

1992

Kim (Fazzio) Woodard v. Richard Cameron Fazzio : Brief of Appellant

Utah Court of Appeals

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Larry R. Keller.

John Walsh.

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920456 IN THE UTAH COURT OF APPEALS

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KIM (FAZZIO) WOODARD, ;
Plaintiff and ;
Appellee, ;
vs. ; ARGUMENT CLASSIFICATION FOUR
RICHARD CAMERON FAZZIO, ;
Defendant and ;
Appellant. ;
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COURT OF APPEALS NO. 920456-CA ~~900626CA~~

BRIEF OF THE APPELLANT

APPEAL FROM THE THIRD DISTRICT JUVENILE COURT
IN AND FOR SUMMIT COUNTY
STATE OF UTAH

JUDGE OLOF A. JOHANSSON - PRESIDING

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

JUDGE HOMER F. WILKINSON - PRESIDING

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FILED
Utah Court of Appeals

MAR 19 1993

Al. 101

ALL PARTIES TO THIS ACTION ARE NAMED IN THE CAPTION

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STATEMENT SHOWING JURISDICTION

This is an appeal from the Third District Juvenile Court, in and for Summit County, State of Utah, to the Utah Court of Appeals, and is authorized pursuant to 78-2a-3(2)(c), Utah Code Annotated as amended in 1990, and is consolidated with the underlying domestic relations action filed in the Third Judicial District Court, in and for Salt Lake County, State of Utah, and is authorized pursuant to 78-2a-3(2)(h), Utah Code Annotated as amended in 1990.

STATEMENT OF THE ISSUES

1. Has Plaintiff/Appellee caused the lower Court to blatantly violate this Court's mandate. The standard of review is a question of law, and is reviewed for correctness with no deference to the lower Court's determination. Berube vs. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989).

2. Do many of the FINDINGS constitute a mere "parade of horrors" that have no bearing whatsoever on whether the Father destroyed a relationship with his son. The standard of review is a question of law, and is reviewed for correctness with no deference to the lower Court's determination. Berube vs. Fashion Centre Ltd., 771 P.2d 1033 (Utah 1989).

3. Had the lower Court followed the instructions regarding appropriate FINDING OF FACT, it could not have come to the conclusion that the Father had abandoned his child. The standard of review is a question of law, and is reviewed for correctness with no deference to the lower Court's determination.

Berube vs. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989).

4. There is no basis in any of the FINDINGS OF FACT to suggest that the Father destroyed the parent-child relationship. The standard of review is a question of law, and is reviewed for correctness with no deference to the lower Court's determination. Berube vs. Fashion Centre Ltd., 771 P. 2d 1033 (Utah 1989).

DETERMINATIVE STATUTE

78-3a-48 Utah Code Annotated

STATEMENT OF THE CASE

NATURE OF THE CASE

This is an appeal to the Utah Court of Appeals from a determination that the Appellant's parental rights be terminated. The FINDINGS and CONCLUSIONS of the Juvenile Court were adopted by the District Court in the underlying annulment proceedings.

COURSE OF PROCEEDINGS

The parties were granted an annulment by the Honorable Homer F. Wilkinson, District Court Judge, on November 19, 1987. The parties experience serious difficulties getting along, so the Paternal Grandparents began picking up and delivering the Child for almost all visitation between the parties. The Mother met

with an attorney who explained to her that there had to be a full year with no contact with the Father before she could have his rights terminated. She cut off the visitation rights altogether, and the Father then Petitioned the District Court for specific visitation. She responds with a termination proceeding, which is assigned to the Juvenile Court for determination. This determination was later adopted by the District Court, and an appeal was made to the Utah Court of Appeals.

On December 9, 1991, this Court reversed and remanded the matter to the trial Court with instructions to make more detailed findings, and to redetermine the question of whether the Father had abandoned the Child, and stated specifically "We do not intend our remand to be merely an exercise in bolstering and supporting the conclusion already reached."

Notwithstanding this directive, the lower Court did exactly that, and restated the Proposed Amended Findings submitted by the Appellee to bolster and support the conclusion already reached.

From this resubmission of FINDINGS the Appellant once again appeals, with a request that this time the Court reverse and remand with instructions to set out meaningful visitation with the minor child.

DISPOSITION BY THE TRIAL COURT

The Juvenile Court, Honorable Olof A. Johansson, terminated all of the parental rights of the Appellant, and the District Court has adopted the Juvenile Court's determination.

SUMMARY OF THE ARGUMENT

Appellant respectfully submits that the lower Court has ignored this Court's specific instruction not to bolster and support the conclusion already reached.

Appellant submits that a good many of the FINDINGS, go only to make the Appellant out as a "bad guy" and have nothing to do with the critical questions of fact that must be addressed.

The lower Court merely adopted, essentially verbatim, the proposed amended findings submitted by the Appellee, and did so, so long after the trial, that the lower Court perhaps, did not recall the specific instructions mandated by this Court.

In addition the lower Court did not address the specific issues that this Court mandated and left a good many wholly unconsidered in the said FINDINGS, under a pretense that only the Mother's testimony should be considered, because only the lower Court can test the demeanor of the witness, etc.

Lastly, there is no basis at all, either in the evidence or as to any FINDINGS, establishing that the Father destroyed the relationship of parent-child.

Appellant respectfully requests that this Court once again reverse, and once again remand, but this time with instructions to set out a meaningful visitation schedule for the Father.

STATEMENT OF THE FACTS

Kim Woodward (hereinafter the Mother) and Richard Cameron Fazzio (hereinafter the Father) met in 1985, and began living together as husband and wife in August, 1985. (T. 94). In February, 1986, the Mother first learned that she was pregnant with R.A.F. (hereinafter the Child). (T.95).

The Child was born on September 17, 1986, and the parties got married approximately three months later, November 3, 1986. (T. 19) At the very time that the Mother married the Father herein, she was married to Darren Holt, and so the Court, the Honorable Homer F. Wilkinson, annulled the marriage between the Mother and Father after about one year of marriage, ie: November 19, 1987. (T. 19)

The Decree of Annulment provided for the Mother to have custody of the subject Child, and the Father would have reasonable visitation "as the parties can agree." (T. 119).

After the Decree of Annulment was entered, up to and including the time of trial, the Mother had moved in with her own mother, and then moved to Springville, then moved to Riverton, then moved to West Jordan, and then moved back to Coalville. (T-119.) At no time did the Mother provide the Father or his parents with her address or phone number. (T-120).

The Father testified that he had continuous contact with the Child, and saw the Child very regularly, except for the time that he could not find the Mother. (T-522).

The Father petitioned the District Court for specific visitation, (T-544), after the Mother had met with an attorney who informed her that the Father has to go a whole year without any contact with the Child before the Mother could have the Child declared legally abandoned. (T-81). The Mother had cut off all contact between the Father and his parents with the minor Child. (T-81).

The Father's Petition for specific visitation, in the District Court was answered with a Petition to Terminate the Parental Rights of the Father, and a Motion to Transfer the same to the Juvenile Court. The Honorable Homer F. Wilkinson granted the request to have the Petition to Terminate Parental Rights heard by the Juvenile Court, and provided for the Father to have one visit a month until further order of the Court.

The Father testified that he saw the minor Child every time that he was allowed, except one time when in jail, and another time when he traveled from Las Vegas, Nevada, to Coalville, both on a Saturday and a Sunday, but - the Mother was no where to be found. (T-300).

The Petition to Terminate the Father's interests in the Child was heard by the Honorable Olof Johansson, in the Third District Juvenile Court, Summit County, State of Utah, on August 16, August 17, and August 29, 1990, and the Court then in November, 1990, entered its ruling that the Father's conduct has led to a destruction of the parent/child relation-

ship, and therefore the Child had been legally abandoned by his Father.

The Appellant then appealed the determination of the Third District Juvenile Court in and for Summit County, State of Utah, the Honorable Olof Johansson Presiding in Court of Appeals No. 900626 CA, and also the adoption of the determination by the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson Presiding, in Court of Appeals No. 910136-CA which was consolidated into the single appeal under Court of Appeals No. 900626-CA.

This Court had the matters fully briefed and argued and then submitted, and then made its Opinion of December 9, 1991, wherein this Court stated: "We reverse and remand for more detailed findings."

Factually it is important to note that this Court reversed the determination made by the Juvenile Court, as this Court stated in its last paragraph:

"We do not intend our remand to be merely an exercise in bolstering and supporting the conclusion already reached." Allred vs. Allred, 797 P. 2d 1108, 1112 (Utah, 1990). This court is not altogether confident that the trial court's final decision was correct, particularly since the action to terminate Fazzio's parental rights was commenced by Woodward in response to Fazzio's petition for specific visitation. The timely assertion of such a petition by Fazzio is hardly the conduct of a disinterested parent.
(emphasis original)

On or about January 24, 1992, the Honorable Olof A. Johansson, Judge invited both parties to submit proposed

Findings, as noted on Exhibit A, attached hereto:

The Court has received a remand of the above case for more specific factual findings as it relates to paragraphs 7, 8, 10 and 11 of this Court's findings. I, therefore, invite you, but you are not required, to submit proposed written findings consistent with the request of the Court of Appeals. (emphasis added)

Such findings should be provided to this Court no later than February 28, 1992. If additional time is necessary, please advise.

Each of the parties then submitted proposed FINDINGS, along with their respective Briefs, for the benefit of the lower Court.

Counsel for the Mother submitted his set of Proposed Additional Findings of Fact, on or about February 28, 1992, as reflected as Exhibit B, attached hereto.

However, instead of following the instructions of the Utah Court of Appeals mandate not to engage in "an exercise in bolstering and supporting the conclusion already reached." Counsel for the Mother submitted his Proposed Findings to do the exact opposite, and then submits the following at the end of the same in order to make the entire appeal a matter of demeanor on the stand, and hence overlooking all that the Father had to say, all that the Paternal Grandmother had to say, and all that the Paternal Grandfather had to say:

"CONCLUSION"

While two of the three Judges on the Court of Appeals hearing the instant matter on appeal, seemed concerned about this Court's final decision, it is Petitioner's belief that if the Court provides the Findings of Fact, clearly supported by the record, which have been proposed in the instant document, the Court of Appeals will have a better understanding as to the nature of this case and the reasons for this Court's decision.

As Petitioner argued in her brief on appeal:

"Never has a case more clearly demonstrated why it is essential for an appellate court to defer to the juvenile court on findings of fact than the instant case. It is the position of the Appellee (Petitioner) that Appellant (Respondent) stated numerous falsehoods and committed perjury during his testimony in the trial court. This was demonstrated through cross-examination, rebuttal witnesses and evidence which could not be overcome by Appellant (Respondent). Furthermore, Appellee (Petitioner) maintains that the physical manner in which the Appellant (Respondent) and his witnesses testified in this case was as important as the words they used in determining their credibility. The trial judge alone was in a position to judge the credibility of the witnesses and his determination should not be disturbed by this Court without a demonstration by Appellant (Respondent) that the Findings are against the weight of the evidence and thus clearly erroneous. State in Interest of P.H. and M.H. vs. Harrison, 783 P. 2d 565, 570 (Utah App. 1989.)"

Petitioner/Appellee's Brief at 21.

RESPECTFULLY SUBMITTED this 28th day of February, 1992.

/s/

LARRY R. KELLER
ATTORNEY FOR PETITIONER

Thereafter, on or about April 30, 1992, the Honorable Olof A. Johansson, Judge sent the letter attached hereto as Exhibit C , which states:

Do not give up hope. I am making serious attempts at providing more detailed findings in the above case, in between my regular caseload.

Each of your briefs are extremely well done and very helpful. I thank you for them.

Finally, the Honorable Olof A. Johansson, Judge, submitted his AMENDED FINDINGS OF FACT, on June 15, 1992, some six months after the directive from the Court of Appeals, and the express mandate not to engage in "an exercise in bolstering and supporting the conclusion already reached."

A copy of the said AMENDED FINDINGS OF FACT, are attached hereto, as Exhibit D , so that this Court can see the almost verbatim duplication of Mr. Keller's PROPOSED ADDITIONAL FINDINGS OF FACT, as if the lower Court considered matter for six months and then blindly copied the PROPOSED ADDITIONAL FINDINGS OF FACT, in an obvious effort to make the entire trial a matter of demeanor on the stand, so that only the trial judge can have a clue as to what the evidence is.

From this bold "exercise in bolstering and supporting the conclusion already reached," the Appellant once again appeals.

EVENTS AT A GLANCE

May 24, 1985 Cameron and Kim meet for the first time (T-94)

August, 1985 Cameron and Kim begin living together (T-94)

February, 1986 Kim learns she's pregnant with R.A.F. (T-94)

September 17, 1986 - R.A.F is born (T-96)

November 3, 1986 - Kim and Cameron get married (T-96)

September, 1987 - Kim and Cameron seperated (T-96)

November 19, 1987 - Marriage Annulled - (T-96)

November, 1987 - July, 1989 - Kim moved to mother's, then her
own apartment, to Ccalville, to Springville, to
Riverton, to West Jordan, to Coalville (T-119)

1987 - 1988 - Father has visitation as parties can agree (T-74)

October 1988 - July 1989 - Visitation via Grandparents (T82,104,105)

March 25, 1988 - Kim marries Third Husband - Mark Woodward (T-83)

October 1988 - Kim consults attorney about cutting Father off (T-81)

October 1989 - Kim terminates contact altogether with K.A.F. (T-274)

October 1989 - Father Petitions for Specific visitation

January 1990 - Mother petitions to terminate parental rights

August 1990 - Trial on termination issue

November 1990 - FINDINGS, CONCLUSIONS and ORDER

December 1990 - Appeal to Court of Appeals

December 1991 - Court of Appeals - reverse and remand

June, 1992 - Amended FINDINGS submitted

July, 1992 - Notice of Appeal filed

August, 1992 - Petition for Writ of Mandamus

September, 1992 - Petition for Writ of Mandamus denied

ARGUMENT NO. ONE

PLAINTIFF HAS CAUSED THE LOWER COURT TO BLATANTLY VIOLATE THIS COURT'S MANDATE.

When this matter was before this Court in the prior Appeal, this Court made the reverse and remand with perfectly clear instructions.

As noted on page 479 of the Opinion, this Court not only stated in unequivocal terms, that the reverse and remand was not to be "merely an exercise in bolstering and supporting the conclusion already reached." this Court referred to a 1990 case, on what was to be completed and why.

In the case of Allred vs. Allred, cited by the Court, which is found at 797 P. 2d 1108, (Utah App. 1990), the Court of Appeals was considering a situation where the lower court had set child support at \$100.00 per month for the month, without making appropriate findings of fact to support the same.

The Appellate Court was trying to determine how the lower Court arrived at the determination, and after a thorough review of the record on appeal, the Court concluded both that the determination was incorrect as well as the fact that there was no connection between the evidence and the findings reached by the trial court.

Hence, the Court reversed the determination because it was an incorrect determination, and then remanded the same.

to follow specific instructions on how to arrive at the correct determination.

This is exactly what this Court has done in the case at bar.

This Court stated that the determination that the father had abandoned was not supported by the evidence, when considering only one bit of evidence, ie: the timely assertion of a petition to determine his specific visitation. Note on page 479 of the Opinion:

This Court is not altogether confident that the trial court's final decision was correct, particularly since the action to terminate Fazzio's parental rights was commenced by Woodward in response to Fazzio's petition for specific visitation. The timely assertion of such a petition by Fazzio is hardly the conduct of a disinterested parent. (emphasis original)

Not only did the Court of Appeals, make it abundantly clear that the determination was incorrect when considering only one factor alone, the Court of Appeals made very specific instructions on what was to be considered in the determination of the abandonment issue.

On page 478 of the Opinion, this Court instructs the lower court on what is to be in the Findings:

The trial court's findings of fact should resolve these conflicts unequivocally, by stating the specific subsidiary facts as the trial court found them. The findings should set forth, with as much precision as possible, the number of times Fazzio visited the child during particular periods; the length of each of the visits; the number of visits Woodward intentionally prevented; the sums Fazzio provided as child support, either personally or through his parents; the number and type of gifts Fazzio gave to the child and the occasions on which he gave them; and the specific

statements, acts, or omissions that demonstrate Fazzio's intent to either accept or disregard his obligations as a parent (e.g., instances of appellant performing child care functions like changing his diaper or feeding him, denying that the child was his responsibility, etc.,).

Further, the findings should explicitly address the impact Woodward's frequent relocation had on Fazzio's ability to maintain contact with the child, the effect Fazzio's living and working outside of Utah had on his visitation, the manner and effect of any refusal on Fazzio's part to legally acknowledge his paternity, and any other factors bearing on whether Fazzio consciously disregarded the child to such an extent that the parent-child relationship was destroyed.

Appellant respectfully submits that instead of addressing the Findings of Fact, showing the specific detail and how the ultimate conclusion was reached by the lower Court, as instructed by the Appellate Court, the lower Court merely adopted the PROPOSED ADDITIONAL FINDINGS OF FACT proposed by the Mother's Counsel, making the clear directions of this Court a mockery, as if every bit of evidence in the lower Court that supports the notion that the Father had not abandoned the child, is a matter of credibility, where only the trial judge can see things mysteriously unknown to the Appellate Court, because the Appellate Court only has the hard, cold record.

Hence, any testimony that the Father may have on the issue is to be wholly and completely disregarded because only the trial court can test the demeanor of the witness and determine issues of credibility, etc.

Hence, any testimony that the Paternal Grandmother may have on the issue is to be wholly and completely disregarded because only the trial court can test the demeanor of the witness and determine issues of credibility, etc.

Hence, any testimony that the Paternal Grandfather may have on the issue is to be wholly and completely disregarded because only the trial court can test the demeanor of the witness and determine the issue of credibility, etc.

Appellant submits that what is even more significant, is the notion that the lower court can wholly and completely disregard all of the toys, and gifts and articles of clothing produced in open court, showing what was supplied by the Father for the child, as well as all of the many pictures, some of which were blown-up, of the times the Father spent with the Child, and lastly the tape recordings of the minor child's own voice, regarding the Father.

Surely one can not argue that the toys, gifts, clothing, pictures, tapes, etc., are of such a nature that only the trial judge can determine their demeanor and credibility on the witness stand.

Notwithstanding, under the guise of a demeanor argument the lower Court totally disregarded the same as non-existent.

Appellant respectfully submits that this Court reverse the lower Court once again, but this time with instructions to set out a meaningful visitation schedule for the father.

ARGUMENT NO. TWO

MANY FINDINGS CONSTITUTE A MERE "PARADE OF HORRIBLES" THAT HAS NO BEARING WHATSOEVER ON WHETHER THE FATHER DESTROYED A RELATIONSHIP WITH HIS SON.

Appellant respectfully submits that at the time of trial Counsel objected to the admissibility of certain evidence as having no relevance whatsoever, and was merely submitted to make the Appellant out as a bad guy.

Now, the lower Court has endorsed the same, as somehow relevant to whether a Father destroyed a relationship with his son, showing just how much the lower Court was misled.

Appellant submits that the following have absolutely no bearing whatsoever on the question:

Finding 7(a) states: Respondent admitted that he urged Petitioner to get an abortion when he first learned she was pregnant with R.A.F. Respondent urged Petitioner to get an abortion on more than one occasion.

Finding 7(e) states: On one occasion, Respondent grabbed Petitioner by the hair and had her on the floor and was beating her head into the floor when she started calling for Christopher (her son from a prior marriage) to run over to the neighbors and have them call the police. As soon as he moved, Respondent said "(I)f anybody moves off that couch, I'll kill her." R.A.F was one of the two children present on the couch observing this physical abuse to his mother and the threat to kill her. Both R.A.F and Christopher were terrified and they

were taken by the police to the YWCA after this incident.

Finding 11(a) states: Petitioner had a child from a previous marriage, Darren Christopher Holt (DOB 2/13/83), who lived with the Petitioner at the time she was married to Respondent. Christopher was approximately four years old during that period.

Finding 11(b) states: During the course of the marriage, Petitioner and her children, including R.A.F., were regularly subjected to mental and physical threats and abuse by Respondent.

Finding 11(c) states: Respondent admitted during the course of the marriage that he "smacked Kim" and that he did not make sure either R.A.F., or the child Christopher were out of the room when he slapped her.

Finding 11(d) states: Petitioner talked Respondent into seeking marriage counseling during the marriage but not only did his abuse of her not change, Respondent actually beat her the day of the counseling because he didn't like the things she said to the counselor;

Finding 11(e) states: Darren Holt testified that his son, Christopher, told him during his visitations that he was terrified of Respondent, and that Respondent had threatened him (Christopher) with a knife and hit him a number of times. Mr. Holt also testified Christopher told him Respondent at one point drove Petitioner and Christopher out of the Petitioner's home with a gun and told them that if they came back, he (Respondent) would kill them. This testimony was corroborated by Petitioner;

Finding 11(f) states: When Mr. Holt confronted Respondent about this abuse of his son, Christopher, Respondent replied: "... While Christopher is in my house, I will treat him the way I want." This testimony was corroborated by Petitioner who described respondent's attitude toward Christopher as "mean and hateful cruel"

Finding 11(g) states: On one occasion, Respondent grabbed Petitioner by the hair and had her on the floor and was beating her head onto the floor when she started calling for Christopher to run over to the neighbors and have them call the police. Petitioner testified that as Christopher moved, Respondent said "(I)f anybody moves off that couch I'll kill her." R.A.F. was one of the two children present on the couch observing this physical abuse of his mother and the threat to kill her. Both R.A.F. and Christopher

were terrified and they were taken by the police to the YWCA after the incident.

As to the finding #7(a), Appellant submits the Child surely would have no knowledge of abortion unless his Mother spent hours and hours with pictures and graphics, etc., and even to this day would be too young to relate with the same.

As noted by the Court in its Opinion at page 477,

The Wulffenstein test for determining abandonment in termination proceedings requires proof of two elements. First, the party seeking termination must prove the "the parent's conduct evidenced a conscious disregard for his or her parental obligations" to the child. Timperly, 750 P. 2d at 1236. Second, the party must demonstrate that the "disregard led to the destruction of the parent-child relationship." Id., Wulffenstein, 560 P. 2d at 334. Both of these elements must be proven by clear and convincing evidence. See Santosky vs. Kramer, 455 U.S. 745 769 (1982); In re J. Children, 664 P. 2d 1158, 1159 (Utah 1983).

Appellant submits that his finding regarding the Father urging the Mother to get an abortion "on more than one occasion" only bears out the Appellant prior argument that the lower Court blindly rubberstamped the parade of horrors that the Mother's Counsel submitted in his PROPOSED ADDITIONAL FINDINGS OF FACT.

As to Finding 7(e) one would assume that this would be very significant in references to the issues before this Court, until one learned that the child was eleven months old at most when this incident allegedly occurred. The child could not talk, and could not run for help, because he was so young he could not even stand. Note the transcript at page 30, with the Mother herself testifying that the Child was only eleven months when the parties split up.

Appellant submits that this again can not possibly bear on "the parent's conduct evidences a conscious disregard for his or her parental obligations to the child and that disregard led to the destruction of the parent-child relationship."

This is evidence however, Appellant submits, that the lower Court blindly rubber stamped the PROPOSED ADDITIONAL FINDINGS OF FACT, submitted by the Mother's counsel.

Appellant respectfully submits that essentially all of Finding #11, further confirms the notion that the lower Court blindly rubber stamped the PROPOSED ADDITIONAL FINDINGS OF FACT, submitted by the Mother's Counsel.

There can be no question that Counsel submitted his "parade of horrors" regarding the Father, and the lower Court endorsed the whole of the same as the basis for abandonment, when the same is not even relevant in the case.

The lower Court even discounted the same when it stated "Although neither dispositive nor controlling in this case, there is evidence...."

The Court should have actually stated, "Although neither helpful or relevant in this case, there is evidence..." as the only bearing that the same could have on the question of abandonment is that the Father "was a bad guy." Then from that conclude that "bad guys should have their parental rights terminated."

Appellant respectfully submits that all of Finding #11 should be disregarded:

Paragraph 11. Although neither dispositive nor controlling in this case, there is evidence that during the period of time that Petitioner and Respondent lived together Respondent was abusive, physically and emotionally to Petitioner, to Petitioner's minor child from a prior marriage, and was emotionally abusive to the minor child, Richard Anthony Fazzio, who is the subject of this action.

(a) Petitioner had a child from a previous marriage, Darren Christopher Holt (DOB 2/13/83), who lived with Petitioner at the time she was married to Respondent. Christopher was approximately four years old during that period;

(b) During the course of the marriage, Petitioner and her children, including R.A.F., were regularly subjected to mental and physical threats and abuse by Respondent;

(c) Respondent admitted during the course of the marriage that he "smacked Kim" and that he did not make sure that either R.A.F. or the child Christopher were out of the room when he slapped her.

(d) Petitioner talked Respondent into seeking marriage counseling during the marriage; but not only did his abuse of her not change, Respondent actually beat her the day of counseling because he didn't like the things she said to the Counselor;

(e) Darren Holt testified that his own son, Christopher told him during his visitations that he was terrified of Respondent, and that Respondent had threatened him (Christopher) with a knife and hit him a number of times. Mr. Holt also testified Christopher told him Respondent at one point drove Petitioner and Christopher out of Petitioner's home with a gun and told them that if they came back, he (Respondent) would kill them. This testimony was corroborated by Petitioner;

(f) When Mr. Holt confronted Respondent about this abuse of his son, Christopher, Respondent replied " . . . While Christopher is in my house, I will treat him the way I want. ." this testimony was corroborated by Petitioner who described respondent's attitude toward Christopher as "mean and hateful . . .cruel . . ."

(g) One one occasion, Respondent grabbed Petitioner by the hair and had her on the floor and was beating her head into the floor when she started calling for Christopher to run over to the neighbors and have them call the police. Petitioner testified that as Christopher moved, Respondent said "(I)f anybody moves, off that couch, I'll kill her." R.A.F. was one of the two children present on the couch observing this physical abuse to his mother and the threat to kill her. Both R.A.F. and Christopher were terrified' and they were both taken by the police to the YWCA after this incident.

As noted above Finding 7(e) and 11(g) are identical, and further bears out the notion that they were blindly rubber stamped.

More importantly, as noted above the child was only eleven months old at most, when any of this allegedly took place. (T. 30)

As noted throughout the PROPOSED ADDITIONAL FINDINGS OF FACT, submitted by Appellee to the lower Court, and then endorsed essentially verbatim by the lower Court, that certain testimony was "unreliable, untrustworthy and unbelievable" the Finding that Appellant did anything improper to the step son Christopher is completely contrary to the sworn statement made by the Mother, when challenged by her former Husband Darren Holt for custody of Christopher. Note Exhibit 18, wherein the Mother stated:

8. All allegations contained in plaintiff's affidavit regarding defendant's boyfriend's (Cameron) alleged threats to the minor child are false, and in complete error. Defendant's boyfriend has a strong and supportive relationship with the minor child. (Christopher)

However, the trial judge was so incensed by the alleged conduct of the Father of the child, he made findings beyond what was even claimed by the Petitioner.

At page 655 of the transcript, Counsel for the Appellee, fortifies his position through the trial, by giving the following statement in closing argument:

. . . and his response to the problem that existed in that family, Judge, was abuse and violence, physical and emotional abuse to his stepson, abuse of his wife and while he never abused the child, and we've never claimed that he did, when he was abusing his wife in front of the child, when he was abusing the wife with the child in her arms, as has been testified to, that's as close as it comes to abuse of the child himself.

The findings by the Judge is that the Father of the child was emotionally abusive to the child, something well beyond even the claims of the Appellee. Appellee's Counsel stated that in reference to emotional abuse, "we've never claimed that he did."

Two parents not getting along, while one of the parents is holding the minor child, would not amount to "emotional abuse."

Appellant respectfully submits that if the basis for terminating the parental rights of the Appellant is found at all in Finding of Fact #11, then this Court should reverse the lower Court and remand with instructions to immediately set

out a meaningful visitation schedule for the Father.

ARGUMENT NO. THREE

HAD THE LOWER COURT FOLLOWED THE INSTRUCTIONS
REGARDING APPROPRIATE FINDINGS IT COULD NOT
HAVE COME TO THE CONCLUSION THAT THE FATHER HAD
ABANDONED HIS CHILD.

Appellant submits that this Court was very clear
with its instructions as to what the lower Court was to do,
in order to reach the ultimate determination of whether the
Father had abandoned his child.

Appellant submits that had the lower Court addressed
the specific areas in the new findings, the lower Court could
not, based upon the evidence, rule that the Father had abandoned
his Son.

At page 478 & 479 of the Opinion this Court stated:

There was conflicting testimony about (1) the frequently
and duration of Fazzio's visits with the Child, (2)
his treatment of the child during those visits; (3)
Woodward's attempts to prevent Fazzio from visiting
with the child; (4) Fazzio's payment of child support
and (5) Fazzio's provision of gifts to the child --
all facts crucial to the validity of the court's
ultimate decision that Fazzio's conduct had destroyed
the parent-child relationship.

.

The findings should set forth, with as much precision
as possible (6) the number of times Fazzio visited
the child during particular periods; (7) the length
of each of the visits; (8) the number of visits
Woodward intentionally prevented; (9) the sums

Fazzio provided as child support, either personally or through his parents; (10) the number and type of gifts Fazzio gave to the child and (11) the occasions on which he gave them; (12) and the specific statements, acts, or omissions that demonstrate Fazzio's intent to either accept or disregard his obligations as a parent (e.g. instances of appellant performing child care functions like changing his diaper or feeding him, denying that the child was his responsibility, etc.,).

Futher, the findings should explicitly address (13) the impact Woodward's frequent relocation had on Fazzio's ability to maintain contact with the Child, (14) the effect Fazzio's living and working outside Utah had on his visitation; (15) the manner and effect of any refusal on Fazzio's part to legally acknowledge his paternity, and (16) any other factors bearing on whether Fazzio consciously disregarded the child to such an extent that the parent-child relationship was destroyed.

As already noted by this Court in this case when on appeal before, at page 477 this Court stated:

The Wulffenstein test for determining abandonment in termination proceedings requires proof of two elements. First, the party seeking termination must prove that "the parent's conduct evidenced a conscious disregard for his or her parental obligations" to the child. Timperly, 750 P. 2d at 1236. Second, the party must demonstrate that the "disregard led to the destruction of the parent-child relationship." Id.; Wulffenstein, 560 P. 2d at 334. Both of these elements must be proven by clear and convincing evidence. See Santosky vs. Kramer, 455 U.S. 745, 769 (1982); In re J. Children, 664 P. 2d 1158, 1159 (Utah 1983).

At the outset of this argument it is critical to note that the burden is on the Mother to establish both elements, and therefore the father has no burden whatsoever.

Equally significant is the standard of proof, ie: by clear and convincing evidence - the highest standard known to law, short of being charged with a crime.

With that background, the Appellant respectfully submits that the Appellee completely failed both as to burden of proof and the standard of proof, because the Mother herself stated that she had no idea of what contact, etc., that the Father had with the Child, when the child was picked up and taken to his folks.

On page 104 and 105 of the transcript, with the Mother testifying she stated on cross examination:

Q. Now, I want you to zero in on my question, please. Do you -- have you observed that Cameron is not there seeing the child during the times that Richard and Stephanie have picked the child up and brought him back?

A. No, sir. I'm not there.

With very few exceptions the sole basis for many of the FINDINGS OF FACT, was exclusively the Mother's testimony, yet she admitted on Cross-examination, that she did not know what contacts, etc., were going on between the Child and his Father when the Child left her home for visitation.

As a matter of law, she must show the following items, and she carries the burden of proof, and in addition the level of proof must be clear and convincing evidence, yet she admits when cornered, that she has no basis at all for her testimony regarding no contact, no gifts, no bonding, etc.

As to the specific instructions given by this Court, in this very action, the Appellant submits the following:

1. "the frequency and duration of Fazzio's visits with the child."

As to this issue, the Court made FINDING OF FACT #7(g):

g. Although Respondent came around four or five times from the date of their separation in September of 1987, through September of 1988, he spent very little time with R.A.F.. After September of 1988, Respondent never came to see the child nor telephone, nor contacted the child;

The support for this Finding is found on page 75, wherein the Mother stated when questioned by her Attorney:

Q. You said that he came around four or five times until September of 1988; is that correct?

A. Yes, sir.

Q. To your knowledge, when was the next time he personally saw R.A.F., to your knowledge?

A. In March of 1990.

Q. In March of 1990 . Okay, And how do you know he personally saw R.A.F., at that time?

A. Because we went into Court and the Court said for him to see him tomorrow.

In marshalling all of the facts in support of this FINDING, the Court should know that the Mother made similar statements at pages 72 through 74, however, the sole basis for the said FINDING, is from the Mother only, and the statements are essentially the same.

Appellant submits that this FINDING OF FACT, is wholly unsupported by any evidence whatsoever, as a careful review of the question by her own Counsel, states twice in the same question, "to your knowledge?"

The only evidence coming from this testimony by the Mother is that she has no knowledge, just as she testified on Cross Examination at page 104 and 105. She just doesn't

know one way or another.

With the burden of proof with the Mother, and the standard of proof being by clear and convincing evidence, the Mother has nothing to substantiate this FINDING.

On the otherhand, as this Court noted in this case as page 477:

To succeed in challenging the findings, appellant must prove they are clearly erroneous, i.e., against the clear weight of the evidence. State ex rel. J.R.T. vs. Timperly, 750 P.2d 1234, 1236 (Utah App. 1988).

At page 228 of the transcript, with the Appellant's Mother testifying on direct examination, she stated:

Q. I see. Did you see a pattern at that time of visitation between Cameron and R.A.F.?

A. Definitely.

Q. And can you -- was that ever other week, or what did you see?

A. When Cameron -- when they were first divorced, or separated until the annulment, we were seeing R.A.F. every weekend, either at our home or Cameron would pick him up, and that went on for a period of at least six months, and then it became every other weekend.

Q. Okay. So from September of 1986, for, are you saying another six months from that point on?

A. I believe it started October of '86 and we saw him regularly, at first, every weekend, then every other weekend, up until Kim sent us the -- gave us the note saying we couldn't see R.A.F. any more, In October of 89'. We saw him fairly regularly for three years. And during that period of time, Cameron saw R.A.F. regularly.

Again on direct examination, the Appellant's mother testified, beginning at page 307:

Q. And now I asked you in reference to visitation, you've talked about a series of times that Cameron and R.A.F. were together and you were present. Have you told us about all of those?

A. Not all of them.

Q. Okay. Give me an idea of the quantity and quality of that, too, please.

A. Between '87 and '90, it was continuous. The quality time, I think was quality time. They shared a lot together and they had a good time with each other. They had a loving, caring relationship, good rapport, it was a father-son quality, period.

On direct examination, the Father testified regarding the visits with the minor child at page 512:

Q. How -- how often did you see the child when you returned back from Cheyenne?

A. When I came back from Cheyenne, it was on a weekly basis and it was every weekend, I had R.A.F. two, three days, sometimes, sometimes three, usually two, all of them overnight, generally at my dad's house, sometimes at my grandmother's house where I was living, and Kim was quite liberal with the visitation.

Again on direct examination, the Father testified regarding the visits with the minor child at page 518:

Q. Okay. How often did your child, say, from December '87 up to the Child's birthday in 1988?

A. It was, I believe it was weekly, every week. It may have been every two weeks, but I think it was more likely weekly then.

Lastly, the Father testified on page 526 of the transcript as follows:

Q. Has there ever been a time to this day that you have not opted to visit with R.A.F.?

A. No, I -- no, I visit R.A.F. every chance I get. I will -- like I drive hundreds of miles to be with my son. He means the world to me. I cannot stress how much my son means to me.

As a result, Appellant submits that there is no evidence to support the specific FINDING, and further that it is "against the clear weight of the evidence."

Futhermore, the Appellant submits that in reference to "the frequency and duration of Fazzio's visits with the Child" there can be no question that the Father saw the Child regularly, except as prevented by the Mother as will be discussed below, and that his visits included the entire weekends, and sometimes a full three days at a time.

Appellant submits, in reference to the second item, that was to be determined by the lower Court:

2. Fazzio's treatment of the child during those visits"
the lower Court made FINDING OF FACT #7(u)

u. Even though Respondent was provided with court-ordered visitation after the filing of the instant lawsuit, he did not make an effort to spend much time with the child during the court-ordered visitations. Ken Kresser, the husband of Barbara Kresser and step-father of Mark Woodward and Petitioner's present husband, testified that after the May 1990, court-ordered visitation with Respondent he asked R.A.F. about the visitation. R.A.F. replied that he had gone to the park. When Mr. Kresser asked him if Cameron (respondent) was there with him, R.A.F. stated "no, he was sleeping."

The support for the particular incident is found when Ken Kresser testified on direct examination on page 173 of the transcript.

Appellant would not perhaps deny that after he had driven all night to be with his son, that he did in fact take a nap, while other members of the Appellant's family spent some time in the park across the street from Appellant's parent's home.

In fact, even if this were not an isolated incident, Appellant submits that it surely is no basis for the Court to find that, "Even though Respondent was provided with court-ordered visitation after the filing of the instant lawsuit, he did not make an effort to spend much time with the child during the court-ordered visitation."

If one were to look at the situation objectively, the reasoning of the Court is as follows: Even though you worked in Las Vegas until the end of the day of Friday, and then left right after work and drove all the way to Salt Lake City, Utah through the night, since you took a nap on Saturday, you were not making an effort to see the child for court-ordered visitation.

Appellant submits that the reasoning is without merit, as the only reason he would be coming to Salt Lake City, Utah, from Las Vegas, for the short stay, as he had to be back to work in Las Vegas on Monday morning, was so that he could spend the few precious moments with his son.

The whole basis for this FINDING, is based upon Ken

Kresser testifying as to what the child said.

The child was born on September 17, 1986, and this occurred during the month of May, 1990, so the child was just over three and one-half years of age when questioned by his Step-father's Step father.

Appellant submits that even if the child were old enough to perceive in reality what was going on, he surely had been through enough of the family gatherings where the Father was put down, to know what the Step-father's Step-father wanted him to say. Note Finding #7(h) regarding how the child was drilled after every visit.

Appellant submits that such questionable evidence is a far cry from any clear and convincing level of proof, and is clearly against the great weight of the evidence as found in the transcript beginning at page 223 with the Appellant's Mother on direct examination:

- Q. Did you see him care for the child on that occasion, other than just play with R.A.F.?
- A. I think we cared for R.A.F. most of the time because we were there.
- Q. Have you ever seen him change the diaper of the child other than in the hospital?
- A. Absolutely. At my home. Many times. He would come and R.A.F. would need to be changed and he would change him, no question.

- Q. Can you give me a ball park figure of how many times?
- A. Oh, every time he needed to be changed; however many times an infant needs to be changed when he's at his grandmonther's: 20, 30.
- Q. What about other needs when the child was there at your home, other than change the diaper?
- A. As I mentioned before, Cameron would feed him. I know of several occasions at our home when Cameron would bring him over to visit, it would be dinnertime, Cameron would sit down and feed him. At my mother-in-law's, we would go over to visit when Cameron would always prepare R.A.F.'s food and feed him himself. He never expected anyone else to do that for R.A.F. He -- I know that he bathed R.A.F., got him ready for bed.

Again on page 227 of the transcript with the Appellant's Mother testifying on direct examination:

- Q. When you say he'd play with the child, what do you mean?
- A. When R.A.F. was really little, Cameron would get down on the floor, play around with him, you know, play with him, play with his toys. As he got older they played with trucks a lot down on the floor. We have a park directly across the street from our home, Cameron takes him to the park, they'd play on the playground there. Sometimes Cameron would take him for an ice cream cone.

Again with the Appellant's Mother testifying on direct examination, at page 265 is the following:

R.A.F. would sit in Cameron's lap, they would sit on the floor head-to-head, eye-to-eye, down on the floor playing. They had a very close relationship. When -- very often, Cameron would get R.A.F. ready for bed, put his night clothes on him. We had kind of a little ritual at our house. With my children, after they had bathed and gotten ready for bed, it was quiet play time to get ready to go to bed, rather than rev them up so they wouldn't go to bed, and they would sit and do that, sometimes, R.A.F. would fall asleep curled up cuddled next to his father on the loveseat in our family room.

Again on page 293 of the transcript with the Appellant's mother still testifying on direct examination is the following:

- Q. And then taking it up there in May, did you observe Cameron and R.A.F. play with the toys?
- A. They spent most of the time in the house playing on the floor of our family room with that truck and the large brown one that Cameron had given him previously. The two of them played with that almost exclusively. There was a period of time during the two-day period where they were over in the park on the slide playing. They played almost exclusively with those two trucks. They would -- R.A.F. liked the large car carrier, it's about this large and it has three smaller cars in it. He liked to delegate who plays with which car, he has to have a certain one and then somebody else can have the others. The trailers are removeable and he would play with -- switch the trailers, they would switch trucks and trade off. R.A.F. would try to stick the truck that fits in the car carrier into the large -- the large one was a van type, and he got very frustrated because they wouldn't fit, they were too wide, so we got other trucks and they played with those as well, putting them in and out of the van.

In addition to the foregoing, Exhibit 12, which was admitted into evidence, was referred to by the Appellant's Mother at page 394:

We had gone -- this is just a little ways away from our house. We had gone to feed ducks. There was my husband, myself, my younger son, Brian, R.A.F. and Cameron. I had taken a loaf of bread and we were throwing bread into the ducks, and R.A.F. came over -- Cameron went over and sat down to feed the ducks and R.A.F. took a piece of bread and went over and sat in his dad's lap and they fed the ducks together.

The Appellant's Father testified on direct examination at page 418 and 419 of the transcript as follows:

Q. Have you seen R.A.F. take care -- excuse me, Cameron take care of R.A.F. when they're together?

A. Yes, I have. Right from the time when R.A.F. was little, when Cameron would bring him over, you know, it was a big deal again, between Cameron and I to -- if the baby needed to be changed, I says, huh uh, I went through this and now it's your turn, and he'd take him in, change him, bathe him at night, put his pajamas on him, sit and rock with him sometimes at night before bed.

Not only did the Appellant, his Mother and his Father each testify as to the treatment by the Appellant of the child during the many visits with the child, Appellant called Jerald Alvey, a person who worked with Cameron in Wyoming, who testified at page 622, on a visit to Wyoming with the child:

And he -- he brought him in and he had a little chocolate on his face, he was eating some chocolate, and came in and Cameron went and changed his diaper and took care of him and everything.

Appellant submits that the lower Court merely rubber stamped what Appellee's Counsel submitted, regarding what Appellant did during his visitation with the child, and endorsed a single time when Cameron took a nap, after driving all night to be with his child.

The lower Court seemed to totally overlook the fact that Cameron had driven all the way from Las Vegas, after getting off work on Friday, and driving all night, just to spend a Saturday and Sunday with his boy, when it concludes, "he did not make an effort to spend much time with the child during the court-ordered visitations" merely because he took a nap on Saturday.

Appellant submits that FINDING 7(u) regarding this isolated incident, as portrayed by a three and a half year old child, as the total reference to the treatment of the child during the visits, can not reach the clear and convincing level to conclude that the Father abandoned his child, and is without question against the clear weight of the evidence.

Appellant submits in reference to the third item, that was to be determined by the lower Court, the lower Court made no FINDING whatsoever, and totally ignored this directive by the Court

3. Woodward's attempts to prevent Fazzio from visiting the child.

As to the evidence regarding the same, the Mother of the child herself testified that she had been to see an attorney who stated that she had to have a whole year go by without Cameron seeing the child, as noted on page 78 and 79 of the transcript:

- Q. Were there -- did there come a time when his parents, Dick and Stephanie Fazzio, asked to visit with the Child?
- A. Yes, sir.
- Q. And did you allow that?
- A. Yes, sir.
- Q. When was that that you recall that they first made that request?
- A. It was after Cameron -- not too long after Cameron quit seeing him.
- Q. Which would have been not too long after --
- A. So it would have been --
- Q. -- September of '88?
- A. It would have been October of '88.
- Q. Did you know whether or not you had any legal obligation to allow them to see the child?
- A. Well, Cameron hadn't been around, so we had talked to an attorney about terminating -- not you, another attorney -- about terminating parental rights, and he said a year had to go by. And I told her we had been allowing the grandparents visitation and she said that was good, if the parents were seeing -- the grandparents were seeing him and the parent still wasn't, that was very good.

As noted in the Decree of Annulment, the Appellant is entitled to visitation as the parties can agree. This Court has once before commented on this provision at page 475, in footnote #1, wherein this Court stated:

"Such a provision is not terribly helpful to parties, like these whose breakups is accompanied by considerable rancor."

Appellant submits that not only was such an arrangement laden with trouble, it literally rose to the level of having to get a court order to spend time with the child.

This was borne out, somewhat inadvertantly by the Step-Father's Step-Father's testimony, at page 176, wherein Mr. Kresser stated:

Q. So it's in 1990 that you observed that he was unruly?

A. Right. After he started having visitation rights because of the court orders this year.

Appellant submits that there is no question that he literally had to petition the Court for specific visitation so that the Mother could no longer prevent the Father from having a meaningful relationship with his Child.

It is clear that the Mother went to her Attorney, Terry Christiansen, in Summit County, and inquired what would need to be done, to cut Cameron off from seeing his child.

She is informed that it takes a whole year of no visitation, and so she then prepares Exhibit #4, and gives it to the Grandparents when they return the child for Cameron in October 1989.

The Appellant's Mother testified in reference to Exhibit #4, at page 274, wherein she stated:

Q. Now, you were telling me about, and I didn't mean to get a field; you were talking about the soccer ball. Did -- did you -- tell me what you observed in reference to Cameron and R.A.F. after the time that you just made reference to, in reference to the soccer ball in October of 1989.

A. After October of '89 we did not see R.A.F. again until Commissioner Peuler made the ruling, and we saw him in March.

Q. Did you receive a letter from Kim in reference to the visitation?

A. She gave me a letter, October, when we returned R.A.F. to her.

She then goes on and explains Exhibit #4, which was from Kim, terminating all visitation with the minor Child, which gives rise to the Petition for specific visitation filed in October of 1989.

The Mother was successful in keeping the Child from his Father and his parents, from that time in October as noted above to March of 1990.

Appellant and his family had been totally cut off from contact with the Child, and so they spend their Christmas with this Child in March.

The Appellant's Mother describes the occasion and what occurred thereafter beginning at page 291:

Cameron gave R.A.F. another huge -- another -- one of his fleet Cameron's building, it's a large white diesel. We have him companion trucks to the one that we gave him on his birthday, we gave him the Tonka dump truck for Christmas, we gave him a large grader and a backhoe.

- Q. Does he take these home with him, to Kim's house?
- A. He tried to take the truck home.
- Q. Which truck?
- A. The large white one.
- Q. From?
- A. From Cameron.
- Q. Okay, What happened?
- A. That was in March. He wanted to take the truck home, he took some candy and there was a gift from my mother-in-law that she sent up from California, it was a little black jogging suit. We drove up, we got out of the car, R.A.F. was eating the candy, I was carrying the jump suit in a box, my husband was carrying a white truck. We got to the door and Mark stopped us and he said, "Our attorney said we can't take anything from you people." And he put the truck down on the porch, my husband picked it up and said, this doesn't belong to any of us, it's R.A.F.'s. We didn't give him all these things, some of these came from his great-grandmother, and Mark wouldn't let him have it. Took it back -- took the truck, you know, wouldn't take - made Dick keep it. R.A.F. started to cry.

Kim came running out of the house screaming at the top of her lungs, this is a Kim I have never seen, telling Dick, grow up, Dick, just grow up, Dick, and stop telling -- calling Mark -- or telling R.A.F. things about Mark and me. And I looked at her, and I said, Kim, that might be your style, but we have never, never done that.

By this time, R.A.F. was almost hysterical, he was crying, he was sobbing, we thought it was best to leave. I told R.A.F., don't worry, R.A.F. we'll -- Grandma will keep your truck at her house and you can play with it when you come down and we left.

And as we were leaving, Mark came, took the candy out of R.A.F.'s hand, he was chewing on a piece of candy he ripped it out of his hand and gave it back to me and says, here, we can't keep this, either, and I just took it and left.

As this Court will note, the trial of this action began in August of 1990, and so the opportunity to see the child immediately before the trial, should the Court want to talk to the minor child, would be a most critical time for the Mother to prevent the Father from seeing the child. This is especially so, since the Father only gets to see the child for one weekend per month.

For this July visit, as with each visit, the Appellant must drive to Salt Lake City, Utah, from Las Vegas, Nevada, after work on Friday. This means that he will drive essentially all night long to arrive in time to get some rest before going to Coalville to pick up his Child first thing, Saturday morning.

Appellant did just that and arrived in Coalville at the scheduled time to be with his Child only to come upon a vacant home, as neither the Child nor any other member of his family was there.

Appellant was devastated, not only because of the great disappointment of not being with his child, but concerned about the upcoming trial where he had not seen his boy since June, and the Court would be deciding the matter in August.

Appellant was wholly unable to locate the Child or the Mother and returned to Salt Lake City, on Saturday.

Then again on Sunday, he drove all the way to Coalville to see his boy, but again he left empty handed, and returned

to Salt Lake and ultimately Las Vegas, after making this extreme effort to see his Child, and not even getting the chance to talk to him on the phone. Note the transcript at page 300 and following. Also note page 526 and following where the Father testified on direct examination:

Q. Tell me -- let me just cut right through to the bottom line if I might. Tell me about what you did in July of this year to see the Child.

A. July of this year? Oh, God. In July of this year, I came down, I work all day and then I drive all night and then we drive again up to Coalville and we get there and they're gone. Nobody is there. I drive -- drive and drive and drive. I was very disappointed, extremely disappointed.

Q. What did you do?

A. I drove around looked for Kim. I didn't -- wasn't a lot I could do. I looked, I called, and nobody seemed to know where they were.

The Father goes on through the next few page of transcript and explains what efforts he made on Sunday, as well, to be with his son.

This very specific visitation time was ordered by the Court, and reflects, perhaps with greater importance, the struggle that the Father had to visit with his Child, as the visitation after the Annulment was "as the parties can agree," whereas this visitation was by Order of the Court, "like it or not."

At trial, the Mother at first claimed that she did not know it was the Father's weekend, but recanted that when faced with the phone tape of the Appellant's Parent's messages, wherein she stated that the child was sick, so Cameron need not come

Cameron does not get the message from the tape however, until after returning from Coalville, empty handed.

Appellant respectfully submits that the entire case bears out the Mother's intent to cut the Appellant from his son. She had seen her Attorney, and consistent with his instructions she cuts off all contact by way of her letter, and then when faced with the Petition for specific visitation, she responded to the same, by filing her petition to terminate parental rights.

Appellant respectfully requests that this Court reverse the lower Court and remand with instructions to set out a meaningful visitation schedule for the Father with his Child.

As to the Fourth instruction, regarding the FINDINGS, Fazzio's payment of child support, the lower Court made the following three FINDINGS:

7(d) After the parties separated for the last time, Petitioner spoke to Respondent many times about needing money and child support, and he refused to give her any child support.

7(f) Petitioner received no child support from Respondent and she tried constantly to locate him, but was unable. Even though Respondent's parents, Richard and Stephanie Fazzio, lived at the same address during this entire period of time, they would refuse to tell her Respondent's address. When Petitioner saw Respondent, she asked for her child support and he refused to give it to her.

8(a) The testimony was clear at the trial that Respondent owed to Petitioner some \$3,000.00 in back child support at the time of trial in this matter.

In marshalling the evidence in support of 7(d), and 7(f) Appellant submits that the record is totally void of any evidence that the Appellant refused to give her any child support.

The Mother however, testified in several places that Appellant had not paid any child support. Note the transcript at pages 107, 121 and 122.

The total basis for this FINDING, is found exclusively in the testimony of the Mother, who testified repeatedly that when she asked Respondent for money, he would say that he would get her what he could, or that he himself did not have any money. Note the transcript at page 67, wherein the Mother is on direct examination:

Q. Okay. Did you ever ask respondent for money for R.A.F.?

A. Yes, sir.

Q. And what was his response?

A. "I don't have it." "I'll get it to you", just nonchalant.

In addition, it is important to note that during the time in question, the Mother was on public assistance, and receiving payments from the State. (T-122).

She testified that she did not file any Petition against him for arrearage because he was to pay Recovery Services and not her (T-121), and when it came right down to it she did not know what he paid to Recovery Services. (T-122).

It addition, the Mother testified at page 107 that she

11 of what was paid directly to

her by Cameron as and for child support, in the first place.

On the otherhand, the Appellant's Father testified about the Appellant's ability to generate income.. (T-428) He also testified about Cameron cashing checks at the shop so that Cameron could give some cash to the Mother. (T-453)

In addition, he testified about providing the car to the Mother, but she abandoned the same, and so the Fazzios got it started, and then sold the same. After it was abandoned all they could get for it was \$75.00. (T-514 and following)

It is true that the Father did not pay his child support regularly on even consistently to the Mother as required by Court order, however, there were two reasons for the same.

First, as testified to by the Father, (T-556 and following) that any monies payable would be paid to Recovery Services and not the Mother, and that the payment or lack of payment to them did not increase or decrease any sums to the Mother.

Second, Appellant had four dependants, himself, his present wife (who was expecting T-552), daughter Jennifer, and Alicia. (T-526). Since, being critically injured in his automobile accident, Appellant was only able to make a fraction of income of even Poverty level. Note the transcript at page 581, showing gross income 2-16-89 of \$3,243.00, and the transcript at page 526 for the year prior.

With this amount of income, the Appellant paid some money to the Mother, but in addition provided various necessities for the children as he could, ie: diapers, medicine, shoes, coat. (T-528).

Appellant submits that it is fair to say that he had not paid all that much in the way of child support, but it is not fair to say that he refused to pay, nor is it fair to say that he did not pay any child support.

Futhermore, considering his financial ability to pay, he really did pay as best he could, with four dependants, going on five, and having a gross income of \$3,243.00.

Appellant respectfully submits that it was against the clear weight of the evidence to suggest that he did not pay any child support and furthermore that he refused to pay.

As to the fifth instruction to the lower Court, regarding the FINDINGS, Fazzio's provision of gifts for the child, the Court made the following FINDING:

7(1) Mrs. Fazzio did testify that some toys were purchased for the child by Respondent, but in light of the fact she testified her son did not pay child support because he had been unemployed and his earnings were low, her testimony was unreliable and the Court believes it was the paternal grandparents who were thoughtful enough to purchase the few toys in question for R.A.F.

As noted above, this is merely an attempt to get the Appellate Court to defer to the lower Court's determination of credibility, since only the lower Court can test the demeanor of the witness, ect.

However, there is no basis to suggest, even if the lower Court questioned Appellant's Mother regarding the gifts, there is no basis to suggest that the Appellant did not shower the child with the various gifts, involving trucks, walkie-talkies, etc.

As noted in the transcript beginning at page 109, the Mother testified that she did not know if the walkie-talkies given the child came from Cameron. She testified that she did not know if Cameron had purchased the child the big brown truck, nor did she know if Cameron has purchased the big white one, as well for the child.

Appellant submits that there in fact is no basis to suggest from the Mother's testimony that no gifts were in fact given to the Child by his Father, as she recanted her testimony about the same. (T- 109 & 112)

On the other hand, the Court had boxes of toys and puzzles and books, and articles of clothing physically produced in open Court and pictures, volumes of pictures, of the Child and his Father and his family of the many memorable times with this Child, who was not even four years old at the time of trial.

The lower Court may say that it finds certain evidence unreliable, but no one can ignore the volumes of evidence that the Father provided many, many gifts, etc. for the child and on meaningful occasions.

Appellant submits, that what does speak volumes is that it is undisputed that neither the Father nor his Family had any Christmas with the child in 1989, as it required a Court order for them to spend their Christmas with the child in March of 1990.

Due to a page limitation of Appellant's Brief, with the exception of the FINDING regarding acknowledging paternity

Appellant will briefly respond to the balance of the instructions given by this Court to the lower Court regarding the FINDINGS.

As to the sixth instruction to the lower Court, the number of times Fazzio visited the child during particular periods, the lower Court made FINDINGS 7(h), 7(i) and 7(j). None of these address particular times that Fazzio visited the child during certain periods they only suggest that the child did say he had not seen his Father, when he was "always" asked after visitation, and that the testimony of the Father and his folks was unreliable.

As to the seventh instruction to the lower Court, the length of each of the visits, the lower Court completely ignored and did not address at all.

As to the eighth instruction to the lower Court, the number of visits Woodward intentionally prevented, the lower Court completely ignored and did not address at all.

As to the ninth instruction to the lower Court, the sums Fazzio provided as child support, either personally or through his parents, the lower Court made FINDINGS 7(k) and 8(c).

FINDING 7(k) states that while payments were made by Appellant's parents for child support, only three had been reimbursed by the Father, and FINDING 8(c) states that the Mother never received any money from Respondent or any one, on an account with Respondent's name on it. (This Court needs to look at the specific findings, as Counsel has had to severely simplify the same for purposes herein.)

There is no question that the FINDINGS, provide no underlying facts as to the child support provided either by the Appellant nor by his parents.

As to the tenth instruction to the lower Court, the number and type of gifts Fazzio gave to the Child, the lower Court made no findings whatsoever and did not address at all.

However, the record is replete with the number and type of gifts Fazzio gave the Child. Note the transcript at page 355 and following, page 407 and following and 519 and following.

As to the eleventh instruction to the lower Court, the occasions on which Fazzio gave gifts, the lower Court made no findings whatsoever and did not address it at all.

As to the twelfth instruction to the lower Court, the statements, acts, omissions reflecting Fazzio's intent to accept or disregard his obligation as a parent, the lower Court made FINDINGS 7(b) and 7(c) regarding what the Court found to be the case while the parties were married.

There are no findings regarding this instruction, involving the time after the parties had their marriage annulled to the time of the Mother's Petition to Terminate Parental Rights.

As to the thirteenth instruction to the lower Court, the impact of Woodward's frequent relocation had on Fazzio's ability to maintain contact with the child, the lower Court made FINDING 7(t), wherein the lower Court stated:

7(t) The Court finds that rather than Petitioner's movements from different residences being the cause of Respondents's failure to visit with the child, Respondent failed to have contact with the child to

avoid paying child support(The Court then goes on about a single incident where the Father saw the Mother's sister, and asked her not to tell the Mother.)

Appellant submits that this conclusion is without merit, as the child support was to go to Recovery Services, and not to the mother, according to everyone's testimony, and the money going to the Mother from the State, would not be affected in the slightest by whether the Father was paying any money to them or not.

There is no basis for the lower Court to fail to address the impact of Woodward's frequent relocations on Fazzio's ability to maintain contact with the child.

As to the fourteenth instruction to the lower Court, the effect Fazzio's living and working outside Utah had on his visitation, the lower Court made no findings whatsoever and did not address at all.

Appellant will come back to the fifteenth instruction regarding acknowledging paternity.

As to the sixteenth and last instruction to the lower Court, regarding any other factors bearing on whether Fazzio consciously disregarded the child to such an extent that the parent-child relationship was destroyed, the lower Court made no findings whatsoever and did not address at all.

However, this is a crucial area for the lower Court to address as noted in the prior appeal, in the Opinion at page 477, wherein this Court stated that not only must the finding reflect that there has been a conscious disregard of the Father's

parental obligations, but second, the disregard led to the destruction of the parent child relationship.

As to the fifteenth instruction to the lower Court, the manner and effect of any refusal on Fazzio's part to legally acknowledge his paternity, the lower Court made FINDINGS #10(a) and #10(b).

10(a) Darren Holt, Petitioner's husband from a prior marriage, and the father of Petitioner's child Darren Christopher Holt, received notice in approximately December of 1986 from the Department of Recovery Services stating he was responsible for child support for R.A.F. Mr. Holt testified that he approached Respondent numerous times regarding this situation and asked him to submit to tests or sign a legal document admitting to the paternity of R.A.F.. Respondent steadfastly refused to ever sign a document with the Department of Recovery Services acknowledging his paternity with R.A.F. Mr. Holt contacted Respondent some 14 or 15 times attempting to get him to admit to his paternity of R.A.F. with the State and Respondent consistently refused;

10(b) Although Respondent claimed he had signed a document upon the birth of R.A.F. acknowledging paternity, Respondent was unable to provide a copy of any documents, or even an identification of a document he had signed acknowledging paternity when challenged to do so at trial by Petitioner's Counsel. The result of Respondent's failure to acknowledge the paternity of R.A.F. to the State of Utah was that Darren Holt paid child support to the State of Utah's Department of Recovery Services on behalf of R.A.F., an obligation that was rightfully that of the Respondent.

Appellant submits that even assuming this Findings to be accurate, there is no Finding whatsoever of a manner and effect, of any refusal on Fazzio's part to legally acknowledge his paternity.

In otherwords, what if anything, do either of these findings have to do with destroying a parent-child relationship?

There was no effect whatsoever on the relationship of the Father with his Child, and could not be, because the child was too young to understanding any of this.

That is the case, unless the Mother drills the child of four, at most, on this allegation, but even then it is not the Father destroying the parent-child relationship, it would have been the Mother.

As to actually what Mr. Holt testified to was that the Father stated that he had already signed the appropriate papers and that it was therefore not necessary for the Father to do anything more with Recovery Services or anyone else.

At page 160 of the Transcript, Mr. Holt testified on Cross-examination, as follows:

- Q. You come out and talk to Cameron on these different ten occasions, Cameron would tell you it's no longer necessary to go to Recovery Services and sign the papers there; is that correct?
- A. To my recollection, he never came out and said that, no. Basically, what he said is that there -- it wasn't necessary for him to do any -- well, I guess you're right, what you said was correct. It was not necessary for him to go down and sign any other papers, but I was still held accountable for his son, even though he had signed -- his name was on the birth certificate.

As to any question that the State may have to as to who the Father of the child was, the Mother herself testified that she was not sure whether it was her ex-husband Darren Holt or the Father that needed to take the blood tests. (T-101)

Surely this Court is well aware of the fact that the

H.L.A. blood testing is a method of exclusion of paternity, and therefore there would only be need of Darren Holt to submit to the test, not the Father, herein.

The father on the otherhand, testified at page 593:

Q. Have you ever formally gone to the State of Utah or any agency thereof and taken responsibility for your son, to your knowledge? Yes or no.

A. Yes.

Q. When?

A. September 17, 1986, L.D.S. Hospital, it was notarized right there right then that night, to my knowledge I had -- that was what I had to do.

Perhaps the most significant problem that the Appellant has with the FINDING, is where did this child get his name R.A.F., if the Father of the child was ever in question. As noted on pages 222 and 491, the name has not only the Father in the same, but has a heritage of the Father's family in the same.

Appellant submits that surely one can not say that because he did not have an ACKNOWLEDGEMENT OF PATERNITY, in his pocket when he is on the stand, that that is proof that therefore the "Respondent was unable to provide a copy of any document, or even an identification of a document he had signed acknowledging paternity when challenged to do so at trial by Petitioner's Counsel."

In reality, everyone testified that the Office of Recovery Services was working with Appellant regarding child support. This is significant as the Appellant never signed anything at the request of Mr. Holt, nor did he ever take any tests. Hence it is blatantly apparent that it was the Office

of Recovery Services, that did not have the correct information and the Mother would have been the sole source for the same.

Hence, all that Mr. Holt had to testify to merely goes to show that the Appellee was misleading the Office of Recovery Services, rather than showing any denial of paternity by the Appellant.

This is particularly so, since it is the Appellee requesting assistance and she is the only one in contact with Recovery Services.

ARGUMENT NO.

THERE IS NO BASIS IN ANY OF THE FINDINGS TO SUGGEST THAT THE FATHER DESTROYED THE PARENT CHILD RELATIONSHIP.

In this case, this Court has held in the prior Appeal, at page 477, as follows:

The Wulffenstein test for determining abandonment in termination proceedings requires proof of two elements. First, the party seeking termination must prove that "the parent's conduct evidenced a conscious disregard for his or her parental obligations" to the child. Timperly, 750 P.2d at 1236. Second, the party must demonstrate that the disregard led to the destruction of the parent-child relationship." (4) Id: Wulffenstein, 560 P.2d at 334. Both of these elements must be proven by clear and convincing evidence. See Santokly vs. Kramer, 455 U.S. 745, 769, 102 S.Ct. 1388, 1403, 71 L.Ed 2d 599 (1982); In re J. Children, 664 P.2d 1158, 1159 (Utah 1983).

Then in Footnote #4, at the bottom of page 477 of the prior Appeal, this Court stated:

#4. Concern for the child's best interest is manifested in the second prong of the Wulffenstein abandonment test,

there is a strong presumption that a child is better off in the care of his natural parents, or at least having some relationship with its natural parents, and absent clear and convincing evidence that the parent's disregard for his or her obligations caused a destruction of the parent-child relationship, the presumption against termination will govern. See In re J.P. 648 P.2d 1365, 1377 (Utah 1982); In re Castello, 632 P. 2d 855, 856-57 (Utah 1981); State ex rel. M.W.H. vs Aguilar, 794 P. 2d 27, 29 (Utah App 1990). (Emphasis original)

As a result, Appellant submits that there clearly is a presumption that the child is better off, not being terminated from his Father, and that to beat the presumption, the Mother would have had to establish by clear and convincing evidence that the Father's conduct led to the destruction of the parent child relationship.

At the outset of this argument, it is critical for the Court of Appeals to know, once again, that the Mother has no knowledge of the facts surrounding the Father's contact and the Father's conduct, once the child is picked up by the Child's Paternal Grandparents for visitation. Note the transcript at pages 105 and 106.

As noted in the transcript at page 536 and following the critical downfall of the failing relationship between the parties, occurred when the Appellant came home during lunch unexpectedly, and found his wife Kim Fazzio, in the shower with a Mr. Mark Woodward.

After the Fazzio's marriage was annulled, Kim Fazzio, married the same Mark Woodward, and the rancor between the parents of R.A.F. was almost beyond control.

Wisely the Paternal Grandparents stepped in between the

hostile factions, and picked up and delivered the child from the time that Cameron stopped to the time that the Mother terminated all visitation, pursuant to Exhibit #4. (T-78).

As the Court can see from the undisputed event, surrounding the March, 1990, Christmas celebration, and the memorable gifts provided the child by his Father, Cameron, which the Mother and Mark Woodward, forceably prevented the child from receiving , as noted on page 292 of the transcript, there was an overt effort to destroy the parent-child relationship of the Father and his Child, by the Mother and her family.

The various statements by the Mother on Direct Examination that the Father had not given the child any gifts whatsoever and never remembered the child on special days like birthdays and Christmas, etc., which she fully recanted on Cross-examination when faced with the many toys, puzzles, articles of clothing and the blow ups of various pictures reflecting special times of a Father with his son, speak volumes of how this Mother would go to whatever means available to terminate the Father's rights involving this Child.

After all, the Mother firmly maintained her position in Court about the relationship, until she was faced with the actual physical evidence produced in open court, the existence of which she could not deny.

On page 67 of the transcript on direct examination, she stated, without any hesitation whatsoever:

Q. Did he ever buy any clothes for R.A.F.?

A. No, sir.

Q. Any toys or anything?

A. No, sir.

Q. On the boy's birthday and Christmas, did he give the boy any presents?

A. No, sir.

However, when sitting on the witness stand, and looking right at the gifts, and right at the pictures, etc., she then changes her story to say that she has no personal knowledge of the clothes that the Father provided his son, and the toys that the Father provided his son nor the times and special events that were remembered by the Father with very meaningful gifts to his son. Note the transcript at page 109 and following.

Appellant submits that the level of hostility is merely hinted at by these references to Christmas in March, refusing to allow the child to keep his gifts from his Father and his Father's family, and all of the visitation with the minor child that was denied by the Mother, which required that the Appellant literally obtain a Court order to be with his son,

Appellant submits that there can be no question as to what the Mother attempted to do in reference to a destruction of the parent-child relationship, between the Father and his son.

However, the question that this Court must address is what if anything, did the Father do in reference to an alleged destruction of the parent-child relationship between this Father and his son.

As noted above in the prior Appeal at page 477, there must be established by clear and confincing evidence that the alleged disregard of the Father led to the destruction of the parent-child relationship.

The Child was born on September 17, 1986, some three months before the parents even married, (T-19) and before the child could even focus on life, the Father was out of the home.(T-30).

Contact and visitation between the Father and his son was "as the parties can agree."

According to the Mother, she sought out an attorney, on how she could totally cut off the Father's rights involving the child, and then systematically followed the attorney's instructions, by cutting off completely the Child's contact with the Father and the Father's family.

Everyone agreed, it took a Court order to force the Mother to allow the Father and his family to be with the child, and that based upon that Court order, the Father at least in 1990, is spending Christmas with his child in March.

Still where is the evidence, and where is the FINDING OF FACT, that shows sufficient underlying detail, where the Father's conduct led to a destruction of the parent-child relationship.

In 1989, when the Petition filed by the Appellant to spell out specific visitation the Child had just turned three years of age. He could, of course, walk and was potty trained, and his vocabulary was on the increase significantly.

However, the infant could hardly percieve what was really going on in life.

At three years of age, the child knows about candy, and toys and surprises, etc., but what would a three year old know about child support and acknowledgments of paternity, etc?

Futhermore, even assuming that the child is exceptionally precocious, and would be versed in the legal aspects of the same at three years of age, who would have told the child about the same, as according to the Mother, the Father is having no contact with the child, and there was no evidence that the Paternal Grandparents were engaging in this level of dialogue with the infant, even assuming they would belittle their own son in front of their grandson.

Where is there any basis to establish even a hint, let alone by clear and convincing evidence, that the Father's conduct led to a destruction of the parent-child relationship?

Even if one were to assume, as the lower Court did, that no child support was paid, how would the child learn of the same

Surely the Mother was getting more through public assistance than she would have had if the Appellant paid his \$100.00 per month on time and consistently, so the child is not going without or having to make it in life on less money per month, whether Appellant pays or not.

Hence, the infant was not facing an empty bowl of cereal, wherein the Child would be exposed to going without, because the "low life Father did not pay this month, so we have nothing to eat."

The Mother was better off on public assistance than she was on his \$100.00 per month.

Hence, the infant would have no exposure to the payment of child support and whether Cameron paid his money or not, and this perhaps is highlighted by the fact that even the Child's Mother does not know if Cameron has been paying his \$100.00 per month to Recovery Services. (Note the transcript at page 122).

It is interesting to note however, that the infant would know some things, like what was his name, and others around him that would have parts of the names reflected as R.A.F., as their own names.

So there would have been some perception by this three year old of who's who, etc.

Yet, where is the evidence, that shows the Father's conduct leading to a destruction of the parent child relationship.

Lastly, where is the FINDING OF FACT, with sufficient underlying detail, or any detail whatsoever, establishing that

Appellant submits that there is no evidence, in fact there is not a hint, as to how this Father allegedly destroyed his parent-child relationship with this three year old.

The evidence on the otherhand, to sustain this FINDING, must be to the level of clear and convincing evidence, the standard of proof just below that afforded those charged with criminal activity, ie: beyond a reasonable doubt.

CONCLUSION

This case involves perhaps, the most important of all of life's issues - a relationship between a Father and his infant son.

The burden of proof ought to be beyond a reasonable doubt as the impacts on peoples lives is more often than not, far more grave than a fine or time in jail.

Here is a case involving a Father's contact with a three year old child - a child that bears his own name, and the name of a favorite uncle of the Father.

This is no "run of the mill" abandonment case, as in this case the Mother admits that she went to an attorney to see how she could cut off the Father from his rights involving the infant boy. She testified that the attorney told her that she had to go a whole year without any contact.

As noted in the first exhibit attached hereto, she prepared a letter and delivered it to the Father's parents, doing just exactly as instructed by her attorney - no visitation at all.

Immediately, thereafter, the Father Petitions the Court for specific visitation, instead of the arrangement involving,

"as the parties can agree."

The Mother responds to the request for meaningful contact, with a Petition to Terminate Parental Rights.

This is not a case of credibility, as the Mother's own testimony supports the bottomline conclusion, that it literally took a court order for the Father to be with his son.

She testified that they took the gifts of the Father away from the child, and refused to let the child have the same in her home.

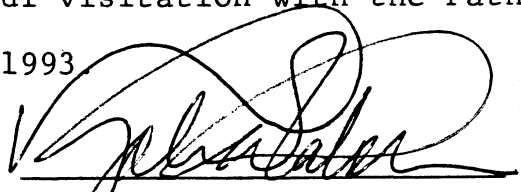
She stated that she had no knowledge of the gifts, etc., given to the Child by his Father, and yet the lower Court has taken this "no knowledge" and concluded by a "clear and convincing standard" that the Father abandoned his son.

This Court has already held in the prior appeal, that there must be clear and convincing evidence of how the Father's conduct led to a destruction of the parent-child relationship.

There are no findings and frankly no evidence to support this determination, as the child was but an infant, had just turned three years of age the month before the Father petitioned for specific visitation.

Appellant respectfully requests that this Court carefully review this most critical part of life itself, ie: his family, and then reverse and remand this matter once again to the Court, with instructions to set out meaningful visitation with the Father.

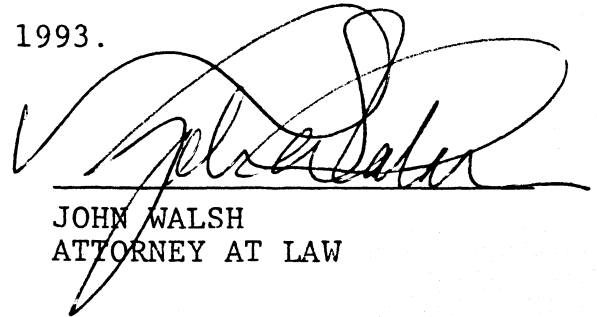
Dated this 19th day of March, 1993.



JOHN WALSH
ATTORNEY FOR THE APPELLANT

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing: BRIEF OF THE APPELLANT, to the Plaintiff, by mailing the same in the United States Mails, addressed to: LARRY KELLER, ATTORNEY FOR THE PLAINTIFF, 257 TOWERS, SUITE 340, 257 EAST 200 SOUTH - 10, SALT LAKE CITY, UTAH, 84111, this 19th day of March, 1993.



JOHN WALSH
ATTORNEY AT LAW

ADDENDUM

I've been meaning to say this for a long time but after yesterday's experience I think it is best that I don't bring Tony down until Mark comes back to town. I feel this way for several reasons. The first being, the way you treat me as a person. You act like I owe you the visits to Tony. Dick especially doesn't miss a chance to yell and this intimidates me and brings back the same feelings of fear that Cameron used to cause me. I don't deserve this. I have been a good mother and you don't have any right to treat me this way.

Secondly: the way Michelle was treated. She was an innocent person trying to do you a favor and you treated her very harshly. It makes me mad to hear that Dick said " She (meaning me) always does this and she should get her act together" because I have always bent over backwards to let you see Tony. Even my own parents did not have him over the weekend every other week nor do your parents get your kids every other week. I am not responsible to take Chris to Darren's parents nor am I responsible to take Tony to Cameron's parents.

I have been doing this for you out of kindness because I realize Cameron didn't bring him over.

Thirdly: I don't like the way you question other people about what I am doing. It is none of your business. I told you a while back that I would let you see Tony when I was in town and you don't need to hassel my family and friends.

As you know, I am leaving soon and I am not sure when I will be back but when both Mark and I are back we will bring Tony to see you.

Kim


EXHIBIT A

EXHIBIT A

Third District Juvenile Court

Judge Arthur G. Christean
Judge Olof A. Johansson
Judge Franklyn B. Matheson
Judge Sharon P. McCully

Richard W. Birrell
Court Commissioner

Roy W. Whitehouse
Court Executive

January 24, 1992

John Walsh
Attorney at Law
Suite 202 Cove Point Plaza
3865 South Wasatch Boulevard
Salt Lake City, Utah 84109

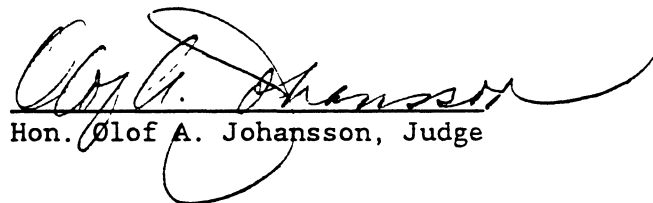
Re: Woodward v. Fazzio,
Case No. 900626-CA

Dear Mr. Walsh:

The Court has received a remand of the above case for more specific factual findings as it relates to paragraphs 7, 8, 10 and 11 of this Court's findings. I, therefore, invite you, but you are not required, to submit proposed written findings consistent with the request of the Court of Appeals.

Such findings should be provided to this Court no later than February 28, 1992. If additional time is necessary, please advise me.

Respectfully,



Hon. Olof A. Johansson, Judge

EXHIBIT B

EXHIBIT B

LARRY R. KELLER, #1785
Attorney for Petitioner
257 Towers, Suite 340
257 East 200 South - 10
Salt Lake City, Utah 84111
Telephone: (801) 532-7282

IN THE THIRD DISTRICT JUVENILE COURT

SUMMIT COUNTY, STATE OF UTAH

IN THE MATTER OF THE INTEREST :	
OF :	PROPOSED ADDITIONAL FINDINGS OF FACT
RICHARD ANTHONY FAZZIO, :	Case No. 786412
DOB: September 17, 1986 :	Judge Olof A. Johansson

KIM (FAZZIO) WOODWARD, :	
Petitioner, :	
vs. :	
RICHARD CAMERON FAZZIO, :	
Respondent. :	

Comes now Petitioner, Kim (Fazzio) Woodward, and proposes the following additional Findings of Fact to be made by the Honorable Olof A. Johansson pursuant to the remand of the above-entitled matter by the Utah Court of Appeals.

I. ADDITIONAL FINDINGS OF FACT PURSUANT TO PARAGRAPH 7.

Petitioner would begin by recommending to the Court that it amend paragraph 7 to begin as follows:

"7. Although there was disputed evidence admitted during the course of the trial, the Court finds the following facts by clear and convincing evidence to be believable:

a. Respondent admitted that he urged Petitioner to get an abortion when he first learned she was pregnant with R.A.F. Respondent urged Petitioner to get an abortion on more than one occasion (T. 20, 21, 585, 586).

b. Respondent was never a parent to R.A.F. from the time he was born. He refused to babysit the child, even though he was not working most of the time during the parties' marriage. Respondent played no part in the care or nurturing of R.A.F. during the one-year marriage. Respondent would not get up at night with the child, would not change a diaper, and would not feed a bottle (T. 23, 24, 25).

c. Respondent refused to take financial responsibility for R.A.F. during the course of the marriage, and never gave her any money for the child in any way. His refusal to help support R.A.F. resulted in the child being required to wear second-hand items and lacking some of the necessities of life (T. 29, 30).

d. After the parties separated for the last time, Petitioner spoke to Respondent many times about needing money and child support, and he refused to give her anything whatsoever as child support (T. 30).

e. Respondent never purchased presents or items for the child during the course of the marriage, and Petitioner testified she never

observed him purchase anything for the child after the marriage (T. 30).

f. Respondent did not love or nurture R.A.F. during the time of the marriage in any way (T. 30).

g. On one occasion, Respondent grabbed Petitioner by the hair and had her on the floor and was beating her head into the floor when she started calling for Christopher (her son from a prior marriage) to run over to the neighbors and have them call the police. As soon as he moved, Respondent said '(I)f anybody moves off that couch, I'll kill her.' R.A.F. was one of the two children present on the couch observing this physical abuse to his mother and the threat to kill her. Both R.A.F. and Christopher were terrified and they were taken by the police to the YWCA after this incident (T. 42, 43, 44).

h. Petitioner received absolutely no child support from Respondent and she tried constantly to locate him, but was unable to. Even though Respondent's parents, Richard and Steffany Fazzio, lived at the same address during this entire period of time, they would refuse to tell her Respondent's address so that she might collect child support from him. Every time Petitioner saw Respondent, she asked him for child support and he would always refuse to give it to her (T. 71, 72, 73, 74).

i. Although Respondent came around four or five times from the date of their last separation in September of 1987 through September of 1988, he spent very little time with R.A.F. After September of 1988, Respondent never came to see the child at all, nor telephoned, nor contacted the child in any way (T. 75, 76, 77, 78).

j. Petitioner would allow Respondent's parents, Richard and Steffany Fazzio, to see the

child occasionally between September of 1988 and October of 1989 as they requested. However, after the visitations with Respondent's parents, Petitioner would always ask R.A.F. if he had seen Respondent during the visitations, and R.A.F. would say 'no' (T. 82, 83).

k. Although Richard and Steffany Fazzio, the paternal grandparents, testified that they visited with the child on occasion between September of 1988 and October 1989; and although the paternal grandparents claimed that Respondent was present during some of these grandparent visitation periods, the father's testimony in this regard was directly impeached and the Court finds his testimony unreliable, untrustworthy and unbelievable.

l. The grandparents' testimony in regard to their son's visitations seemed unreliable and unbelievable in light of their own great interest in maintaining contact with R.A.F., and in light of the fact that their testimony was impeached on several occasions. For instance, the grandparents' willingness to exaggerate and stretch the truth regarding their son's contact with the child was shown by their testimony regarding the court-ordered visitation occurring between March and the time of the trial in the instant case in August 1990. While suggesting that Petitioner was hard to find, Mrs. Fazzio admitted that Petitioner brought the child to her and her husband for visitation for approximately one year (T. 340, 348, 349, 351). Furthermore, Mrs. Fazzio admitted on cross-examination that she really did not know when Respondent did or did not see R.A.F. (T. 352). Mrs. Fazzio admitted that she and her husband were paying the attorney's fees for the instant action and not Respondent (T. 350).

m. Although Mrs. Fazzio testified that she and her husband had submitted child support payments to Petitioner once this termination action was filed, she claims it was on behalf

of Respondent; however, she admitted Respondent only reimbursed her for three of the nine checks she claimed to have sent to Petitioner (T. 322). Furthermore, Mrs. Fazzio admitted that no offers were made to pay the child support to Petitioner until this termination action was filed on January 26, 1990, by Petitioner (T. 354).

n. Mrs. Fazzio did testify that some toys were purchased for the child by Respondent, but in light of the fact she testified her son did not pay child support because he had been unemployed and his earnings were low, her testimony was unreliable and the Court believes it was the paternal grandparents who were thoughtful enough to purchase the few toys in question for R.A.F. (T. 318).

o. Mrs. Fazzio admitted that she never concerned herself with whether or not Petitioner had enough money to meet the basic needs of R.A.F., her grandson (T. 320, 321). Mrs. Fazzio suggested this was because she felt it was 'a matter between Kim and Cameron. . . (A)nd I did not know he was not providing for her. I had no need to do (sic know) that.' (T. 321). Despite this testimony, on at least two different occasions during Petitioner's attorney's cross-examination of her, Mrs. Fazzio admitted that she knew Respondent was not paying child support to Petitioner, making her testimony less credible (T. 318).

p. Further testimony showing the unreliability and unbelievability of the testimony of the paternal grandparents came during cross-examination involving court-ordered visitation commenced in June of 1990 after the instant actions were filed. Mrs. Fazzio admitted that she was aware that visitation with R.A.F. was to be at the residence of she and her husband by court order (T. 373). Upon cross-examination, she admitted that on one occasion she and her husband left Salt Lake City with a boat attached to their truck, but

dropped off the boat prior to picking up R.A.F. at Petitioner's residence. She admitted that after picking up R.A.F., she and her husband went back and picked up the boat and went boating on Echo Reservoir with R.A.F., completely unbeknownst to Petitioner (T. 399, 400). Mrs. Fazzio then stated, apparently seriously, that her boat was her home and so she didn't feel that she and her husband were violating Commissioner Peuler's (and Judge Wilkinson's) Order that visitation be at their residence (T. 400). She indicated that '... summer weekends, our boat is our home. . . . It's an overnight boat, it has cooking and sleeping facilities, and we live in it week-ends.' (T. 400). However, when Mrs. Fazzio was asked how many weekends they had slept overnight on the boat that year, 1990, through August 17 (the day of the trial), she admitted that they had not slept on the boat once that year (T. 400).

q. Richard Bruce Fazzio, the paternal grandfather, agreed with his wife that his boat was his personal residence and their exercising visitation in June of 1990 by taking the child boating rather than to their home in Salt Lake City was not a violation of the District Court's Order (T. 468). Such testimony shows the incredulity and unbelievability of the paternal grandparents, Steffany Fazzio and Richard Bruce Fazzio.

r. Respondent never provided R.A.F. with a gift on his birthday or for Christmas (T. 79, 80).

s. Petitioner gave Respondent's parents a note in October of 1989 indicating that she was going on vacation and she would allow them to see the child later. It was immediately after receiving this note at a time of expected visitation, that Mr. and Mrs. Fazzio retained an attorney and filed the Petition for Modification on behalf of their son, the Respondent (T. 76, 77, 78, 79, 80, 81). The

Court believes that the fact is the instant action was filed only as a response to Respondent's parents' concern about their own visitation with the child, and not their son's.

t. R.A.F. believes his dad is Petitioner's present husband, Mark Woodward (T. 83). This could only be true if he simply did not know who his biological father was as a result of his biological father's failure to make any serious efforts to visit with him.

u. Petitioner allowed court-ordered visitation when requested between March of 1990 and the time of trial in this matter (August 1990); although there were only three occasions when Respondent took advantage of the opportunity to visit the child during this period of time. After one of these visitations, R.A.F. exclaimed to Petitioner 'Mom, Cameron told me he's my dad. He's not my dad.' On another occasion after a court-ordered visitation, R.A.F. was asked by Petitioner who Cameron (Respondent) was, and he would say that he was Brian's brother; and when asked by Petitioner who his dad was, he would always say 'Mark' (R.A.F.'s stepfather) (T. 88).

v. Witnesses Barbara Kresser and Ken Kresser, the parents of R.A.F.'s stepfather, Mark Woodward, testified that R.A.F. has never mentioned Respondent or anything about his natural father, and that contrary to the claims of the Respondent, R.A.F. has not been taught anything by the family with regard to who his father is, that it is just a natural relationship and a happy family (T. 138).

w. The Court finds that rather than Petitioner's movements from different residences being the cause of Respondent's failure to visit with the child, Respondent failed to have contact with the child to avoid paying child support. On one occasion, Christy Tinnin, Petitioner's sister, testified she

accidentally ran into Respondent at a truck stop in February of 1989 at a time when she was aware Petitioner was looking for him to get him to pay child support. Respondent said to Ms. Tinnin during that conversation '. . . do me a favor and don't tell Kim you saw me, because I am supposed to be in Nevada.' (T. 182, 183).

x. Even though Respondent was provided with court-ordered visitation after the filing of the instant lawsuit, he did not make an effort to spend much time with the child during the court-ordered visitations. Ken Kresser, the husband of Barbara Kresser and step-father of Mark Woodward and Petitioner's present husband, testified that after the May 1990 court-ordered visitation with Respondent, he asked R.A.F. about the visitation. R.A.F. replied that he had gone to the park. When Mr. Kresser asked him if Cameron (Respondent) was there with him, R.A.F. stated 'no, he was sleeping.' (T. 173).

II. PROPOSED CHANGES IN FINDING OF FACT NO. 8

a. The testimony was clear at the trial that Respondent had never personally paid a single penny of child support to Petitioner, and that some \$3,000.00 in back child support was owed at the time of trial in this matter (T. 71, 72; T. 362, 363).

b. Petitioner made significant efforts to contact Respondent to get him to pay child support and was regularly informed by Respondent's parents, Richard and Steffany Fazzio, that they did not know how to contact Respondent and could not give her an address or telephone number for him (T. 71, 72). This Court finds it unbelievable that Mr. and Mrs. Fazzio never knew where their son was so as to allow Petitioner to contact him for purposes of obtaining her court-ordered child support.

c. Only after Petitioner filed her Petition for Termination of Parental Rights did she receive any checks from anyone regarding child support. She did receive certain checks from the grandparents, Richard and Steffany Fazzio, at that time, supposedly on behalf of Respondent, but her attorney advised her to return those checks (T. 133). The evidence is uncontroverted that no monies were ever submitted to Petitioner on a checking account with Respondent's name on it. Nor was there any evidence that Respondent had provided any money to Petitioner of any kind.

d. After numerous incidents of abuse, Petitioner retained a lawyer and asked Respondent to accompany her to the lawyer's office to sign some papers, one provision of which would require him to pay child support. Due to the existence of this provision, Respondent became angry and tore up the paper, although he later signed it (T. 63, 64, 65).

e. Respondent's testimony regarding efforts to pay child support was inherently unbelievable, untrustworthy and unreliable. Examples from the record as to Respondent's unbeliefability are follows:

1. Respondent claimed to have provided a car worth \$600.00 to Petitioner in lieu of two months child support (T. 564, 565). However, rebuttal witness Scott Ortar testified that in fact Respondent sold the car in question to Sommers Auto Wrecking approximately three months after the parties' marriage was annulled for \$75.00 (T. 475-482). Respondent admitted on cross-examination that he indeed sold the very same vehicle he claimed to have given Petitioner in lieu of child support to Sommers Auto Wrecking for \$75.00; and further admitted that he

did not give the \$75.00 to Petitioner (T. 571, 572, 573, 574).

2. Related to, but in addition to the foregoing regarding the car, Respondent testified on direct examination he did not give Petitioner title to the 1979 Mercury he was providing her in lieu of child support after the annulment, because he did not have the title. Despite this clear testimony by Respondent, Petitioner introduced at trial Exhibit 7 which is a Utah Certificate of Title to the 1979 Mercury in question and related documents. This exhibit clearly showed that the Utah Certificate of Title was issued in the name of Respondent, and was never in the name of Petitioner. Furthermore, this exhibit showed that Respondent signed the document as "transferor" before a notary public on February 5, 1988. This was the very date of the check introduced as Plaintiff's Exhibit 6 made out to Respondent from Sommers Auto Wrecking. Moreover, the VIN number of the vehicle on the Certificate of Title and the check made out to Richard D. Fazzio from Sommers Auto Wrecking are exactly the same, and clearly establish that this was the same vehicle Respondent claimed to have given Petitioner in lieu of child support. When confronted with the title to the car and the check from Sommers Wrecking on cross-examination by Petitioner's attorney, Respondent testified he wished to changed his testimony about not having the title to the vehicle and giving it to Petitioner in lieu of child support (T. 564, 571).

3. Pursuant to the Decree of Annulment issued by the Honorable Homer F. Wilkinson in Civil No. D-87-3798 on November 19, 1987, Petitioner alone was entitled to claim R.A.F. as a dependent on her income tax return (Decree of Annulment paragraph 2).

4. Although Respondent had stated on cross-examination that he had always been truthful with government agencies, Petitioner's attorney on cross-examination showed Respondent Exhibit 8 which is Respondent's 1987 Tax Return. Petitioner's attorney asked Respondent if everything reported on his 1987 Tax Return was true, and Respondent replied it was. Yet he claimed R.A.F. as a deduction in violation of the Decree of Annulment despite his failure to pay a single cent in child support (T. 580).

5. On cross-examination, Respondent was shown Petitioner's Exhibit 9 which was Respondent's 1988 Income Tax Return. Respondent admitted he paid no child support for 1988, but that the tax return showed that he was claiming R.A.F. as a dependent stating to the IRS that R.A.F. had lived in Respondent's home six months during 1988. Respondent admitted that that was not true and that he had apparently made a mistake in believing that his son, R.A.F., had lived in his home for six months in 1988 when he was living in Wyoming, Nevada and with his grandmother in Salt Lake City (T. 581, 582).

6. The false statements made to the federal government on the income

tax return claiming R.A.F. as a dependent under circumstances where he did not pay a single penny of child support made Respondent's testimony incredible and unbelievable.

III. PROPOSED CHANGES IN FINDING OF FACT NO. 10

a. Darren Holt, Petitioner's husband from a prior marriage, and the father of Petitioner's child Darren Christopher Holt, received notice in approximately December of 1986 from the Department of Recovery Services stating he was responsible for child support for R.A.F. Mr. Holt testified that he approached Respondent numerous times regarding this situation and asked him to submit to tests or sign a legal document admitting to the paternity of R.A.F. Respondent steadfastly refused to ever sign a document with the Department of Recovery Services acknowledging his paternity of R.A.F. Mr. Holt contacted Respondent some 14 or 15 times attempting to get him to admit to his paternity of R.A.F. with the State and Respondent consistently refused (T. 146, 147, 148, 149, 150, 151, 591, 592).

b. Although Respondent claimed he had signed a document upon the birth of R.A.F. acknowledging paternity, Respondent was unable to provide a copy of any document, or even an identification of a document he had signed acknowledging paternity when challenged to do so at trial by Petitioner's counsel (T. 590, 591). The result of Respondent's failure to acknowledge the paternity of R.A.F. to the State of Utah was that Darren Holt paid payments to the State of Utah's Department of Recovery Services on behalf of R.A.F., an obligation that was rightfully that of Respondent.

IV. PROPOSED CHANGES TO FINDING OF FACT NO. 11

a. Petitioner had a child from a previous marriage, Darren Christopher Holt (DOB: 2/13/83), who lived with Petitioner at the time she was married to Respondent. Christopher was approximately four years old during that period (T. 28).

b. During the course of the marriage, she and her children, including R.A.F., were regularly subjected to mental and physical threats and abuse by Respondent (T. 22, 23, 32, 33, 34, 35, 36, 37, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 55, 56, 151, 153, 154, 155, 158, 183, 184, 189, 190, 191).

c. Respondent admitted during the course of the marriage that he "smacked Kim" and that he did not make sure that either R.A.F. or the child Christopher were out of the room when he slapped her (T. 598).

d. Petitioner talked Respondent into seeking marriage counseling during the marriage; but not only did his abuse of her not change, Respondent actually beat her the day of counseling because he didn't like the things she said to the counselor (T. 21, 22, 23).

e. Darren Holt testified that his son, Christopher, told him during his visitations that he was terrified of Respondent, and that Respondent had threatened him (Christopher) with a knife and hit him a number of times. Mr. Holt also testified Christopher told him Respondent at one point drove Petitioner and Christopher out of Petitioner's home with a gun and told them that if they came back, he (Respondent) would kill them. (T. 151, 152, 153, 154, 155, 156, 157, 158). This testimony was corroborated by Petitioner.

f. When Mr. Holt confronted Respondent about this abuse of his son, Christopher, Respondent replied ". . . while Christopher is in my house, I will treat him the way I want."

(T. 154, 155). This testimony was corroborated by Petitioner who described Respondent's attitude toward Christopher as "mean and hateful . . . cruel. . ." (T. 32).

g. Respondent admitted he tried to commit suicide on at least one occasion during the marriage (T. 595, 596).

h. On one occasion, Respondent grabbed Petitioner by the hair and had her on the floor and was beating her head into the floor when she started calling for Christopher to run over to the neighbors and have them call the police. Petitioner testified that as soon as Christopher moved, Respondent said "(I)f anybody moves off that couch, I'll kill her." R.A.F. was one of the two children present on the couch observing this physical abuse to his mother and the threat to kill her. Both R.A.F. and Christopher were terrified and they were taken by the police to the YWCA after this incident (T. 42, 43, 44).

CONCLUSION

While two of the three Judges on the Court of Appeals hearing the instant matter on appeal, seemed concerned about this Court's final decision, it is Petitioner's belief that if the Court provides the Findings of Fact, clearly supported by the record, which have been proposed in the instant document, the Court of Appeals will have a better understanding as to the nature of this case and the reasons for this Court's decision.


As Petitioner argued in her brief on appeal:

"Never has a case more clearly demonstrated why it is essential for an appellate court to defer to the juvenile court on findings of fact than the instant case. It is the posi-

tion of Appellee (Petitioner) that Appellant (Respondent) stated numerous falsehoods and committed perjury during his testimony in the trial court. This was demonstrated through cross-examination, rebuttal witnesses and evidence which could not be overcome by Appellant (Respondent). Furthermore, Appellee (Petitioner) maintains that the physical manner in which the Appellant (Respondent) and his witnesses testified in this case was as important as the words they used in determining their credibility. The trial judge alone was in a position to judge the credibility of the witnesses and his determination should not be disturbed by this Court without a demonstration by Appellant (Respondent) that the Findings are against the weight of the evidence and thus clearly erroneous. State in Interest of P.H. and M.H. v. Harrison, 783 P.2d 565, 570 (Utah App. 1989)."

Petitioner/Appellee's Brief at 21.

RESPECTFULLY SUBMITTED this 28th day of February, 1992.



LARRY R. KELLER
Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, first class postage prepaid, on this 28th day of February, 1992, to:

John Walsh
2319 Foothill Drive, #270
Salt Lake City, Utah 84109



EXHIBIT C

EXHIBIT C

Third District Juvenile Court

Judge Arthur G. Christean
Judge Olof A. Johansson
Judge Franklyn B. Matheson
Judge Sharon P. McCully

April 30, 1992

Richard W. Birrell
Court Commissioner

Roy W. Whitehouse
Court Executive

Mr. John Walsh
2319 South Foothill Drive, Suite 270
Salt Lake City, Utah 84109

RE: Woodward v. Fazzio
Case No. 900626-CA
Juvenile Court Case No. 786512

Do not give up hope. I am making serious attempts at providing more detailed findings in the above case, in between my regular caseload.

Each of your briefs are extremely well done and very helpful. I thank you for them.

Respectfully,



Judge Olof A. Johansson

cc: file

EXHIBIT D

IN THE THIRD DISTRICT JUVENILE COURT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

JUN 15 1992

STATE OF UTAH, in the Interest	:	AMENDED FINDINGS OF FACT
of	:	JUVENILE COURT
	:	
FAZZIO, RICHARD ANTHONY	:	Case No.: 786412
(09/17/86)	:	
<hr/>		
WOODWARD, KIM (FAZZIO) - Petitioner	:	ORDER
	:	
vs.	:	DISTRICT COURT
	:	Case No: 87-37986
FAZZIO, RICHARD CAMERON - Respondent	:	
	:	
<hr/>		

Upon remand from the Utah Court of Appeals this Court submits the following supplemental and amended detailed findings in support of its order entered on November 28, 1990.

Paragraph 7. Although there was disputed evidence admitted during the course of the trial, the Court finds the following facts by clear and convincing evidence to be believable:

- a. Respondent admitted that he urged Petitioner to get an abortion when he first learned she was pregnant with R.A.F.. Respondent urged Petitioner to get an abortion on more than one occasion;
- b. Respondent did not actively participate in the parenting of R.A.F. from the time he was born. He refused to babysit the child, even though he was not working most of the time during the parties' marriage. Respondent would not get up at night with the child, would not change a diaper, and would not bottle feed the child;
- c. Respondent refused to take financial responsibility for R.A.F., during the course of the marriage and never gave her any money for the child, except as mentioned in paragraph (m);
- d. After the parties separated for the last time, Petitioner spoke to Respondent many times about needing money and child support, and he refused to give her any child support;
- e. On one occasion, Respondent grabbed Petitioner by the hair and had her on the floor and was beating her head into the floor when she started calling for Christopher (her son from a prior marriage) to run over to the neighbors and have them call the police. As soon as he moved, Respondent said '(I)f anybody moves off that couch, I'll kill her.' R.A.F. was one of the two children present on the couch observing this physical abuse to his mother and the threat to kill her. Both R.A.F. and Christopher were terrified and they were taken to the police to the YWCA after this incident;

f. Petitioner received no child support from Respondent and she tried constantly to locate him, but was unable. Even though Respondent's parents, Richard and Steffany Fazzio, lived at the same address during this entire period of time, they would refuse to tell her Respondent's address. When Petitioner saw Respondent, she asked him for child support and he refused to give it to her;

g. Although Respondent came around four or five times from the date of their separation in September of 1987, through September of 1988, he spent very little time with R.A.F.. After September of 1988, Respondent never came to see the child nor telephone, nor contacted the child;

h. Petitioner would allow respondent's parents, Richard and Steffany Fazzio, to see the child occasionally between september of 1988 and October of 1989, as they requested. However, after the visitations with Respondent's parents, Petitioner would always ask R.A.F., if he had seen Respondent during the visitations, and R.A.F., would say "no";

i. Although Richard and Steffany Fazzio, the paternal grandparents, testified that they visited with the child on occasion between September of 1988 and October 1989, and although the paternal grandparents claimed that Respondent was present during some of these grandparent visitation periods, the father's testimony in this regard was directly impeached and the Court finds his testimony unreliable, untrustworthy and unbelievable;

j. The grandparents' testimony in regard to their son's visitations seemed unreliable and unbelievable in light of their own great interest in maintaining contact with R.A.F., and in light of the fact that their testimony was impeached on several occasions. For instance, the grandparents' willingness to exaggerate the truth regarding their son's contact with the child was shown by their testimony regarding the court-ordered visitation occurring between March and the time of the trial in the instant case in August 1990. While suggesting that Petitioner was hard to find, Mrs. Fazzio admitted that Petitioner brought the child to her and her husband for visitation for approximately one year. Furthermore, Mrs. Fazzio admitted on cross-examination that she really did not know when Respondent did or did not see R.A.F.. Mrs. Fazzio admitted that she and her husband were paying the attorney's fees for the instant action and not Respondent;

k. Although Mrs. Fazzio testified that she and her husband had submitted child support payments to Petitioner once this termination action was filed, she claims it was on behalf of Respondent; however, she admitted Respondent only reimbursed her for three of the nine checks she claimed to have sent to Petitioner. Furthermore, Mrs. Fazzio admitted that no offers were made to pay the child support to

Petitioner until this termination action was filed on January 26, 1990, by Petitioner;

l. Mrs. Fazzio did testify that some toys were purchased for the child by Respondent, but in light of the fact she testified her son did not pay child support because he had been unemployed and his earnings were low, her testimony was unreliable and the Court believes it was the paternal grandparents who were thoughtful enough to purchase the few toys in question for R.A.F.;

m. Mrs. Fazzio admitted that she never concerned herself with whether or not Petitioner had enough money to meet the basic needs of R.A.F., her grandson. Mrs. Fazzio suggested this was because she felt it was 'a matter between Kim and Cameron....(A)nd I did not know he was not providing for her. I had no need to do (sic know) that.' Despite this testimony, on at least two different occasions during Petitioner's attorney's cross-examination of her, Mrs. Fazzio admitted that she knew Respondent was not paying child support to Petitioner, making her testimony less credible;

n. Further testimony showing the unreliability and unbelievability of the testimony of the paternal grandparents came during cross-examination involving court-ordered visitation commenced in June of 1990, after the instant actions were filed. Mrs. Fazzio admitted that she was aware that visitation with R.A.F. was to be at her residence by court order. Upon cross-examination, she admitted that on one occasion she and her husband left Salt Lake City with a boat attached to their truck, but dropped off the boat prior to picking up R.A.F. at Petitioner's residence. She admitted that after picking up R.A.F., she and her husband went back and picked up the boat and went boating on Echo Reservoir with R.A.F., Mrs. Fazzio stated that her boat was her home and so she didn't feel that she and her husband were violating Commissioner Peuler's (and Judge Wilkinson's) Order that visitation be at their residence. She indicated that '. . . summer weekends, our boat is our home. . . It's an overnight boat, it has cooking and sleeping facilities, and we live in it weekends.' However, when Mrs. Fazzio was asked how many weekends they had slept overnight on the boat that year, 1990, through August 17 (the day of the trial), she admitted that they had not slept on the boat once that year);

o. Richard Bruce Fazzio, the paternal grandfather, agreed with his wife that his boat was his personal residence and their exercising visitation in June of 1990, by taking the child boating rather than to their home in Salt Lake City was not a violation of the District Court's Order. Such testimony shows the incredulity and unbelievability of the paternal grandparents, Steffany Fazzio and Richard Bruce Fazzio;

p. Petitioner gave Respondent's parents a note in October of 1989, indicating that she was going on vacation and she would allow them to see the child later. It was immediately after receiving this note at a time of expected visitation, that Mr. and Mrs. Fazzio retained an attorney and filed the Petition for Modification on behalf of their son, the Respondent. The Court believes that the instant action was filed only as a response to Respondent's parents' concern about their own visitation with the child, and not their son's;

q. R.A.F. believes his dad is Petitioner's present husband, Mark Woodward (T. 83). He simply did not know who his biological father was as a result of his biological father's failure to make any serious efforts to visit with him;

r. Petitioner allowed court-ordered visitation when requested between March of 1990 and the time of trial in this matter (August 1990), although there were only three occasions when Respondent took advantage of the opportunity to visit the child during this period of time. After one of these visitations, R.A.F. exclaimed to Petitioner 'Mom, Cameron told me he's my dad. He's not my dad.' On another occasion after a court-ordered visitation, R.A.F. was asked by Petitioner who Cameron (Respondent) was, and he would say that he was Brian's brother; and when asked by Petitioner who his dad was, he would always say 'Mark' (R.A.F.'s stepfather);

s. Witnesses Barbara Kresser and Ken Kresser, the parents of R.A.F.'s stepfather, Mark Woodward, testified that R.A.F. has never mentioned Respondent or anything about his natural father, and that contrary to the claims of the Respondent, R.A.F. has not been taught anything by the family with regard to who his father is, that it is just a natural relationship and a happy family;

t. The Court finds that rather than Petitioner's movements from different residences being the cause of Respondent's failure to visit with the child, Respondent failed to have contact with the child to avoid paying child support. On one occasion, Christy Tinnin, Petitioner's sister, testified she accidentally ran into Respondent at a truck stop in February of 1989, at a time when she was aware Petitioner was looking for him to get him to pay child support. Respondent said to Ms. Tinnin during that conversation '. . . do me a favor and don't tell Kim you saw me, because I am supposed to be in Nevada.';

u. Even though Respondent was provided with court-ordered visitation after the filing of the instant lawsuit, he did not make an effort to spend much time with the child during the court-ordered visitations. Ken Kresser, the husband of Barbara Kresser and step-father of Mark Woodward and Petitioner's present husband, testified that after the May

1990, court-ordered visitation with Respondent, he asked R.A.F. about the visitation. R.A.F. replied that he had gone to the park. When Mr. Kresser asked him if Cameron (Respondent) was there with him, R.A.F. stated 'no, he was sleeping.';

Paragraph 8. During the period of the parties' separation, and since the date of the Decree of Annulment (November 19, 1987), Respondent has paid no child support to Petitioner or anyone else on behalf of the minor child, Richard Anthony Fazzio.

a. The testimony was clear at the trial that Respondent owed to Petitioner some \$3,000.00 in back child support at the time of trial in this matter;

b. Petitioner made significant efforts to contact Respondent to get him to pay child support and was regularly informed by Respondent's parents, Richard and Steffany Fazzio, that they did not know how to contact Respondent and could not give her an address or telephone number for him. This Court finds it unbelievable that Mr. and Mrs. Fazzio never knew where their son was so as to allow Petitioner to contact him for purposes of obtaining her court-ordered child support;

c. Only after Petitioner filed her Petition for Termination of Parental Rights did she receive any checks from anyone regarding child support. She did receive certain checks from the grandparents, Richard and Steffany Fazzio, at that time, supposedly on behalf of Respondent, but her attorney advised her to return those checks. The evidence is uncontroverted that no monies were ever submitted to Petitioner on a checking account with Respondent's on a checking account with Respondent's name on it. Nor was there any evidence that Respondent had provided any money to Petitioner;

d. Respondent's testimony regarding efforts to pay child support was inherently unbelievable, untrustworthy and unreliable. Examples from the record are follows:

1. Respondent claimed to have provided a car worth \$600.00 to Petitioner in lieu of two months child support. However, rebuttal witness Scott Ortar testified that in fact Respondent sold the car in question to Sommers Auto Wrecking approximately three months after the parties' marriage was annulled for \$75.00. Respondent admitted on cross-examination that he indeed sold the very same vehicle he claimed to have given Petitioner in lieu of child support to Sommers Auto Wrecking for \$75.00, and further admitted that he did not give the \$75.00 to Petitioner;

2. Related to, but in addition to the foregoing regarding the car, Respondent testified on direct examination he did not give Petitioner title to the 1979 Mercury he was providing her in lieu

of child support after the annulment, because he did not have the title. Despite this testimony by Respondent, Petitioner introduced at trial Exhibit 7 which is a Utah Certificate of Title to the 1979 Mercury in question and related documents. This exhibit showed that the Utah Certificate of Title was issued in the name of Respondent, and was never in the name of Petitioner. Furthermore, this exhibit showed that Respondent signed the document as "transferor" before a notary public on February 5, 1988. This was the very date of the check introduced as Plaintiff's Exhibit 6 made out to Respondent from Sommers Auto Wrecking. Moreover, the VIN number of the vehicle on the Certificate of Title and the check made out to Richard D. Fazzio from Sommers Auto Wrecking are exactly the same, and clearly establish that this was the same vehicle Respondent claimed to have given Petitioner in lieu of child support. When confronted with the title to the car and the check from Sommers wrecking on cross-examination by Petitioner's attorney, Respondent testified he wished to change his testimony about not having the title to the vehicle and giving it to Petitioner in lieu of child support;

3. Pursuant to the Decree of Annulment issued by the Honorable Homer F. Wilkinson in Civil No D-87-3798 on November 19, 1987, Petitioner alone was entitled to claim R.A.F. as a dependent on her income tax return;

4. Although Respondent had stated on cross-examination that he had always been truthful with government agencies, Petitioner's attorney on cross-examination showed Respondent Exhibit 8 which is Respondent's 1987 Tax Return. Petitioner's attorney asked Respondent if everything reported on his 1987 Tax return was true, and Respondent replied it was. Yet he claimed R.A.F. as a deduction in violation of the Decree of Annulment despite his failure to pay child support;

5. On cross-examination, Respondent was shown Petitioner's Exhibit 9 which was Respondent's 1988 Income Tax Return. Respondent admitted he paid no child support for 1988, but that the tax return showed that he was claiming R.A.F. as a dependent stating to the IRS that R.A.F. had lived in Respondent's home six months during 1988. Respondent admitted that that was not true and that he had apparently made a mistake in believing that his son, R.A.F., had lived in his home for six months in 1988 when he was living in Wyoming, Nevada and with his grandmother in Salt Lake City;

6. The false statements made to the federal government on the income tax return claiming R.A.F. as a dependent under circumstances where he did not pay child support made Respondent's testimony incredible and unbelievable.

Paragraph 10. Subsequent to the birth of said child, Respondent had the opportunity to legally declare his paternity for the minor child, but he failed to do so in order to prevent the State of Utah or other persons or agencies from requiring him to meet his financial obligations as a parent.

- a. Darren Holt, Petitioner's husband from a prior marriage, and the father of Petitioner's child Darren Christopher Holt, received notice in approximately December of 1986 from the Department of Recovery Services stating he was responsible for child support for R.A.F.. Mr. Holt testified that he approached Respondent numerous times regarding this situation and asked him to submit to tests or sign a legal document admitting to the paternity of R.A.F. Respondent steadfastly refused to ever sign a document with the Department of Recovery Services acknowledging his paternity of R.A.F.. Mr. Holt contacted Respondent some 14 or 15 times attempting to get him to admit to his paternity of R.A.F. with the State and Respondent consistently refused;
- b. Although Respondent claimed he had signed a document upon the birth of R.A.F. acknowledging paternity, Respondent was unable to provide a copy of any document, or even an identification of a document he had signed acknowledging paternity when challenged to do so at trial by Petitioner's counsel. The result of Respondent's failure to acknowledge the paternity of R.A.F. to the State of Utah was that Darren Holt paid child support to the State of Utah's Department of Recovery Services on behalf of R.A.F., an obligation that was rightfully that of the Respondent.

Paragraph 11. Although neither dispositive nor controlling in this case, there is evidence that during the period of time that Petitioner and Respondent lived together, Respondent was abusive, physically and emotionally to Petitioner, to Petitioner's minor child from a former marriage, and was emotionally abusive to the minor child, Richard Anthony Fazzio, who is the subject of this action.

- a. Petitioner had a child from a previous marriage, Darren Christopher Holt (DOB: 2/13/83), who lived with Petitioner at the time she was married to Respondent. Christopher was approximately four years old during that period;
- b. During the course of the marriage, Petitioner and her children, including R.A.F., were regularly subjected to mental and physical threats and abuse by Respondent;
- c. Respondent admitted during the course of the marriage that he "smacked Kim" and that he did not make sure that either R.A.F. or the child Christopher were out of the room when he slapped her;

d. Petitioner talked Respondent into seeking marriage counseling during the marriage; but not only did his abuse of her not change, Respondent actually beat her the day of counseling because he didn't like the things she said to the counselor;

e. Darren Holt testified that his son, Christopher, told him during his visitations that he was terrified of Respondent, and that Respondent had threatened him (Christopher) with a knife and hit him a number of times. Mr. Holt also testified Christopher told him Respondent at one point drove Petitioner and Christopher out of Petitioner's home with a gun and told them that if they came back, he (Respondent) would kill them. This testimony was corroborated by Petitioner;

f. When Mr. Holt confronted Respondent about this abuse of his son, Christopher, Respondent replied". . . While Christopher is in my house, I will treat him the way I want." this testimony was corroborated by Petitioner who described respondent's attitude toward Christopher as "mean and hateful . . . cruel. . . ;

g. On one occasion, Respondent grabbed Petitioner by the hair and had her on the floor and was beating her head into the floor when she started calling for Christopher to run over to the neighbors and have them call the police. Petitioner testified that as Christopher moved, Respondent said "(I)if anybody moves off that couch, I'll kill her." R.A.F. was one of the two children present on the couch observing this physical abuse to his mother and the threat to kill her. Both R.A.F. and Christopher were terrified and they were taken by the police to the YWCA after this incident.

Dated this 15th day of June, 1992.

BY THE COURT

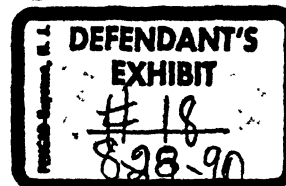

Olof A. Johansson, Judge

cc: ~~Mr.~~ Larry R. Keller, Esq.
257 Towers, Suite 340
257 East 200 South - 10
Salt Lake City, Utah 84111
~~Mr.~~ John Walsh, Esq.
3865 South Wasatch Blvd.
Suite 202 - Cove Point Plaza
Salt Lake City, Utah 84109
~~Utah~~ Court of Appeals
No. 900626CA

DEFENDANT'S EXHIBIT 18

FILMED

STANFORD NIELSON
LES F. ENGLAND (Bar No. 3646)
Attorney for Plaintiff
3760 Highland Drive, Suite 200
Salt Lake City, Utah 84106
Telephone: (801) 278-5311



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3 DIST. COURT

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DEPUTY CLERK

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

DARREN S. HOLT	*	
	*	
	*	AFFIDAVIT OF KIMBERLY FAYE
	*	HOLT
	*	
Plaintiff,	*	
vs.	*	
KIMBERLY FAYE HOLT	*	Civil No. D85-3447
	*	
	*	Judge Banks
	*	
Defendants.	*	

COMES NOW the Defendant, Kimberly Faye Holt, and being first duly sworn upon oath, deposes and states as follows:

1. That she is the defendant in the above-entitled matter, the natural mother of the minor child of this marriage, DARREN CHRISTOPHER HOLT, born February 13, 1984.

2. That the parties seperated on approximately May 20, 1985 and at that time agreed to a temporary joint custody arrangement of the minor child, Darren Holt.

3. That from May 1985 through November 1985 the parties did share custody of the minor child, but that during the first part of December, 1985 plaintiff refused and has continued to relinquish custody of the minor child to defendant.

4. That defendant is the natural mother of the minor child and a fit and proper person to whom care custody and control of

5. That plaintiff has attempted suicide in the past and defendant fears for the minor child's well-being, and further believes that plaintiff is not a fit parent to care for said child.

6. That plaintiff should be ordered to pay child support in the sum of \$100.00 per month on a temporary basis until final determination of the court for permanent support and custody.

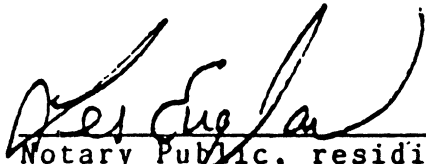
7. That because of plaintiff's refusal to return the minor child, Darren, to defendant's custody, all future visitation should be on a restricted and supervised basis.

8. All allegations contained in plaintiff's affidavit regarding defendant's boyfriend's alleged threats to the minor child are false, and in complete error. Defendant's boyfriend has a strong and supportive relationship with the minor child.

DATED this 27 day of January, 1986.


KIMBERLY FAYE HOLT

SUBSCRIBED and SWORN to before me this 27 day of January, 1986.


Notary Public, residing in
Salt Lake City, Utah

My Commission expires:

11-6-89

Woodward vs. Fazzio, 823 P.2d 474, (Utah App. 1991)

dant claims he should have been *convicted* and, thus, sentenced for arson rather than aggravated arson, as both offenses proscribe the conduct for which he was convicted. Therefore, we find defendant's justification for our reaching his *Shondel* argument, raised for the first time on appeal, without merit. Defendant's *Shondel* claim presents neither "plain error" nor "exceptional circumstances" and, therefore, we refuse to consider it for the first time on appeal. See *Archambeau*, 820 P.2d at 926.

CONCLUSION

In sum, because defendant failed to marshal the evidence supporting his jury conviction for aggravated arson, we refuse to consider his claim of insufficient evidence. Furthermore, we decline to entertain the merits of defendant's *Shondel* claim, as he raises it for the first time on appeal. We, therefore, affirm his conviction for aggravated arson.

BENCH, P.J., and GARFF, J., concur.



Kim (Fazio) WOODWARD,
Plaintiff and Appellee,

v.

Richard Cameron FAZZIO, Defendant
and Appellant.

No. 900626-CA.

Court of Appeals of Utah.

Dec. 9, 1991.

Father's parental rights were terminated by order of the Third District Juvenile

"because of the clear error in the original sentences." *State v. Babbel*, 770 P.2d 987, 994 (Utah 1989). In the later *Babbel* case, the defendant challenged the remand sentence which was harsher than his original sentence.

The later *Babbel* case distinguished the "correction of an illegal sentence [which] stands on

Court, Summit County, Olaf A. Johansson, J., and father appealed. The Court of Appeals, Orme, J., held that: (1) trial court's findings of fact were inadequate, and (2) affirmance as a matter of law was precluded, thus requiring remand, in light of disputed evidence in the record.

Reversed and remanded.

1. Infants ⇐180

"Prima facie" showing of abandonment as set forth in statute concerning termination of parental rights may be established only for custodial parent, but abandonment by noncustodial parent may also be established by clear and convincing evidence that parent's conduct evidenced a conscious disregard for his or her parental obligations to the child, and that the disregard led to destruction of the parent-child relationship. U.C.A.1953, 78-3a-48.

2. Parent and Child ⇐2(8)

There is strong presumption that child is better off in the care of its natural parents, or at least having some relationship with its natural parents, and absent clear and convincing evidence that parent's disregard for his or her obligations caused destruction of parent-child relationship, presumption against termination of parental rights will govern.

3. Trial ⇐395(5)

Findings of fact must embody sufficient detail and include enough subsidiary facts to clearly show the evidence on which they are grounded. Rules Civ.Proc., Rule 52(a).

4. Appeal and Error ⇐1008.1(1)

Court of Appeals will grant deference to fact finder only when findings of fact are sufficiently detailed to disclose the evi-

a different footing from the correction of an error in a conviction." *Babbel*, 813 P.2d at 88. This distinction pertains to this case because defendant contends not that his sentence is illegal but that his conviction was erroneous.

dentiary basis for the court's decision.
Rules Civ.Proc., Rule 52(a).

5. Appeal and Error \S 757(3)

Appellant need not go through the futile exercise of marshalling evidence when findings are so inadequate that they cannot be meaningfully challenged as factual determinations; appellant can simply argue the legal insufficiency of the findings as framed.

6. Infants \S 210

Trial court's findings of fact in support of termination of noncustodial father's parental rights were inadequate, though constituting three pages of text, where most of the "findings" were conclusory and more akin to conclusions of law, and provided no insight into the evidentiary basis for the trial court's decision. Rules Civ. Proc., Rule 52(a).

7. Appeal and Error \S 1106(5)

Unless record clearly and uncontrovertedly supports trial court's decision, absence of adequate findings of fact ordinarily requires remand for more detailed findings by the trial court. Rules Civ.Proc., Rule 52(a).

8. Infants \S 254

Affirmance of noncustodial father's parental rights as a matter of law was impossible, thus requiring remand where findings of fact were inadequate, where there was conflicting testimony about matters such as frequency and duration of father's visits with the child, his treatment of the child during those visits, and custodial mother's attempts to prevent father from visiting with the child.

John Walsh, Salt Lake City, for appellant.

Larry R. Keller, Salt Lake City, for appellee.

Before JACKSON, ORME, and
RUSSON, JJ.

1. Such a provision is not terribly helpful to parties, like these, whose breakup is accompanied by considerable rancor.

OPINION

ORME, Judge:

Appellant appeals the juvenile court's order terminating his parental rights in son. Appellant challenges the juvenile court's findings of fact insofar as they purportedly support a determination of abandonment. We reverse and remand for more detailed findings.

FACTS

Appellee Kim Woodward and appellant Richard Cameron Fazzio met in 1985 and began living together in August of that year. In September of 1986, Woodward gave birth to the parties' son. Three months later, Woodward and Fazzio participated in a marriage ceremony. However, at the time of the ceremony Woodward was already married to another man. As a result, when the union between Woodward and Fazzio was terminated, annulment was the method employed. The decree of annulment gave Woodward custody of the child, subject to reasonable visitation by Fazzio "as the parties can agree."¹ After approximately two years under this arrangement, during which time Fazzio claims Woodward repeatedly attempted to prevent him from contacting the child, Fazzio petitioned the district court to amend the decree to provide for specific visitation. Woodward responded with a petition to terminate Fazzio's parental rights and a motion to transfer the same to juvenile court. The transfer was granted, and the petition was heard by the juvenile court in August of 1990. The court granted Woodward's petition, ruling Fazzio's conduct constituted abandonment of the child. This determination was accepted by the district court.

On appeal, Fazzio challenges the correctness of four of the juvenile court's findings of fact.² Those findings, in pertinent part provide:

2. Fazzio sets forth three additional issues on appeal. These arguments are wholly without merit and we decline to address them. *See, e.g., State v. Carter*, 776 P.2d 886, 896 (Utah 1989)

(# 7) Petitioner and Respondent separated for the last time on September 10, 1987, and Respondent has failed to make a serious effort to see the minor child, since that time.

....

It is evident to the court that the natural father has abdicated his responsibility as a parent to said child. He has absented himself, for various and sundry reasons, from the Child's life.

....

His contacts with the child have been inconsistent, sporadic and token.... [T]he father's contact with the child has been minimal and only when his parents, Mr. and Mrs. Richard Fazzio, the paternal grandparents, had the child.

....

The father testified to frequent contacts and visits with the child, usually when in the care of the paternal grandparents, but, on more than one occasion, the father's testimony was directly impeached rendering his testimony less reliable and trustworthy. Indeed, there is credible and believable testimony that the child does not know Richard Cameron Fazzio as his father.

....

The court is convinced that the father's conduct has led to the destruction of the parent/child relationship.

(# 8) During the period of the parties' separation, and since the date of the Decree of Annulment (November 19, 1987) Respondent has paid no child support to Petitioner or anyone else on behalf of the minor child.

....

(# 10) Subsequent to the birth of the said child, Respondent had the opportunity to legally declare his paternity for the minor child, but he failed to do so in order to prevent the State of Utah or other persons or agencies from requiring him to meet his financial obligations as a parent.

(# 11) [Respondent] ... was emotionally abusive to the minor child, who is the subject of this action.

LAW GOVERNING TERMINATION OF PARENTAL RIGHTS

Utah Code Ann. § 78-3a-48 (1987) provides the mechanism by which termination of parental rights may be effected. Since, in the instant case, the termination is based solely on abandonment, we begin our analysis by identifying the elements necessary to establish that condition.³ The statutory abandonment provision reads as follows:

(1) The court may decree a termination of all parental rights with respect to one or both parents if the court finds either (a), (b), (c), or (d) as follows:

....

(b) that the parent or parents have abandoned the child. It is prima facie evidence of abandonment that the parent or parents, although having legal custody of the child, have surrendered physical custody of the child, and for a period of six months following the surrender have not manifested to the child or to the person having the physical custody of the child a firm intention to resume physical custody or to make arrangements for the care of the child;

....

Utah Code Ann. § 78-3a-48 (1987).

[1, 2] Only for a custodial parent may a "prima facie" showing of abandonment be established as set forth in subsection (b). *State ex rel. T.E. v. S.E.*, 761 P.2d 956, 958 (Utah App.1988). But abandonment by a non-custodial parent like Fazzio, as well as a custodial parent, "may also be found where conduct on the part of the parent 'implies a conscious disregard of the obligations owed by a parent to the child, leading to the destruction of the parent-child relationship.'" *Id.* (quoting *State ex rel.*

3. Under the statute, termination is permitted by a clear and convincing showing of: (1) parental unfitness or incompetence; (2) abandonment of the child; (3) refusal or failure to properly care for the child during an at-home trial period; or

(4) failure to communicate with the child for a period of one year, without just cause. See *Santosky v. Kramer*, 455 U.S. 745, 769, 102 S.Ct. 1388, 1403, 71 L.Ed.2d 599 (1982), *In re K.S.*, 737 P.2d 170, 172 (Utah 1987).

Cite as 823 P.2d 474 (Utah App. 1991)

Summers Children v. Wulffenstein, 560 P.2d 331, 334 (Utah 1977)). See *State ex rel. J.R.T. v. Timperly*, 750 P.2d 1234, 1236 (Utah App.1988). The *Wulffenstein* test for determining abandonment in termination proceedings requires proof of two elements. First, the party seeking termination must prove that "the parent's conduct evidenced a conscious disregard for his or her parental obligations" to the child. *Timperly*, 750 P.2d at 1236. Second, the party must demonstrate that the "disregard led to the destruction of the parent-child relationship."⁴ *Id.*; *Wulffenstein*, 560 P.2d at 334. Both of these elements must be proven by clear and convincing evidence. See *Santosky v. Kramer*, 455 U.S. 745, 769, 102 S.Ct. 1388, 1403, 71 L.Ed.2d 599 (1982); *In re J. Children*, 664 P.2d 1158, 1159 (Utah 1983).

FINDINGS GENERALLY

[3] Rule 52(a), Utah R.Civ.P., provides that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon...."⁵ Utah appellate courts "consistently stress" the importance of adequate "findings of fact." *State v. Vigil*, 815 P.2d 1296, 1300 (Utah App.1991). To succeed in challenging the findings, appellant must prove they are clearly erroneous, i.e., against the clear weight of the evidence. *State ex rel. J.R.T. v. Timperly*, 750 P.2d 1234, 1236 (Utah App.1988). Therefore, if we are to determine whether the evidence adduced at trial supports the trial court's findings, the findings must embody sufficient detail and include enough subsidiary facts to clearly show the evidence upon which they are grounded. See *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987); *Bastian v. King*, 661 P.2d 953, 957 (Utah

1983); *Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979). Absent adequate findings of fact, meaningful review of a decision's evidentiary basis is virtually impossible. See *State v. Lovegren*, 798 P.2d 767, 771 (Utah App.1990).

Fazzio, in his brief and at oral argument, characterized his appeal as a challenge to the trial court's factual findings. Accordingly, he attempted to marshal the evidence, as is required for such a challenge. See *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989) (quoting *State v. Walker*, 743 P.2d 191, 193 (Utah 1987)). However, the marshaling effort was largely ineffectual by reason of the conclusory nature of the trial court's findings of fact.

[4,5] "The process of marshaling the evidence serves the important function of reminding litigants and appellate courts of the broad deference owed to the fact finder at trial." *State v. Moore*, 802 P.2d 732, 739 (Utah App.1990). However, we will only grant this deference when the findings of fact are sufficiently detailed to disclose the evidentiary basis for the court's decision. See *Lovegren*, 798 P.2d at 771 (trial court decision afforded no deference when findings inadequate). See also *Allred v. Allred*, 797 P.2d 1108, 1111 (Utah App. 1990) (failure to enter detailed findings concerning child support determination constitutes abuse of trial court's discretion). There is, in effect, no need for an appellant to marshal the evidence when the findings are so inadequate that they cannot be meaningfully challenged as factual determinations. In other words, the way to attack findings which appear to be complete and which are sufficiently detailed is to marshal the supporting evidence and then demonstrate the evidence is inadequate to sustain such findings. But where the findings are not of that caliber, appel-

4. Concern for the child's best interest is manifested in the second prong of the *Wulffenstein* abandonment test: there is a strong presumption that a child is better off in the care of its natural parents, or at least having some relationship with its natural parents, and absent clear and convincing evidence that the parent's disregard for his or her obligations caused a destruction of the parent-child relationship, the

presumption against termination will govern. See *In re J.P.*, 648 P.2d 1364, 1377 (Utah 1982); *In re Castillo*, 632 P.2d 855, 856-57 (Utah 1981); *State ex rel. M.W.H. v. Aguilar*, 794 P.2d 27, 29 (Utah App.1990).

5. The rule is applicable to juvenile proceedings. See *In re N.H.B.*, 777 P.2d 487, 493 (Utah App.), cert. denied, 789 P.2d 33 (Utah 1989).

lant need not go through a futile marshaling exercise. Rather, appellant can simply argue the legal insufficiency of the court's findings as framed. As explained in the next section, whatever may be said of the extent to which the trial court's intended findings lack evidentiary support, the more immediate problem in this case is the inadequacy of the findings.

INADEQUACY OF TRIAL COURT'S FINDINGS OF FACT

[6] Although the trial court's findings of fact constitute a full three pages of text, they nonetheless provide an inadequate account of the actual *facts* supporting the court's ultimate decision. Most of the "findings" are conclusory, and reflect an intention to merge the trial court's ultimate factual determinations with the requirements of the *Wulffenstein* test, and as such are more akin to conclusions of law. See *Vigil*, 815 P.2d at 1299-1301. Finding of Fact # 7, for instance, states that "[appellant's] contacts with the child have been inconsistent, sporadic and token," that "it is evident to the court that the natural Father has abdicated his responsibility as a parent," and that "the court is convinced that the father's conduct has led to the destruction of the parent/child relationship." These conclusory statements provide no insight into the evidentiary basis for the trial court's decision and render effective appellate review unfeasible.⁶ See *Adams v. Board of Review*, 821 P.2d 1, 5-6 (Utah Ct.App.1991). The issue before the court was whether Fazzio had abandoned R.A.F.; accordingly, the findings should have set forth *specific facts*—subsidiary facts—bearing on that issue. The conclusory statements in Findings of Fact # 7, 8,

6. Taking, for example, the court's statement that appellant's contacts with the child have been "token," the court obviously had in mind some number or range of contacts appellant had with the child. But such a finding is problematic. Does the court have in mind one contact over a three-year period or ten contacts over a one-year period? A reviewing court would possibly agree that the former is "token," but disagree that the latter is. However, without knowing what the trial court had in mind, to affirm

10, and 11 do not provide this information and are therefore inadequate.

[7] Unless the record "clearly and uncontrovertedly support[s]" the trial court's decision, the absence of adequate findings of fact ordinarily requires remand for more detailed findings by the trial court.⁷ *Acton*, 737 P.2d at 999. See also *Lovegren*, 798 P.2d at 770-71 (remand necessary when facts disputed). But see *State v. Ramirez*, 817 P.2d 774, 787-88 & n. 6 (Utah 1991) (suggesting same liberalization of *Acton*'s requirement of express findings even absent uncontroverted evidence).

[8] We have canvassed the record in the instant case and find disputed evidence, making affirmance as a matter of law impossible. Cf. *Lovegren*, 798 P.2d at 771 n. 10 (absence of adequate findings is harmless when facts concerning an issue are undisputed). There was conflicting testimony about the frequency and duration of Fazzio's visits with the child, his treatment of the child during those visits, Woodward's attempts to prevent Fazzio from visiting with the child, Fazzio's payment of child support, and Fazzio's provision of gifts to the child—all facts crucial to the validity of the court's ultimate decision that Fazzio's conduct had destroyed the parent-child relationship. See *Adams*, 821 P.2d at 6 ("When multiple conflicting versions of the facts create a matrix of possible factual findings, we are unable on appeal to assume that any given finding was in fact made.").

The trial court's findings of fact should resolve these conflicts unequivocally, by stating the specific subsidiary facts as the trial court found them. The findings should set forth, with as much precision as possible, the number of times Fazzio visited the child during particular periods; the

would be to defer to the court's *legal conclusion*, as though a matter of fact, without being able to evaluate its correctness against particular facts.

7. Otherwise, this court would be placed in the awkward position of having to speculate about what the court actually determined the facts to be, without benefit of the guidance that proper factual findings are meant to provide.

length of each of the visits; the number of visits Woodward intentionally prevented; the sums Fazzio provided as child support, either personally or through his parents; the number and type of gifts Fazzio gave to the child and the occasions on which he gave them; and the specific statements, acts, or omissions that demonstrate Fazzio's intent to either accept or disregard his obligations as a parent (e.g., instances of appellant performing child care functions like changing his diaper or feeding him, denying that the child was his responsibility, etc.).

Further, the findings should explicitly address the impact Woodward's frequent relocation had on Fazzio's ability to maintain contact with the child,⁸ the effect Fazzio's living and working outside Utah had on his visitation,⁹ the manner and effect of any refusal on Fazzio's part to legally acknowledge his paternity, and any other factors bearing on whether Fazzio consciously disregarded the child to such an extent that the parent-child relationship was destroyed.¹⁰ The court's findings as to these issues should be set forth specifically and should correspond to the factual evidence upon which the court relied.

Once we possess this information, we can meaningfully evaluate whether the visits have been sporadic, the child support payments insufficient, Fazzio's conduct unacceptable, and, ultimately, whether Fazzio abandoned the child. Accordingly, we remand for more detailed findings by the trial court.

"We do not intend our remand to be merely an exercise in bolstering and supporting the conclusion already reached." *Allred v. Allred*, 797 P.2d 1108, 1112 (Utah 1990). This court is not altogether confident that the trial court's final decision was

8. The record indicates that from the time the decree of annulment was entered until trial, Woodward had moved in with her mother, then into her own apartment, then to Coalville, Springville, Riverton, West Jordan, and back to Coalville.

9. The record indicates Fazzio was employed in Wyoming and Nevada for periods of time after the decree was entered and maintained residences in those states.

correct, particularly since the action to terminate Fazzio's parental rights was commenced by Woodward in *response* to Fazzio's petition for specific visitation. The timely assertion of such a petition by Fazzio is hardly the conduct of a disinterested parent.

JACKSON, J., concurs.

RUSSON, J., concurs in the result.



LeBARON & ASSOCIATES,
INC., Plaintiff,

v.

REBEL ENTERPRISES, INC.,
Defendant, Third-Party
Plaintiff and Appellant,

v.

NEC INFORMATION SYSTEMS,
INC., Third-Party Defendant
and Appellee.

No. 910120-CA.

Court of Appeals of Utah.

Dec. 18, 1991.

Manufacturer, by third-party counterclaim, asserted contract action to recover from dealer money allegedly owed under authorized dealer agreement. Judgment for manufacturer was entered by the Third District Court, Salt Lake County, Kenneth Rigtrup, J., and dealer appealed. The Court of Appeals, Billings, Associate P.J.,

10. For example, the court seems to have discounted visits Fazzio had with his son while the son was in the company of Fazzio's parents. Especially given the animosity between Woodward and Fazzio, and Woodward's apparent preference for dealing with Fazzio's parents, no reason immediately suggests itself for why Fazzio's visits with the child during time the child spent with his paternal grandparents should not "count" in Fazzio's favor.