plaintiff had not made any payment of child support since November or December, 1988 and was over \$27,000.00 in arrears.

b) That Plaintiff had been held in contempt of court and had served 30 days in the Salt Lake County Jail for his contempt.<sup>3</sup> (Record at 214).

c) That Plaintiff still demanded his visitation rights with the parties' minor daughter after his release from jail. (Record at 214).

d) That the trial court should again sentence Plaintiff to serve time in the Salt Lake County Jail for his continued failure to pay child support and his continued contempt of court. (Record at 214).

e) That the trial court should suspend Plaintiff's visitation rights with the parties' minor daughter for his continued contempt of court. (Record at 214).

Disposition in the Lower Court. A hearing was held on Defendant's Order to Show Cause on June 18, 1990 in the Third District Court. Evidence was proffered by counsel for Defendant and Plaintiff was called to testify. Judge James S. Sawaya found that Plaintiff was in contempt and ordered Plaintiff's visitation terminated until further order of the court and sentenced Plaintiff to serve thirty (30) days in the Salt Lake County Jail, however, the jail sentence was suspended. (Record at 262). An Order was

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<sup>3</sup> On or about November, 1989.

signed by Judge Sawaya on July 13, 1990, (Record 268-271), and an Amended Order was entered by Judge Sawaya on January 9, 1991.

#### STATEMENT OF FACTS

1. The Plaintiff's "Statement of Case" (p. 6 of Brief of Appellant), consists of approximately 34 paragraphs that, collectively, are somewhat true but are generally misleading and slanted according to Plaintiff's pro-se and non-lawyer approach to his own case. Rather than challenge the truth and veracity of Plaintiff's representations of fact, Defendant elects to set forth her own version of the pertinent facts as follows.

2. Plaintiff and Defendant were divorced on September 8, 1982 in the Third Judicial District Court, Salt Lake County, State of Utah. (Decree, Record at 12-14). Plaintiff was ordered to pay child support in the amount of \$250.00 per month for the parties' minor child until said child reached age 21. (Record at 13).

3. Since the entry of the Decree, Defendant has brought numerous motions for orders to show cause against Plaintiff for child support arrearages, payment of medical expenses, for the timely payment of child support, etc..<sup>4</sup>

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<sup>4</sup> November 17, 1982, judgment entered in the amount of \$1,750.00. (Record at 24-25).

February 7, 1984, judgment entered in the amount of \$1,880.14. (Record at 53-55, 65-67)

4. On December 3, 1988, an evidentiary hearing was held before the Honorable James S. Sawaya, Third District Court, on the issue of Plaintiff's contempt of court for failing to pay court ordered child support.

5. On December 16, 1988, an Order was entered finding Plaintiff in contempt of court and sentencing Plaintiff to thirty (30) days in the Salt Lake County Jail. Imposition of the sentence was reserved for sixty (60) days to give Plaintiff time to purge himself of the contempt. (Record at 188-193).

6. On January 24, 1989, Plaintiff, having failed to purge the contempt, was ordered (in court) to surrender himself to the Salt Lake County Jail on January 27, 1989 for a period of thirty (30) days. (Record at 212).

7. On January 27, 1989, Plaintiff failed to report at the jail as ordered.

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April 22, 1986, judgment entered in the amount of \$5,471.00, combining all previous judgments. (Record at 95-99)

October 27, 1988, judgment entered in the amount of \$10,001.24. (Record at 173-177)

July 13, 1990, judgment entered in the amount of \$27,365.76 combining all previous judgments plus interest. (Record at 268-271)

8. On February 6, 1989 a bench warrant was issued against Plaintiff after he failed to appear on January 27, 1989 as ordered. (Record at 211).

9. Plaintiff left the State of Utah for several months (Hearing Transcript, June 18, 1990, pg. 10-12, 15-21) and upon his return to Utah he was arrested and served his jail sentence during November, 1989.

10. On February 21, 1990, Defendant filed a Verified Motion for Order to Show Cause, (Record at 213-215), requesting judgment for child support arrearages, for Plaintiff to be sentenced to jail for continued contempt and for Plaintiff's visitation with the parties' minor child to be suspended. On May 7, 1990, Defendant filed an Affidavit in Support of said Motion. (Record at 222-233).

11. On June 18, 1990, Defendant's Order to Show Cause was heard by Judge Sawaya. Plaintiff testified and Defendant's testimony was proffered by counsel. Based upon the evidence presented, Judge Sawaya found Plaintiff in continuing contempt of court and ordered Plaintiff to serve thirty (30) days in jail and suspended Plaintiff's visitation with the parties' minor child. (Record at 262).

12. On July 13, 1990, an Order was entered against Plaintiff for child support arrearages<sup>5</sup>, for continued contempt of court, and suspending Plaintiff's visitation with the parties' minor child. (Record at 268-271).

13. On July 16, 1990, Plaintiff filed an Affidavit of Bias or Prejudice (Record at 272-284) and on July 20, 1990 Plaintiff filed a Supplemental Affidavit of Bias or Prejudice (Record at 299-304).

14. On August 1, 1990, Judge Sawaya entered a Minute Entry stating "the Court having reviewed the Affidavit of Bias or Prejudice in the above entitled matter and questions its sufficiency and orders the same referred to Judge Murphy for his determination." (Record at 313).

15. On August 1, 1990, Judge Michael R. Murphy entered an Order stating Plaintiff's Affidavit of Bias or Prejudice lacked legal sufficiency and that Judge Sawaya would remain assigned to the case. (Record at 314-315).

16. On August 13, 1990 Plaintiff filed a Notice of Appeal of the July 13, 1990 Order of Judge Sawaya and the August 7, 1990 Order of Judge Murphy. (Record at 316).

17. On October 10, 1990, this Court vacated the July 13, 1990 Order denying Plaintiff contact with the parties' minor child and

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<sup>5</sup> Judgment was entered for \$27,365.76.

temporarily remanded to the district court for additional findings on the issue of the best interest of the child. This Court retained jurisdiction to review any new orders. (Record at 332-333).

18. On December 11, 1990, Findings of Fact and Conclusions of Law were signed by Judge Sawaya pertaining to the July 13, 1990 Order.

19. On January 9, 1991 an Amended Order<sup>6</sup> was entered by Judge Sawaya in accordance with the Findings and Conclusions of December 11, 1990.

#### SUMMARY OF ARGUMENT

The Amended Order<sup>7</sup> signed by Judge Sawaya does not violate the First, Eighth, or Fourteenth Amendments of the United States Constitution as argued by Plaintiff.

Judge Sawaya found that Plaintiff's non-payment of child support was willful and contumacious and that it was in the best interest of the minor child not to have visitation with Plaintiff.

The district court did not err in conditioning the restoration of visitation rights upon compliance with support orders.

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<sup>6</sup> Amending the June 18, 1990 Order on Order to Show Cause.

<sup>7</sup> January 9, 1991.

U.C.A. §78-32-10 does not prevent the district court from restricting visitation privileges, if the court finds that the restriction is in the best interests of the child.

An order to show cause proceeding is proper for the purpose of suspending and/or terminating Plaintiff's visitation.

The district court can sign an order even though objections have been filed if the district court finds the objections have no merit.

Plaintiff fails to support his contention that Judge Sawaya is biased.

Defendant is entitled to an award of attorney fees on appeal.

### ARGUMENT

1. THE ORDER SIGNED BY JUDGE SAWAYA DOES NOT VIOLATE THE FIRST, EIGHTH, OR FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AS ARGUED BY PLAINTIFF.

Plaintiff states in his Brief (p. 13) that "there is a constitutional right of a parent to maintain a personal and close relationship with their [sic] children" and cites to several cases to support his position. (Interest of Walter B., 577 P.2d 119 (Utah 1978); Meyer vs. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, L.Ed. 1042 (1923); and In Re J.P., 648 P.2d 1364 (Utah 1982)). All of these cases involve the termination of parental rights. Plaintiff's reliance on these cases is flawed for two reasons: first, the cases are limited in scope to permanent termination of parental rights while case at hand is far more limited in that Judge Sawaya merely suspended Plaintiff's visitation until he exhibits behavior consistent with the best interests of his daughter; and, second, the cases are cited out-of-context of the law governing suspending of visitation rights because there are numerous cases that empower a court to restrict or suspend visitation rights under certain fact situations.

Termination of parental rights means the permanent elimination of all parental rights and duties, by court order. (See, Utah Code Ann., §78-3a-2(14)). In the present case, Judge Sawaya did not permanently eliminate the Plaintiff's parental rights or his

visitation. The Judge merely suspended the Plaintiff's visitation until he responsibly responds to the needs of his daughter. Plaintiff errs in trying to insert into this case legal authorities which pertain to permanent parental-right deprivation situations.

This case is not about permanently terminating Plaintiff's parental rights; it is about a parent's responsibility to help his ex-wife raise their child. Plaintiff may think that because his ex-wife has a home and employment -- and because his daughter gets fed, clothed and cared for without assistance from him -- that this is just a case of legal semantics where he can play lawyer and appeal his case<sup>8</sup> and spend countless hours trying to legally justify why he does not financially support his daughter. However, this is a case where, as Judge Sawaya found, Plaintiff's failure to pay child support is willful and contumacious. It does not take a legal scholar to rightly conclude that a man who willfully refuses to support his child does not have her best interest at heart or in mind.

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<sup>8</sup> On February 8, 1989 Plaintiff filed a Petition for Writ of Prohibition against Judge Sawaya in this Court. On July 28, 1989 this Court determined that the Petition was frivolous and therefore denied the same. On August, 1990 Plaintiff filed a Notice of Appeal in the matter at hand. Since the filing of the Notice, Plaintiff has filed several motions and this matter was heard by this Court back in October, 1990. Plaintiff has continued with the matter since that time and has filed several more motions and has even filed a Petition for Writ of Certiorari with the Utah Supreme Court with respect to the Order of this Court denying Plaintiff's Motion to Stay.

Plaintiff next argues that the Amended Order violates the Eighth Amendment of the United States Constitution as it constitutes cruel and unusual punishment. There are several cases in which visitation has been suspended or conditioned and Defendant will cite those cases below. Plaintiff's only support for his argument that suspension of visitation amounts to cruel and unusual punishment is his own subjective belief that it does.

The credibility of Plaintiff's statement, that the Amended Order destroys a loving relationship, is undermined by the fact that Plaintiff, of his own accord, willfully refuses to financially support his child and he physically abandoned her between February, 1989 until after November, 1989.<sup>9</sup>

Plaintiff further contends that the Amended Order violates the Fourteenth Amendment of the United States Constitution by denying him due process. Plaintiff has had more than ample opportunity to show Judge Sawaya, as supported by the entire record, that he genuinely loves and cares for his daughter in not only word but, as important, in deed.

Finally, Plaintiff argues that the Amended Order violates his First Amendment rights of free speech. The district court did not rule that Plaintiff could not possess the attitudes and beliefs he portrays, or that he could not express them in public places. The

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<sup>9</sup> See Defendant's Statement of Facts #7.

district court simply ruled that it was not in the best interest of the minor child to be exposed to Plaintiff's anti-social attitudes and beliefs through contact with him. The district court is not punishing Plaintiff for his beliefs but is only trying to impress upon Plaintiff his proper behavior and responsibility to his daughter. Specifically, Plaintiff has a parental responsibility to bring up his daughter to be the best citizen possible.

Therefore, nothing in the Amended Order contradicts the Constitution of the United States and it does not in any manner violate Plaintiff's rights.

**2. JUDGE SAWAYA FOUND THAT PLAINTIFF'S NON-PAYMENT OF CHILD SUPPORT WAS WILLFUL AND CONTUMACIOUS AND THAT IT WAS IN THE BEST INTEREST OF THE PARTIES' MINOR CHILD NOT TO HAVE VISITATION WITH PLAINTIFF.**

Plaintiff alleges that Judge Sawaya suspended his visitation for the sole reason that Plaintiff is willfully not paying his court-ordered child support. The Findings of Fact, Conclusions of Law and Amended Order clearly takes into consideration the best

interest of the child as required under Rohr vs. Rohr, 709 P.2d 382 (Utah 1985).<sup>10</sup>

The Lunsford, Slade, West, Soderburg, Smith, and Dana cases, cited by Plaintiff, are erroneously utilized by Plaintiff; the portions of those cases that he refers to are taken out of context.

In Lunsford vs. Waldrip, 493 P.2d 789 at 792 (Wash. App. 1972), the Washington Court of Appeals stated:

The paramount concern in such matters [suspending visitation] is the welfare of the child, and the conduct of the father as it affects the child's welfare is a proper consideration for the trial court.

How can it be in the best interest of any child to be raised by a parent who refuses, unless faced with jail or suspension of visitation, to pay any support to help provide food, clothing, shelter, etc. for that child? In the present case, the district court found that Plaintiff was educated, healthy and able to provide the ordered support and that Plaintiff had not given the district court any reason whatsoever as to why Plaintiff had not paid the support as ordered.

Slade vs. Slade, 594 P.2d 898 (Utah 1979), was an action by a father to establish visitation rights with his child who was born

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<sup>10</sup> ... where the noncustodial parent's refusal to pay child support is contumacious, or willful and intentional, and not due to inability to pay, visitation rights may be reduced or denied, if the welfare of the child so requires. Rohr (p.383).

out of wedlock and the Utah Supreme Court found that "visitation is a matter addressed to the district court's sound discretion". (Slade at 901).

In West vs. West, 487 P.2d 96 (Or. App. 1971), the case involved an order by the trial court conditioning the father's visitation upon the father paying the court ordered child support. The Oregon Court of Appeals stated that "the right of visitation cannot be made dependent upon the payment of support for children ....". However, the court upheld the trial court's order:

[T]he order was set for the purpose of bringing home to the defendant a sense of responsibility for the child. (West at 98)

Soderburg vs. Soderburg, 299 P.2d 479 (Idaho 1956), is a case where the father petitioned the trial court for a restraining order so that the children's mother could not transport the children out of the court's jurisdiction.

Plaintiff's reliance on Smith vs. Smith, 135 Utah Adv. Rep. 33 (Utah App. 1990) is inappropriate because the language quoted by Plaintiff refers to a situation where a party sought a change in custody because the other party had interfered with visitation rights.

Plaintiff's reliance on Dana vs. Dana, 131 Utah Adv. Rep. 76 (Utah App. 1990) is similarly mistaken because the visitation issue in that case focused on the mother's complaint that the father did

not exercise visitation and she wanted him to be ordered to comply with the visitation schedule or be ordered to pay additional child support to offset her babysitting expenses.

In Reardon vs. Reardon, 415 P.2d 571 at 574 (Ariz. App. 1966) the Arizona Court of Appeals stated:

The denial of [sic] right of visitation conditioned upon payment of support monies is based on the premise that the primary beneficiaries of support payments are the children and that the court may balance the equities by requiring the husband to make the payments for the benefit of the children before visitation is allowed, against allowing the father to visit the children regardless of whether the father cares enough to provide adequate support for his children or not.

We are not persuaded there was error in requiring the father to keep up his payments of \$25 per month, as a condition to his seeing them and having temporary custody once a week. This is not to be construed as a bartering of justice, but rather a holding that to this extent the father must perform the duty to support his children, if he expects the pleasure of their companionship. The court holds out an inducement to perform a father's duty. Since the court retains full control over this matter, so as to suit orders to conditions that may arise, ....

In the case at hand, The Plaintiff has failed to provide support for his daughter for several years except when faced with jail. The only actions which have prompted payments by Plaintiff have been jail sentences, yet after serving the first jail sentence, Plaintiff still made no child support payments until

faced with a second jail sentence. In suspending Plaintiff's visitation for a period of time, Judge Sawaya is trying to help Plaintiff realize and understand that he (Plaintiff) has a responsibility to support his daughter.

Therefore, the Amended Order did not suspend Plaintiff's visitation for the sole reason of non-payment of support.

At this point, a review of Rohr is appropriate. The facts in Rohr and the facts in the present case are compared as follows:

1. Amount of Father's Child-Support Arrearage. At the time the issue of suspending visitation came before the district court, the amount of the father's child-support delinquency was:

a. In Rohr: \$2,400. Id. at 383.

b. In Coley: \$27,305.00 (Amended Order).

2. Number of Child-Support Judgments Against Father.

At the time the issue of suspending visitation came before the district court, the court had entered judgments for child support against the father:

a. In Rohr: Not apparent from case text.

b. In Coley: 4 previous times. (Record at 223).

3. Conditions on Restoration of Visitation. At the time the issue of suspending visitation came before the

district court, the district court conditioned restoration of visitation upon:

- a. In Rohr: Payment of all arrearages of alimony, child support, attorney's fees and costs, at which time the court would determine what visitation would be appropriate. Id. at 383.
- b. In Coley: Payment of \$450 per month for 4 consecutive months (i.e. ongoing support of \$250 per month and payment of \$200 per month toward the arrearage judgment of \$27,305.00 which was accruing interest of \$273.05 per month at the rate of 12% per annum post-judgment interest.)

The Utah Supreme Court then held that the following principles of law applied to the Rohr facts:

1. "A court may not deny the noncustodial parent visitation rights for the mere failure to pay child support, where the failure to pay is due to an inability to pay." In the present case, Judge Sawaya found that Plaintiff had the ability to earn income (Findings of

Fact and Conclusions of Law Re: Amended Order on Order to Show Cause) and that Plaintiff's failure to pay was willful and contumacious (Findings of Fact and Conclusions of Law Re: Amended Order on Order to Show Cause).

2. "[W]here the noncustodial parent's refusal to pay child support is willful and intentional, and not due to inability to pay, visitation rights may be reduced or denied, if the welfare of the child so requires" and "the conduct of the father [sic] as it affects the child's welfare is a proper consideration of the trial court." In the present case, Judge Sawaya made the following findings with respect to the requirement "if the welfare of the child so requires" and as to "the conduct of the father as it affects the child's welfare":

- a. Plaintiff does not respect the legal system. (Findings of Fact #12).
- b. Plaintiff's attitudes and behaviors are anti-social and constitute a substantial deviation from the moral norms of society. (Findings of Fact #12).

- c. Plaintiff's behaviors and attitudes are not a proper example for his child. (Findings of Fact #12).
- d. Plaintiff lacks concern for the child's financial welfare. (Conclusions of Law).

Plaintiff's visitation was suspended to impress upon Plaintiff a sense of responsibility for the welfare of his child, and the district court found that until Plaintiff felt such a responsibility it was not in the daughter's best interest to have visitation with Plaintiff.

**3. THE DISTRICT COURT DID NOT ERR IN CONDITIONING THE RESTORATION OF VISITATION RIGHTS UPON COMPLIANCE WITH SUPPORT ORDERS.**

The Plaintiff seems to argue that Rohr prohibited Judge Sawaya from conditioning the restoration of visitation rights upon payment of child support. (Brief of Appellant, p. 21-22).

The quotation that Plaintiff inserts from Rohr does not support his contention. The language Plaintiff quotes referred to the Rohr trial court requiring payment of all back alimony, child support, attorney's fees and costs before the trial court would consider a modification of the divorce decree.

In the present case, the Amended Order does not in any way restrict Plaintiff from petitioning the trial court for a modification of the divorce decree and it does not require payment of all back child support, interest and attorney fees prior to restoration of visitation. The Amended Order provides Plaintiff with a means of restoring his visitation. Rohr did not prohibit Judge Sawaya from requiring Plaintiff to pay his ongoing child support of \$250 per month and \$200 per month toward the judgment of \$27,305.00.<sup>11</sup> The purpose of Judge Sawaya's ruling was to convert Plaintiff from a willful non-payer of support to a willful payer of support. The Judge's experience with Plaintiff -- which is clear from the record -- was that Plaintiff did not pay child support and his failure to pay was willful. When found in contempt of court in 1989 for not paying child support, Plaintiff still did not pay. The first time he paid support, following the 1989 hearings, was on the eve of going to jail, and then he did not pay the amount required to not go to jail. After serving the jail sentence, Plaintiff still did not pay until he was again brought before Judge Sawaya in 1990 and faced with the prospect of going to jail and losing his visitation. At that time, Plaintiff was again found in contempt of court and sentenced to jail, but Judge

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<sup>11</sup> Post-judgment interest at 12% per annum was accruing on that judgment in the amount of approximately \$273.05 per month.

Sawaya gave Plaintiff two payment options: \$50 a week to stay out of jail or \$450 a month for four consecutive months to stay out of jail and to have his visitation restored. Plaintiff has elected the first option and has ignored the second option. With respect to the first option, Plaintiff has seldom paid on a weekly basis. Judge Sawaya's obvious intent was to help Plaintiff get used to paying a small amount of \$50 per week on a regular basis. Rather than paying weekly, however, Plaintiff has paid a day or two in advance of regularly-scheduled contempt-review hearings. A day or two before each such hearing, Plaintiff will pay most of what was owed since the previous such hearing, but when he does so he is usually about \$100 short of what should have been paid (assuming he had paid \$50 per week).<sup>12</sup> Nevertheless, the partial payment usually satisfies Judge Sawaya enough so that he continues to stay imposition of the contempt jail sentence.

Review of the record will reveal that Judge Sawaya was basically faced with this dilemma:

Defendant has brought her ex-husband to court a number of times and obtained judgments;

Plaintiff is well-educated, lives reasonably well, has income, and eats well and his failure to pay child support is willful;

The Defendants' judgments against Plaintiff have run up to \$27,305.00;

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<sup>12</sup> See "Schedule of Payments" attached hereto.

Accrual of interest on the judgments doesn't prompt payments by Plaintiff;

Assessment of attorney fees against Plaintiff doesn't prompt payments;

Imposition of a jail sentence prompted a few hundred dollars in payments but as soon as Plaintiff was out of jail he didn't make any more payments until faced with the prospect of a second jail sentence;

If Plaintiff would work as hard at gainful employment as he works in trying to avoid judgments and contempt orders, he'd probably be able to support his daughter quite well;

Plaintiff works awfully hard at trying to avoid paying support, and I don't think that type of behavior and attitude is a socially-responsible or healthy attitude for his daughter to be subjected to directly or indirectly;

So what do I do to turn Plaintiff into a child-support paying parent?

Given the foregoing, Judge Sawaya exercised proper judicial discretion in fashioning a contempt order designed to impress upon Plaintiff his responsibility to financially support his daughter, and an order that would allow him to get on with his visitation schedule in a matter of four short months.

Finally, this appellate court stated in its October 10, 1990 decision, that there needed to be some type of program by which Plaintiff's visitation rights could be restored unto him.

4. U.C.A §78-32-10 DOES NOT PREVENT THE DISTRICT COURT FROM RESTRICTING A PARENT'S VISITATION PRIVILEGES IF THE COURT FINDS THAT THE RESTRICTION IS IN THE BEST INTERESTS OF THE CHILD.

Plaintiff argues that the district court erred in using its contempt power to suspend Plaintiff's visitation rights.

Judge Sawaya found Plaintiff in contempt for failing to pay the court ordered child support and sentenced Plaintiff to thirty (30) days in the Salt Lake County Jail. That sentence was suspended with the condition that Plaintiff make \$50.00 per week installment payments.

Plaintiff's visitation rights were also suspended because the trial court found it was not in the best interest of the child to have visitation with her father at this time. Plaintiff's visitation was also suspended based on the trial court believing, based on the history of the case, that it would take more than a jail sentence to bring home to Plaintiff a sense of responsibility for the welfare of his child.

The Arizona Court of Appeals in Reardon at 574 stated:

Support payments, however, are provided for the benefit of the minor children and when considering the history of the matter, the age of the children, the past conduct of the non-custodial parent in exercising rights of visitation, and the possible ineffectiveness of the court contempt power, the trial court could properly find that the children will benefit by conditioning visitation privileges upon payment of support (emphasis added).

In the case at hand, Plaintiff was sentenced to thirty (30) days in the Salt Lake County Jail in early 1989 and served that sentence in approximately November of 1989. Between that time (November, 1989) and the filing of Defendant's Order to Show Cause in April 1990, Plaintiff made no efforts to pay ongoing child support nor did he make any attempt to reduce the arrearages. Judge Sawaya knowing this, not only found Plaintiff in contempt again but, based on the history of the case and the nominal effect the last jail term had on Plaintiff, also decided that further measures were needed to bring home to Plaintiff a sense of responsibility for his daughter's welfare.

The Arizona Court in Reardon further stated:

Nothing we say herein should be construed by parties litigant that they may assume the burden upon themselves of denying rights of visitation conditioned on payment of support monies without a court order. This is a power that the court only may have and it is basic that the parties themselves do not have the authority to so modify the orders of the court. (Id at 574).

Trial courts have the authority to suspend visitation. In the case at hand, Judge Sawaya did not abuse any of the powers which have been vested in him by the State of Utah. Judge Sawaya was simply fashioning an order to try and bring home to Plaintiff a sense of responsibility for the welfare of his daughter -- knowing that if he can convince Plaintiff that Plaintiff has that responsibility,

and that if Plaintiff will perform that responsibility, the overall long-term relationship between that father and child will be enhanced and strengthened.

**5. AN ORDER TO SHOW CAUSE PROCEEDING IS PROPER FOR THE PURPOSE OF SUSPENDING AND/OR TERMINATING PLAINTIFF'S VISITATION.**

Plaintiff argues that the district court erred in "denying visitation" in the absence of a petition for modification. The trial court's power includes the power to suspend and/or terminate Plaintiff's visitation rights without modifying the divorce decree. The trial court can impose restrictions upon existing rights if the trial court determines that such is necessary to compel a party's performance of an obligation. Plaintiff's reliance on Rohr is misplaced because, in that case, the wife petitioned to modify the decree permanently. In the present case, Defendant's Order to Show Cause was not intended to permanently deprive Plaintiff of visitation. The intention of the Order to Show Cause, and the resulting Amended Order, was to temporarily suspend Plaintiff's visitation in order to impress upon him his responsibility for his daughter's care, support and welfare, and the resulting Amended Order gave Plaintiff an avenue whereby he could quickly re-instate his decree-awarded visitation rights.

**6. THE DISTRICT COURT CAN SIGN AN ORDER EVEN  
THOUGH OBJECTIONS HAVE BEEN FILED IF THE  
DISTRICT COURT FINDS THE OBJECTIONS HAVE NO  
MERIT.**

Nothing in Rule 4-504(2) of the Utah Code of Judicial Administration, which is cited in Plaintiff's Brief, indicates that even though objections to an order have been filed that the judge cannot go ahead and sign the order over the objections. The Rule only states that a party must file their objections within five (5) days after receiving the proposed order. Further, Plaintiff cites no evidence that Judge Sawaya failed to review Plaintiff's objections before signing the July 13, 1990 Order. Assuming that Plaintiff's objections were received by Judge Sawaya on July 11, 1990, as Plaintiff says, Judge Sawaya had three days, before he signed the July 13, 1990 Order, to review Plaintiff's objections.

Furthermore, the July 13, 1990 Order was vacated and remanded. At the November 26, 1990 hearing (regarding several motions filed by Plaintiff), Judge Sawaya again took into consideration Plaintiff's objections to the proposed Amended Order before the Judge decided to write his own Findings of Fact. (November 26, 1990 Hearing Transcript pg. 14).

Plaintiff has failed to support his position that the trial court erred by signing the Order over his objections.

**7. PLAINTIFF FAILS TO SUPPORT HIS CONTENTION THAT  
JUDGE SAWAYA IS BIASED.**

This section is in response to Plaintiff's Supplemental Brief which is an appeal of the Order of Judge Michael R. Murphy, August 7, 1990, in which Judge Murphy found no legal sufficiency to remove Judge Sawaya from this case.

Plaintiff states that Judge Sawaya is biased against him because the Judge overruled his objections, denied his order to show cause, etc.. Those types of actions by a judge do not establish a condition of bias. The judge's function is to take evidence, weigh evidence, assess credibility, make findings of fact and apply existing law to the facts of the case. Someone will win and someone will lose, however that does not mean that the judge was biased against the loser.

There is nothing in the record to support the Plaintiff's allegations of bias.

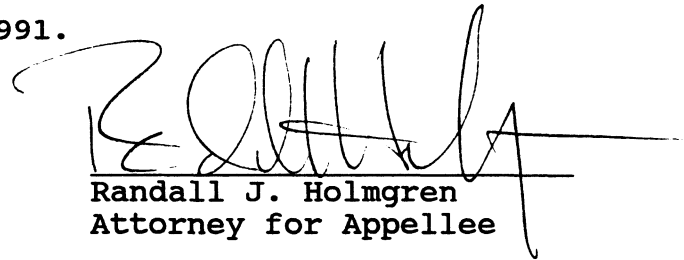
**8. DEFENDANT IS ENTITLED TO AN AWARD OF ATTORNEY  
FEES ON APPEAL.**

Defendant does not believe that this appeal has been initiated in good faith for the reason that Plaintiff has not presented a plausible position. Defendant can only conclude that Plaintiff's motive has been to "wear down" Defendant's resolve and continue to avoid having to pay child support. If Plaintiff truly wanted to

continue his relationship with his daughter, he would use the time and energy involved in this appeal and put it towards making an effort to support his child and help provide for her.

Based upon Utah Code Ann. §78-27-56 (1988), Plaintiff should be required to pay the attorney's fees and costs incurred by Defendant in this appeal. (See Burt vs. Burt, 145 Utah Adv. Rep. 29, 30 (Utah App. 1990); Hurt vs. Hurt, 793 P.2d 948, 951 (Utah App. 1990)).

DATED this 20 day of May, 1991.



Randall J. Holmgren  
Attorney for Appellee

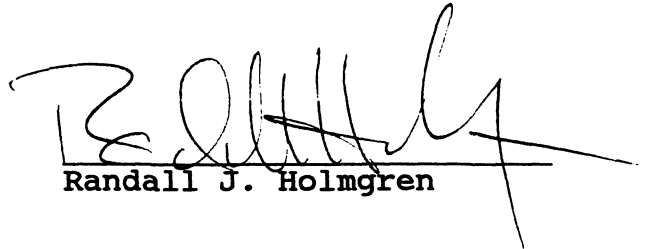
**CERTIFICATE OF MAILING**

I hereby certify that I personally caused to be mailed four (4) true and correct copies of the foregoing BRIEF OF APPELLEE to the following, postage prepaid.

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

Appellant

Date: May 20, 1991.

  
Randall J. Holmgren

## **ADDENDUM**

Section	
78-3a-52.	Violation of order of court — Contempt — Penalty.
78-3a-52.5.	Minor held in detention — Credit for good behavior.
78-3a-53.	Courtrooms, office space and equipment — Maintenance costs of juvenile court.
78-3a-54.	Fines — Paid to state treasurer and rehabilitative employment program — Witness costs and certification — Court costs — Juvenile court fees.
78-3a-55.	Court records — Inspection — When fingerprints or photographs may be taken — Expungement.
78-3a-56.	Expungement of juvenile court record — Petition — Procedure.
78-3a-57.	Repealed.
78-3a-58.	Cooperation of political subdivisions and public or private agencies and organizations.
78-3a-59.	Plan for obtaining health, mental health and related services for juveniles — Duty of administrator.
78-3a-60, 78-3a-61.	Repealed.
78-3a-62.	Short title.
78-3a-63.	Abused or neglected child — Guardian ad litem — Costs.
78-3a-64.	Abuse, neglect, or dependency of child — Coordination of proceedings.
78-3a-65.	Treatment for offender and victim — Costs.

#### 78-3a-1. Juvenile court — Purposes — Jurisdiction.

The juvenile court is established as a forum for the resolution of all matters properly brought before it, consistent with applicable constitutional and statutory requirements of due process. The court has the jurisdiction, powers, and duties under this chapter to:

- (1) promote public safety and individual accountability by the imposition of appropriate sanctions on persons who have committed acts in violation of law;
- (2) where appropriate, order rehabilitation, reeducation, and treatment for persons who have committed acts bringing them within the court's jurisdiction;
- (3) adjudicate matters that relate to abused, neglected, and dependent children and to provide care and protection for these children by placement, protection, and custody orders;
- (4) adjudicate matters that relate to children who are beyond parental or adult control and to establish appropriate authority over these children by means of placement and control orders;
- (5) order appropriate measures to promote guidance and control, preferably in the child's own home, as an aid in the prevention of future unlawful conduct and the development of responsible citizenship;
- (6) remove a child from parental custody only where the minor's safety or welfare, or the public safety, may not otherwise be adequately safeguarded; and
- (7) consistent with the ends of justice, strive to act in the best interests of the children in all cases and attempt to preserve and strengthen family ties where possible.

1988

#### 78-3a-2. Definitions.

As used in this chapter:

(1) "Abused child" includes a child less than 18 years of age who has suffered or been threatened with nonaccidental physical or mental harm, negligent treatment, sexual exploitation, or been the victim of a sexual offense as defined in the Utah Criminal Code.

(2) "Adjudication" means a finding by the court, incorporated in a decree, that the facts alleged in the petition have been proved.

(3) "Adult" means a person 18 years of age or over, except that persons 18 years or over under the continuing jurisdiction of the juvenile court pursuant to Section 78-3a-40 shall be referred to as children.

(4) "Board" means the Board of Juvenile Court Judges.

(5) "Child" means a person less than 18 years of age.

(6) "Child placement agency" means:

(a) a private agency licensed to receive children for placement or adoption under this code; or

(b) a private agency receiving children for placement or adoption in another state, which agency is licensed or approved where such license or approval is required by law.

(7) "Commit" means to transfer legal custody.

(8) "Court" means the juvenile court or the district juvenile court, as the case may be.

(9) "Dependent child" includes a child who is homeless or without proper care through no fault of his parent, guardian, or custodian.

(10) "Deprivation of custody" means transfer of legal custody by the court from a parent or the parents or a previous legal custodian to another person, agency, or institution.

(11) "Detention" means the temporary care of children who require secure custody in physically restricting facilities:

(a) pending court disposition or transfer to another jurisdiction; or

(b) while under the continuing jurisdiction of the court.

(12) "Group rehabilitation therapy" means psychological and social counseling of one or more persons in the group, depending upon the recommendation of the therapist.

(13) "Guardianship of the person" includes, among other things, the authority to consent to marriage, to enlistment in the armed forces, and to consent to major medical, surgical, or psychiatric treatment. "Guardianship of the person" includes legal custody, if legal custody is not vested in another person, agency, or institution.

(14) "Legal custody" means a relationship embodying the following rights and duties:

(a) the right to physical custody of a child;

(b) the right and duty to protect, train, and discipline him;

(c) the duty to provide him with food, clothing, shelter, education, and ordinary medical care;

(d) the right to determine where and with whom he shall live; and

(e) the right, in an emergency, to authorize surgery or other extraordinary care.

(15) "Neglected child" includes a child:

(a) whose parent, guardian, or custodian has abandoned him or has subjected him to mistreatment or abuse;

(2) "Injury" means any personal injury or property damage or loss.

(3) "Skier" means any person present in a ski area for the purpose of engaging in the sport of skiing.

(4) "Ski area" means any area designated by a ski area operator to be used for skiing.

(5) "Ski area operator" means those persons, and their agents, officers, employees or representatives, who operate a ski area. 1979

**78-27-53. Inherent risks of skiing — Bar against claim or recovery from operator for injury from risks inherent in sport.**

Notwithstanding anything in Sections 78-27-37 through 78-27-43 to the contrary, no skier may make any claim against, or recover from, any ski area operator for injury resulting from any of the inherent risks of skiing. 1986

**78-27-54. Inherent risks of skiing — Trail boards listing inherent risks and limitations on liability.**

Ski area operators shall post trail boards at one or more prominent locations within each ski area which shall include a list of the inherent risks of skiing, and the limitations on liability of ski area operators, as defined in this act. 1979

**78-27-55. Repealed.** 1980

**78-27-56. Attorney's fees — Award where action or defense in bad faith — Exceptions.**

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1). 1988

**78-27-56.5. Attorney's fees — Reciprocal rights to recover attorney's fees.**

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees. 1986

**78-27-57. Attorney's fees awarded to state funded agency in action against state or subdivision — Forfeit of appropriated monies.**

Any agency or organization receiving state funds which, as a result of its suing the state, or political subdivision thereof, receives attorney's fees and costs as all or part of a settlement or award, shall forfeit to the General Fund, from its appropriated monies, an amount equal to the attorney's fees received. 1981

**78-27-58. Service of judicial process by persons other than law enforcement officers.**

Persons who are not peace officers, constables, sheriffs, or lawfully appointed deputies of such officers or authorized state investigators in counties of 400,000 persons or more are not entitled to serve any

forms of civil or criminal process other than complaints, summonses, and subpoenas. 1983

**78-27-59. Immunity for transient shelters.**

(1) As used in this section, "transient shelter" means any person which provides shelter, food, clothing, or other products or services without consideration to indigent persons.

(2) Except as provided in Subsection (3), all transient shelters, owners, operators, and employees of transient shelters, and persons who contribute products or services to transient shelters, are immune from suit for damages or injuries arising out of or related to the damaged or injured person's use of the products or services provided by the transient shelter.

(3) This section does not prohibit an action against a person for damages or injury intentionally caused by that person or resulting from his gross negligence. 1986

**CHAPTER 27a**

**SMALL BUSINESS EQUAL ACCESS TO JUSTICE ACT**

Section	
78-27a-1.	Short title.
78-27a-2.	Legislative findings — Purpose.
78-27a-3.	Definitions.
78-27a-4.	Litigation expense award authorized in actions by state.
78-27a-5.	Litigation expense award authorized in appeals from administrative decisions.
78-27a-6.	Payment of expenses awarded — Statement required in agency's budget.

**78-27a-1. Short title.**

This act shall be known and may be cited as the "Small Business Equal Access to Justice Act." 1983

**78-27a-2. Legislative findings — Purpose.**

The Legislature finds that small businesses may be deterred from seeking review of or defending against substantially unjustified governmental action because of the expense involved in securing the vindication of their rights. The purpose of this act is to entitle small businesses, under conditions set forth in this act, to recover reasonable litigation expenses. 1983

**78-27a-3. Definitions.**

As used in this act:

(1) "Prevail" means to obtain favorable final judgment, the right to all appeals having been exhausted, on the merits, on substantially all counts or charges in the action and with respect to the most significant issue or set of issues presented, but does not include the settlement of any action, either by stipulation, consent decree or otherwise, whether or not settlement occurs before or after any hearing or trial.

(2) "Reasonable litigation expenses" means court costs, administrative hearing costs, attorney's fees, and witness fees of all necessary witnesses, not in excess of \$10,000, which a court finds were reasonably incurred in opposing action covered under this act.

(3) "Small business" means a commercial or business entity, including a sole proprietorship, which does not have more than 250 employees, but does not include an entity which is a subsidiary or affiliate of another entity which is not a small business.

elected to perform a judicial or ministerial service.

(4) Deceit, or abuse of the process or proceedings of the court, by a party to an action or special proceeding.

(5) Disobedience of any lawful judgment, order or process of the court.

(6) Assuming to be an officer, attorney or counselor of a court, and acting as such without authority.

(7) Rescuing any person or property in the custody of an officer by virtue of an order or process of such court.

(8) Unlawfully detaining a witness or party to an action while going to, remaining at, or returning from, the court where the action is on the calendar for trial.

(9) Any other unlawful interference with the process or proceedings of a court.

(10) Disobedience of a subpoena duly served, or refusing to be sworn or to answer as a witness.

(11) When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action to be tried at such court, or with any other person, concerning the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court.

(12) Disobedience by an inferior tribunal, magistrate or officer of the lawful judgment, order or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate or officer. Disobedience of the lawful orders or process of a judicial officer is also a contempt of the authority of such officer. 1953

#### **78-32-2. Re-entry after eviction from real property.**

Every person dispossessed of, or ejected from or out of, any real property by the judgment or process of any court of competent jurisdiction, who, not having a right so to do, re-enters into or upon, or takes possession of, any such real property, or induces or procures any person, not having the right so to do, or aids or abets him therein, is guilty of a contempt of the court by which such judgment was rendered, or from which such process issued. Upon a conviction for such contempt the court must immediately issue an alias process, directed to the proper officer, requiring him to restore such possession to the party entitled thereto under the original judgment or process. 1953

#### **78-32-3. In immediate presence of court; summary action — Without immediate presence; procedure.**

When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily, for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as prescribed in Section 78-32-10 hereof. When the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators or other judicial officers. 1953

#### **78-32-4. Warrant of attachment or commitment order to show cause.**

When the contempt is not committed in the immediate view and presence of the court or judge a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause. 1953

#### **78-32-5. Bail.**

Whenever a warrant of attachment is issued pursuant to this chapter, the court or judge must direct, by an endorsement on such warrant, that the person charged may be [let] to bail for his appearance, in an amount prescribed in such endorsement. 1953

#### **78-32-6. Duty of sheriff.**

Upon executing the warrant of attachment the sheriff must keep the person in custody, bring him before the court or judge and detain him until an order is made in the premises, unless the person arrested entitles himself to be discharged as provided in the next section [Section 78-32-7]. 1953

#### **78-32-7. Bail bond — Form.**

When a direction to let the person arrested to bail is contained in the warrant of attachment or endorsed thereon, he must be discharged from the arrest upon executing and delivering to the officer, at any time before the return day of the warrant, a written undertaking, with two sufficient sureties, to the effect that the person arrested will appear on the return of the warrant, and abide the order of the court or judge thereon, or that the sureties will pay as may be directed the sum specified in the warrant. 1953

#### **78-32-8. Officer's return.**

The officer must return the warrant of arrest, and the undertaking, if any, received from the person arrested, by the return day specified therein. 1953

#### **78-32-9. Hearing.**

When the person arrested has been brought up or has appeared the court or judge must proceed to investigate the charge, and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him; for which an adjournment may be had from time to time, if necessary. 1953

#### **78-32-10. Contempt — Action by court.**

Upon the answer and evidence taken, the court shall determine whether the person proceeded against is guilty of the contempt charged. If the court finds the person is guilty of the contempt, the court may impose a fine not exceeding \$200, order the person imprisoned in the county jail not exceeding 30 days, or order both fine and imprisonment. However, a justice court judge or court commissioner may punish for contempt by a fine not to exceed \$100 or by imprisonment for one day, or by both the fine and imprisonment. 1990

#### **78-32-11. Damages to party aggrieved.**

If an actual loss or injury to a party in an action or special proceeding, prejudicial to his rights therein, is caused by the contempt, the court, in addition to the fine or imprisonment imposed for the contempt or in place thereof, may order the person proceeded against to pay the party aggrieved a sum of money sufficient to indemnify him and to satisfy his costs and ex-

**Rule 4-503. Requests for jury instructions.****Intent:**

To establish a uniform procedure for submitting and requesting jury instructions.

**Applicability:**

This rule shall apply to the District, Circuit and Justice Courts.

**Statement of the Rule:**

(1) All jury instruction requests shall be presented to the court five days prior to the scheduled trial date unless otherwise ordered by the court. The court, in its discretion, may allow the presentation of jury instructions at any time prior to the submission of the case to the jury. At the time of presentation to the court, a copy of the requested instructions shall be furnished to opposing counsel.

(2) Jury instruction requests must be in writing and state in full the instruction requested. Each request shall be upon a separate sheet of paper, the original and copies of which shall be free from red lines and firm names and shall be entitled:

"Instruction No. \_\_\_\_"

The number of the request shall be written in lead pencil.

(3) If case citations are used in support of a requested instruction, at least one copy of the requested instruction furnished to the court shall be submitted without the citations. Citations may be provided upon separate sheets attached to the particular instruction to which the citation applies.

(Amended effective January 15, 1990.)

**Amendment Notes.** — The 1989 amendment added Justice Courts to the scope of applicability of this rule and substituted "five" for "10" in the first sentence and added the second sentence in Subdivision (1).

**Rule 4-504. Written orders, judgments and decrees.****Intent:**

To establish a uniform procedure for submitting written orders, judgments, and decrees to the court. This rule is not intended to change existing law with respect to the enforceability of unwritten agreements.

**Applicability:**

This rule shall apply to all civil proceedings in courts of record except small claims.

**Statement of the Rule:**

(1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

(2) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless

the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

(3) Stipulated settlements and dismissals shall also be reduced to writing and presented to the court for signature within fifteen days of the settlement and dismissal.

(4) Upon entry of judgment, notice of such judgment shall be served upon the opposing party and proof of such service shall be filed with the court. All judgments, orders, and decrees, or copies thereof, which are to be transmitted after signature by the judge, including other correspondence requiring a reply, must be accompanied by pre-addressed envelopes and pre-paid postage.

(5) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered upon the stipulation of counsel, the motion of counsel or upon the court's own initiative and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made.

(6) Except where otherwise ordered, all judgments and decrees shall contain the address or the last known address of the judgment debtor and the social security number of the judgment debtor if known.

(7) All judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court. Orders not constituting judgments or decrees may be made a part of the documents containing the stipulation or motion upon which the order is based.

(8) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

(9) In all cases where judgment is rendered upon a written obligation to pay money and a judgment has previously been rendered upon the same written obligation, the plaintiff or plaintiff's counsel shall attach to the new complaint a copy of all previous judgments based upon the same written obligation.

(10) Nothing in this rule shall be construed to limit the power of any court, upon a proper showing, to enforce a settlement agreement or any other agreement which has not been reduced to writing.

(Amended effective January 15, 1990; April 15, 1991.)

**Amendment Notes.** — The 1989 amendment inserted "civil proceedings in" and "except small claims" under "Applicability" and made minor stylistic changes in the Statement of the Rule.

The 1990 amendment added the final sentence to the Intent paragraph, deleted "and not of record" following "courts of record" in the Applicability paragraph, and added Subdivision (10).

## **Rule 4-505. Attorneys' fees affidavits.**

### **Intent:**

To establish uniform criteria and a uniform format for affidavits in support of attorneys' fees.

### **Applicability:**

This rule shall govern the award of attorneys' fees in the trial courts.

DEC 11 1990

SALT LAKE COUNTY  
By Susan Gray  
Deputy Clerk

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
	)	

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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

DEC 11 1990

SALT LAKE COUNTY  
By Susan Gray  
Deputy Clerk

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

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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

EXHIBIT \_\_\_\_\_  
Coley v. Coley

Mr. Coley's Payments (\$50/Week) Since 7/16/90 Order

<u>DUE DATE</u>	<u>AMOUNT DUE</u>	<u>AMOUNT PAID</u>	<u>DATE PAID</u>	<u>BALANCE DUE</u>
JUL 23	50.00	.00		50.00
JUL 30	50.00	-40.00	JUL 26	60.00
AUG 6	50.00	.00		110.00
AUG 13	50.00	-100.00	AUG 13	60.00
AUG 20	50.00	.00		110.00
AUG 27	50.00	.00		160.00
SEP 3	50.00	.00		210.00
SEP 10	50.00	-100.00	SEP 10	160.00
SEP 17	50.00	-50.00	SEP 17	160.00
SEP 24	50.00	.00		210.00
OCT 1	50.00	.00		260.00
OCT 8	50.00	-150.00	OCT 11	160.00
OCT 15	50.00	.00		210.00
OCT 22	50.00	.00		260.00
OCT 29	50.00	.00		310.00
NOV 5	50.00	.00		360.00
NOV 12	50.00	.00		410.00
NOV 19	50.00	.00		460.00
NOV 26	50.00	-100.00	NOV 26	410.00
DEC 3	50.00	.00		460.00
DEC 10	50.00	-460.00	DEC 10	50.00
DEC 17	50.00	.00		100.00
DEC 24	50.00	.00		150.00
DEC 31	50.00	.00		200.00
JAN 07	50.00	-150.00	JAN 03	100.00
JAN 14	50.00	.00		150.00
JAN 21	50.00	-100.00	JAN 22	100.00
JAN 28	50.00	.00		150.00
FEB 04	50.00	.00		200.00
FEB 11	50.00	-150.00		100.00
FEB 18	50.00	.00		150.00
FEB 25	50.00	.00		200.00

MAR 04	50.00	.00		250.00
MAR 11	50.00	.00		300.00
MAR 18	50.00	.00		350.00
MAR 25	50.00	.00		400.00
APR 01	50.00	.00		450.00
APR 08	50.00	-450.00	APR 12	50.00
APR 15	50.00	.00		100.00
APR 22	50.00	.00		150.00
APR 29	50.00	.00		200.00
MAY 06	50.00	.00		250.00
MAY 13	50.00	.00		300.00
MAY 20	50.00	.00		350.00
MAY 27				