

1992

Jeanette Crawford Osguthorpe v. Jerry Silver Osguthorpe : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JEANETTE CRAWFORD OSGUTHORPE,

Plaintiff-Appellee,

vs.

Case No. 920395-CA

JERRY SILVER OSGUTHORPE,

Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Homer F. Wilkinson

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OF APPEALS

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IN THE UTAH COURT OF APPEALS

JEANETTE CRAWFORD OSGUTHORPE,

Plaintiff-Appellee,

vs.

Case No. 920395-CA

JERRY SILVER OSGUTHORPE,

Defendant-Appellant.

BRIEF OF APPELLANT

JURISDICTION OF COURT

Jurisdiction of this matter is conferred by Section
78-2a-3(2)(i).

STATEMENT OF ISSUES PRESENTED

1. Were the federal and state constitutional rights of Defendant violated by finding Defendant guilty of criminal contempt without (a) providing him proper notice of the charges against him and penalties he was facing; (b) advising him as to his right of assistance of counsel and appointment if he was indigent; (c) advising him of his right to remain silent, (d) conducting an evidentiary hearing where he could confront witnesses and to offer testimony on his own behalf, and (e) giving him other rights that are inherent in all criminal proceedings? This issue presents a question of law. State v. Gonzales, 822 P.2d 1214 (Utah App. 1991). As such, no particular deference to a trial court's decision is required. Carpet Barn v. State, 786 P.2d 770 (Utah App. 1990).

2. As to civil contempt, were Appellant's federal and state constitutional rights violated in the proceeding below when the lower court failed to conduct an inquiry as to whether Appellant was indigent and if so failed to appoint counsel to represent him? This issue presents a question of law. State v. Gonzales, 822 P.2d 1214 (Utah App. 1991).

3. Since no evidentiary hearing was conducted, was there any evidence before the lower court to show beyond a reasonable doubt that the appellant had the ability to comply with the court's order and willfully failed to do so, thereby justifying criminal contempt? Was there any evidence before the lower court to show by clear and convincing evidence that the appellant had the present ability to purge himself of civil contempt and imprisonment by being able to make the required support payments? Jense v. Jense, 784 P.2d 1249 (Utah App. 1989).

4. Did the lower court enter Findings of Fact and Conclusions of Law which are legally sufficient to impose criminal and civil contempt of court? This is a question of law for the court to decide de novo. State v. Gonzales, 822 P.2d 1214 (Utah App. 1991). Carpet Barn v. State, 786 P.2d 770 (Utah App. 1990), Von Hake v. Thomas, 759 P.2d 1162 (Utah 1988).

5. Did the lower court violate Article 1, Section 16 of the Utah Constitution by imposing a jail sentence against Defendant amounting to imprisonment for debt? This is a question of law to be reviewed by the Court de novo. State v. Gonzales, 822 P.2d 1214 (Utah App. 1991). Carpet Barn v. State, 786 P.2d 770 (Utah App. 1990).

7. Did the lower court err in awarding attorneys' fee to

the plaintiff for litigation occurring before the Utah Supreme Court and United States Federal District Court when neither court specifically awarded such fees? §30-3-3, U.C.A.; Riche v. Riche, 784 P.2d 465 (Utah App. 1989); State v. Gonzales, 822 P.2d 1214 (Utah App. 1991). Carpet Barn v. State, 786 P.2d 770 (Utah App. 1990).

CONSTITUTIONAL PROVISIONS AND STATUTES

Pertinent constitutional and statutory provisions are contained in the Addendum to this Brief.

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from the order of the Honorable Judge Homer F. Wilkinson finding Defendant in contempt of court thereby causing Defendant's incarceration for thirty days in the Salt Lake County jail. It is also an appeal from the order of Judge Wilkinson upon remand awarding attorneys' fees to the plaintiff as to litigation in the Utah Supreme Court and the Federal District Court of Utah.

Course of Proceedings and Statement of Facts

Because this appeal centers around the court proceedings below, the underlying facts of this divorce action serve only as background to this appeal. References will be made to the record number of both pleadings and transcripts. For those instances where no record number is available, the date of transcript and page number will be utilized or a description of the document's location will be given. Relevant documents which are not contained in the District Court file but which are contained in the file of the Utah Supreme Court, or the United States Federal

District Court will be contained in the Addendum. Finally, all matters dealing with contempt will be underlined.

The plaintiff and defendant were married on August 26, 1974 and separated on December 26, 1987. The parties had four children during their marriage. On December 30, 1987 Jeannette Osguthorpe filed a Verified Complaint for Divorce before the Honorable Homer F. Wilkinson. (R. 2). During the preliminary proceedings the 1986 joint federal and state income tax forms were entered into the record. (R. 36-48). These documents showed that the adjusted gross income including wages, interest and rental income from both parties totalled \$17,371.00. (R. 34). Prior to trial the defendant filed a financial declaration under oath stating that his total monthly income as of 1988 was \$2,350.00. (R. 80-88).

During the lower court proceedings of divorce, Defendant was represented by attorney David Dolowitz. (R. 63-68). On August 16, 1988 a trial was held before the Honorable Homer Wilkinson. During the trial the 1982 through 1987 joint income tax returns of the parties were received into evidence. (R. 157). At the conclusion of the trial the court awarded custody of the children to the plaintiff subject to reasonable visitation by the defendant. The court ordered Defendant to pay \$150.00 support per month per child and \$150.00 alimony per month for a period of five years, then \$1.00 per year for the next five years. The court also made various orders concerning health insurance and personal property. (R. 159).

Fewer than four months after the divorce trial, Plaintiff filed a Verified Motion for Order to Show Cause and sought an

order of the court finding Defendant in contempt. (R. 176-180). Shortly thereafter, the attorney for defendant's attorney filed a motion for contempt against Plaintiff's attorney on the basis that he had willfully failed to prepare written Findings of Fact, Conclusions of Law and a Divorce Decree in accordance with the bench ruling of the lower court. (R. 215-17). In addition, Defendant requested that Plaintiff be held in contempt for failure to abide by the previous bench order of the court. (R. 218-223).

Plaintiff's counsel subsequently prepared the required documents. On February 28, 1989 a hearing was held as to the objections lodged by defense counsel concerning these documents. (R. 250). The court essentially approved the Findings as written and executed them on February 28, 1989. (R. 251-67). Likewise, the Decree of Divorce was also executed. (R. 269-77). These Findings and Decree form the basis for subsequent actions of contempt which are the issue in this appeal.

On March 1, 1989 the Domestic Commissioner executed an order ruling upon the separate motions for contempt filed by both parties. (R. 279-283). Neither party was found in contempt by the commissioner. On March 29, 1989 Defendant appealed to this Court various provisions of the divorce decree. (R. 286-87). On March 19, 1990 this Court affirmed all provisions of the divorce decree on the basis that the lower court had not abused its discretion. (R. 300-03; 131 Utah Adv. Rpt. 21; 791 P.2d 895.) This Court affirmed the lower court's decision of alimony that the defendant had the ability to earn more than his present income and had chosen to be employed by his father at a lower

salary. This Court also affirmed the lower court's finding that the federal and state tax returns appeared to understate the parties' income during the marriage. This Court stated:

"The trial court found that defendant was not being candid as to his actual current income or was purposefully under-employed. We defer to the trial court's assessment of the credibility of the witnesses....Given the evidence in the record, it was well within the court's discretion to determine that Defendant was either earning more than the evidence indicated or had the ability to earn more money. 131 Utah Adv. Rpt. at 23.

Subsequently, on a petition for rehearing this Court awarded attorneys' fees and costs on appeal. This Court found, "Because those findings [of the lower court in the divorce action] are supported by the evidence we award Plaintiff her costs and reasonable attorneys' fees incurred on appeal and remand to the trial court for a determination of reasonable attorneys' fees Plaintiff has incurred on appeal." (134 Utah Adv. Rpt. at 23; R. 299).

On October 17, 1990 Plaintiff filed a "Verified Motion for Judgment, Enforcement of Decree of Divorce, Determination of Attorneys' Fee on Appeal, Contempt Order and Sanctions and Other Relief." (R. 305-12).

During all of these preceding events Defendant was still being represented by attorney David S. Dolowitz. On October 17, 1990 Mr. Dolowitz filed a Withdrawal of Counsel. (R. 377). Concurrently, he also filed a Notice of Attorneys' Lien. (R. 375-76). On November 1, 1990 Plaintiff's attorney sent to Defendant a "Notice to Appoint Successor Counsel." (R. 381).

On November 20, 1990 a hearing was held before the Honorable Sandra Peuler, Domestic Relations Commissioner. Plaintiff was

represented by attorney Kent Kasting and Defendant appeared pro se. (R. 402). At that time Plaintiff was awarded a judgment of \$22,538.00 consisting of delinquent child support, alimony, attorneys' fees, and costs of appeal. The commissioner certified to the judge the issue of Defendant's contempt and ordered an evidentiary hearing be set unless Defendant brought himself current through November prior to the evidentiary hearing. (R. 402).

Defendant filed a pro se objection to the commissioner's recommendation claiming that he had insufficient income to pay the continuing obligation ordered by the court and had no assets available to pay the \$22,000 amount required for the purging of contempt. (R. 404-08). He attached copies of his 1988 federal income tax return to his objection. (R. 410-26). This document, the federal tax return, showed an adjusted gross income of \$11,933.00.

On January 3, 1991 Commissioner Peuler affirmed her previous decision and executed an order to that effect. (R. 436-441). On January 25, 1991 the Court considered the objection to the Domestic Commissioner's recommendation. The Court made various orders regarding visitation, support, and personal property and in addition "reserved for an evidentiary hearing plaintiff's request for a finding of contempt, imposition of fine, sanctions, and jail sentence with plaintiff being allowed to schedule such a hearing in the future if she so desires." (R. 442; 449-55). (Emphasis added).

On September 26, 1991 a new "Verified Motion for Judgment, Contempt Order and Sanctions and Other Relief" was filed by

Plaintiff's attorney. (R. 466-71). In part, Plaintiff's pleading stated:

Defendant's attitude of contempt for the orders of this Court throughout the history of this case, and since the November 1990 hearing, is blatant and shameless. Plaintiff requests the Court impose appropriate sanctions against Defendant, including but not limited to sentencing him to an appropriate term in the county jail for his contemptuous behavior. (R. 470-71). (Emphasis added).

On October 8, 1991 the motion of Plaintiff was heard. Again, plaintiff was represented by her attorney Kent Kasting and the defendant appeared pro se. The Commissioner recommended an award of an additional \$6,750 for a period of December 1990 through September 1991 of unpaid child support and alimony as well as recommending an evidentiary hearing as to the issue of contempt. (R. 484; 485-87).

On October 18, 1991 Defendant filed objections to the domestic commissioner's recommendations. (R. 492-538). Included in the exhibits attached by Defendant was his 1990 federal and state income tax returns. (R. 526-35). The 1990 federal return showed an adjusted gross income of \$11,167.00.

On January 7, 1992 a hearing was held before the Honorable Homer Wilkinson concerning the matters previously raised by Plaintiff. Because this hearing and its subsequent orders are relevant to this appeal the hearing and orders will be discussed in some detail.

On January 7, 1992 Plaintiff appeared in person and with her attorney, Kent Kasting. Defendant appeared in person pro se. Prior to any evidence being taken a discussion occurred between the court, Defendant, and Plaintiff's counsel. (R. 647-58). At no time during this preliminary procedure was Defendant advised

of any criminal rights he may have or as to his right to have an attorney appointed if he could not afford one.

During the hearing Plaintiff, Defendant, Plaintiff's attorney, Defendant's present wife, and Plaintiff's brother all testified. (R. 698-828). Defendant testified that he had insufficient financial income to keep current on his support and alimony obligation. (R. 757, 762-63, 778). Defendant's 1989 and 1990 income tax returns were offered and received into evidence. (R. 785, Exs. 15 and 16). Defendant's new wife, Gwenda, also testified that her husband did not have sufficient income to meet the current support obligation. (R. 793). She stated, in addition, that the defendant was representing himself because they were unable to afford the services of an attorney. (R. 795). Defendant testified that he had insufficient income to pay for the past services of his own attorney Mr. Dolowitz and that a lien had been filed against him. In addition, he had insufficient income to pay the attorneys' fees for plaintiff. (R. 765-66).

At the conclusion of the hearing the lower court made the following statement in rendering its opinion. This statement is quoted in its entirety because of its relevance to this appeal.

The Court would also find that the defendant is in contempt of this court pursuant to Section 78-32-1(5), "disobedience of any lawful judgment, order or process of the court." The Court would further find that the defendant has had an opportunity to have a hearing here in the courtroom, that evidence has been taken regarding the contempt, that his credibility is in question, he has not answered the questions put to him truthfully, that the only evidence the court has to go on is that no child support has been paid since February of 1991 and that time only

Well, you take the \$375 that was paid, and of course none was paid in January, and going back to where he hadn't paid full child support back I guess to almost the time of the divorce, it looks like back in March of 1989, that there is an amount of child support--and this would have to be determined accurately--but its up in the amount of \$16,000.

Now I'm not talking about alimony or attorneys' fees, I'm looking only at child support, and that he's had the means to pay this child support and that he's had a good education, he has the ability to, if he does not have the income--and the Court even questions that--that he is paying for rent in an excessive amount instead of paying his child support.

The Court finds that this is one of the most flagrant violations of the law as far as support of children that has come before this Court, and as I say, I cannot even comprehend how a father can allow himself to do such a thing and still claim he loves his children and wants to visit the children.

The Court would order, pursuant to Section 78-32-10--and of course I've indicated he has been found in contempt--that he be fined \$200 and that he be ordered to spend 30 days in the Salt Lake County jail.

The Court would further order, pursuant to Section 78-32-12 that the imprisonment is for his omission to perform an act enjoined by law, which he is yet in the power to pay, and that after serving the 30 days, he is to continue to serve the time in jail until he pays the child support as ordered by the court.

* * *

The Court would further order that the prison--or, the jail sentence be stayed for a period of six days or until the 13th day of January, 1992, that if the defendant, by that time, has paid the sum of \$5,000 to the plaintiff for child support, then the sentence will be stayed and each month thereafter that he pays child support as ordered by the court, plus the sum of \$300 towards the arrearage--or for an amount of \$900--then the jail term will be stayed.

If he fails to pay the \$5,000 by the 13th day of January, 1992 then he is to report to the Salt Lake County jail at 12:00 noon. If he does not report, a bench warrant will be issued for his arrest.

* * *

The alimony would have to be paid, too; I'm just not ordering that that be paid as far as the jail. He's

in contempt of this Court as far as alimony and as far as the obligation of attorneys' fees and all the orders of this Court; and that should be noted for the record.

But I am purging him of the contempt if he's paid the child support and gets the child support going, and what you do as far as the collection of alimony, I'll have to leave that to you. [Directed to Mr. Kasting]. (Transcript of January 7, 1992 entitled "Reporter's Partial Transcript of Hearing on Commissioner's Recommendation "Court's Ruling", pp. 9-13). (Emphasis added).

The oral order of the court was reduced to a judgment on January 24, 1992. (R. 549-53). In addition, Findings of Fact and Conclusions of Law were also entered by the lower court. (R. 555-63).

In order to bring his support obligation more current and to avoid a charge of contempt, Defendant and his current wife applied for and received a loan from Valley Bank & Trust in the amount of \$5,000 and paid this to the plaintiff before January 13, 1992. Defendant then filed on February 21, 1992 a "Motion to Reconsider Judgment" on the basis that he did not have the income to pay the \$900 a month imposed by the court and that now he was required to pay installment amounts on the \$5,000 loan. (R. 565). The Motion to Reconsider Judgment was denied by the court on April 3, 1992. (R. 586).

Three months later on April 30, 1992 Plaintiff filed a new "Verified Motion for Judgment, Attorneys' Fee and Immediate Imposition of Jail Sentence." Plaintiff requested the immediate imposition of the thirty day jail sentence previously stayed by the court together with additional judgments for unpaid support and attorneys' fees. Plaintiff requested the following:

Defendant has again willfully and intentionally violated the previous orders of this Court and, therefore, is once again in blatant contempt of this

Court's previous orders and it is reasonable that he should be ordered to immediately commence serving the entire thirty-day jail sentence which the Court had earlier imposed upon him but stayed conditioned upon his complying with the payments the court required him to make to the plaintiff and the court should issue a bench warrant requiring the defendant to commence serving that jail sentence forthwith. (R. 590-91). (Emphasis added).

On May 7, 1992 a Notice of Hearing of this Motion was filed.

It stated the following:

Please take notice that Plaintiff's Verified Motion for Judgment, Attorneys' Fees and Immediate Imposition of Jail Sentence will come on for hearing on the 18th day of May, 1992 at 9:00 a.m. before the Honorable Homer F. Wilkinson, Judge of the above-entitled court. (R. 593). (Emphasis added).

On May 18, 1992 Plaintiff's motion came before the lower court. Plaintiff was now represented by her new attorney, Sharon A. Donovan. Defendant once again appeared pro se. No attempt was made to conduct an evidentiary hearing. No effort was made to advise Defendant of any criminal rights nor was inquiry made concerning his financial status to hire an attorney. Concerning the appellant's ability to pay, Plaintiff's counsel made the following statement:

He clearly has the ability to pay child support. I'm sure the court is aware of the Osguthorpe farm up in Park City, which part of it has been condemned in the newspaper recently, and they indicated that they received about \$600,000--at least the family has--for the widening of the road into Park City and other property which is worth a couple of million dollars up there with the family properties. (R. 635).

In another portion of the hearing, Plaintiff's counsel stated:

And if Dr. Osguthorpe is only making \$5.00 an hour, which I highly doubt given the amount of education he's had, given his family background, they own the veterinary clinic, they own property, he says he doesn't have an interest in it. (R. 643).

Defendant informed the court that he had no interest in the

Osguthorpe family farm nor the income of his father. (R. 639). Moreover, he again asserted that his income as shown by his income tax returns was insufficient to pay the current amount of child support and alimony together with the past amount for arrearages. Defendant offered his 1991 tax returns to substantiate this claim. (R. 638, Ex. 2).

Defendant then made the following statement:

I'm doing the best I can with the income I have. I have no other source from which to draw and I wish I did. I wish I did have the income. But veterinary medicine is tough right now. It's going through tough economic times right now. I wish I could make more to bring this situation current, Your Honor. I've checked on other jobs in this area, and there are none available at this time, Your Honor. (R. 640).

At the conclusion of the hearing, the following dialogue occurred:

THE COURT: Please understand, Mr. Osguthorpe, I did let you know that you had the right to call witnesses; if you have any, or to have them take the stand, or to take the stand yourself and give any testimony.

MR. OSGUTHROPE: I didn't know today that I could call witnesses, Your Honor. I thought this was just a motion to show cause. I'm not familiar--that familiar with the court system.

THE COURT: You have a right to--in order to show cause, at which you have a right to bring any witnesses in to testify. (R. 645).

The court sustained its previous order and structured the contempt of court identically to the January contempt. Defendant was ordered to serve thirty days in the Salt Lake County jail and, pursuant to Section 73-32-12, to a continuing sentence beyond that time in the event he did not comply with the child support and alimony requirements. The court stayed the order until May 26 at 12:00 noon at which time \$2,000 had to be paid to the plaintiff. In addition, if the monthly \$900 was not paid by

June 5, a bench warrant would be issued for his arrest. (Tr. May 18, 1992 at 2-4). After imposition of this sentence, Plaintiff asked, "Where am I going to come up with this income, Your Honor?" The Court replied, "Mr. Osguthorpe, payment of money is your responsibility which has been placed on you by this Court and by the Court of Appeals. As I indicated to you before, I'm not telling you what to do. You do what you have to do." (Transcript of June 18, 1992, "Court's Ruling", p. 4).

On June 11, 1992 Defendant's present appellate counsel entered his appearance for the Defendant. (R. 606). Counsel was retained by Defendant's father because of his father's concern that his son would spend an indefinite term in the Salt Lake County jail under the court's orders. Subsequently, because of certain procedural irregularities, counsel for both parties stipulated that the May 18 order would be adjusted in order to give Defendant time to comply. Accordingly, the amount of payment was adjusted to \$3,050 and Defendant was given until June 24, 1992 at 12:00 noon in order to make the payment. (R. 607-16). On June 5, 1992 a warrant and order of commitment was issued against the defendant. The order stated in part:

Now, therefore, in obedience to an order of the court made and entered on the 5th day of June, 1992 you are commanded to take into your custody and commit to the Salt Lake County jail Jerry S. Osguthorpe and to confine him therein for a period of thirty days or until such time as he shall purge himself of this court's finding of contempt by fully cooperating with this court's previous orders.... (R. 617-18). (Emphasis added).

On June 24, 1992 a Notice of Appeal as to the lower court's decision of contempt of June 19, 1992 was filed in the District Court. (R. 632). Subsequently, Petitioner filed a Motion for

Stay of Jail Sentence pending appeal with this Court. (See Addendum). Attached to this motion was an affidavit of Defendant stating that he had been representing himself throughout the lower court proceeding because he was financially unable to afford an attorney. In addition, he attached letters from Valley Bank stating that he could receive no further loans because of his poor credit, as well as three letters from other veterinarians relating to the current salary of contract veterinarians and stating that the veterinarian economic climate was poor. (See Addendum).

On June 24, 1992 the Honorable Russell W. Bench of this Court entered a temporary stay order of the jail sentence pending a hearing on the merits before a panel of this Court. (See Addendum). On July 16, 1992 this Court heard oral argument concerning the motion for stay. The Court made the following order:

It is hereby ordered that the Motion for Stay Pending Appeal is denied, and the temporary stay previously granted is vacated, based upon the court's determination that appellant has not sufficiently demonstrated that he would be likely to succeed on the merits of the appeal. See Jensen v. Schwendiman, 744 P.2d 1026, 1027 (Utah App. 1987).

and

It is further ordered that the case is temporarily remanded to the trial court for determination and entry of an award of appellee's costs and attorneys' fees reasonably incurred in opposing the motion for stay. (See Addendum).

On August 5, 1992 Defendant filed a Petition for Extraordinary Writ with the Utah Supreme Court requesting a review of the failure of the District Court and this Court to stay the imposition of the jail sentence pending final review on

this appeal. On August 13, 1992 the attorney for Plaintiff filed a Memorandum of Points and Authorities in opposition to the issuance of a writ and concluded by stating, "Respondent respectfully requests that the Petition for Extraordinary Relief be denied, that no stay of the jail sentence be granted and that Respondent be awarded her attorneys' fees and court costs herein." (See Addendum). (Emphasis added).

On August 17, 1992 a panel of the Utah Supreme Court heard oral argument concerning Defendant's Petition. On the same day a minute entry was entered stating, "In the absence of an adequate foundation the Petition for Extraordinary Writ is denied. In addition, the motion for a stay of execution is also denied." (See Addendum).

On August 12, 1992 a second warrant and order of commitment was executed by the lower court. This warrant also directed the county sheriff to confine defendant for a period of thirty days or until such time "as he shall purge himself of this Court's finding of contempt by fully cooperating with this Court's previous orders relating to payment of the amount of \$3,050 in delinquent child support and alimony through June of 1992." (See warrant contained in unnumbered pages of Vol. II of District Court Record).

On August 27, Defendant surrendered himself to the Salt Lake County Sheriff. On this same date Defendant filed a Writ of Habeas Corpus in the Federal District Court of Utah claiming unlawful incarceration. (See Addendum).

On August 31, 1992 Defendant's father D. A. Osguthorpe and Defendant's wife, Gwenda, paid \$2,000 cash to the Salt Lake

County Jail Clerk on the representation that such money would be utilized as bail to release Defendant from incarceration.

Defendant was released that same day. On September 21, 1992 Plaintiff filed a motion to transfer these funds to Plaintiff claiming that the money was properly hers and was not "bail". See Motion to Release Funds to Plaintiff and Affidavit of Sharon A. Donovan contained in Vol. II of District Court Pleadings unnumbered pages.

On September 23, 1992 a hearing was held in the District Court concerning Plaintiff's motion for release of funds. At that time Defendant called Gwenda Osguthorpe and D.A. Osguthorpe who both testified that the \$2,000 belonged to D.A. Osguthorpe and was posted upon the representation of the Salt Lake County Jail personnel that the money was to be used for bail and would be returned if Defendant attended all court hearings. (R. 667-82).

During cross examination of Defendant's father, Dr. D.A. Osguthorpe, Plaintiff's counsel directly and frankly asked Defendant's father why he was not willing to pay the support obligation of his son. The following dialogue occurred:

Q. The last question I have, Dr. Osguthorpe, is: you are quite emphathetic in your testimony that had you known that this \$2,000 might have gone towards child support, you wouldn't have given them a dime. Is that correct?

A. Yes.

Q. Why do you feel so strongly about that, Dr. Osguthorpe?

A. You have been irritating me for the past four years. I have omitted them from my will, and I was told that they were going to harrass me until they got every dime I've got, and I'll tell you that as far as I'm concerned, I have written them all out of my will. And just because I have a few dollars, it's no sign that I have to pick this up all the time, and I'm not going to.

Q. I guess my question, and what I don't understand in this case, Dr. Osguthorpe, is why you feel so strongly about not helping your own grandchildren such as you would write them out of your will. Is there some vendetta against Jeannette or something of that nature?

A. No, Jeannette's father was the sole cause of this whole divorce, and these kinds of people--they're too many good people in the world for me to spin my wheels with these kinds of people.

Q. So no matter what, you're not going to do anything to help your grandchildren as far as helping to support them, correct?

A. I'm not. (Tr. 681-82).

At the conclusion of the hearing the lower court found factually that both D.A. Osguthorpe and Gwenda Osguthorpe believed that the money they were posting was for bail and that the confusion was caused by jail personnel. The Court noted that it had not set bail in the matter and that there was an error by the jail in accepting the money as bail. The Court then stated:

Now the next question the Court has to face is: whose money was being used? The Court would find that the money was obtained by D.A. Osguthorpe, that it was presented, given, loaned to Gwenda Osguthorpe, and that she presented herself at the jail and paid the money to the jail for the bail.

* * *

The Court is of the opinion that the money was bail, but it was paid by Gwenda, that based on the payment by Gwenda, the Court would grant the motion to forfeit the bail. (R. 691).

During this same hearing Defendant's counsel argued that the bench warrants issued by the court were ambiguous and not consistent with the original orders of contempt. Specifically, counsel argued that the original orders of the court in January and May required Defendant to serve a straight thirty days in jail plus any additional time until he complied with the monetary

payment. The bench warrants, however, provided that he would be confined in jail for a period of thirty days or until such time as he made the payments. This wording created an ambiguity which allowed the plaintiff to argue that the contempt was purely civil since it provided a thirty-day maximum sentence or sooner if he paid the required amount. Counsel stated he wanted this warrant corrected in order to correctly argue in the federal action the court's intent to utilize the criminal thirty-day statute. (R. 694-95).

The Court in denying the motion to modify the language of the warrant stated the following:

Well, the Court has not reviewed these orders; of course I read them at the time, and I signed them, and I know that there was discussion as to that first one, whatever it was, I can't remember myself right now. But Mr. Cook was a participant in the discussion at that time.

And the Court does not feel that the motion now is timely as far as changing any warrant. I would deny the motion. And when you talk about criminal contempt, this Court was not indicating in any way that it was a criminal proceeding here. This has been a civil action, and of course the contempt was a civil contempt under the law. (R. 696). (Emphasis added).

As predicted, the County Attorney in his response to the Petition for Writ of Habeas Corpus on September 25, 1992 pled as a defense that Petitioner was incarcerated solely for civil contempt based upon the language contained in the warrant. See Addendum.

During this same period of time a third revised warrant and order of commitment was issued by the court in which the Salt Lake County Jail was ordered to confine Defendant for a period of thirty days or until such time "as he shall purge himself of this Court's finding of contempt by fully cooperating with this

Court's previous orders related to payment of the amount of \$3,950.00." See unnumbered page contained in Vol. II of District Court file.

On September 28, 1992 Plaintiff filed a Verified Motion for Judgment, Attorneys' Fees and Other Related Matters. This motion was filed pursuant to the remand by this Court to determine attorneys' fees for Defendant's attempt to stay the sentence. In addition, however, Plaintiff sought attorneys' fees that she incurred in the Supreme Court action and in the Federal District Court action. See Motion and Affidavit of Sharon Donovan in unnumbered portion of Vol. II of lower court record.

On October 1, 1992 Defendant was arrested outside of his home and taken to the Salt Lake County jail for further incarceration.

On October 2, 1992 a hearing was held in the Federal District Court. Judge Bruce Jenkins granted the sheriff's motion for dismissal on the basis that Defendant should pursue a modification of the current support order in the state court and that appellate review of the contempt proceeding was still pending in the state system. The Order of Dismissal was executed on October 16, 1992. See Addendum.

On October 6, 1992 Defendant filed a Memorandum in Opposition to Plaintiff's Motion to Release Funds to Plaintiff on the basis that the Court did not have authority to take the money of Dr. D.A. Osguthorpe which was posted for bail and to turn it over to Defendant's former wife. See Memorandum in unnumbered pages of Vol. II District Court Record.

On October 9, 1992 a hearing was held concerning Plaintiff's

motion for judgment and attorneys' fees. Plaintiff Jeanette Osguthorpe testified as to the amount which was delinquent since the last hearing. Defendant did not object to the computation of these amounts. He did, however, object to Plaintiff's request for \$3,196.00 in attorneys' fees from the Utah Supreme Court on the basis that Plaintiff had requested attorneys' fees from the Utah Supreme Court but that they were not awarded. Likewise, he objected to the award of attorneys' fees incurred by Plaintiff in the federal habeas corpus action on the basis that she was not even a party and that it was not directly related to the divorce but was related to his incarceration. The Court made the following order:

I think that the argument, of course, as to the merits was brought up by the defendant, but this Court is persuaded that the divorce statute, Title 30, as referred to, that it does put responsibility on this Court for the awarding of attorneys' fees in divorce actions.

If the Supreme Court had denied, or the Federal Court had denied them, then there's no question this Court would not have acted.

But I have seen--well, I shouldn't say "many"--I've seen cases where the Supreme Court has sent cases back for the award of attorneys' fees. I've seen cases in divorce actions where attorneys' fees are awarded where the Supreme Court has not made an actual award of them.

So what I'm saying is this: I'm granting the plaintiff's motion as prayed for attorneys' fees. Of course I don't want to create more litigation; however, if either the Supreme Court or the Federal Court did take the position that they did not intend to have any attorneys' fees awarded, then of course that would override my order here today. Otherwise, they would be awarded. (October 9, 1992 hearing, p. 12).

In the same proceeding Defendant's counsel made the following request:

MR. COOK: And one more, then, also, Your Honor, we would like to have credit for the previous four days he was previously incarcerated when he was released erroneously as to this sentence, so that he can add that to the thirty days; so it's the same basic sentence. It is the same sentence; he was only released because of the error, and therefore we believe he should be credited for those four days.

MS. DONOVAN: I think it was a new bench warrant. Whatever the Court thinks.

THE COURT: What does the bench warrant say?

MS. DONOVAN: Thirty days.

MR. COOK: There were two separate bench warrants.

MS. DONOVAN: Did you--

MR. COOK: But they're both thirty days.

MS. DONOVAN: Or earlier if you'll pay the money.

THE COURT: Well I think he's entitled to any time that he served, the he would be entitled to that. If that's what the bench warrant is limited to, I would grant that. (Transcript October 9, 1992 hearing, p. 14). (Emphasis added).

On October 16, 1992 the lower court signed an order to credit the jail time thereby giving Defendant the four-day credit for his previous incarceration. See "Order to Credit Jail Time" contained in unnumbered pages of Vol. II of lower court record.

On October 22, 1992 Plaintiff's counsel filed a "Motion for Order Extending Revised Warrant and Order of Commitment." The Affidavit of attorney Sharon Donovan filed in conjunction with such motion stated that she had learned that based upon the Court's earlier order allowing Defendant credit for time served that Defendant would be released on October 23, 1992 after serving 27 days in the county jail. The Affidavit stated, "Based upon the language of the prior revised warrant and order of

commitment, affiant respectfully requests that this Court extend the jail sentence, until Defendant fully complies with paying the \$3,950 ordered by this Court."

On October 22, 1992 the Court entered its "Ex Parte Order Extending Revised Warrant and Order of Commitment." The new order provided that the Salt Lake County Jail was ordered not to release Defendant "until he fully complies with paying the sum of \$3,950 or until further order of this Court." See Ex Parte Order contained in Vol. II of unnumbered pages of District Court Record.

As of October 23, 1992 Defendant had served 27 days in jail based upon the contempt proceeding and was entitled to release because of good time served. Once the Ex Parte Order was signed by the lower court, however, it was apparent that the previous representations made by Plaintiff and her attorney for purposes of defeating the claim of a criminal contempt argument were shifting mounds of sand. At this point, Defendant's father Dr. D.A. Osguthorpe, in spite of the Defendant's opposition, elected to pay an additional \$1,950 to Plaintiff for his son's obligation and to forego any claim as to the previous \$2,000 he had paid erroneously based on bail since otherwise his son would stay in jail indefinitely. See "Motion and Stipulation" contained in unnumbered pages of District Court Record Vol. II. Accordingly, on October 23, 1992 the lower court ordered Defendant released from custody and further ordered that the \$2,000 being held in dispute be released to Plaintiff.

Unbelievably, there have been no further procedural events since the time of Defendant's release on October 23 until the

time of the filing of this Brief approximately one month later.

SUMMARY OF ARGUMENT

1. Even though this was a domestic lawsuit, Defendant was found guilty of criminal contempt and therefore was entitled to all of the procedural and substantive protections that criminal defendants are afforded. The failure to treat this matter as criminal constitutes clear reversible error.

2. Because a finding of civil contempt can result in unlimited jail incarceration an accused defendant is entitled to assistance of counsel if he is indigent and unable to afford counsel. No such inquiry was made in the instant case thereby violating Defendant's due process rights.

3. Before criminal contempt can be imposed upon a defendant the moving party must show beyond a reasonable doubt that a petitioner had the ability to comply with the court's order and has willfully failed to do so. In this case, no evidentiary hearing was held at all in May and therefore this burden was never even attempted to be met. For this reason there is no evidence in the record to justify Defendant's conviction for criminal contempt.

4. Likewise, before being able to be convicted of civil contempt the moving party must show by clear and convincing evidence that a defendant has the present ability to purge himself by making the necessary required child support payments. Again, no evidentiary hearing at all was held in this matter and there is no evidentiary basis to believe that Defendant was able to meet the conditions of the court to be released from incarceration.

5. Before a court can impose criminal or civil contempt it must make findings of fact and conclusions of law which are legally sufficient. In the instant case no such findings were ever made as to the May hearing which resulted in Defendant's imprisonment. For this reason, therefore, the incarceration was contrary to law.

6. Article 1 Section 16 of the Utah Constitution prohibits imprisonment for debt. Since there was no showing in this case that the defendant was willfully refusing to pay his support obligations, his imprisonment clearly violated this section of the Utah Constitution.

7. Utah divorce statutes allow courts to assess attorneys' fees in order to enable a party to prosecute or defend the divorce action. This statute does not authorize costs incurred in ancillary lawsuits not directly related to the divorce itself nor does it permit the District Court to assess attorneys' fees when such fees have not been granted by the higher courts.

ARGUMENT

Courts, lawyers, and clients are all familiar with the term "contempt of court." It is a concept which is utilized each day in our judicial system as a threat or as an actual punishment. It is therefore surprising that the technicalities of contempt are so little known by those who daily utilize it. Hopefully, the instant case and another case involving criminal contempt of a lawyer being decided by a panel of this Court (State v. Long, No. 910708) will help to educate the judges and lawyers of this State to better understand the requirements of this drastic remedy.

Defendant will first examine the legal technicalities of criminal and civil contempt to demonstrate that this case involves both. Next, he will argue that his state and federal constitutional rights were clearly violated in the procedural aspects of both the criminal and civil contempt citations.

Defendant will then review the evidentiary basis that is required before criminal and civil contempt can be imposed and will demonstrate that this case has no such basis. Furthermore, the lower court failed to make the required findings in order to justify any imposition of criminal and civil contempt. Defendant will next urge that without evidence of a willful failure to pay a support obligation imprisonment amounts to a Utah State constitutional violation of imprisonment for pure debt.

Finally, Defendant will attack the award of attorneys' fees to Plaintiff concerning an extraordinary writ action brought before the Utah Supreme Court and an habeas corpus action brought before the Federal District Court. Defendant will demonstrate that such fees are not allowable under Utah statute and cannot be made by the District Court unless specifically ordered by the other ancillary courts. These items will not be addressed in serium.

POINT I

THE JANUARY AND MAY ORDERS OF THE LOWER COURT CONSTITUTE BOTH CRIMINAL AND CIVIL CONTEMPT.

During the September 23, 1992 hearing Judge Wilkinson made the following enlightening statement:

And when you talk about criminal contempt, this Court was not indicating in any way that it was a criminal proceeding here. This has been a civil action, and of course the contempt was a civil contempt under

the law. (R. 696).

This statement says it all. The lower court simply did not understand that even in this clearly civil action he had imposed a criminal sentence against a defendant.

The Utah Supreme Court in Von Hake v. Thomas, 759 P.2d 1162 (Utah 1988) discussed in detail the law of contempt of court. The Court stated:

The primary determinant of whether a particular contempt order is to be labeled civil or criminal is the trial court's purpose in entering the order....A contempt order is criminal if its purpose is to vindicate the court's authority, as by punishing an individual for disobeying an order, even if the order arises from civil proceedings....A contempt order is civil if it has a remedial purpose, either to coerce an individual to comply with a court order given for the benefit of another party, or to compensate an aggrieved party for injuries resulting from the failure to comply with an order. Id. at 1168.

The Utah Supreme Court acknowledged the United States Supreme Court decision of Hicks v. Feiock, 485 U.S. 624 (1988) in which the distinction between criminal and civil contempt was outlined in terms of federal constitutional law. The Utah Supreme Court stated that it would adopt the Feiock approach as a matter of state law in the following manner:

For all future cases, we will follow the rule that a contempt order is criminal if the fine or sentence imposed is fixed and unconditional, but is civil if the fine or imprisonment is conditional such that the contemner can obtain relief from the contempt order merely by doing some act as ordered by the court. Further, a contempt order is civil if the order is to pay a fine to the other party rather than to the court. 759 P.2d 1168 at n.5.

The Order of Contempt being appealed in this case emanated originally from the January 7, 1992 hearing. As quoted earlier, the Court relied upon Section 78-32-10 to fine Defendant \$200 and to sentence him to thirty days in the Salt Lake County jail.

(Tr. at 10, January 7, 1992 hearing). In addition, relying upon Section 78-32-12 the Court stated, "that after serving the thirty days, he is to continue to serve time in jail until he pays the child support as ordered by the Court." Id. at 11. The written order and findings echoes this same scheme of contempt. (R. 549-53; 555-63). Likewise, the May 18, 1992 hearing incorporated this prior contempt sentence and reapplied it once again. (Tr. May 18, 1992 at 2-4). The written order also repeated the criminal and civil contempt penalties. (R. 613-14).

It is obvious, therefore, that the Court first sentenced Defendant to a criminal contempt charge of thirty days in the county jail plus a fine of \$200. Second, the Court imposed a civil contempt penalty for unlimited additional jail time beyond the thirty days until Defendant purged himself by paying the delinquent amount. In both cases, however, the Court stayed these sentences to give the defendant ten days in which to pay the set amount required. Pursuant to the January order Defendant was able to borrow \$5,000 and thus avoid incarceration. As to the second order in May, however, Defendant was unable to ever make this payment and it was only through the money of his father that Defendant was released from incarceration. Had his father not paid this required amount, there is no doubt in appellate counsel's mind that Defendant would still be incarcerated!

The lower court together with many other judges and lawyers practicing in Utah erroneously believe that if a thirty-day jail sentence is stayed for a definite period of time to allow payment of a specified amount that the contempt is civil and not criminal since the defendant has the opportunity to "purge" himself before

going to jail. However, this reasoning is erroneous since the ability to purge must be present while incarcerated. Two cases from other jurisdictions which utilize the identical orders of this case were clearly found to constitute criminal contempt. In Maddux v. Maddux, 475 N.W.2d 524 (Neb. 1991) the lower court gave the defendant a short period of time to come up with an amount in arrears. If he did not do so, like here, he was ordered to spend thirty days in the county jail. The Nebraska Supreme Court stated:

The order ceased to be coercive on April 1, 1989 because the jail sentence was no longer subject to mitigation. If the child support amounts due were not paid by April 1, 1989, Maddux was required to serve a punitive thirty-day sentence, regardless of whether the amounts were paid subsequent to that date. Maddux no longer would be "holding the keys to his jail cell" after April 1. An unconditional penalty is criminal in nature because it is "solely and exclusively punitive in character." Hicks v. Feiock, 485 U.S. 624, 633 (1988). Id. at 528.

Likewise, in the case of In Re Marriage of Talmadge, 534 N.E.2d 1356 (Ill.App. 1989) a similar order was entered by the lower court. The Illinois Court of Appeals stated:

In the instant case, the order finding respondent in contempt sentenced him to thirty days in jail with said sentence to be stayed for a period of 45 days to allow respondent to purge himself by payment of \$4,806.22 to petitioner. We find that this order was criminal in nature because, once respondent failed to pay within 45 days, he was to be incarcerated without any way to purge himself. See Hicks, 108 S.Ct. at 1432. Thus, assuming that on remand, the trial court finds that petitioner did consult with respondent, respondent should be entitled to a new hearing using the standard of beyond a reasonable doubt. Id. at 1363.

The second phase of Judge Wilkinson's contempt order was clearly civil in nature. Civil contempt proceedings have two fundamental attributes: (1) the contemner must be capable of taking the action sought to be coerced and (2) no further

contempt sanctions are imposed upon the contemner's compliance with the pertinent court order. In other words, the contemner must have an opportunity to purge himself of contempt by complying with the pertinent court order. If the contempt sanction is incarceration, the defendant's circumstances should be such that he may correctly be viewed as possessing the "keys to his cell." Penfield Co. v. S.E.C., 330 U.S. 585, 590 (1947); Von Hake, supra, p. 1168.

Under the civil contempt rule, a party can be held indefinitely in jail until such time as he complies with the court order. Thus, a civil contempt citation may carry a much greater penalty than a criminal citation. An important standard that must be considered in civil contempt cases, however, is that the person who is sentenced to prison or jail must be capable of purging himself at any time. As noted by the United States Supreme Court in Feiock, supra:

Our precedents are clear, however, that punishment may not be imposed in a civil contempt proceeding when it is clearly established that the alleged contemner is unable to comply with the terms of the order. 485 U.S. at 638.

See also, State Ex Rel N.A. v. G.S., 456 N.W.2d 867 (Wis.App. 1990) (compliance with the purge provision must be within the power of the contemner); Maddux v. Maddux, 475 N.W.2d 524 (Neb. 1991) (to be reasonable, the amount of money required to be paid for a contemner to purge himself or herself of contempt of court must be within the contemner's ability to pay).

The Supreme Court of Michigan and the Supreme Court of Florida have held that even though a contempt order is in the

nature of civil contempt, it immediately becomes criminal in nature if the defendant is unable to comply with its terms. In Sword v. Sword, 249 N.W.2d 88 (Mich. 1976), the court stated:

If the defendant does not have the present ability to pay, then he does not have the "keys to the jail"; what is nominally a civil contempt proceeding is in fact a criminal proceeding--the defendant is not being coerced, but punished. Id. at 88.

See also, Mead v. Batchelor, 460 N.W.2d 493 (Mich. 1990); Bowen v. Bowen, 471 S.2d 1274 (Fla. 1985).

A final legal principle that should be noted in the criminal versus civil contempt comparison is that if both civil and criminal relief are imposed in the same proceeding, then the "criminal feature of the order is dominant and fixes its character for purposes of review." Nye v. United States, 313 U.S. 33, 42-43 (1941); Von Hake v. Thomas, 759 P.2d at 1169.

In addition to labeling a contempt of court either criminal or civil in nature, it is necessary to determine whether the contempt is direct, i.e., committed in the presence of the judge, or indirect, i.e., committed outside the presence of the judge. Section 78-32-3, U.C.A.; Von Hake v. Thomas, supra at 1169. See also, In Re Marriage of Betz, 558 N.E.2d 404, 418 (Ill.App. 1990) where the court stated:

Simply put, indirect contempt includes all contempts which do not occur in such proximity to a court that they fall within the direct contempt category. In indirect contempt cases, the judge does not have full personal knowledge of all elements of the contempt. Therefore, proof of facts of which the court cannot take judicial notice must be presented in order to support a finding of contempt. Id. at 418-19.

In the instant case, there can be no doubt but that defendant was found guilty of indirect criminal and civil

contempt. His failure to make the support payments clearly occurred outside of the presence of the court and required proof from Plaintiff in order for a contempt finding to be made. The thirty-day incarceration and fine was clearly criminal in nature for failure to pay past obligations. The additional incarceration until he paid the future required amounts was clearly civil in nature.

Obviously, it is to a defendant's advantage to contend that a contempt of court is criminal because of the much higher burden which attaches to a criminal contempt proceeding. Conversely, it is to the opposing party's advantage to claim the contempt is civil. In the instant case, Defendant argued before the Utah Supreme Court and the Federal District Court that the thirty-day provision was criminal and therefore he had been denied all of his federal and state due process rights. To counter this argument, Plaintiff prepared the bench warrants in such a manner that they were ambiguous. As noted earlier, in each case the three bench warrants provided that Defendant would be confined for a period of thirty days "or until such time as he shall purge himself." Plaintiff argued below, therefore, that based upon the language of the bench warrant (not upon the underlying order) that this was a civil contempt order with a cap of thirty days and the option of early release if he were to pay the money sooner. See e.g., October 9, 1992 hearing, at 13-14. This accidental or intentional ambiguity in the bench warrants created the strange situation where Defendant's counsel had to ask the lower court to modify the bench warrant for purpose of future argument in the federal court even though it would mean a

straight thirty-day incarceration for the defendant without any opportunity to be released sooner. (Tr. September 23, 1992, R. 693-96). The court refused to modify the bench warrants, finding no ambiguity in their wording. (R. 696).

Based upon the interpretation of the bench warrants by Plaintiff during the due process hearing before the Utah Supreme Court and the Federal District Court, Defendant could only serve a maximum of thirty days imprisonment and could be released sooner if he produced the necessary money. However, when it suddenly appeared that Defendant was indeed going to serve the entire thirty-day sentence and be released, the Plaintiff panicked and immediately ran to the District Court seeking help. Plaintiff now argued to the lower court in the ex parte hearing that Defendant had to serve beyond the thirty days until such time as he came up with the money. See "Motion for Order Extending Revised Warrant and Order of Commitment," and "Affidavit of Sharon A. Donovan" contained in unnumbered portion of Vol. II of District Court Record. The Court dutifully entered an "Ex Parte Order Extending Revised Warrant and Order of Commitment" on the eve that Defendant was supposed to be released from the Salt Lake County jail after serving the thirty-day sentence.

Thus, Plaintiff had the best of both worlds. She was able to argue to the Utah Supreme Court and through the County Attorney in the Federal District Court that this was merely a civil order of contempt with a thirty-day cap and therefore, the arguments of Defendant as to criminal due process simply did not apply. When it appeared that Defendant would be released from

jail after serving the thirty-day sentence, the plaintiff immediately ran to the District Court Judge who readily changed the bench warrant to require Defendant's incarceration indefinitely. The "thirty-day cap" under the Court's revised bench warrant of October 22 therefore had no meaning whatsoever except to illustrate that it was indeed a thirty-day criminal sentence.

This Court should not condone the action of Plaintiff and the trial court in manipulating the underlying court order in such a way as to make it extremely difficult for Defendant to assert his constitutional rights in the appellate and federal judicial system.

POINT II

DEFENDANT WAS DENIED PROCEDURAL RIGHTS DURING THE PROCEEDINGS OF CRIMINAL CONTEMPT.

For purposes of this section, only the thirty-day sentence and fine will be examined. However, as noted earlier, if Defendant is unable to meet the financial obligation imposed by the court then the entire contempt proceeding is also criminal in nature.

The Utah Supreme Court has stated the standard to be applied as to indirect criminal contempt proceedings. That Court stated:

The due process provisions of the Federal Constitution requires that in a prosecution for a contempt not committed in the presence of the court, "the person charged be advised of the nature of the action against him--or her--have assistance of counsel, if requested, have the right to confront witnesses, and have the right to offer testimony on his [or her] behalf....These protections are amplified upon in the Code, which requires, inter alia, that in a case of indirect contempt, an affidavit must be presented to the

court reciting the facts constituting the contempt in order to insure that the court and the person charged are informed of the conduct alleged to be contemptuous. Von Hake, supra, at 1150 (citations omitted).

See also, Boggs v. Boggs, 824 P.2d 478 (Utah App. 1991).

Clearly, charges of indirect criminal contempt deserve the same constitutional protections as any other crime. Several courts throughout the country have enumerated these rights. In Vito v. Vito, 551 A.2d 573 (Pa.Super. 1988), the court noted that where one is accused of indirect criminal contempt he shall enjoy the normal rights to bail, rights to be notified of the accusation and time to prepare a defense, and the right to a speedy and public trial by impartial jury. In addition, he is entitled to the assistance of counsel and may only be found guilty if every element of the crime is proven beyond a reasonable doubt. "In short, the accused in such a proceeding is entitled to the essential procedural safeguards that attend criminal proceedings generally." Id. at 575-76.

In re Marriage of Betts, 558 N.E.2d 404, 425 (Ill.App. 1990). The Illinois Appellate Court observed a common problem which occurs in these type of divorce proceedings. As in the instant case, the party who is being charged with contempt is served notice that he is to "show cause" why he should not be held in contempt. By definition, however, if a defendant accused of criminal contempt has a constitutional right not to testify, he cannot be required to "show cause" since this violates his right to remain silent. In addition, in a criminal contempt the burden is on the petitioner to prove the charges in the petition beyond a reasonable doubt and not upon the defendant to prove his innocence. 558 N.E.2d at 425.

The Utah Supreme Court in Von Hake, supra, recognized that in criminal contempt proceedings, it must be shown that the person cited for contempt knew what was required, had the ability to comply, and intentionally failed or refused to do so. These elements must be proven beyond a reasonable doubt. 759 P.2d at 1172.

A review of the record now before this Court shows without question that the federal and state due process rights of Defendant were never applied in the instant case. Petitioner was incarcerated for nearly thirty days because of the May 18 proceeding. From the record now before this Court it is apparent that he was never advised of the criminal nature of the proceeding, never advised of his right to counsel or the right to have counsel appointed by the court if he was indigent, never advised of his right to remain silent, and never advised of his right to cross examine witnesses or to confront his accusers.

While Defendant does not believe the January hearing is relevant to this issue of contempt, this same deficiency is equally applicable to that hearing.

For the above reasons, therefore, Defendant was illegally incarcerated in the Salt Lake County jail in direct violation of federal and state constitutional procedural mandates. His conviction must be reversed.

POINT III

DEFENDANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS WERE VIOLATED AS TO CIVIL CONTEMPT BY FAILING TO INQUIRE IF DEFENDANT WAS INDIGENT AND WHETHER COUNSEL NEEDED TO BE APPOINTED.

Incarceration under civil contempt can have a far greater consequence than that for criminal contempt. Utah law, for

example, places a ceiling of thirty days incarceration for criminal contempt, but places no such ceiling for civil contempt.

Compare Section 78-32-10, U.C.A. with Section 78-32-12, U.C.A.

The California Court of Appeals stated this problem as follows:

More importantly, because the consequences of a "civil" contempt are potentially greater than those of a "criminal" one, the procedural protection in those cases should be the same or stronger. Child support cases provide a perfect example. In each type of proceeding, ability to pay can be an issue. But a criminal contempt conviction results in no more than a five-day jail sentence and a \$1,000 fine for each contempt, while a civil contemner may be imprisoned indefinitely pending compliance. Thus, the consequences of a mistake on the ability to pay issue are infinitely graver in a civil than in a criminal contempt. Pity the poor civil contemner who rots in jail, having erroneously been determined to hold the keys to release!

The preferable rule in contempt proceedings might be that the more stringent due process protections apply whenever the contemner is faced with the potential for any jail time. In Re Feiock, 263 Cal.Rptr. 437, 440-41, n.6 (Cal.App. 1989).

While the Utah Supreme Court and this Court have never addressed the issue of appointment of counsel in civil contempt proceedings to indigent defendants, it is submitted that both federal and state due process of law requires such appointment be made or, at the minimum, inquiry of indigency status be made. The United States Supreme Court has recognized that indigent defendants have a right to have counsel appointed at government expense when their physical liberty is in jeopardy. Lassiter v. Dept. of Social Services, 452 U.S. 18, 26-27 (1981). Numerous federal circuit courts have held that the due process clause of the Fourteenth Amendment require that an indigent defendant in a non-support proceeding may not be incarcerated if he has been denied the assistance of counsel. Sevier v. Turner, 742 F.2d 262 (6th Cir. 1984); Walker v. McLain, 768 F.2d 1181 (10th Cir.

1985); Ridgeway v. Baker, 720 F.2d 1409 (5th Cir. 1983); and Henkel v. Bradshaw, 483 F.2d 1386 (9th Cir. 1973).

The Tenth Circuit Court of Appeals in Walker v. McLain, 768 F.2d 1181 (10th Cir. 1985) found that the right to counsel as an aspect of due process turns not on whether the proceeding may be characterized as criminal or civil, but on whether the proceedings may result in deprivation of liberty. The Tenth Circuit Court of Appeals, in quoting a decision from the Fifth Circuit Court of Appeals, stated the following:

It is the defendant's interest in personal freedom, and not simply the special "Sixth and Fourteenth Amendment right to counsel" in criminal cases, which triggers the right to appointed counsel. It would be absurd to distinguish criminal and civil incarceration; from the prospective of the person incarcerated, the jail is just as bleak no matter which label is used. In addition, the line between criminal and civil contempt is a fine one, and is rarely as clear as the state would have us believe. The right to counsel, as an aspect of due process, turns not on whether a proceeding may be characterized as "criminal" or "civil" but on whether the proceeding may result in a deprivation of liberty. Id. at 1183.

The Tenth Circuit of Appeals knows the need for counsel is even greater in civil contempt cases. The Court stated:

If petitioner is truly indigent, his liberty interest is no more conditional than if he were serving a criminal sentence; he does not have the keys to the prison doors if he cannot afford the price. The fact that he should not have been jailed if he is truly indigent only highlights the need for counsel, for the assistance of a lawyer would have greatly aided him in establishing his indigency and insuring that he was not improperly incarcerated. The argument that the petitioner has the keys to the jailhouse door does not apply to diminish petitioner's liberty interest. Id. at 1184.

In addition, a number of federal district courts have reached a similar result. McKenstry v. Genesee Co., 669 F.Supp. 801 (D.Mich. 1987); Johnson v. Zurz, 596 F.Supp. 39 (D.Ohio

1984); Lake v. Speziale, 580 F.Supp. 1318 (D.Conn. 1984); Young v. Whitworth, 522 F.Supp. 759 (D.Ohio 1981); Maston v. Fellerhoff, 526 F.Supp. 969 (D.Ohio 1981).

Likewise, a large majority of the state courts have held that an indigent defendant is entitled to counsel in a civil contempt proceeding before he can be incarcerated. State v. Gruchalla, 467 N.W.2d 451 (N.D. 1991); Mead v. Batchelor, 460 N.W.2d 493 (Mich. 1990); New York v. Lobenthal, 516 N.Y.S.2d 928 (N.Y. 1987); In Re: Marriage of Stariha, 509 N.E.2d 1117 (Ind.App. 1987); Hunt v. Moreland, 697 S.W.2d 326 (Mo.App. 1985); Rutherford v. Rutherford, 464 A.2d 228 (Md. 1983); Dube v. Lopes, 481 A.2d 1293 (Conn. 1984); and Padilla v. Padilla, 645 P.2d 1327 (Colo.App. 1982).

During both the January and May proceedings Defendant represented himself. Defendant's wife testified in the January proceeding that they were unable to afford an attorney. In an affidavit filed with this Court in support of a stay, Defendant stated he was financially unable to afford counsel to represent him. Defendant's income tax returns for 1989, 1990 and 1991 fully support his position of income. Plaintiff has not shown in any of these proceedings below sources of income or assets which have been hidden or which are available to Defendant upon command. Instead, Plaintiff has relied upon the wealth of Defendant's father as the source of income from which these delinquent amounts can be paid. Such reliance is clearly inappropriate, improper, and illegal since Defendant's father is under no legal obligation to support his son or his son's ex-spouse and children.

It is submitted that under the standards enunciated by these numerous courts throughout the country, Defendant was and is entitled to appointed counsel in these civil contempt proceedings in which he faces unlimited jail incarceration for failure to make support payments. The failure to make any inquiry as to his financial status not only goes to the issue of the substantive evidence required for contempt but also goes to the question of appointment of counsel. As such, the failure to make this inquiry voids any finding of civil contempt.

POINT IV

THERE IS INSUFFICIENT EVIDENCE TO ESTABLISH THE ELEMENTS REQUIRED FOR CIVIL OR CRIMINAL CONTEMPT AND, IN ADDITION, THE FINDINGS OF THE LOWER COURT ARE LEGALLY INSUFFICIENT TO IMPOSE CONTEMPT.

The Utah Supreme Court in Von Hake, supra, found that the trial court must enter written findings of fact and conclusions of law with respect to each of the three substantive elements of contempt. 759 P.2d at 1172. These include a showing that the defendant knew what was required, had the ability to comply, and intentionally failed or refused to do so. These elements must be proven beyond a reasonable doubt in a criminal contempt proceeding and by clear and convincing evidence in a civil contempt proceeding. Id.

This Court in State v. Hurst, 821 P.2d 467 (Utah App. 1991) held that written findings of fact and conclusions of law are not required because of an amendment to the civil code provided that these findings are contained somewhere in the written record. Even if this interpretation of the Von Hake decision is correct, the record clearly shows that no such

findings exist in any form.

The present contempt of court action in which defendant was incarcerated for nearly thirty days was based upon the May hearing in which no separate findings of fact or conclusions of law were made. While the order of June 19, 1992 recites that the Court "made and entered adequate and sufficient findings of fact" no such findings or conclusions exist. Moreover, there is no evidence in the May hearing justifying the conclusion of criminal or civil contempt. No evidence was formally taken at all! The only statements made by Plaintiff's attorney relating to Defendant's ability to pay concern the sale of his father's farm and the inadequacy of Defendant's income. Neither of these unsupported assertions are sufficient to incarcerate a defendant father.

There is a major distinction between an original divorce action and a supplemental action for contempt. As in this case, the lower court concluded by a preponderance of the evidence that Defendant was capable of making the support payments in spite of his claims to the contrary. This Court affirmed that decision based upon the lower court's discretion. The result of these decisions was to impose a continuing financial obligation upon the defendant to meet the amounts awarded to the plaintiff. Failure to comply with the court's order results in a monetary judgment being levied against the defendant and subjects his income and property to continued attachment by plaintiff as a creditor.

On the other hand, this same standard of evidence is not appropriate in contempt proceedings. In order for civil contempt

to apply there must be a showing of clear and convincing evidence of the present ability of the defendant to meet the obligations ordered by the court. In criminal proceedings this proof rises to the highest level of beyond a reasonable doubt. Thus, under either of these standards mere speculation as to what the defendant should be making as a veterinarian or inferences that his family should be able to assist him in his support obligation are simply insufficient as a matter of law.

The evidentiary hearing held in January is equally defective should it be relevant to this case. Defendant would assert, however, that as a matter of law this hearing is not relevant since Defendant's incarceration did not directly emanate from that hearing. Moreover, as a matter of principle a hearing which is held five months prior to another hearing in which contempt is ordered is simply insufficient to meet the high standards of proof since the financial ability of a defendant can change from month to month and it is simply against due process of law to allow previous hearings as the evidentiary basis for subsequent contempts.

In any event, there is nothing contained in the January findings to indicate the willful failure to have paid past obligations or the present ability of the defendant to pay these large arrearages and ongoing obligations. No finding whatsoever is made of his income, with the exception of paragraph 5(f) which states: "Defendant is a veterinarian practicing in excess of 15 years and testified he earns \$5 per hour in connection with consultations he claims he provided to the Osguthorpe Animal Hospital. Defendant had and has the means to pay child support."

This conclusionary statement is inadequate as a basis to show Defendant's ability to pay these amounts by clear and convincing evidence or to show that he willfully failed to pay his past obligations beyond a reasonable doubt. No contrary evidence was offered by Plaintiff as to what the defendant should have been making as a veterinarian or that he was guilty of federal fraud for falsely reporting his income on the federal tax forms. There is not a single reference contained in the findings of January to show that Defendant has the past or present ability to pay the amounts now imposed by the lower court.

The Utah Supreme Court has required that civil contempt cannot be imposed without an affirmative finding by the lower court of a present ability to comply. Bradshaw v. Kershaw, 627 P.2d 528, 531 (Utah 1981). Moreover, the Utah Supreme Court in Coleman v. Coleman, 664 P.2d 1155 (Utah 1983) held that a lower court must make explicit findings as to a defendant's ability to comply when there is conflicting evidence. Failure to provide sufficient findings of the ability to comply with a contempt order requires automatic reversal. Von Hake, supra, 1159 P.2d at 1173. See also, Matter of Elder, 763 P.2d 219 (Ala. 1988).

In summary, the fact that this Court affirmed the award of child support and alimony in the previous appeal is completely irrelevant to the issues now before this Court as to the contempt. An examination of the transcripts of the May and January hearings show that there is clearly insufficient evidence to justify a finding of criminal contempt or civil contempt. Moreover, the lower court has completely failed in its obligation

to make explicit findings needed in order to affirm these types of contempt proceedings. It is submitted that lower courts routinely abuse the penalty of contempt and subject litigants to illegal hardship caused by the courts' failures to understand and to follow the concepts of criminal and civil contempt.

POINT V

DEFENDANT'S INCARCERATION FOR THIRTY
DAYS IN THE SALT LAKE COUNTY JAIL
VIOLATED ARTICLE I SECTION 16 OF THE
UTAH CONSTITUTION WHICH PROVIDES THAT
THERE SHALL BE NO IMPRISONMENT FOR DEBT.

Each day hundreds of judgments are entered in the State of Utah. In each case one party is indebted to another. It is rare indeed, however, that such indebtedness results in jail incarceration. Defendant, in fact, knows of no classification of cases except for domestic relation controversies in which indebtedness can result in jail sentences.

Obviously, the reason that child support and other marital obligations can result in imprisonment whereas other forms of debts do not, is the value society places upon the support of its children. If a father willfully refuses to meet his support obligation then society allows the father's imprisonment until he meets his moral and legal obligation. On the other hand, if a father is simply unable to meet his financial obligation through no willful disobedience then imprisonment is no more justified than in any other case involving debt.

The Utah Supreme Court in Thomas v. Thomas, 569 P.2d 1119 (Utah 1977) discussed Article I Section 16 of the Utah Constitution. The Court stated:

Under what we regard as a view more enlightened than prevailed in former times, the mere failure to pay

a debt or meet an obligation is not punishable by imprisonment. (Citing Article I Section 16, Utah Constitution). However, when a proper order or judgment has been made, one who stands in willful defiance or disobedience thereof may be found in contempt of court and punished by imprisonment....Although technically civil in nature, the finding of a person in contempt and sentencing him to jail is a very serious consequence to the person involved, somewhat akin to a criminal penalty. It is for this reason that such a severe measure is not permissible unless a party has manifested such obstinacy in disobedience of the court order that it is necessary to accomplish that which equity and justice demand. Accordingly, in order to justify a finding of contempt and the imposition of a jail sentence, it must appear by clear and convincing proof that (1) the party knew what was required of him; (2) that he had the ability to comply; and (3) that he willfully and knowingly failed and refused to do so. Id. at 1121. (Emphasis added).

This Court can search the record in vain for any evidence to show that defendant Jerry Osguthorpe willfully refused to meet the obligations imposed by the court during the divorce proceeding. Plaintiff has been unable to point to any source of income that Defendant is shielding or hiding. There is no asset which Defendant could utilize in satisfying the court obligation. In fact, the income that Defendant now has is nearly identical to that which he had during the marriage to Plaintiff. An examination of all of the income tax forms from 1981 to 1991 reveal almost a consistent pattern of income.

Plaintiff has convinced Judge Wilkinson to the contrary by relying upon three arguments: (1) Defendant should be making more as a veterinarian; (2) Defendant lives very nicely with his present wife and therefore must have money; (3) Defendant's family and father are very wealthy and therefore he must have money too.

These emotional arguments of Plaintiff in her claim of a "deadbeat dad" are not legally or factually supportable.

Plaintiff has failed to produce any evidence in the record to show what the defendant should be making as a veterinarian. Not one item of evidence exists as to the normal income of a contract veterinarian such as defendant. Essentially, the lower court is taking judicial notice of what he believes the defendant should be making and holding him to that standard.

The income or assets of Defendant's wife is equally irrelevant. The fact that Defendant has married a woman who was given a house and other assets from her ex-husband is irrelevant to the obligation of Defendant. She is not required to utilize her assets in paying his pre-marital debts. Furthermore, the fact that Defendant contributes \$500 to the household expenses each month is not justification for imprisonment. Had he not married his current wife it is unlikely that even Judge Wilkinson would have denied him the use of \$500 for his own living expenses.

Finally, the fact that his father and family are purportedly wealthy is also irrelevant to placing Defendant in jail. Defendant's family is not legally obligated to support Defendant's children. The dialogue which occurred between Plaintiff's counsel and Defendant's father is indicative of Plaintiffs feeling that D.A. Osguthorpe is obligated to pay his son's financial obligations.

The cold hard record in this case shows without question that defendant Jerry Osguthorpe is financially incapable of meeting the demands of the court and will consistently be indebted to the plaintiff as long as support must continue. However, such indebtedness does not show contempt and does not

justify imprisonment. Innuendoes and implications cannot be used as the clear and convincing evidence or the evidence beyond a reasonable doubt that must be present before incarceration can occur.

The past incarceration in the Salt Lake County jail and the future threat of incarceration are not permissible under the Utah Constitution based upon the record as it now exists. Defendant's imprisonment was clearly unconstitutional and any future attempt for imprisonment without a strong showing of additional evidence by plaintiff cannot be tolerated.

POINT VI

THE TRIAL COURT ERRED IN AWARDING
PLAINTIFF ATTORNEYS' FEES INCURRED AS
A RESULT OF THE UTAH SUPREME COURT
EXTRAORDINARY WRIT ACTION AND THE
FEDERAL COURT HABEAS CORPUS ACTION.

There is no question but that Section 30-3-3 U.C.A. provides that either party to a divorce action may be ordered to pay the adverse party to prosecute or defend the action. Maughn v. Maughn, 770 P.2d 156 (Utah App. 1989). In addition, there is no question but that this Court in its discretion may award attorney's fees on appeal especially if they were awarded by the lower court in the divorce action. Weston v. Weston, 773 P.2d 408 (Utah App. 1989).

The decision to award attorneys' fees on appeal, however, rests with the appellate court. In this very action, for example, this Court originally awarded only attorneys' fees as to the divorce proceeding in the lower court. Plaintiff petitioned for rehearing and this Court subsequently issued a separate opinion in which attorneys' fees on appeal were ordered.

Obviously, Plaintiff was aware that in the absence of such an award by this Court she could not seek attorneys' fees on appeal from Judge Wilkinson. She correctly petitioned this Court for an order remanding to the lower court for a determination of fees.

Likewise, in the motion to stay the contempt proceeding Plaintiff sought attorneys' fees for her effort. This court in denying the stay granted attorneys' fees on appeal and once again remanded for a determination of the amount. Thus, the instant case itself is a prime example of the principle that a superior court must itself award attorneys' fees in an appeal before an inferior court can determine their amount.

Section 30-3-3 is unique. In most instances involving litigation, attorney fees are not awarded to the opposing party. As such, this section must be strictly construed. The section states that the court may order either party to pay to the clerk a sum of money "to enable such party to prosecute or defend the action." The term "the action" must refer to a divorce proceeding since it is contained in Chapter 3 of the Utah Code exclusively dealing with divorce.

Defendant sought a writ of mandamus and/or common law writ of certiorari from the Utah Supreme Court to require this Court or Judge Wilkinson to grant a stay of imprisonment until this matter had been decided on appeal. Thus, the action before the Supreme Court was not one of divorce but was one seeking to stay Defendant's imprisonment on the theory of judicial abuse of discretion. As such, therefore, Section 30-3-3 cannot be used to grant authority for attorneys' fees to plaintiff before the Utah Supreme Court.

The action in the Federal District Court is even more apparent. There, Defendant brought an action against the Salt Lake County Sheriff seeking relief based on the writ of habeas corpus. Plaintiff was not even a named party in that lawsuit. Certainly Section 30-3-3 cannot be utilized to pay the costs of a non-party in a federal habeas corpus action.

Moreover, in the Supreme Court action Plaintiff specifically asked the court to grant attorneys' fees to her in her effort to incarcerate her former husband. The court made no such award. Had it wished to award attorney fees it could have honored her request since Plaintiff's attorney specifically proffered an amount of fees and costs during oral argument.

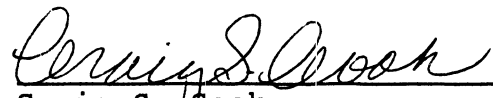
Neither this Court nor the trial court has authority even in a divorce action to award attorney fees incurred in a higher court without that court's discretionary approval. Judge Wilkinson was in error in believing that he could make such an award in the complete absence of authority by the Supreme Court ordering such an award be made.

For these reasons, therefore, the lower court's award of attorneys' fees to Plaintiff as to the Supreme Court action and the Federal habeas corpus action must be vacated and these amounts must be subtracted from the judgment entered against Defendant.

CONCLUSION

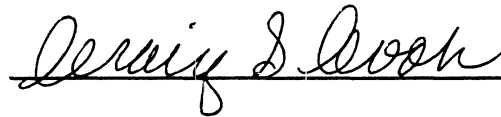
For the reasons herein stated, the judgment of contempt and for attorney fees must be reversed.

Respectfully submitted this 30th day of November, 1992.


Craig S. Cook
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Appellant to Sharon A. Donovan, Attorney for Appellee, 310 South Main, #1330, Salt Lake City, Utah 84111 this 30th day of November, 1992.



ADDENDUM

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COPY

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

-----oOo-----

JEANETTE CRAWFORD OSGUTHORPE,	:	ORDER ON PLAINTIFF'S MOTION
	:	FOR JUDGMENT, ATTORNEY'S FEES
Plaintiff,	:	AND OTHER RELATED MATTERS
	:	
v.	:	
	:	Civil No. 874904967
JERRY SILVER OSGUTHORPE,	:	
	:	Judge Homer F. Wilkinson
Defendant.	:	

-----oOo-----

Plaintiff's Verified Motion for Judgment, Attorney's Fees and Other Related Matters came on regularly for hearing on October 9, 1992, before the Honorable Homer F. Wilkinson, one of the Judges of the above-entitled Court, Plaintiff appearing in person and by and through her attorney, Sharon A. Donovan, and Defendant appearing in person and being represented by his attorney, Craig S. Cook, and Plaintiff having been called as a witness on her Motion, and the Court having heard the testimony and reviewed the pleadings and argument of counsel, and being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Judgment shall enter against Defendant in the sum of \$1,625.00, which represents \$1,100.00 unpaid child support through

the first half of October, 1992, and \$525.00 alimony through the first half of October, 1992.

2. The Court finds that Defendant has filed an appeal in the Utah Court of Appeals from the District Court's finding of contempt, has filed a Petition for Extraordinary Relief in the Utah Supreme Court and further filed a Federal Writ of Habeas Corpus against the Sheriff's Department, necessitating action and attorney's fees on behalf of the Plaintiff.

The Court finds that pursuant to Utah Code Ann., §30-3-3, this Court has the authority in divorce actions to grant fees as may be appropriate in this matter. Based thereon, the Court orders a judgment of \$5,214.25 against Defendant for attorney's fees Plaintiff has reasonably incurred in defending the matters filed by Defendant in the Court of Appeals, Supreme Court and Federal Court. The Court further finds that the Court of Appeals specifically remanded to the trial Court the award of Appellee's costs and attorney's fees reasonably incurred in opposing the stay. The Court further finds that the judgment for attorney's fees in the Supreme Court of \$3,196.60 and the Federal Court of \$620.70 shall be awarded by way of judgment, unless the Federal Court or Supreme Court specifically indicate that it was their intention not to award attorney's fees to Plaintiff in this matter. The relief requested by Defendant in the Court of Appeals, Federal Court and Supreme Court have all been denied by those Courts. The Court

further finds that Defendant shall receive credit for time served from the previous jail sentence in this matter.

The Court further finds that Plaintiff does not have the ability to pay these fees and that these fees are reasonable, in light of the actions of Defendant, and that Defendant has the ability to pay said fees. The Court further finds that these fees are segregated as follows:

Court of Appeals	\$1,396.95
Supreme Court	3,196.60
Federal Court	<u>620.70</u>
Total:	\$5,214.25

The Court further finds that judgment shall enter against Defendant in the sum of \$300.00 for additional fees, for purposes of this hearing, for a total judgment for this hearing of \$7,139.25.

DATED this _____ day of November, 1992.

BY THE COURT:

HOMER F. WILKINSON
District Court Judge

Approved as to form:

CRAIG S. COOK
Attorney for Defendant

DAVID E. YOCOM
Salt Lake County Attorney
MARTIN VERHOEF #3326
Deputy Salt lake County Attorney
Attorney for Respondent
2001 South State Street, #S3600
Salt lake City, Utah 84190-1200
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FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

OCT 9 9 13 AM '92

MANUEL B. ZIMMER
CLERK

DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Jerry Silver Osguthorpe,	*	Order of Dismissal
Petitioner	*	
-v-	*	Case No. 92c-0748A
Aaron D. Kennard, Sheriff	*	
of Salt lake County,	*	
Respondent		

The referenced matter came on for hearing on Friday, October 2, 1992, the Honorable Bruce S. Jenkins presiding, Craig Cook appearing for Petitioner and Marty Verhoef appearing for Respondent;

The Court having reviewed the pleadings on file and having heard arguments of counsel concerning Petitioner's opportunity and ability to be heard on the merits in the Courts of the State of Utah, including appellate review on the merits, Petitioner's present opportunity for further review within the State Courts upon allegations of changed circumstances which would justify modifications of current support orders, and the Federal Court's extreme deference to the factual findings of the Courts of the

State of Utah and the right of a State Trial Court to vindicate its own orders; and

It appearing to the Court Petitioner has failed to demonstrate that Petitioner's custody was in violation of the Constitution, laws or treaties of the United States;

NOW, THEREFORE, it is hereby ORDERED the entitled matter be and hereby is dismissed.

Dated this 16 day of October 1992.

By the Court:

A handwritten signature in black ink, appearing to read "Bruce S. Jenkins", written over a horizontal line.

Bruce S. Jenkins
District Court Judge

DAVID E. YOCOM
Salt Lake County Attorney
MARTIN VERHOEF #3326
Deputy Salt Lake County Attorney
Attorney for Respondent
2001 South State Street, #S3600
Salt Lake City, Utah 84190-1200
(801) 468-2656

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Jerry Silver Osguthorpe,	*	RESPONSE TO PETITION FOR
Petitioner	*	WRIT OF HABEAS CORPUS
-v-	*	Case No. 92C-0748A
Aaron D. Kennard, Sheriff	*	
of Salt Lake County,	*	
Respondent		

Respondent, through counsel of record hereby answers the allegations of the Petition for Writ of Habeas Corpus as follows:

FIRST DEFENSE

Petitioner was released from incarceration on August 31, 1992 upon payment of \$2,000 pursuant to Court order filed with Respondent. A copy of said order, a receipt for the funds, booking record and jail internal log sheet are attached hereto as exhibits. Petitioner's lack of custody deprives the Court of jurisdiction under 28 U.S.C. §2254 requiring dismissal.

SECOND DEFENSE

Petitioner is not in custody and therefore is seeking relief against a future judgment. Petitioner has not requested such

relief nor named the Attorney General of the State of Utah as respondent. The Sheriff of Salt Lake County is not a proper party to such an action.

THIRD DEFENSE

Petitioner's incarceration was for civil contempt as reflected by the Court order attached hereto as an exhibit. Said order committed Petitioner into the custody of the Salt Lake County Sheriff "for a period of thirty (30) days, or until such time as he shall purge himself..." of contempt by paying past due alimony, child support and attorney's fees totalling \$2,000 to plaintiff, Jeanette C. Osguthorpe. Civil contempt custody is not a proper ground upon which relief may be granted.

FOURTH DEFENSE

Responding to the allegations of the petition, Respondent answers as follows:

1. Admitted.
2. Denied. The judgment received by Respondent from the trial court was dated June 5, 1992. A copy thereof is attached.
3. Denied. The judgment was for thirty (30) days or until Petitioner purged himself by paying \$2,000 to plaintiff for past due child support, alimony and attorney's fees or unless otherwise discharged.
4. Admitted.
- 5-7. Denied. The Court found in prior evidentiary hearings Petitioner had the ability to pay.

8-11. Admitted.

12A-D. Denied. Civil contempt proceedings of the trial court are presumptively valid, were imposed for only thirty (30) days and were purged by Petitioner upon payment of \$2,000. The substance of Petitioner's allegations are clearly refuted by the Memorandum of Points and Authorities filed in the Utah Supreme Court in opposition to Petitioner's Petition for Extraordinary Writ, a copy of which is attached hereto. The Utah Supreme Court denied the writ.

RULE 5 STATEMENTS

Pursuant to Rule 5, Rules Governing Section 2254 Cases in the United States District Court, Respondent states as follows:

1. Petitioner requested a stay of the contempt order pending appeal and exhausted that remedy through the Utah Supreme Court. Said request appears to have raised the issues which could have been raised in a petition for Writ of Habeas Corpus.

2. Petitioner has filed a Notice of Appeal in Salt Lake County District Court, however no further steps have been taken in furtherance of said appeal, no briefs have been filed and no transcripts have been ordered.

3. All proceedings before the Trial Court have been reported; however, Respondent has determined Petitioner has failed to make financial arrangements with the Court reporter for payment. Only two partial transcripts are available for January 7, 1992 and May 18, 1992. No evidentiary hearings have been transcribed.


RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS
Case No. 92C-0748A
Page 4

4. Certain transcripts of proceedings have been supplied by counsel for Plaintiff and are attached hereto. Copies of pleadings filed in the Utah Court of Appeals and Utah Supreme court are also attached.

WHEREFORE, having fully answered the Petition, Respondent requests the same be dismissed or Respondent be dismissed from the action or such other relief as the Court deems appropriate.

DATED this 25th day of September, 1992

DAVID E. YOCOM
Salt Lake County Attorney

By: 

Martin Verhoef, #3326
Deputy Salt Lake County Attorney
2001 South State Street, #S3600
Salt Lake City, Utah 84190-1200

PETITION UNDER 28 USC § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court		District
Name <u>Jerry Silver Osguthorpe</u>	Prisoner No.	Case No.
Place of Confinement <u>Salt Lake County Jail</u>		
Name of Petitioner (include name under which convicted) <u>Jerry Silver Osguthorpe</u>		Name of Respondent (authorized person having custody of petitioner) <u>v. Aaron D. Kennard, Sheriff, Salt Lake Co.</u>
The Attorney General of the State of:		

PETITION

1. Name and location of court which entered the judgment of conviction under attack Third Judicial District Court of Salt Lake County, State of Utah; Honorable Homer F. Wilkinson

2. Date of judgment of conviction June 19, 1992

3. Length of sentence 30 days "and such longer time as the court deems fit to impose sentence" until Petitioner pays the delinquent child support and alimony.

4. Nature of offense involved (all counts) Failure to pay current and delinquent child support and alimony.

5. What was your plea? (Check one)

(a) Not guilty	<input type="checkbox"/>	Since this matter was never treated as a criminal proceeding no official plea was ever taken. Petitioner
(b) Guilty	<input type="checkbox"/>	maintained, however, that he had the inability to pay
(c) Nolo contendere	<input type="checkbox"/>	the amount required by the court.

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

(a) Jury	<input type="checkbox"/>	The May 18, 1992 hearing was not an evidentiary trial.
(b) Judge only	<input type="checkbox"/>	Judge Wilkinson ruled on an Order to Show Cause.

7. Did you testify at the trial?

Yes <input type="checkbox"/> No <input type="checkbox"/>	Petitioner, unrepresented by counsel, made statements to the court but did not do so under oath.
--	--

8. Did you appeal from the judgment of conviction?

Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	
---	--

9. If you did appeal, answer the following:

- (a) Name of court Utah Court of Appeals
- (b) Result Court of appeals refused to issue stay pending appeal and remanded to trial court for award of attorneys' fees.
- (c) Date of result and citation, if known July 16, 1992
- (d) Grounds raised Improper procedure; failure to conduct an evidentiary hearing as to ability to pay; failure to enter legally sufficient findings and conclusions of law; stay should be granted because of irreparable harm if sentence is allowed to proceed.
- (e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court _____

(2) Result _____

(3) Date of result and citation, if known _____

(4) Grounds raised _____

- (f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court _____

(2) Result _____

(3) Date of result and citation, if known _____

(4) Grounds raised _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court Utah Supreme Court

(2) Nature of proceeding Extraordinary writ requested in the nature of mandamus, supersedeas and certiorari.

(3) Grounds raised Improper procedure; failure to conduct an evidentiary hearing as to ability to pay; failure to enter legally sufficient findings and conclusions of law; stay should be granted because of irreparable harm if sentence was allowed to proceed.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

The Utah Supreme Court declined to grant any relief staying the

(5) Result execution of the sentence.

(6) Date of result August 17, 1992

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☒

(2) Second petition, etc. Yes ☐ No ☒

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

Since the petition was brought in the Utah Supreme Court there was no other
avenue of appeal.

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

- A. Ground one: Petitioner was denied federal due process of law in that his conviction for criminal contempt did not involve any criminal procedural protections.

Supporting FACTS (state *briefly* without citing cases or law) Petitioner was found guilty of criminal contempt in May of 1992. He was never advised that this was a criminal proceeding, was not advised as to the right of counsel or to appointment of counsel, was not advised as to the right to remain silent or the right to call or confront witnesses. In short, this matter was treated as purely civil in nature even though a criminal sentence was imposed.

- B. Ground two: Petitioner was denied substantive due process rights in that there was no evidence taken to establish that Petitioner has the ability to comply with the Court's order but willfully refused to do so.

Supporting FACTS (state *briefly* without citing cases or law): The May 1992 hearing was not an evidentiary trial. Instead, it was in the nature of an Order to Show Cause at which time Petitioner, representing himself, merely made statements to the Court as to his inability to pay. No witnesses were called and neither party was placed under oath. The failure to conduct an evidentiary hearing of any type violates procedural due process. The failure to produce any substantial evidence of ability to pay violates substantive due process.

C. Ground three: Petitioner's right to due process was also violated by failure to inquire as to his financial status for appointment of counsel as to a civil contempt proceeding.
 Supporting FACTS (state *briefly* without citing cases or law): During the May hearing, no effort was made to inquire as to whether Petitioner wished counsel appointed to represent him for civil contempt which could result in an unlimited sentence of incarceration.

D. Ground four The failure of the State courts to grant a stay of the jail sentence pending appeal renders any such appeal ineffective to protect the constitutional rights of Petitioner.
 Supporting FACTS (state *briefly* without citing cases or law): Petitioner's present incarceration for criminal and civil contempt will continue for thirty days plus any additional time the state court judge wishes to impose upon Petitioner. Under the procedures of appeal in Utah, Petitioner will serve all of his jail time months, if not years, before a decision of its imposition will be made.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: The argument in D has never been presented to a state court since it is a particularized claim for federal habeas corpus jurisdiction. Petitioner has no other state remedy available to stay the imposition of the sentence pending appeal.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
 Yes ☒ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
~~(a) At preliminary hearing~~ Craig S. Cook, 3645 East 3100 South, represented Petitioner after the contempt proceeding had occurred. He has represented Petitioner in the Utah Court of Appeals and in the Utah Supreme Court.

(b) At arraignment and plea _____

(c) At trial _____

(d) At sentencing _____

(e) On appeal _____

(f) In any post-conviction proceeding _____

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ☐ No ☐ N/A

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☐ N/A

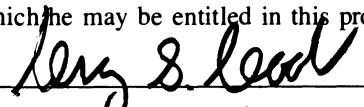
(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.



Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

(date)

Signature of Petitioner

IN THE SUPREME COURT

STATE OF UTAH

332 STATE CAPITOL

SALT LAKE CITY, UTAH 84114

AUGUST 17, 1992

RECEIVED

AUG 20 1992

Dart, Adamson & Donovan

OFFICE OF THE CLERK

Sharon A. Donovan
DART, ADAMSON & DONOVAN
Attorneys at Law
310 South Main, Suite 1330
Salt Lake City, UT 84101

Jerry Silver Osguthorpe,
Petitioner,

v.

No. 920368

Jeanette Crawford Osguthorpe,
The Honorable Homer F.
Wilkinson, Judge of the Third
Judicial District Court, State
of Utah; Judges Judith
Billings, Russell W. Bench,
Norman H. Jackson, Judges of
the Utah Court of Appeals,
Respondents.

In the absence of an adequate foundation the petition for extraordinary writ is denied. In addition the motion for a stay of execution is also denied.

Geoffrey J. Butler
Clerk

EXHIBIT "B"

SHARON A. DONOVAN (0901)
SHANNON W. CLARK (5678)
DART, ADAMSON & DONOVAN
Attorneys for Respondent, Jeanette Crawford Osguthorpe
310 South Main, Suite 1330
Salt Lake City, Utah 84101-2167
Telephone: (801) 521-6383

IN THE UTAH SUPREME COURT

-----oOo-----

JERRY SILVER OSGUTHORPE,	:	
	:	
Petitioner,	:	
	:	MEMORANDUM OF POINTS
v.	:	AND AUTHORITIES
	:	
JEANETTE CRAWFORD OSGUTHORPE,	:	
THE HONORABLE HOMER F.	:	
WILKINSON, Judge of the Third	:	
Judicial District Court, State	:	
of Utah; JUDGES JUDITH	:	Case No. 920368
BILLINGS, RUSSELL W. BENCH,	:	
NORMAN H. JACKSON, Judges of	:	
the Utah Court of Appeals,	:	
	:	
Respondents.	:	

-----oOo-----

COMES NOW the Respondent, Jeanette Osguthorpe, and hereby submits this Memorandum of Points and Authorities in Opposition to the Petitioner's Petition for Extraordinary Writ. This Memorandum is supplemental to Respondent's Response to Motion to Stay Bench Warrant and/or Issue Writ of Supersedeas Pending Review by Law and Motion Panel filed in this Court on August 10, 1992 (hereinafter referred to as "Respondent's Response"). That Response sets forth in detail the statement of facts relied on in this Memorandum.

The trial court also provided adequate findings as reflected in the bench ruling and the Orders to show, beyond a reasonable doubt, the elements of contempt were met, namely "that the person cited for contempt knew what was required, had the ability to comply, and intentionally failed or refused to do so." Von Hake, 759 P.2d at 1172.

The Court of Appeals did not abuse its discretion in finding that Petitioner's appeal is not likely to prevail on its merits. Respondent respectfully requests that the Petition for Extraordinary Relief be denied, that no stay of the jail sentence be granted and that Respondent be awarded her attorney's fees and Court costs herein.

RESPECTFULLY SUBMITTED this 13th day of August, 1992. ✓

DART, ADAMSON & DONOVAN

By Sharon A. Donovan
SHARON A. DONOVAN
Attorneys for Respondent

FILED

JUL 16 1992

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

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

Jeanette Crawford Osguthorpe,)
)
Plaintiff and Appellee,)
)
v.)
)
Jerry Silver Osguthorpe,)
)
Defendant and Appellant.)

ORDER DENYING STAY

Case No. 920395-CA

Before Judges Billings, Bench, and Jackson (Law and Motion).

This case is before the court on appellant's motion for stay pending appeal. Based upon the memoranda filed by the parties and oral argument before the court,

IT IS HEREBY ORDERED that the motion for stay pending appeal is denied, and the temporary stay previously granted is vacated, based upon the court's determination that appellant has not sufficiently demonstrated that he would be likely to succeed on the merits of the appeal. See Jensen v. Schwendiman, 744 P.2d 1026, 1027 (Utah App. 1987) (per curiam), and

IT IS FURTHER ORDERED that the case is temporarily remanded to the trial court for determination and entry of an award of appellee's costs and attorneys' fees reasonably incurred in opposing the motion for stay.

Dated this 16th day of July, 1992.

BY THE COURT:

Judith M. Billings
Judith M. Billings, Judge

JUN 24 1992

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

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

Jeanetter Crawford Osguthorpe,)
)
Plaintiff and Appellee,)
)
v.)
)
Jerry Silver Osguthorpe,)
)
Defendant and Appellant.)

ORDER

Case No. 920395-CA

This case is before the court on appellant's motion for a staying the imposition of a jail sentence upon defendant for contempt of court pending a determination on appeal or, in the alternative, until a full hearing can be held on the motion for stay.

IT IS HEREBY ORDERED that a temporary stay of the imposition of the jail sentence is granted, which shall continue until a further order of this court, and

IT IS FURTHER ORDERED that a hearing on the merits of the motion for stay is scheduled before the law and motion panel of this court on July 15, 1992 at 9:00 a.m. at 230 South 500 East, #400, Salt Lake City Utah, and

IT IS FURTHER ORDERED that this temporary stay shall have no effect on the ongoing obligations of defendant/appellant to make any child support, alimony, or other payments under the orders of the trial court previously entered in this matter.

Dated this 24th day of June ~~24~~, 1992.

BY THE COURT:

Russell W. Bench

Russell W. Bench, Judge

CRAIG S. COOK, Bar No. 713
Attorney for Defendant
3645 East 3100 South
Salt Lake City, Utah 84109
Telephone: 485-8123

IN THE UTAH COURT OF APPEALS

- - - - -

JEANETTE CRAWFORD OSGUTHROPE,

Plaintiff-Appellee,

vs.

JERRY SILVER OSGUTHORPE,

Defendant-Appellant.

- - - - -

MOTION FOR STAY OF
JAIL SENTENCE PENDING
APPEAL

No. _____
District Ct. No. 874904967
Judge Homer F. Wilkinson

Defendant Jerry Osguthorpe pursuant to Rule 8 of the Utah Rules of Appellate Procedure moves this Court for an order staying the imposition of a jail sentence upon Defendant for contempt of court until such time as this matter has been heard by this Court on appeal or, in the alternative, until a full hearing can be held concerning this Motion for Stay.

This motion is based upon the following:

1. An ongoing dispute for several years concerning the divorce and terms of divorce has occurred between the plaintiff and the defendant.
2. As a result of this dispute Defendant has been ordered to pay a large amount of accrued child support and alimony to the plaintiff.
3. In January of 1992 the lower court issued an order that

Defendant was to be incarcerated in the Salt Lake County Jail if he did not pay \$5,000 toward these arrearages by January 13, 1992 and to continue to pay the sum of \$900 per month each month thereafter.

4. On January 13, 1992 Defendant did pay to the plaintiff \$5,000 which was obtained from Valley Bank & Trust Co. in the form of a loan signed by the defendant and his current wife.

5. On May 18, 1992 a further hearing was held before the Honorable Homer F. Wilkinson concerning the defendant's failure to make payments in accordance with the Court's schedule. At that time the Court found Defendant in contempt of court and sentenced him to the Salt Lake County Jail for a period of thirty days "and such longer time as the Court deems fit to impose sentence" if the defendant did not pay an additional \$2,000 by May 26, 1992 as well as continue to make the \$900 per month payment as scheduled.

6. During all of these proceedings Defendant has represented himself since he has been unable to afford counsel.

7. Because of certain procedural irregularities the parties stipulated that the prior Order of May 18, 1992 could be vacated and that a new order executed on June 19, 1992 would take effect. Under the terms of this Order Defendant is ordered to be incarcerated in the Salt Lake County Jail for a period of thirty days and such longer time as the Court deems fit if the defendant is unable to pay \$3,050 by June 24, 1992 at 12:00 noon.

8. The Affidavit of Defendant attached herein states that he is unable to meet this financial obligation because he does

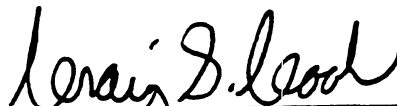
not have the funds available to pay this amount under the Court's time table. Furthermore, the Affidavit of Defendant establishes that he is acting in good faith in attempting to settle this matter with his wife but that he is financially unable to meet the economic schedule established by the Court. Further, the Affidavit of Defendant together with supporting notarized statements of other veterinarians supports his position that he is not under-employed and is making a wage which is not inconsistent with other veterinarians doing his type of work in this depressed market.

9. The attached Affidavit of Counsel Craig S. Cook is filed to support the reasoning as to why this request for stay on appeal has not first been formally made to the lower court. As stated in the Affidavit the lower court has imposed numerous contempt of court sentences upon the defendant and has issued stays based upon various events. In speaking with the lower court on June 19, 1992 the Court stated that it would be extremely unlikely to grant a stay on appeal unless some significant new evidence concerning Defendant's financial condition was presented to the Court. Since there is no new financial information that the Court has not already seen and rejected it is counsel's opinion that there is no likelihood that a stay pending appeal would be granted by the lower court. Moreover, the lower court is now sitting in Summit County during this week and is unavailable for a timely hearing.

Based upon this motion, therefore, Defendant requests the following relief: (1) for a stay entered by a judge or judges of

this Court preventing the imposition of the incarceration that has now been ordered by the lower court as of June 24, 1992 at 12:00 noon and continuing such stay until the appeal in this case has been decided by this Court; or (2) in the alternative, for an order issued by a judge or judges of this Court staying imposition of the jail sentence until such time as this matter concerning a stay on appeal may be fully argued to a panel of this Court.

DATED this 24th day of June, 1992.



Craig S. Cook
Attorney for Defendant-
Appellant

CERTIFICATE OF HAND DELIVERY

I hereby certify that I personally delivered a true and correct copy of the foregoing Motion for Stay of Jail Sentence Pending Appeal to Sharon A. Donovan, Attorney for Plaintiff, 310 South Main, Suite 1330, Salt Lake City, Utah 84101-2167 this 24th day of June, 1992.



CRAIG S. COOK, Bar No. 713
Attorney for Defendant
3645 East 3100 South
Salt Lake City, Utah 84109
Telephone: 485-8123

IN THE UTAH COURT OF APPEALS

- - - - -

JEANETTE CRAWFORD OSGUTHROPE,

Plaintiff-Appellee,

vs. APPEAL

AFFIDAVIT OF
JERRY OSGUTHROPE

JERRY SILVER OSGUTHORPE,

Defendant-Appellant.

No. _____
District Ct. No. 874904967
Judge Homer F. Wilkinson

- - - - -

1. I am the defendant in the above-entitled case and have been involved in this continuing dispute with my former wife since our separation in 1988. The terms of my divorce have been before this Court on a previous occasion in Case No. 890219 which was decided on March 19, 1990, 131 Utah Adv.Rpt. 21.

2. I have been representing myself since this Court's decision on appeal because I have been financially unable to afford an attorney. On numerous occasions I have been found in contempt of the court for failure to make the required payments under the Divorce Decree but such jail sentence has been stayed pending my fulfillment of the financial obligation.

3. In January of 1992 I again was ordered to go to jail unless I was able to provide \$5,000 to my wife before January 13, 1992. In order to meet this obligation my current wife and I

took out a loan from Valley Bank & Trust for \$5,000 and paid her this amount prior to the imposition of the jail sentence.

4. Since that time I have been making payments of \$500 a month to my ex-wife the last one being on June 2, 1992 but these amounts are not sufficient to comply with the Court's Order of \$1,050 a month which includes child support, alimony, and back payments.

5. I have now been ordered to pay \$3,050 to my ex-wife by June 24, 1992 at 12:00 noon or to report to the Salt Lake County Jail. I have again attempted to borrow this money from Valley Bank but as evidenced by the attached letter of Nori Dustman, Assistant Vice President of Valley Bank, I am unable to obtain any further loans.

6. During the hearing of May 18, 1992 and on previous occasions I have testified to the Court that I am presently making an adjusted gross income of approximately \$14,000 as a contract veterinarian and that I simply am unable to meet the payment schedule created by the Court. I have attached notarized letters of three other veterinarians who support my contention that under the market in Salt Lake today that this is not an unreasonable wage and that I am not under-employed as continually alleged by my former wife and as found by the lower court.

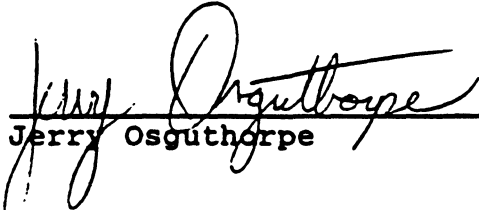
7. I have submitted to the Court copies of my recent federal tax returns which verify my income and my inability to meet these schedules. The Court has seemingly ignored these documents and has continued to impose a financial obligation upon me which I cannot meet.

8. I do not have any other assets or income available to meet this obligation of some \$3,000 by today nor will I be able to meet the \$1,050 obligation per month in the future.

9. I presently, under the terms of the Divorce Decree, have all four of my children living with me and my current wife throughout the summer. It is therefore necessary for me to support them at home while at the same time paying my former wife for the child support and delinquent amounts even though they are not living with her during this three-month period.

10. If I am forced to stay at the Salt Lake County Jail for thirty days or more as now ordered by the lower court I will lose any income that I could have earned during this period as a veterinarian as well as alienate many of my clients who I will be unable to service. In addition, my current wife and my four children will not have sufficient income available to support them during my incarceration.

DATED this 24th day of June, 1992.


Jerry Osguthorpe

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

On the 24th day of June, 1992, personally appeared before me Jerry Osguthorpe who duly acknowledged that the contents of the foregoing Affidavit are true and correct to the best of his knowledge and belief.

DISCLOSURE STATEMENT

Principal	Loan Date	Maturity	Loan No	Call	Collateral	Account	Officer	Initials
\$5,000.00	1-13-1992	1-13-1997						

References in the shaded area are for Lender's use only and do not limit the applicability of this document to any particular loan or item

Borrower: JERRY S. OSGUTHORPE
GWENDA OSGUTHORPE
4696 HIGHLAND DR
SALT LAKE CITY, UT 84117-5135

Lender: Valley Bank and Trust Company
BROADWAY OFFICE
80 WEST BROADWAY
SALT LAKE CITY, UT 84101-0000

ANNUAL PERCENTAGE RATE The cost of my credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost me.	Amount Financed The amount of credit provided to me or on my behalf.	Total of Payments The amount I will have paid after I have made all payments as scheduled.
6.998%	\$941.20	\$5,000.00	\$5,941.20

☐ I want an itemization. ☐ I do not want an itemization.

PAYMENT SCHEDULE. My payment schedule will be 60 monthly payments of \$99.02 each, beginning February 13, 1992.

SECURITY. I am giving a security interest in Branch 00202 0000000047383125 PASSBOOK SAVINGS in addition to Lender's security interest and other rights in my deposit accounts.

LATE CHARGE. If a payment is 11 days late, I will be charged 5.000% of the payment or \$15.00, whichever is greater.

PREPAYMENT. If I pay off early, I will not have to pay a penalty.

I will look at my contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

I read and was given a completed copy of this Disclosure Statement on January 13, 1992, prior to signing the Note.

BORROWER:

X Jerry S. Osguthorpe
JERRY S. OSGUTHORPE

X Gwenda Osguthorpe
GWENDA OSGUTHORPE

Other Charges Paid In Cash:

\$0.00

Fixed Rate Installment. LASER PRO (tm) Ver. 3.13a (c) 1992 CFI Bankers Service Group, Inc. All rights reserved. [UT-B10 F3.14 P3.13 Generated by the Customer Service System.LN]

Disclosing Officer Signature And Officer Number

BROADWAY OFFICE
80 WEST BROADWAY
SALT LAKE CITY, UT 84101-0000

June 22, 1992

DR. JERRY OSGUTHORPE
6808 COURTLAND AVENUE
SALT LAKE CITY, UT 84121-0000

Dear DR. OSGUTHORPE:

In viewing your request, I am sorry to inform you that we will be unable to process your request.

We feel that you have excessive obligations and insufficient income to support any further debt at this time.

If circumstances should change in the future, we will be glad to re-evaluate your request.

If you have any further questions, or would like to discuss this matter further, please feel free to contact me.

Sincerely,

Nori Dustman

NORI DUSTMAN
ASSISTANT VICE PRESIDENT
BROADWAY OFFICE
(801)481-5350

STATE OF UTAH

County of Salt Lake ss.

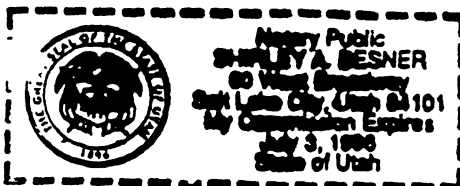
On the 22nd day of June, A.D. 19 92 personally
appeared before me Nori Dustman the signer
of the within instrument, who duly acknowledged to me
that she executed the same.

Shirley A. Besner
Notary Public

My commission expires:

7-3-96

Salt Lake Co.
Residing at:



Olympus Cove Veterinary Clinic
3247 East 3300 South
Salt Lake City, Utah 84109
(801) 485-6060
J. Britt Hosken, D.V.M.

6/23/92

To Whom It May Concern,

This will state that I pay a relief veterinarian \$115.00 per day for a 9 hour shift. This veterinarian is an independent contractor who uses my staff, facilities and supplies.

The availability of jobs is a very limited market here in the Salt Lake area and competition among the various veterinary clinics is fierce keeping wages and salaries low for veterinarians and all staff.

Sincerely,

J. Britt Hosken DVM

J. Britt Hosken, D.V.M.

STATE OF UTAH)
COUNTY OF SALT LAKE) SS

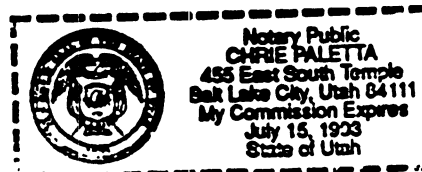
On the 23 day of June 1992
personally appeared before me J. Britt Hosken

the executor(s) of the foregoing instrument who duly
acknowledged to me that he/she executed the same.

Christie Paletta

Notary Public

Residing at: SL
Commission expires: 7/15/93



GIVE THEM THE CARE THEY DESERVE



ANIMAL CARE CLINIC

Earnest J. Heward DVM

5484 South 900 East
Murray, Utah 84117
(801) 266-1219

June 23, 1992

To Whom It May Concern:

I currently will pay 125.00-165.00 per day for a full time relief veterinarian in my exclusively small animal veterinary practice. This is for a 12 hour shift and the doctor uses my facility, equipment, and staff. The doctor is expected to assure managerial type responsibilities while in the practice. The daily rate of pay set is based on their level of experience and ability in the practice and management of a solo small animal clinical practice.

Relief work is seasonal and a doctor performing this type of work can expect to have periods of time when they are not employed.

Sincerely,

Earnest J. Heward, D.V.M.

DEPTAH

Y OF SALT LAKE, SS

24th June 1992

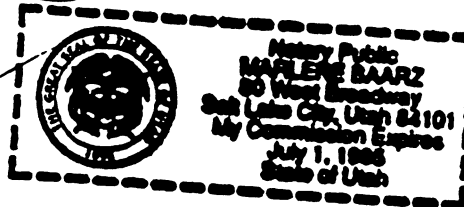
By Earnest J. Heward

Signature of Earnest J. Heward

Signature of Matthew Leary

Signature of Sandy

7-1-95





WHITE PINE VETERINARY CLINIC

P.O. BOX 1811, PARK CITY, UTAH 84060

Telephone 801 - 649-7182
801 - 521-4657

June 23, 1992

Dear Sirs,

This will state that I pay a relief veterinarian
\$110.00 per day for a 9 hour shift. This veterinarian
is an independent contractor who uses my staff, facilities
and supplies.

Sincerely,

Keith S. Lund DVM

Keith S. Lund, DVM

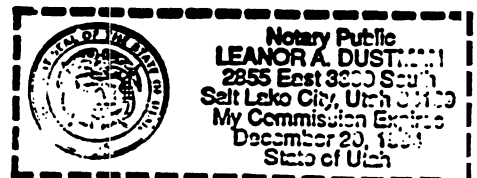
OF UTAH
County of Salt Lake) ss.
On the 23rd day of June, A.D. 1992 personally
appeared before me Keith S. Lund the signer
of the within instrument, who duly acknowledged to me
that he executed the same

Leonor A. Dust
Notary Public

My commission expires:

12/26/94

Salt Lake
Residing at:



SHARON A. DONOVAN, 0901
DART, ADAMSON & DONOVAN
Attorneys for Plaintiff
310 South Main, Suite 1330
Salt Lake City, Utah 84101-2167
Telephone: 521-6383

Third Judicial District

JUN 19 1992

SALT LAKE COUNTY

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

JEANETTE CRAWFORD OSGUTHORPE,

Plaintiff,

vs.

ORDER FINDING DEFENDANT
IN CONTEMPT AND IMPOSING
JAIL SENTENCE AND JUDGMENT

JERRY SILVER OSGUTHORPE,

Defendant.

Civil No. 874904967
Judge Homer F. Wilkinson

Plaintiff's Motion for Judgment, attorneys' fees and immediate imposition of jail sentence came on regularly for hearing on May 18, 1992 before the Honorable Homer F. Wilkinson, one of the judges of the above-entitled Court, Plaintiff appearing in person and by and through Sharon A. Donovan on behalf of Kent M. Kasting, and Defendant appearing pro se, and the Court having heard evidence and during the proceedings having received documentary evidence regarding Defendant's income, Defendant's Exhibit Nos. 1 and 2.

Pursuant to such hearing an Order was entered by the Court on June 5, 1992 finding the defendant in contempt and imposing a jail sentence and judgment. Because of procedural irregularities

the parties have stipulated that such Order should be withdrawn and that a new Order should be issued in Order to allow the defendant the opportunity to take appropriate action with reference to such Order.

The Court considers itself very familiar with the file of this case, having had numerous proceedings before this Court prior to the above-referenced hearing. The Court has carefully listened to the proffer and evidence of the parties and reviewed prior testimony of the parties regarding prior imposition of jail sentence and considers itself fully advised in the premises. Based upon the foregoing, and the Court having made and entered adequate and sufficient Findings of Fact, now, therefore, the Court being fully advised,

IT IS HEREBY ORDERED, ADJUGED, AND DECREED AS FOLLOWS:

1. The Court finds that this matter has been before this Court before, has been up to the Court of Appeals on one occasion and that Court has sustained this Court, and the Court finds the defendant's income, as he states, is just not realistic.

2. The Court finds that the parties' children need to be supported and Defendant has failed to meet his obligations, pursuant to the Decree of Divorce.

3. The Court sustains its previous order. The Court further orders that Defendant shall be incarcerated in the Salt Lake County Jail for a period of thirty days, and such longer time as the Court deems fit to impose sentence, pursuant to Utah Code Annotated §78-32-12, if the acts performed as ordered by this Court are not fully complied with. However, the Court will

stay its imposition of jail sentence, as long as the following conditions are met: (a) the Court shall stay this Order until the June 24, 1992, at 12:00 noon, at which time \$3,050.00 shall be paid by Defendant to Plaintiff to bring the delinquent child support and alimony through June 1992 (\$1,800.00 in child support through June 1992, and alimony of \$750.00 through June, 1992; and attorneys' fees of \$500.00 for purpose of these proceedings). If the the \$3,050.00 is not paid by June 24, 1992 at 12:00 noon, a bench warrant shall issue, unless the defendant submits himself to the Salt Lake County Jail for incarceration. (b) The Court further orders that if the on-going child support and payment on arrearages of \$900.00 per month due on the 5th day of July, 1992 is not paid at that time, a bench warrant shall issue, unless Defendant submits himself voluntarily to the Salt Lake County Jail. (c) If Defendant submits himself voluntarily to the Salt Lake County Jail, he is ordered to inform this Court of such, so that the necessary paperwork can be taken care of. ~~the~~ Judgment shall enter against Defendant in favor of Plaintiff in the amount of \$1,800.00 in delinquent child support through June 1992; \$750.00 in alimony through June 1992 and attorneys' fees of \$500.00 for purposes of these proceedings, for a total judgment of \$3,050.00.

DATED this 19 day of June, 1992.

BY THE COURT:


HOMER F. WILKINSON
District Judge

transcript May 10, 1992

1 (WHEREUPON, THE FOLLOWING PROCEEDINGS CONTINUED
2 IN OPEN COURT:)

3 THE COURT: LET ME INDICATE TO YOU THAT I'M NOT
4 GOING TO GO BACK OVER WHAT I SAID THE LAST TIME, EXCEPT TO
5 EMPHASIZE THAT THIS MATTER HAS ALREADY BEEN UP BEFORE THE
6 COURT OF APPEALS ON ONE OCCASION, THAT THE COURT SUSTAINED
7 THIS COURT, AND THAT THE COURT INDICATED THE SAME AS THIS
8 COURT HAS, THAT THE DEFENDANT'S INCOME AS STATED BY HIM IS
9 JUST NOT REALISTIC.

10 THE COURT OF APPEALS TOOK THE POSITION THAT THE
11 UNKNOWN AMOUNTS OF INCOME--THAT THERE WAS AN UNKNOWN AMOUNT OF
12 INCOME THAT THIS COURT HAS TAKEN INTO CONSIDERATION, AND IT
13 WAS JUSTIFIED IN DOING SO, AND NO MATTER HOW YOU LOOK AT IT,
14 WE STILL HAVE CHILDREN THERE THAT DO NEED TO BE SUPPORTED.

15 WE HAVE A MARRIAGE OF A CERTAIN DURATION WHERE
16 ALIMONY HAS BEEN AWARDED, AND IT HAS NOT BEEN KEPT UP.

17 THIS COURT IS GOING TO SUSTAIN ITS ORDER PREVIOUSLY.
18 THE COURT IS GOING TO ORDER THAT THE DEFENDANT BE INCARCERATED
19 IN THE SALT LAKE COUNTY JAIL FOR A PERIOD OF 30 DAYS, AND SUCH
20 LONGER TIME AS THE COURT SEES FIT TO IMPOSE PURSUANT TO
21 78-32-12, IF THE ACTS ARE NOT PERFORMED AS ORDERED BY THIS
22 COURT.

23 THE COURT WOULD--NOW THIS AMOUNT YOU HAVE GIVEN ME
24 IS THROUGH MAY?

25 MS. DONOVAN: THAT'S CORRECT.

1 THE COURT: THE COURT WOULD STAY THE ORDER--ARE
2 THOSE SUPPOSED TO BE PAID AT THE FIRST OF THE MONTH?

3 MS. DONOVAN: THE 5TH AND THE 20TH, YOUR HONOR.

4 THE COURT: THE COURT WOULD STAY THIS ORDER UNTIL
5 THE 26TH DAY OF MAY AT 12 O'CLOCK NOON, AT WHICH TIME \$2,000
6 SHALL BE PAID BY THE DEFENDANT, AND THAT WOULD INCLUDE
7 BRINGING THE CHILD SUPPORT FOR MAY AND ATTORNEY'S FEES AND
8 ALIMONY FOR MAY AND PROVISION FOR COMING BEFORE THIS COURT.

9 AND EACH TIME THIS MATTER IS BROUGHT BACK, THERE ARE
10 GOING TO BE ADDITIONAL ATTORNEY'S FEES, MR. OSGUTHORPE. YOU
11 SHOULD UNDERSTAND THAT. AND THAT \$2,000 IS TO BE PAID BY THE
12 26TH BY 12 O'CLOCK NOON OR A BENCH WARRANT WOULD BE ISSUED,
13 UNLESS THE DEFENDANT SUBMITS HIMSELF TO THE SALT LAKE COUNTY
14 JAIL FOR INCARCERATION.

15 THE COURT WOULD FURTHER NOTE THAT IF THE AMOUNT DUE
16 AND OWING ON THE 5TH OF JUNE IS NOT PAID BY THAT TIME--AND
17 THAT AMOUNT WOULD BE HOW MUCH IS DUE? AND I'M SPEAKING OF
18 EACH MONTH?

19 MS. DONOVAN: \$900 CHILD SUPPORT. THAT INCLUDES
20 ARREARAGES.

21 THE COURT: \$900, IF THAT IS NOT PAID BY THE 5TH OF
22 JUNE, A BENCH WARRANT WOULD BE ISSUED.

23 THAT'S GIVING YOU AN OPPORTUNITY TO BRING THIS
24 CURRENT BY THE 26TH, AND THEN CURRENT THROUGH THE MONTH OF
25 JUNE. AND IF IT'S NOT DONE, AS I SAY, A BENCH WARRANT WILL

1 ISSUE, UNLESS YOU SUBMIT YOURSELF VOLUNTARILY TO THE COUNTY
2 JAIL.

3 I WOULD INDICATE TO YOU THAT IF YOU DO SUBMIT
4 YOURSELF VOLUNTARILY, THAT YOU DO INFORM THIS COURT OF SUCH SO
5 THAT THE NECESSARY PAPERWORK CAN BE TAKEN CARE OF. ANY
6 QUESTIONS?

7 THE DEFENDANT: WHERE AM I GOING TO COME UP WITH
8 THIS INCOME, YOUR HONOR?

9 THE COURT: MR. OSGUTHORPE, PAYMENT OF MONEY IS YOUR
10 RESPONSIBILITY WHICH HAS BEEN PLACED ON YOU BY THIS COURT AND
11 BY THE COURT OF APPEALS. AS I INDICATED TO YOU BEFORE, I'M
12 NOT TELLING YOU WHAT TO DO. YOU DO WHAT YOU HAVE TO DO.

13 ~~BUT~~ WHATEVER YOU DO, AS FAR AS ANY FURTHER APPEAL OR
14 ANY MODIFICATION, THAT WOULD BE YOUR DECISION.

15 THAT'S THE ORDER OF THE COURT. WOULD YOU PREPARE
16 THE PLEADINGS?

17 MS. DONOVAN: I WILL.

18 THE COURT: AND GET THEM OVER TO ME AS SOON AS
19 POSSIBLE, AND A COPY TO MR. OSGUTHORPE. ANY QUESTIONS
20 CONCERNING THE ORDER?

21 MS. DONOVAN: NO, YOUR HONOR.

22 THE COURT: IF THERE ARE NO FURTHER QUESTIONS, THEN
23 THAT WILL BE THE ORDER. FOR THE RECORD, LET ME ALSO INDICATE
24 THAT THE COURT DOES ADMIT DEFENDANT'S EXHIBIT NOS. 1 AND 2.

25 (WHEREUPON, THE PROCEEDINGS CAME TO A CLOSE.)

KENT M. KASTING (1772)
DART, ADAMSON & KASTING
Attorneys for Plaintiff
310 South Main, Suite 1330
Salt Lake City, Utah 84101
(801) 521-6383

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---oooOooo---

JEANETTE CRAWFORD OSGUTHORPE,	:	ORDER AND JUDGMENT IN RE:
Plaintiff,	:	HEARING ON DEFENDANT'S
	:	OBJECTIONS TO PLAINTIFF'S
	:	WRITTEN ORDER AND JUDGMENTS,
	:	ENFORCEMENT OF DECREE OF
v.	:	DIVORCE, CONTEMPT ORDER, ETC.
	:	FILED JANUARY 11, 1991 AND
	:	DEFENDANT'S OBJECTIONS TO
	:	DOMESTIC COMMISSIONER'S
	:	RECOMMENDATIONS RELATED TO
	:	PLAINTIFF'S VERIFIED MOTION
JERRY SILVER OSGUTHORPE,	:	FOR JUDGMENTS, CONTEMPT ORDER,
Defendant.	:	SANCTIONS, AND OTHER RELIEF
	:	MADE OCTOBER 8, 1991 AND
	:	PLAINTIFF'S REQUEST FOR
	:	CONTEMPT CITATION
	:	
	:	Civil No. 874904967
	:	
	:	Judge Homer F. Wilkinson
	:	

---oooOooo---

The Hearing on Defendant's Objections to Plaintiff's Written Order and Judgements, Enforcement of Decree of Divorce, Contempt Order, Etc., Filed January 11, 1991 and Defendant's Objections to Domestic Commissioner's Recommendations Related to Plaintiff's Verified Motion for Judgments, Contempt Order, Sanctions, and Other Relief Made October 8, 1991 and Plaintiff's Request for Contempt Citation came on for argument and evidentiary hearing on

EXHIBIT "E"

Tuesday, January 7, 1992, at the hour of 10:30 a.m. The proceedings concluded at the hour of 4:30 p.m. The plaintiff was present and represented by her counsel Kent M. Kasting of Dart, Adamson & Kasting. The defendant was present and represented himself pro se. The parties presented testimony and documentary evidence and argument in support of their respective positions. Each party was sworn and testified under oath. The Court reviewed the file, the pleadings, motions, and other documents before the Court and considers itself fully advised in the premises. The Court issued its ruling from the bench and has made Findings of Fact and Conclusions of Law. Based upon the foregoing, it is hereby ORDERED as follows:

1. OBJECTIONS TO JANUARY 1991 PROPOSED ORDER. Defendant's Objections to Plaintiff's Proposed Order and Judgments on Plaintiff's Motion for Judgment, Enforcement of Decree of Divorce, Determination of Attorneys Fees on Appeal, Contempt Order and Sanctions and Other Relief filed in January, 1991, are without merit and overruled and the Order has been signed as proposed and without modification.

2. DEFENDANT'S REJECTION OF DOMESTIC COMMISSIONER'S RECOMMENDATIONS OF OCTOBER 8, 1991. Defendant's Rejection of Domestic Commissioner's Recommendation dated October 8, 1991 is denied and the Recommendation is affirmed in all respects, except as to plaintiff's claim for \$180.53 in medical expenses which she agreed to relinquish.

3. PERSONAL PROPERTY EXCHANGE. Any personal property to be exchanged under the original Decree of Divorce shall occur at the residence of the plaintiff at 12:00 noon on January 11, 1992. Plaintiff's counsel shall have a representative present. Defendant shall attend and secure possession of any such property to which he may be entitled. Following that exchange the issue of personal property shall be fully, finally and completely resolved and neither shall raise any further claims to personal property.

4. UNREIMBURSED MEDICAL AND DENTAL EXPENSES. Plaintiff's claims for unreimbursed medical and dental expenses incurred prior to January 4, 1991, have previously been reduced to Judgment and, therefore, defendant's attempt to challenge those expenses is barred by the doctrine of res judicata. Plaintiff has waived her right to seek reimbursement from defendant for the children's medical and dental expenses from January 4, 1991 through September 25, 1991, the date which she filed her motion seeking such reimbursement.

5. JUDGMENT - UNPAID CHILD SUPPORT AND ALIMONY. Plaintiff is granted a judgment against defendant in the sum of \$9,750, together with any accrued interest thereon, representing unpaid child support and alimony from December 1990 through January 1992. This judgment shall be in addition to prior judgments for unpaid child support and alimony previously entered by the Court.

6. JUDGMENT - ATTORNEYS FEES. Plaintiff is granted judgment against defendant in the sum of \$875 for attorneys fees. This

January 24, 1992 Judgment

judgment shall be in addition to prior judgments for attorneys fees previously entered by the Court.

7. SANCTIONS FOR CONTEMPT. The Court imposes the following sanctions on defendant for his contempt:

a. The defendant is fined \$200.

b. The defendant is ordered to serve 30 days in the Salt Lake County Jail.

c. Pursuant to Section 78-32-12 Utah Code Annotated (1953 as amended), the imprisonment is for his omission to perform an act required by law, which he has the power and ability to perform. He shall continue to serve the time in jail until he pays the child support as ordered by the Court.

d. Pursuant to Section 78-32-12.1(5) Utah Code Annotated, (1953 as amended), if the Court in its discretion finds that the defendant would benefit from performing community service, participating in workshop classes and/or individual counselling to educate him about the importance of compliance with the Court's Orders and the need to support his children, then the Court may so order if it elects to do so.

e. The jail sentence ordered above may be stayed for a period of 6 days or until January 13, 1992. If by that time defendant has paid to plaintiff \$5,000 towards the child support arrearages reduced to judgment in ¶5 above. If he fails to pay the \$5,000 by January 13, 1992, then the defendant is to report to the Salt Lake County Jail at 12:00 noon, January 14, 1992. If

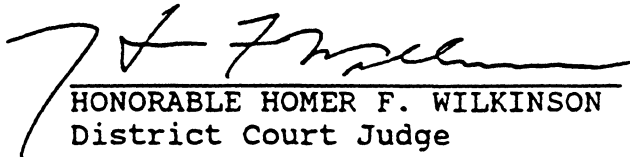
he does not so report, a bench warrant will be issued for his arrest.

f. Further, in addition to and independent of the requirements in the preceding paragraph, the jail sentence shall be stayed, provided the defendant pay to plaintiff in a timely fashion the sum of \$900 per month (\$600 regular child support and \$300 towards support arrearages). Should defendant not make these monthly payments as ordered, then the stay of the jail sentence shall be lifted and he shall immediately commence serving such sentence. This \$900 monthly payment shall continue until all child support arrearages have been paid. It shall be in addition to the \$150 monthly alimony payment he is required to pay plaintiff under the Decree of Divorce.

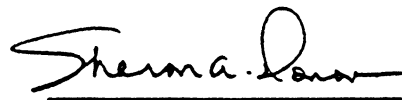
g. Defendant may purge himself of his contempt as has been found by the Court by paying the amounts required in ¶s (e) and (f) above.

DATED this 24 day of January, 1992.

BY THE COURT


HONORABLE HOMER F. WILKINSON
District Court Judge

Approved as to Substance and Form:


for Kent M. Kasting
Attorneys for Plaintiff

1/15/92
Date

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---ooo0ooo---

JEANETTE CRAWFORD OSGUTHORPE,
Plaintiff,

v.

JERRY SILVER OSGUTHORPE,
Defendant.

: FINDINGS OF FACT AND
 : CONCLUSIONS OF LAW IN RE:
 : HEARING ON DEFENDANT'S
 : OBJECTIONS TO PLAINTIFF'S
 : WRITTEN ORDER AND JUDGMENTS,
 : ENFORCEMENT OF DECREE OF
 : DIVORCE, CONTEMPT ORDER, ETC.
 : FILED JANUARY 11, 1991 AND
 : DEFENDANT'S OBJECTIONS TO
 : DOMESTIC COMMISSIONER'S
 : RECOMMENDATIONS RELATED TO
 : PLAINTIFF'S VERIFIED MOTION
 : FOR JUDGMENTS, CONTEMPT ORDER
 : SANCTIONS, AND OTHER RELIEF
 : MADE OCTOBER 8, 1991 AND
 : PLAINTIFF'S REQUEST FOR
 : CONTEMPT CITATION

Civil No. 874904967

Judge Homer F. Wilkinson

---ooo0ooo---

The Hearing on Defendant's Objections to Plaintiff's Written Order and Judgements, Enforcement of Decree of Divorce, Contempt Order, Etc., Filed January 11, 1991 and Defendant's Objections to Domestic Commissioner's Recommendations Related to Plaintiff's Verified Motion for Judgments, Contempt Order, Sanctions, and Other Relief Made October 8, 1991 and Plaintiff's Request for Contempt Citation came on for argument and evidentiary hearing on

Tuesday, January 7, 1992, at the hour of 10:30 a.m. The proceedings concluded at the hour of 4:30 p.m. The plaintiff was present and represented by her counsel Kent M. Kasting of Dart, Adamson & Kasting. The defendant was present and represented himself pro se. The parties presented testimony and documentary evidence and argument in support of their respective positions. Each party was sworn and testified under oath. The Court reviewed the file, the pleadings, motions, and other documents before the Court and considers itself fully advised in the premises. The Court issued its ruling from the bench and now in connection with that ruling now makes the following Findings of Fact.

FINDINGS OF FACT

1. NOTICE. Both parties had proper notice of these proceedings and the Court has jurisdiction over each of these parties. Defendant had the opportunity for a full hearing on Plaintiff's Request for Contempt.

2. OBLIGATIONS UNDER DECREE OF DIVORCE. The defendant at all times knew and understood the obligations imposed upon him under ¶s 4, 6, 7 and 15 of the Decree of Divorce entered in this matter.

3. PERSONAL PROPERTY. Disputes as to the exchanges of personal property have arisen between the parties in the past and those disputes have not been able to be voluntarily resolved by the parties. Any such disputes are independent from, and not related to, the defendant's ongoing obligations to pay plaintiff

Plaintiff has in the past attempted to make arrangements for the orderly exchange of this property.

4. UNREIMBURSED MEDICAL AND DENTAL EXPENSES. The defendant has challenged plaintiff's claims for reimbursement of medical and dental expenses not covered by insurance. Those unreimbursed expenses through January 4, 1991 were reduced to judgment in connection with previous hearings held before the Commissioner and this Court. With regard to unreimbursed medical and dental expenses incurred after January 4, 1991 through September 25, 1991, the date of the filing of plaintiff's last Motion, plaintiff stated she would not seek reimbursement from defendant for the same.

5. UNPAID CHILD SUPPORT AND ALIMONY.

a. Defendant has failed to pay ongoing child support and alimony for considerable periods of time (See plaintiff's Exhibits 2, 3, 4 and 5). Between December 1990 and January 1992, plaintiff owed defendant \$8,400 in child support, \$2,100 in alimony (total \$10,500 plus accrued interest). Defendant paid \$750 leaving an unpaid arrearage of \$9,750 (See plaintiff's Exhibit 5 and \$750 owed for January, 1992.) No child support has been paid since February, 1991.

b. Defendant and his current wife both testified "He would pay child support if his personal items were returned".

c. Defendant further testified the plaintiff had plenty of money and could sell one of her houses.

d. Defendant has not demonstrated good faith in connection with attempting to pay his ongoing support obligations.

e. Defendant testified he was paying his new wife \$500 per month rent in order to reside with her in a home she recently purchased at 6808 Courtland Circle, Salt Lake City, Utah.

f. Defendant is a veterinarian practicing in excess of 15 years and testified he earned \$5.00 per hour in connection with consultation he claimed he provided to the Osguthorpe Animal Hospital. Defendant had and has the means to pay child support.

g. The credibility of the defendant and his present wife is lacking. Both refused to answer questions on the stand. Both were evasive. The defendant did not answer questions truthfully.

h. The defendant's failure to pay his support obligations as previously ordered was done willfully, voluntarily and with full knowledge of those obligations as previously ordered by the Court.

6. CONTEMPT. The Court finds the defendant is in contempt of this Court pursuant to Section 78-32-1(5) Utah Code Annotated (1953, as amended), in that he has been disobedient of lawful ~~judgments, orders and processes of this Court.~~ The defendant had the opportunity to have a full hearing and evidence has been taken regarding that contempt. The defendant has not answered the questions put to him truthfully. The Court specifically finds that this is one of the most flagrant violations of the law

as far as support of children that has come before this Court, in that the defendant owes plaintiff in excess of \$16,000 in unpaid child support alone. Defendant is further in contempt for his failure to pay alimony and attorneys fees as previously ordered by the Court.

7. ATTORNEYS FEES.

a. The defendant has paid nothing towards the attorneys fees he was previously ordered to pay by this Court in connection with the trial of this matter and his subsequent appeal of this Court's decision to the Utah Court of Appeals.

b. , The plaintiff has incurred attorneys fees and costs in connection with this hearing and will be required to pay those fees.

c. Plaintiff does not have the financial means to pay her fees.

d. Plaintiff's counsel bills at the rate of \$125 per hour. That rate is consistent with rates charged in the community for domestic relations work. Plaintiff's counsel expended in excess of 7 hours in connection with preparation for and attendance at the hearing. The rate charged and hours expended are reasonable and necessary. Plaintiff's counsel requested an award of \$875 in attorneys fees.

From the foregoing Findings of Fact the Court now makes the following:

CONCLUSIONS OF LAW

1. OBJECTIONS TO JANUARY 1991 PROPOSED ORDER. Defendant's Objections to Plaintiff's Proposed Order and Judgments on Plaintiff's Motion for Judgment, Enforcement of Decree of Divorce, Determination of Attorneys Fees on Appeal, Contempt Order and Sanctions and Other Relief filed in January, 1991, are without merit and overruled and the Order has been signed as proposed and without modification.

2. DEFENDANT'S REJECTION OF DOMESTIC COMMISSIONER'S RECOMMENDATIONS OF OCTOBER 8, 1991. Defendant's Rejection of Domestic Commissioner's Recommendation dated October 8, 1991 is denied and the Recommendation is affirmed in all respects, except as to plaintiff's claim for \$180.53 in medical expenses which she agreed to relinquish.

3. PERSONAL PROPERTY EXCHANGE. Any personal property to be exchanged under the original Decree of Divorce shall occur at the residence of the plaintiff at 12:00 noon on January 11, 1992. Plaintiff's counsel shall have a representative present. Defendant shall attend and secure possession of any such property to which he may be entitled. Following that exchange the issue of personal property shall be fully, finally and completely resolved and neither shall raise any further claims to personal property.

4. UNREIMBURSED MEDICAL AND DENTAL EXPENSES. Plaintiff's claims for unreimbursed medical and dental expenses incurred prior to January 4, 1991, have previously been reduced to

January 1992 Judgment

Judgment and, therefore, defendant's attempt to challenge those expenses is barred by the doctrine of res judicata. Plaintiff by stipulation has waived her right to seek reimbursement from defendant for the children's medical and dental expenses from January 4, 1991 through September 25, 1991, the date which she filed her motion seeking such reimbursement.

5. JUDGMENT - UNPAID CHILD SUPPORT AND ALIMONY. Plaintiff is granted a judgment against defendant in the sum of \$9,750, together with any accrued interest thereon, representing unpaid child support and alimony from December 1990 through January 1992. This judgment shall be in addition to prior judgments for unpaid child support and alimony previously entered by the Court.

6. JUDGMENT - ATTORNEYS FEES. Plaintiff is granted judgment against defendant in the sum of \$875 for attorneys fees. This judgment shall be in addition to prior judgments for attorneys fees previously entered by the Court.

7. SANCTIONS FOR CONTEMPT. The Court imposes the following sanctions on defendant for his contempt:

a. The defendant is fined \$200.

b. The defendant is ordered to serve 30 days in the Salt Lake County Jail.

c. Pursuant to Section 78-32-12 Utah Code Annotated (1953 as amended), the imprisonment is for his omission to perform an act required by law, which he has the power and ability to perform. He shall continue to serve the time in jail until he pays the child support as ordered by the Court.

d. Pursuant to Section 78-32-12.1(5) Utah Code Annotated, (1953 as amended), if the Court in its discretion finds that the defendant would benefit from performing community service, participating in workshop classes and/or individual counselling to educate him about the importance of compliance with the Court's Orders and the need to support his children, then the Court may so order if it elects to do so.

e. The jail sentence ordered above may be stayed for a period of 6 days or until January 13, 1992. If by that time defendant has paid to plaintiff \$5,000 towards the child support arrearages reduced to judgment in ¶5 above. If he fails to pay the \$5,000 by January 13, 1992, then the defendant is to report to the Salt Lake County Jail at 12:00 noon, January 14, 1992. If he does not so report, a bench warrant will be issued for his arrest.

f. Further, in addition to and independent of the requirements in the preceding paragraph, the jail sentence shall be stayed, provided the defendant pay to plaintiff in a timely fashion the sum of \$900 per month (\$600 regular child support and \$300 towards support arrearages). Should defendant not make these monthly payments as ordered, then the stay of the jail sentence shall be lifted and he shall immediately commence serving such sentence. This \$900 monthly payment shall continue until all child support arrearages have been paid. It shall be in addition to the \$150 monthly alimony payment he is required to pay plaintiff under the Decree of Divorce.

g. Defendant may purge himself of his contempt as has been found by the Court by paying the amounts required in ¶s (e) and (f) above.

DATED this ____ day of January, 1992.

BY THE COURT

HONORABLE HOMER F. WILKINSON
District Court Judge

Approved as to Substance and Form:

Sharon A. Kasting
+ Kent M. Kasting
Attorneys for Plaintiff

1/15/92
Date

January 11, 1990 hearing

1 THE COURT: WELL, YOU TAKE THE \$375 THAT WAS
2 PAID, AND OF COURSE NONE WAS PAID IN JANUARY, AND GOING BACK
3 TO WHERE HE HADN'T PAID FULL CHILD SUPPORT BACK I GUESS TO
4 ALMOST THE TIME OF THE DIVORCE, IT LOOKS LIKE BACK IN MARCH OF
5 1989, THAT THERE IS AN AMOUNT OF CHILD SUPPORT--AND THIS WOULD
6 HAVE TO BE DETERMINED ACCURATELY--BUT IT'S UP IN THE AMOUNT OF
7 \$16,000.

8 NOW I'M NOT TALKING ABOUT ALIMONY OR ATTORNEYS
9 FEES, I'M LOOKING ONLY AT CHILD SUPPORT, THAT HE'S HAD THE
10 MEANS TO PAY THIS CHILD SUPPORT AND THAT HE HAS A GOOD
11 EDUCATION, HE HAS THE ABILITY TO, IF HE DOES NOT HAVE THE
12 INCOME--AND THE COURT EVEN QUESTIONS THAT--THAT HE IS PAYING
13 FOR RENT IN AN EXCESSIVE AMOUNT INSTEAD OF PAYING HIS CHILD
14 SUPPORT.

15 THE COURT FINDS THAT THIS IS ONE OF THE MOST
16 FLAGRANT VIOLATIONS OF THE LAW AS FAR AS SUPPORT OF CHILDREN
17 THAT HAS COME BEFORE THIS COURT, AND AS I SAY, I CANNOT EVEN
18 COMPREHEND HOW A FATHER CAN ALLOW HIMSELF TO DO SUCH A THING
19 AND STILL CLAIM HE LOVES HIS CHILDREN AND WANTS TO VISIT THE
20 CHILDREN.

21 THE COURT WOULD ORDER, PURSUANT TO SECTION
22 78-32-10--AND OF COURSE I'VE INDICATED HE HAS BEEN FOUND IN
23 CONTEMPT--THAT HE BE FINED \$200, AND THAT HE BE ORDERED TO
24 SPEND 30 DAYS IN THE SALT LAKE COUNTY JAIL.

25 THE COURT WOULD ~~FURTHER~~ ORDER, PURSUANT TO

1 SECTION 78-32-12 THAT THE IMPRISONMENT IS FOR HIS OMISSION TO
2 PERFORM AN ACT ENJOINED BY LAW, WHICH HE IS YET IN THE POWER
3 TO PAY, AND THAT AFTER SERVING THE 30 DAYS, HE IS TO CONTINUE
4 TO SERVE THE TIME IN JAIL UNTIL HE PAYS THE CHILD SUPPORT AS
5 ORDERED BY THE COURT.

6 THE COURT WOULD FURTHER ORDER THAT THE COURT
7 WILL RETAIN JURISDICTION OF THIS MATTER PURSUANT TO SECTION
8 78-32-12.1(5), THAT IF THE COURT FINDS THAT THE DEFENDANT--IF
9 THE COURT, IN ITS DISCRETION, FINDS THAT THE DEFENDANT WOULD
10 BENEFIT FROM PERFORMING COMMUNITY SERVICE, AND PARTICIPATE IN
11 WORKSHOP CLASSES OR INDIVIDUAL COUNSELING TO EDUCATE HIM ABOUT
12 THE IMPORTANCE OF COMPLIANCE WITH THE COURT'S ORDERS, AND TO
13 PROVIDE HIS CHILDREN WITH A SUBSTANTIAL SOURCE OF SUPPORT,
14 THEN THE COURT MAY ORDER THAT IF THE COURT SEES FIT.

15 THE COURT WILL FURTHER ORDER THAT THE PRISON--
16 OR, THE JAIL SENTENCE WILL BE STAYED FOR A PERIOD OF SIX DAYS
17 OR UNTIL THE 13TH DAY OF JANUARY, 1992, THAT IF THE DEFENDANT,
18 BY THAT TIME, HAS PAID THE SUM OF \$5,000 TO THE PLAINTIFF FOR
19 CHILD SUPPORT, THEN THE SENTENCE WILL BE STAYED AND EACH MONTH
20 THEREAFTER THAT HE PAYS CHILD SUPPORT AS ORDERED BY THE COURT,
21 PLUS THE SUM OF \$300 TOWARDS THE ARREARAGE--OR FOR AN AMOUNT
22 OF \$900--THEN THE JAIL TERM WILL BE STAYED.

23 IF HE FAILS TO PAY THE \$5,000 BY THE 13TH DAY
24 OF JANUARY, 1992, THEN HE IS TO REPORT TO THE SALT LAKE COUNTY
25 JAIL AT 12 O'CLOCK NOON. IF HE DOES NOT REPORT, A BENCH

1 WARRANT WILL BE ISSUED FOR HIS ARREST.

2 I WOULD ASK THE PLAINTIFF TO PREPARING THE
3 PLEADINGS. ANY QUESTIONS?

4 MR. KASTING: NO, YOUR HONOR, AND I WILL.

5 THE COURT: ANY QUESTIONS?

6 MR. OSGUTHORPE: YES, YOUR HONOR. I'M A LITTLE
7 CONFUSED ON THIS--HOW MUCH I HAVE TO PAY OR--.

8 THE COURT: YOU HAVE TO PAY, BY JANUARY 13TH--
9 YOU HAVE TO PAY THAT BEFORE 12 O'CLOCK NOON. LET ME COUNT MY
10 DAYS.

11 MR. OSGUTHORPE: PAY TO THE PLAINTIFF?

12 THE COURT: WAIT A MINUTE. I HAVE GIVEN SIX
13 DAYS, YOU HAVE TO PAY THAT TO THE PLAINTIFF BY THE 13TH,
14 OTHERWISE REPORT TO THE JAIL ON JANUARY 14TH AT 12 O'CLOCK
15 NOON OR A BENCH WARRANT WOULD BE ISSUED.

16 MR. OSGUTHORPE: THEN \$900 AFTER THAT?

17 THE COURT: \$900 A MONTH THEREAFTER. THAT
18 WOULD BE \$600 ONGOING CHILD SUPPORT AND \$300 UNTIL THE
19 ARREARAGE IN CHILD SUPPORT IS CAUGHT UP.

20 AFTER THE ARREARAGE OF CHILD SUPPORT IS CAUGHT
21 UP, THEN OF COURSE IT GOES BACK TO THE \$600 A MONTH. OF
22 COURSE IF THE CHILDREN BECOME OF AGE, THEN OF COURSE THAT'S
23 SOMETHING, TOO.

24 MR. KASTING: YOUR HONOR, WITH REGARD TO THE
25 ONGOING ALIMONY OBLIGATION OF \$150, THE SUPPORT OBLIGATION

1 WOULD BE \$750 A MONTH, \$600 FOR CHILD SUPPORT--.

2 THE COURT: THE ALIMONY WOULD HAVE TO BE PAID,
3 TOO; I'M JUST NOT ORDERING THAT THAT BE PAID AS FAR AS THE
4 JAIL. HE'S IN CONTEMPT OF THIS COURT AS FAR AS ALIMONY AND AS
5 FAR AS THE OBLIGATION OF ATTORNEYS FEES AND ALL THE ORDERS OF
6 THIS COURT; AND THAT SHOULD BE NOTED FOR THE RECORD.

7 BUT I AM PURGING HIM OF THE CONTEMPT IF HE'S
8 PAID THE CHILD SUPPORT AND GETS THE CHILD SUPPORT GOING, AND
9 WHAT YOU DO AS FAR AS THE COLLECTION OF ALIMONY, I'LL HAVE TO
10 LEAVE THAT TO YOU.

11 MR. KASTING: OKAY, YOUR HONOR.

12 THE COURT: IF THERE ARE NO FURTHER QUESTIONS,
13 COURT WILL BE IN RECESS.

14 (WHEREUPON, AT THE HOUR OF 4:35 P.M., THE
15 PROCEEDINGS CAME TO A CLOSE.)

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20 (TRANSCRIBED BY NANCY BURR)

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APPLICABLE CONSTITUTIONAL PROVISIONS AND
STATUTES TO THIS APPEAL

Amendment 5, United States Constitution:

No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law....

Article 1, Section 7, Utah State Constitution:

No person shall be deprived of life, liberty or property, without due process of law.

Article 1, Section 12, Utah State Constitution:

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Article 1, Section 16, Utah State Constitution:

There shall be no imprisonment for debt except in cases of absconding debtors.

Section 78-32-1, Utah Code Annotated:

The following acts or omissions in respect to a court or proceeding therein are contempt of the authority of the court:

* * *

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

Section 78-32-3, Utah Code Annotated:

...When 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 judges of the fact constituting the contempt, or a statement of the facts by the referees or arbitrators or other judicial officers.

Section 78-32-4, Utah Code Annotated:

...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.

Section 78-32-9, Utah Code Annotated:

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.

Section 78-32-10, Utah Code Annotated:

Upon the answer and evidence taken, the court shall determine whether the person proceeded against is guilty of the contempt charge. 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....

Section 78-32-11, Utah Code Annotated:

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 expenses; which order and the acceptance of money under it is a bar to an action by the aggrieved party for such loss and injury.

Section 78-32-12, Utah Code Annotated:

When the contempt consists in the omission to perform an act enjoined by law, which is yet in the power of the person to perform, he may be imprisoned until he shall perform it, or until released by the court, and in such case the act must be specified in the warrant of commitment.