

2015

**Karina Barba, Petitioner/Appellee v. Eric Vasquez, Respondent/
Appellant**

Utah Court of Appeals

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In the Court of Appeals

KARINA BARBA,
Petitioner and Appellee

v.

ERIC VASQUEZ,
Respondent and Appellant

Case No. 20150687

Appellant's Brief

Appeal from the Third District Court, Salt Lake Division, from a refusal to set aside a Decree of Divorce for lack of jurisdiction before the Honorable Richard McKelvie.

Oral Argument Requested

Cassie J Medura and Brent Hall
215 South State Street, Suite 500
Salt Lake City, Utah 84111
(801) 883-8325
Counsel for Appellee

Russell Yauney
357 S 200 E Ste 103
Salt Lake City, UT 84111
(801) 519-4774
Counsel for Appellant

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UTAH APPELLATE COURTS

DEC 16 2015

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Counsel for Appellant

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Appellate Jurisdiction

The Court of Appeals has jurisdiction pursuant to Utah Code. Ann. § 78A-4-103(2)(h) in that this is an appeal from a domestic relations case regarding divorce.

Issues

The following subjects are at issue in this brief:

1. Where a Petitioner admits lying to the court in order to obtain alternate service, and service was not otherwise perfected, the district court did not have jurisdiction to enter an Order and should have set aside the Divorce Decree under Utah R. Civ. P. 60(b)(4) as void.
 - a. The propriety of the jurisdictional determination, and hence the decision not to vacate, becomes a question of law upon which no deference is granted to the district court." *Miles v. Miles*, 2011 UT App 359, ¶ 6, 269 P. 3d 958 (*quoting Department of Soc. Servs. v. Vigil*, 784 P.2d 1130, 1132 (Utah 1989)). Factual findings underlying the jurisdictional issue are reviewed for clear error. *Miles*, 2011 UT App 359 ¶ 6, (*quoting Cooke v. Cooke*, 2001 UT App 110, ¶ 7, 22 P.3d 1249). When a court of general jurisdiction enters a judgment, however, the existence of jurisdiction is presumed, and the burden of demonstrating its absence lies with the party attacking it. *Miles*, 2011 UT App 359, (*quoting Jackson Constr. Co. v. Marrs*, 2004 UT 89, ¶ 9, 100 P.3d 1211).

- b. Respondent's Rule 60(b) Motion to Set Aside and Quash Service, R. at 130-132; Memorandum in Support of Rule 60(b) Motion to Set Aside and Quash Service, R. at 133-141.
- 2. Where a Petitioner fails to comply with the requirements regarding alternate service under Utah R. Civ. P. 4(d)(4)(b), specifically mailing a copy of the Order for Alternate Service, and failing to comply with the remaining portions of the Order for Alternate Service, there is no effective service and the court is without jurisdiction to enter a Decree of Divorce.
 - a. "An appellate challenge to a district court's refusal to set aside a default judgment for lack of jurisdiction presents a question of law, for which no discretion is afforded to the district court." *Sewell v. Xpress Lube*, 2013 UT 61, ¶ 16, 321 P. 3d 1080.
 - b. Respondent's Rule 60(b) Motion to Set Aside and Quash Service, R. at 130-132; Memorandum in Support of Rule 60(b) Motion to Set Aside and Quash Service, R. at 133-141.
- 3. Where a method of service is improper, it is appropriate to quash service.
 - a. Whether service of process was proper is a jurisdictional issue and the standard of review is a correction-of-error standard." *Paar v. Stubbs*, 2005 UT App 310, ¶ 4, 117 P. 3d 1079 (*quoting Parkside Salt Lake Corp. v. Insure-Rite, Inc.*, 2001 UT App 347, ¶ 16, 37 P.3d 1202.

- b. Respondent's Rule 60(b) Motion to Set Aside and Quash Service, R. at 130-132; Memorandum in Support of Rule 60(b) Motion to Set Aside and Quash Service, R. at 133-141.

Operative Statutes and Rules

Utah R. Civ. P. 4 is set out verbatim as part of the addendum.

Utah R. Civ. P. 60

Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 90 days after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Statement of the Case

At issue is a divorce proceeding between Karina Barba (Appellee) and Eric Vasquez (Appellant). Appellee filed for divorce in August of 2008, and obtained a divorce decree in April of 2009. The Divorce Decree was obtained as a result of an Order for Alternate Service pursuant to Appellee's request for such.

In October 2014 Appellant, acting pro se, filed a Motion for Relief from Judgment with Request for Mandatory Judicial Notice wherein Appellant asserted that he was never served and requested that the Court vacate all orders in the case. Commissioner Luhn declined to address the request in a December 2014 minute entry, stating that nothing had been filed pursuant to Utah R. Civ. P. 101.

Appellant then obtained counsel and filed a Motion to Set Aside pursuant to Utah R. Civ. P. 60(b) in May of 2015, alleging that Appellee had lied to the Court in obtaining permission to serve Appellant in an alternative manner. Appellant requested that the court set aside the Decree of Divorce and quash service. Appellee then filed an opposition to the Motion, admitting that she had lied to the Court in her Motion for Alternate Service, but justified the lies by alleging that she was scared of Appellant because of alleged previous domestic violence. A hearing on the motion was held in June of 2015.

At the hearing Commissioner Luhn ruled that the Court did not have jurisdiction because of a lack of service. However, the Commissioner observed that some notes written by Appellant in February of 2011 mentioned the divorce, and therefore found that Appellant had notice of the divorce at that time. The Commissioner then ruled that the amount of time that had passed between February 2011 and when Appellant had sought to set aside the

Decree were not within a reasonable time, and therefore denied the Motion to Set Aside. The Commissioner also found that setting aside the Decree would have an adverse impact on a separate case wherein Appellee had filed to terminate Appellant's parental rights regarding the party's minor daughter.¹ Finally, the court also found that setting aside the Decree would be an undue hardship. This appeal followed.

Statement of Facts

1. Appellee filed for Divorce in August of 2008. R. at 1.
2. Appellee filed a Verified Petition for Alternate Service on August 11, 2008. R. at 15-20.
3. The district court granted the Petition for Alternate Service and ordered that the Summons and Complaint be mailed to an address in Guadalajara, Jalisco, Mexico. R. at 23.
4. The district court did not order that a copy of the Order for Alternate Service be served with the Summons and Complaint. *Id.*
5. The district court did order that the only relief that would be granted under this service would be a divorce. In other words, the requested relief regarding custody, property, etc, would not be granted unless service was obtained pursuant to the Hague Convention. *Id.*
6. Appellee filed an Affidavit of Mailing, wherein she certified that she mailed a copy of the Summons along with a copy of the "Verified Petition for Alternate Services" to the address in Mexico. Appellee did not aver that she had sent a copy of the Complaint, nor did she aver that she had sent a copy of the Order for Alternate Service. R. at 30-33.

¹ Appellant's parental rights have subsequently been terminated, as of November 2015.

7. Appellee then submitted proposed Findings of Fact and Conclusions of Law, as well as a proposed Decree of Divorce, for signature. The Court denied the Decree as submitted, noting that the Court would only grant a divorce, or that Appellee would have to obtain service pursuant to the Hague Convention. Minute Entry, R. at 59 -60.
8. Pursuant to a subsequent filing, the Court entered Findings of Fact, Conclusion of Law along with a Decree of Divorce and Judgment on April 8, 2009. R. at 61-67.
9. No other pleadings or motions were filed until August 7, 2013 when Appellee requested an extension of time to respond to a motion that was never filed with the court. R. at 71-79.
10. On October 14, 2014 Appellant filed a Motion for Relief from Judgment, with Request for Mandatory Judicial Notice. R at 99-103. Appellant requested, among other relief, that the Court vacate all previous orders. R. at 100.
11. On December 8, 2014² Appellant filed a Movant's Status Request; with Demand to Vacate; and Request for Telephonic Hearing. R. at 104-108. Appellant requested, among other relief, that the "void judgments" be vacated and that the matter be set for a telephonic hearing. R. at 106.
12. On December 10, 2014 the commissioner "declined" Appellant's request in a minute entry, stating that nothing had been filed pursuant to Utah R. Civ. P. 101. R. at 109.

² This Motion was served on December 2, 2014, and postmarked on December 3, 2014. R. at 107-108.

13. In the meantime, on December 2, 2014, Appellant had been served with pleadings indicating that Appellee had filed to allow her current husband to adopt the Appellant's daughter, and simultaneously terminate Appellant's parental rights. R. at 11-116.
14. Appellant then obtained counsel through the modest means program with the Utah State Bar, and filed a Rule 60(b) Motion to Set Aside and Quash Service, with a supporting Memorandum and Declaration. R. at 130-171. Alternative motions were also filed to consolidate the instant case with a paternity case that had been filed by Appellant, as well as an alternative Motion for Temporary Orders. R. at 123 -124, 214-217.
15. As part of the Memorandum, Appellant alleged that Appellee had lied in obtaining permission to serve the Summons and Complaint by alternate means. R. at 134-135.
16. Appellee timely filed a Verified Memorandum in Opposition to Motion to Set Aside and Quash Service and Motion for Temporary Orders. R. at 222-395.
17. Appellee admitted that she did not serve the serve Appellant with the "divorce documents" because "she feared for the safety of herself and her child if Respondent knew she intended to divorce him." R. at 224. *But cf.* R. at 227, where Appellee states that "she was in contact with [Appellant] before and after [Appellant]'s incarceration and she informed [Appellant] on more than one occasion that she intended to obtain a divorce from [Appellant]."
18. Appellee admitted that she did not serve the Petition for Divorce as ordered by the district court, nor did she serve the Order for Alternate Service. R. at 227-228.
19. A hearing was held on June 11, 2015, wherein the commissioner admitted that the court did not have jurisdiction because of a lack of service. R. at 487.

20. The commissioner found that because of a note in 2011, Appellant had notice of the divorce at that time. Further, the commissioner found that Appellant did not act diligently “to determine exactly what his rights were.” *Id.*
21. The commissioner then found that it was not reasonable to bring a Motion to Set Aside three or four years later. *Id.*
22. Finally, the commissioner found that it would not be in the child’s best interests, and that setting aside the Decree could negatively impact the termination case that had been filed. *Id.*

Summary of Arguments

Appellee has admitted, and the Court has noted, that (1) Appellant was not properly served and (2) Appellee lied to the court in obtaining permission to serve Appellant in an Alternate Manner. Both of these admissions are grounds to set aside a judgment pursuant to Utah R. Civ. P. 60(b)(4) as void. While a court normally has discretion as to whether or not to set aside an order, there is no discretion when an order is void.

Where the Commissioner found that the Court did not have jurisdiction, but then exercised her discretion to find that Appellant had not acted within a reasonable amount of time, the Commissioner erred as a matter of law. Because service has never been completed, any judgments should be set aside and service should be quashed.

Argument

The case at hand is very similar to *Garcia v. Garcia*, 712 P. 2d 288 (Utah 1986). In *Garcia*, the parties were married and had one child as issue of the marriage. *Id.* at 289.

Father was sent to prison for burglary and grand larceny. *Id.* at 298, n. 1. Mother sought and obtained a divorce. *Id.* at 298. The Supreme Court later determined that the divorce was predicated on faulty service. *Id.* at 299. Father was released from prison and filed his Motion to Set Aside two years after his release from prison, and ten years after the entry of the divorce Decree. The Supreme Court remanded the case “for entry of judgment vacating the decree of divorce because of the ineffective service of process.” *Id.* at 292.

Here, the parties were married and had one child as a result of the relationship. Appellant and father was sent to prison for 8 years. Appellee and mother sought and obtained a divorce. Appellee has admitted that she obtained the divorce on faulty service, specifically her misleading affidavit and the failure to comply with the Order for Alternate Service. Father moved to set aside the Decree, which was 6 years old at the time.³

Unfortunately, instead of setting aside the decree for ineffective service of process, as was done in *Garcia*, the Commissioner denied the motion based on discretionary grounds, which is a legal error under Utah law.

I. The Judgment is Void Because Petitioner Lied to the Court

A court may relieve a party from a judgment for several reasons, including determining that a judgment is void. Utah R. Civ. P. 60(b)(4). “If a plaintiff falsely avers or intentionally misleads a court to believe that he or she has exercised such diligence when he or she has not done so, the court, although at the time appearing to have jurisdiction, never had jurisdiction because the plaintiff never met the [due process] constitutional mandate.” *Bonneville Billing v. Whatley*, 949 P. 2d 768, 773 (Utah App 1997). “[T]he fundamental

³ As opposed to the 10 year old decree in *Garcia*.

requirement of due process is the opportunity to be heard, at a meaningful time and in a meaningful manner." *Hollenbach v. Salt Lake City Civil Service Commission*, 2015 UT App 116, ¶ 8 (quoting *Department of Transp. v. Osguthorpe*, 892 P.2d 4, 8 (Utah 1995)).

In the present case Appellee has admitted that she intentionally mislead the Court to believe that she had exercised due diligence when she had not done so. Appellee has attempted to justify her deceit based on a professed fear that harm may come to her.⁴ Nevertheless, there is no factual dispute as to whether or not Appellee mislead the Court. Thus, even though the Court appeared to have jurisdiction when the Court entered the Decree of Divorce, the Court did not have jurisdiction. Appellee had not fulfilled the due process requirements. Appellant had no opportunity to be heard in any way prior to the entry of Decree, let alone at a meaningful time or meaningful manner. Consequently, the Court is without jurisdiction and the judgment is void.⁵

II. The Judgment is Void Because Petitioner Did not Comply with the Court Order or Utah R. Civ. P. 4 (d)(4)(B)

Under Utah R. Civ. P. 4(d)(4)(b), when a court grants a request for alternate service, "[u]nless service is by publication, a copy of the court's order shall be served upon the defendant with the process specified by the court." Thus, the court need not specify that the Order for Alternate Service be served with the Summons and Complaint. If there is no effective service of process, a court is without jurisdiction to enter the original decree of divorce, as the requirements of Rule 4 relating to service of process are jurisdictional. *See, e.g.,*

⁴ The district court made no findings as to whether or not the deceit was justified.

⁵ Interestingly, the district court admitted that it did not have jurisdiction, and nevertheless refused to set aside the Decree on discretionary grounds, discussed below.

Martin v. Nelson, Utah, 533 P.2d 897 (1975); *Murdock v. Blake*, 26 Utah 2d 22, 484 P.2d 164 (1971); *Fibreboard Paper Products v. Dietrich*, 475 P.2d 1005 (1970).

When the district court granted the request for alternate service, the Court specifically required that the Summons and the Complaint be served at the noted addresses. In Appellee's Affidavit of Mailing, she lists only the Summons and the Verified Petition for Alternative Service. Nowhere does it state that she mailed a copy of the complaint, nor did she mail a copy of the Order for Alternate Service. Appellee has attempted to ask for leniency as she was appearing *pro se* at the time. While reasonable considerations for *pro se* parties are certainly appropriate, parties that represent themselves are held to the same standard as any licensed attorney and they are subject to the consequences of their decision to function as an attorney without being trained as an attorney. *Fuller v. Springville City*, 2015 UT App 177, ¶ 20.

Because Appellee failed to comply with the district court's order, and because she failed to comply with Rule 4 by not including a copy of the Order for Alternate Service, the service purported to have occurred was defective, and the court was without jurisdiction to enter the default and resulting Decree. As such, the decree is void.

III. There is No Discretion in Setting Aside a Void Order

While a court usually has discretion in setting aside a judgment, if the judgment is void "the court has no discretion, and the judgment must be set aside." *Workman v. Nagle Constr., Inc.*, 802 P.2d 749, 754 n. 11 (Utah.Ct.App.1990), *see also Classic Cabinets, Inc. v. All American Life Insurance Co.*, 978 P. 2d 465, 468 (Utah App. 1999). If a judgment is entered by a court that lacks jurisdiction, justice is furthered by setting that judgment aside as void

under rule 60(b)(4) even absent a separate meritorious defense. *Judson v. Wheeler RV Las Vegas, LLC*, 2012 UT 6, ¶ 15, 270 P. 3d 456. The requirement that the motion be made within a "reasonable time," which seems literally to apply to motions under Rule 60(b)(4), cannot be enforced with regard to this class of motion. A void judgment cannot acquire validity because of laches on the part of the judgment debtor. *Garcia*, 712 P. 2d 288, 290-291 (quoting Wright & Miller, Federal Practice and Procedure: Civil § 2862). Several Utah cases have relied on or restated the principle that if the judgment is void then the time limitations of rule 60(b) have no application and the court is without discretion to set the matter aside. See, e.g., *Migliore v. Livingston Financial, LLC*, 2015 UT 9, ¶ 24; *Utah Down Syndrome Foundation, Inc. v. Utah Down Syndrome Association*, 2012 UT 86, ¶ 28, 293 P.3d 241;⁶ *Jackson Construction Co. v. Marrs*, 2004 UT 89, ¶ 8, 100 P.3d 1211; *Bonneville Billing*, 949 P. 2d 768, 771 n. 2; *KO v. Denison*, 748 P. 2d 588, 592 (Utah App 1988); *Woody v. Rhodes*, 461 P.2d 465, 466 (1969).

In the present case, the commissioner agreed that the court was without jurisdiction. However, the commissioner relied on equitable grounds in refusing to set aside the Decree.

One ground relied on was an idea that because Appellant had mentioned a divorce in some notes he took in 2011, he was then on notice of the existence of the judgment. The commissioner reasoned that by not acting diligently on this notice, Appellant had lost his right to set aside the Decree.

⁶ Also stating that "[i]n *Garcia*, we held that a man who had waited ten years after the entry of judgment to file a 60(b) motion to vacate was not disqualified based on timeliness concerns because "where the judgment is void because of a fatally defective service of process, the time limitations of [r]ule 60(b) have no application."

Another discretionary ground that the commissioner relied on was that setting aside the Decree would harm the child at issue by interfering with the termination case being heard by a different judge in the probate court.

The combination of these two arguments is essentially finding Appellant guilty of laches.⁷ The commissioner found that Appellant was not diligent, and that Appellee was harmed by the lack of diligence.

The doctrine of laches is at the very least a mixed question of law and fact, and a district court is allowed some discretion in applying laches to a case. *Veysey v. Veysey*, 2014 UT App 264, ¶ 6, 339 P. 3d 131.

By invoking the doctrine of laches, the commissioner ran afoul of the rule that there is no discretion in setting aside a void judgment. If there were a timeliness analysis, then a court would necessarily have to use discretion in analyzing whether a Motion to Set Aside under Rule 60(b)(4) was reasonably timely. This would run contrary to the case law mandate that setting aside a void judgment involves no discretion.

Further, our case law specifically states that a void judgment cannot acquire validity because of laches. *Garcia*, 712 P. 2d 288, 290-291.

The commissioner erred as a matter of law when she invoked equitable principles in refusing to set aside the void decree. There is no allowance for equity, and any court considering a void judgment is without discretion when asked to set it aside.

⁷ “[L]aches has two elements: (1) a party's lack of diligence and (2) an injury resulting from that lack of diligence.” *Fundamentalist Church of Jesus v. Lindberg*, 2010 UT 51, ¶ 27, 238 P. 3d 1054. “The length of time that constitutes a lack of diligence depend[s] on the circumstances of each case.” *Id.*

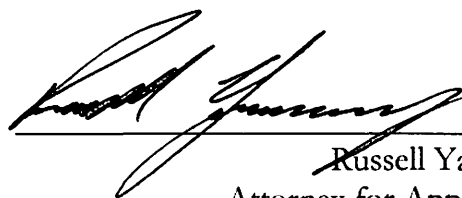
IV. Where a Method of Service is Improper, it is Appropriate to Quash Service and Set Aside Any Orders

Where a court does not have jurisdiction, service should be quashed and any orders based on the faulty service should be vacated. *Parkside Salt Lake Corp.*, 2001 UT App 347, ¶ 34 (holding “[t]he trial court erred in not quashing the summons and did not have personal jurisdiction to hear the claims against Tenant. We therefore vacate each of the orders issued below and remand for the trial court to enter an order quashing the summons.”)

Conclusion

Based on the foregoing, Appellant requests that this Court reverse the commissioner’s refusal to set aside the Decree of Divorce, quash service, and remand for further proceedings with the district court.

DATED this 16th day of December, 2015.



Russell Yauney
Attorney for Appellant

Order Denying Motion to Set Aside

Addendum

The Order of Court is stated below:

Dated: July 22, 2015
01:40:33 PM

/s/ KIM M LUHN
District Court Commissioner

Russell Yaune (13409)
357 S 200 E Suite 103
Salt Lake City, UT 84111
russell@rylegal.com
(801) 519-4774
Attorney for Respondent

In the District Court of Utah

Third Judicial District, Salt Lake County

KARINA BARBA,
Petitioner

v.

ERIC VASQUEZ,
Respondent

**ORDER DENYING MOTION TO SET
ASIDE**

Civil No. 084903557

Judge Richard McKelvie

Commissioner Kim M Luhn

THE HEARING on the Motion to Set Aside and Quash Service and Respondent's Motion for Temporary Orders was held on June 11, 2014, pursuant to notice, Commissioner Kim M Luhn presiding. Respondent appeared in person and was represented by counsel, Russell Yaune. Petitioner appeared in person and was represented by counsel, Cassie Medura. The parties having proffered their testimony through counsel, the Court having heard argument of counsel, having reviewed the file in this matter and being otherwise fully advised in the premises, the court finds, concludes and enters orders as follows:

FINDINGS OF FACT and CONCLUSIONS OF LAW

1. There are no custody orders in this case and no Petition to Modify is required.

2. Respondent did not need to set aside the Decree in order to bring a Motion for Temporary Orders.
3. It is conceded that service was inadequate and that the court had no personal jurisdiction over Respondent at the time the divorce was entered.
4. However, in his own writing, Respondent acknowledges that he was divorced in 2011.
5. At that time Respondent had to act diligently in order to determine exactly what his rights were.
6. The timelines under Utah R. Civ. P 60(b) do not apply. However, a reasonable time requirement does apply.
7. It is not reasonable to bring a Motion to Set Aside three or four years later.
8. Further, the only thing that has been entered is the divorce itself. The court is treating this as a bifurcation, and those issues remain open for determination under motions for temporary orders.
9. It is not in the child's best interest and would harm the child to uproot the process that they are currently involved in to have her adopted with the trial in two weeks. It is more appropriate for the judge in the adoption action to determine if Respondent's parental rights should be terminated, based on the facts and not a setting aside of a marriage which they would have to be married for a year in order to file an adoption proceeding. The adoption and

termination outcome should not be based on a legal technicality.

10. If the termination is not granted, Respondent shall, at his own expense, obtain an evaluation as to whether it would even be in the child's best interest to be introduced to him. This is not a custody evaluation or a visitation evaluation. If the answer is yes, then how it should be done.

11. It would be an undue hardship to set aside the Decree.

12. The court struggles as to whether or not the motion was brought in good faith in that all issues besides the divorce (e.g. custody and parent-time) could have been brought by motion as the Motion for Temporary Orders was appropriately brought. However, despite believing that the Motion to Set Aside was not brought in good faith, the court finds that it was brought with merit and denies any attorney's fees based on bad faith.

IT IS HEREBY ORDERED:

13. The Motion to Set Aside is denied.

14. The Motion for Temporary Orders is denied. However, if the termination is not granted, Respondent shall, at his own expense, obtain an evaluation as to whether it would even be in the child's best interest to be introduced to him. This is not a custody evaluation or a visitation evaluation. If the answer is yes, then how it should be done should be addressed.

15. This is the final order of the court and no further order is required.

Such is the Order of the Court, as evidenced by the stamp and electronic signature on the first page of this Order Denying Motion to Set Aside.

/s/ Cassie Medura
Attorney for Petitioner
with permission via email

Certificate of Service

I certify that on July 16th, 2015, I caused the forgoing Order Denying Motion to Set Aside to be served on the individuals below by the method noted, in accordance with Utah R. Civ. P. 5:

Cassie J Medura
Via electronic filing

/s/ Russell Yaune

Utah R. Civ. P. 4

Rule 4. Process.

(a) **Signing of summons.** The summons shall be signed and issued by the plaintiff or the plaintiff's attorney. Separate summonses may be signed and served.

(b)(i) **Time of service.** In an action commenced under Rule 3(a)(1), the summons together with a copy of the complaint shall be served no later than 120 days after the filing of the complaint unless the court allows a longer period of time for good cause shown. If the summons and complaint are not timely served, the action shall be dismissed, without prejudice on application of any party or upon the court's own initiative.

(b)(ii) In any action brought against two or more defendants on which service has been timely obtained upon one of them,

(b)(ii)(A) the plaintiff may proceed against those served, and

(b)(ii)(B) the others may be served or appear at any time prior to trial.

(c) Contents of summons.

(c)(1) The summons shall contain the name of the court, the address of the court, the names of the parties to the action, and the county in which it is brought. It shall be directed to the defendant, state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number. It shall state the time within which the defendant is required to answer the complaint in writing, and shall notify the defendant that in case of failure to do so, judgment by default will be rendered against the defendant. It shall state either that the complaint is on file with the court or that the complaint will be filed with the court within ten days of service.

(c)(2) If the action is commenced under Rule 3(a)(2), the summons shall state that the defendant need not answer if the complaint is not filed within 10 days after service and shall state the telephone number of the clerk of the court where the defendant may call at least 14 days after service to determine if the complaint has been filed.

(c)(3) If service is made by publication, the summons shall briefly state the subject matter and the sum of money or other relief demanded, and that the complaint is on file with the court.

(d) **Method of service.** Unless waived in writing, service of the summons and complaint shall be by one of the following methods:

(d)(1) **Personal service.** The summons and complaint may be served in any state or judicial district of the United States by the sheriff or constable or by the deputy of either, by a United States Marshal or by the marshal's deputy, or by any other person 18 years of age or older at the time of service and not a party to the action or a party's attorney. If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof. Personal service shall be made as follows:

(d)(1)(A) Upon any individual other than one covered by subparagraphs (B), (C) or (D) below; by delivering a copy of the summons and the complaint to the individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing, or by delivering a copy of the summons and the complaint to an agent authorized by appointment or by law to receive service of process;

(d)(1)(B) Upon an infant (being a person under 14 years) by delivering a copy of the summons and the complaint to the infant and also to the infant's father, mother or guardian or, if none can be found within the state, then to any person having the care and control of the infant, or with whom the infant resides, or in whose service the infant is employed;

(d)(1)(C) Upon an individual judicially declared to be of unsound mind or incapable of conducting the person's own affairs, by delivering a copy of the summons and the complaint to the person and to the person's legal representative if one has been appointed and in the absence of such representative, to the individual, if any, who has care, custody or control of the person;

(d)(1)(D) Upon an individual incarcerated or committed at a facility operated by the state or any of its political subdivisions, by delivering a copy of the summons and the complaint to the person who has the care, custody, or control of the individual to be served, or to that person's designee or to the guardian or conservator of the individual to be served if one has been appointed, who shall, in any case, promptly deliver the process to the individual served;

(d)(1)(E) Upon any corporation not herein otherwise provided for, upon a partnership or upon an unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and the complaint to an officer, a managing or general agent, or other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy of the summons and the complaint to the defendant. If no such officer or agent can be found within the state, and the defendant has, or advertises or holds itself out as having, an office or place of business within the state or elsewhere, or does business within this state or elsewhere, then upon the person in charge of such office or place of business;

(d)(1)(F) Upon an incorporated city or town, by delivering a copy of the summons and the complaint to the recorder;

(d)(1)(G) Upon a county, by delivering a copy of the summons and the complaint to the county clerk of such county;

(d)(1)(H) Upon a school district or board of education, by delivering a copy of the summons and the complaint to the superintendent or business administrator of the board;

(d)(1)(I) Upon an irrigation or drainage district, by delivering a copy of the summons and the complaint to the president or secretary of its board;

(d)(1)(J) Upon the state of Utah, in such cases as by law are authorized to be brought against the state, by delivering a copy of the summons and the complaint to the attorney general and any other person or agency required by statute to be served; and

(d)(1)(K) Upon a department or agency of the state of Utah, or upon any public board, commission or body, subject to suit, by delivering a copy of the summons and the complaint to any member of its governing board, or to its executive employee or secretary.

(d)(2) Service by mail or commercial courier service.

(d)(2)(A) The summons and complaint may be served upon an individual other than one covered by paragraphs (d)(1)(B) or (d)(1)(C) by mail or commercial courier service in any state or judicial district of the United States provided the defendant signs a document indicating receipt.

(d)(2)(B) The summons and complaint may be served upon an entity covered by paragraphs (d)(1)(E) through (d)(1)(I) by mail or commercial courier service in any state or judicial district of the United States provided defendant's agent authorized by appointment or by law to receive service of process signs a document indicating receipt.

(d)(2)(C) Service by mail or commercial courier service shall be complete on the date the receipt is signed as provided by this rule.

(d)(3) Service in a foreign country. Service in a foreign country shall be made as follows:

(d)(3)(A) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(d)(3)(B) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(d)(3)(B)(i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(d)(3)(B)(ii) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(d)(3)(B)(iii) unless prohibited by the law of the foreign country, by delivery to the individual personally of a copy of the summons and the complaint or by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(d)(3)(C) by other means not prohibited by international agreement as may be directed by the court.

(d)(4) **Other service.**

(d)(4)(A) Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party to be served, or the circumstances which make it impracticable to serve all of the individual parties.

(d)(4)(B) If the motion is granted, the court shall order service of process by means reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable. The court's order shall also specify the content of the process to be served and the event or events as of which service shall be deemed complete. Unless service is by publication, a copy of the court's order shall be served upon the defendant with the process specified by the court.

(d)(4)(C) In any proceeding where summons is required to be published, the court shall, upon the request of the party applying for publication, designate the newspaper in which publication shall be made. The newspaper selected shall be a newspaper of general circulation in the county where such publication is required to be made.

(e) **Proof of service.**

(e)(1) If service is not waived, the person effecting service shall file proof with the court. The proof of service must state the date, place, and manner of service. Proof of service made pursuant to paragraph (d)(2) shall include a receipt signed by the defendant or defendant's agent authorized by appointment or by law to receive service of process. If service is made by a person other than by an attorney, the

sheriff or constable, or by the deputy of either, by a United States Marshal or by the marshal's deputy, the proof of service shall be made by affidavit.

(e)(2) Proof of service in a foreign country shall be made as prescribed in these rules for service within this state, or by the law of the foreign country, or by order of the court. When service is made pursuant to paragraph (d)(3)(C), proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(e)(3) Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

(f) Waiver of service; Payment of costs for refusing to waive.

(f)(1) A plaintiff may request a defendant subject to service under paragraph (d) to waive service of a summons. The request shall be mailed or delivered to the person upon whom service is authorized under paragraph (d). It shall include a copy of the complaint, shall allow the defendant at least 21 days from the date on which the request is sent to return the waiver, or 30 days if addressed to a defendant outside of the United States, and shall be substantially in the form of the Notice of Lawsuit and Request for Waiver of Service of Summons set forth in the Appendix of Forms attached to these rules.

(f)(2) A defendant who timely returns a waiver is not required to respond to the complaint until 45 days after the date on which the request for waiver of service was mailed or delivered to the defendant, or 60 days after that date if addressed to a defendant outside of the United States.

(f)(3) A defendant who waives service of a summons does not thereby waive any objection to venue or to the jurisdiction of the court over the defendant.

(f)(4) If a defendant refuses a request for waiver of service submitted in accordance with this rule, the court shall impose upon the defendant the costs subsequently incurred in effecting service.

DEC 16 2015

In the Court of Appeals

KARINA BARBA,
Petitioner and Appellee

v.

ERIC VASQUEZ,
Respondent and Appellant

**CERTIFICATE OF SERVICE FOR
APPELLANT'S BRIEF**

Case No. 20150687

I certify that on December 16th, 2015, I caused to be mailed by first class mail a copy of the following items to the individuals at the addresses indicated below in accordance with Utah R. App. P. 21:

Items Mailed

- Appellant's Brief

Mailed To:

Cassie J Medura
Brent Hall
215 South State Street, Suite 500
Salt Lake City, Utah 84111
Attorneys for Petitioner

DATED this 16th day of December, 2015.

/s/ Russell Yauney
Attorney for Appellant

Certificate of Service

I certify that on December 16th, 2015, I caused the forgoing Certificate of Service for Appellant's Brief to be served on the individuals below by U.S. mail, in accordance with Utah R. App. P. 21:

Cassie J Medura
Brent Hall
215 South State Street, Suite 500
Salt Lake City, Utah 84111
Attorneys for Petitioner

/s/ Russell Yaunev

In the Court of Appeals

KARINA BARBA,
Petitioner and Appellee

v.

ERIC VASQUEZ,
Respondent and Appellant

**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME
LIMITATION, TYPEFACE
REQUIREMENTS, AND TYPE
STYLE REQUIREMENTS**

Case No. 20150687

PURSUANT to Utah R. App. P. 24, Appellant Appellee certifies that Appellant's Brief conforms with the requirements of Rule 24 in that:

1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because this brief contains 4,144 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B); and

2. This brief complies with the typeface requirements of Utah R. App. P.27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 13 point Garamond (excluding headings).

DATED this 16th day of December, 2015.

/s/ Russell Yaune
Attorney for Appellant

Certificate of Service

I certify that on December 16th, 2015, I caused the forgoing Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements to be served on the individuals below by U.S. mail, in accordance with Utah R. App. P. 21:

Cassie J Medura
Brent Hall
215 South State Street, Suite 500
Salt Lake City, Utah 84111
Attorneys for Petitioner

/s/ Russell Yauney

