

2002

Meretta Adams v. Nolan Duane Adams : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MERETTA ADAMS,	:	
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	:	Appellate No. 20020135
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Petitioner/Appellee,	:	
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NOLAN DUANE ADAMS	:	
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Respondent/Appellant.	:	
	:	Argument Priority No. 15

MERETTA ADAMS,	:	
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BRIEF OF APPELLANT

Appeal from the Order, Judgment and Sentence of Commitment of the District Court of the Fifth Judicial District, the Honorable James L. Shumate, Presiding, entered on January 22, 2002.

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NOLAN DUANE ADAMS

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Appellate No. 20020135

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MERETTA ADAMS,

NOLAN DUANE ADAMS

Respondent/Appellant.

Appellate No. 20020135

Argument Priority No. 15

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JURISDICTION OF THE UTAH COURT OF APPEALS

The Utah Court of Appeals has jurisdiction over this appeal pursuant to §78-2a-3(2)(h), Utah Code Annotated 1953, as amended.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE NO. 1

Whether the district court erred in finding the Appellant in contempt of court for failure to pay child support when the alleged contempt was not committed in the presence of the court and the Appellee did not submit a sworn affidavit stating the basis of the Appellant's alleged contempt.

Standard of Review:

This issue presents a question of law. An appellate court reviews the trial court's application of the law de novo. State v. Pena, 869 P.2d 932 (Utah 1994).

ISSUE NO. 2

Whether the district court's findings of fact regarding the Appellant's alleged contempt sufficiently set forth the elements of contempt.

Standard of Review:

This issue presents a question of law. An appellate court reviews the trial court's application of the law de novo. State v. Pena, 869 P.2d 932 (Utah 1994).

ISSUE NO. 3

Whether the district court erred in hearing and ruling on the contempt issue at the January 3, 2002 hearing when the Appellee failed to bring the alleged contempt issue before the district court in the manner prescribed by express Utah law.

Standard of Review:

This issue presents a question of law. An appellate court reviews the trial court's application of the law de novo. State v. Pena, 869 P.2d 932 (Utah 1994).

ISSUE NO. 4

Whether there was sufficient evidence presented at the hearing on the Appellee's Motion for Damages to support the Findings of Fact, Order, Judgment and Sentence of Commitment entered by the District Court.

Standard of Review:

This issue presents a question of fact. An appellate court reviews a challenge of the legal sufficiency of evidence, under a clearly erroneous standard. American Vending Servs. v. Morse, 881 P.2d 917 (Utah 1994).

ISSUE NO. 5

Whether the manner in which the Appellant was notified of the hearing on the Appellee's Motion for Damages and the manner in which the hearing was conducted deprived the Appellant of his constitutional due process rights.

Standard of Review:

This issue presents a question of law. An appellate court reviews the trial court's application of the law de novo. State v. Pena, 869 P.2d 932 (Utah 1994).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES AND RULES**

Utah Code Annotated §78-32-3 provides as follows:

When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily, for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person

proceeded against is thereby guilty of contempt, and that he be punished as prescribed in Section 78-32-10 hereof. When the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators or other judicial officers.

Utah Code Annotated §78-32-4 provides as follows:

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

U.S. Const. amend. XIV, §1 provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Utah Const. art. I, §7 provides as follows:

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

STATEMENT OF THE CASE

1. NATURE OF THE CASE

This appeal is from an Order and Judgment entered by the Fifth Judicial District Court in Washington County, Judge James L. Shumate, presiding. The Order and Judgment is the district court's ruling on a Motion for Damages submitted by the Appellee regarding the Appellant's alleged noncompliance with the Supplemental Decree of Divorce entered in this case on October 16, 2001. The court awarded a money judgment to the Appellee in the amount of \$40,550.95. This money judgment represents unpaid medical and dental expenses, child support and alimony arrearages, attorney's fees, and other related damages. The Judgment and Order also awarded all title and interest of the marital home located at 790 S. 850 E., St. George, Utah 84790 to the

Appellee, with the stipulation that the Appellant's equity therein constitute a partial satisfaction of the money judgment awarded to the Appellee. The Judgment and Order also awarded the Appellee the balance of the money judgment in excess of the Appellant's equity in the marital home in the amount of \$4,030.95.

The Order of Commitment and Sentence entered by the district court sentenced the Appellant to 30 days in the Washington County Purgatory Facility for contempt of court committed by the Appellant. The prison sentence commenced on January 3, 2002.

2. STATEMENT OF FACTS

1. The Appellee filed a Complaint for Divorce on or about June 18, 1998. (Record hereinafter "R." at 1).

2. An order awarding the Appellee temporary alimony and child support during the pendency of the divorce proceeding was entered on or about July 17, 1998. According to the minutes of the hearing, the Appellant was to pay child support of \$182.00 per month and alimony of \$300.00 per month. (R. at 30-31).

3. On November 29, 1999, the Appellee obtained a judgment against the Appellant for child support arrears dating back to the July 17, 1998 Order. The judgment included accrued interest and attorney's fees and totaled \$9,743.38. (R. at 91).

4. A Bifurcated Decree of Divorce was entered in this case on or about June 12, 2000. Pursuant to the terms of the Bifurcated Decree of Divorce all issues of child custody, child support, alimony, property division, debt distribution, and legal fees were reserved for a later determination. (R. at 184).

5. Shortly before trial in early December 2000, the parties reached a mutual stipulation

regarding child custody, child support, alimony, property division, and debt distribution. A Supplemental Decree of Divorce was entered on October 16, 2001. The terms of the Supplemental Decree mirrored the parties' agreement as set forth in their Stipulation. (R. at 352).

6. According to the terms of the Supplemental Decree, the Appellant was required to pay child support of \$132.00 per month, pay one half of any uninsured medical or dental expenses, and obtain and pay for an appraisal of the marital home so that it could be sold. (R. at 353).

7. The Supplemental Decree also set forth that the Appellee would be responsible for the mortgage payments on the marital home "subject to setoff at the time of sale for delays attributable to [the Appellant]." (R. at 354).

8. The Supplemental Decree further stated that the Appellant, prior to December 25, 2000, was to "pay the property taxes on the home required to prevent the home from going into foreclosure." (R. at 354).

9. There was no mention in the Supplemental Decree regarding responsibility for homeowner's insurance or maintenance or repair expenses to the marital home.

10. On or about December 19, 2001, the Appellee filed a Motion for Damages claiming that the Appellant had failed to comply with the provisions of the Supplemental Decree of Divorce. The Appellee sought in her Motion a money judgment consisting of several elements of alleged damage. These alleged damages were, among things: (a) failure to pay child support and uninsured medical and dental expenses pursuant to the Decree; and (b) failure to pay outstanding property taxes on the marital home. The Motion also sought consequential damages such as mortgage expenses, homeowner's insurance, and maintenance and rental charges on the

basis of the Appellant's alleged interference with the sale of the marital home. The only reference to the issue of contempt was contained in the last page of the Motion. In the Motion the Appellee requested "that the Respondent be held in contempt of court for his willful failure to abide by the terms of the Decree of Divorce . . ." (R. at 371, 376).

11. The Appellee did not submit nor did the district court issue an order to show cause regarding the Appellant's alleged contempt pursuant to Utah Code Ann. §78-32-4. Furthermore, the record is void of any notice provided by the court regarding the hearing or the possibility of the contempt issue being considered at the hearing.

12. The Appellee did not submit an affidavit prior to or at the Motion hearing stating the basis for the alleged contempt pursuant to Utah Code Ann. §78-32-3, and no contemptuous conduct was committed in the presence of the court.

13. The hearing on the Motion was conducted on January 3, 2002. At the hearing the Appellee was represented by counsel. The Appellant represented himself pro se. (R. at 553, Hearing Transcript hereinafter "T." at 3).

14. The hearing commenced with the Appellee's counsel making introductory comments regarding the Appellee's alleged damages. (R. at 553, T. at 3-9).

A. Finding on child support and alimony.

15. Regarding the issue of child support and alimony, the Appellee's counsel simply explained to the court in summary fashion the existence of the Appellee's unpaid child support judgment which she had obtained in November 1999 and that the Appellant had made no child support payments thereon. (R. at 553, T. at 4-5).

16. The Appellee's counsel later informed the court that the child support judgment as of

November 29, 1999 was \$9,743.38 and that unpaid child support from that day forward was \$8,634.83. (R. at 553, T. at 6).

17. At this point the Appellee's counsel provided a one page summary of the Appellee's alleged damages to the court. (R. at 553, T. at 6). The document was not sworn to or in affidavit form and was not offered into evidence. Furthermore, the Appellant was not given the opportunity to examine it. Because the document was not offered into evidence the document is not formally part of the record. However, the document was instrumental in the court's ultimate decision. (See R. at 389 ¶ 14). For this Court's information, the document was attached to the Memorandum of Points and Authorities in Support of the Appellant's URCP 60(b) Motion for Relief from the Judgment as an exhibit. (See R. at 465).

18. The court ultimately took testimony from the Appellant on some of the Appellee's alleged damages. Initially, the examination was not under oath. Ultimately, the court placed the Appellant under oath and questioned him regarding his payment of child support. The Appellant essentially testified that he had been delinquent in meeting his child support obligation. (R. at 553, T. at 11, 16, and 18-19). There was no testimony from either side regarding alimony.

19. The court ultimately found that there was an arrearage of child support owing and that no voluntary payment had been made and that the Appellant was therefore in contempt. As a result of this finding the court sentenced the Appellant to serve 30 days in the Washington County Jail commencing that very day. (R. at 553, T. at 35).

20. The court's written findings stated that the Appellant had failed to abide by the Supplemental Decree by failing to pay child support and was therefore in contempt. (R. at 389 ¶ 2, 9, 10, 12-13).

21. The only finding regarding the amount of arrearages owing by the Appellant for child

support and alimony was that the court “[found] the damages identified on the exhibit presented by Petitioner acceptable and appropriate.” (R. at 389 ¶14).

B. Findings on property taxes.

22. The Appellee’s counsel informed the court in his introductory remarks that the Appellee had to “borrow \$74,000 -- \$7,400” to pay off the property taxes then owing on the home. (R. at 553, T. at 7). The Appellee did not submit any testimony or formal evidence on this issue.

23. The court later questioned the Appellant regarding the property tax issue. The Appellant testified that he had paid a total of \$2,500.00 in property taxes and estimated that the amount outstanding at the time was approximately \$5,000.00. (R. at 553 T. 20-21).

24. The court did not make a formal finding at the hearing regarding the property tax issue other than to question the Appellee’s counsel regarding the total amount of the money judgment he was seeking in excess of the Appellant’s equity in the marital home. (R at 553, T. 35).

25. The court’s written finding regarding the property tax issue was that the Appellant had failed to pay the property tax arrearage by December 25, 2000 thus requiring the Appellee to “borrow funds to prevent the marital home from being foreclosed by a Washington County tax sale.” (R. at 389 ¶ 2 and 3).

C. Finding on interference with sale of marital home issue.

26. The Appellee’s counsel argued to the court in his initial remarks that the Appellant had interfered with the sale of the marital property. The Appellee argued that the home had been listed with Mr. Steve Bradbury, a local realtor, and that Mr. Bradbury was threatened by the Appellant regarding his involvement in the sale of the property and of the potential of litigation.

The Appellee's counsel then informed the court that Mr. Bradbury was there to testify regarding the allegations. (R. at 553, T. at 4-5). However, Mr. Bradbury never testified.

27. The court later questioned the Appellant regarding the Appellee's allegations that he tortiously interfered with the sale of the marital home. In response to those questions the Appellant testified that he marketed the property and that as part of those efforts he listed the home approximately five months previous through Wasatch Front multiple listings but that he had not listed it in Washington County. (R. at 553, T. at 25-26).

28. The Appellant also testified that as part of his marketing efforts he placed a for sale sign on the property which the Appellee repeatedly took down. (R. at 553, T. at 26).

29. The Appellant testified that he listed the home for \$189,000.00 and had three comparative market analyses by reputable real estate people in the community confirming that the property was at least that valuable. (R. 553, T. at 27).

30. The Appellant further testified that he had spoken to Mr. Bradbury on the telephone and that the essence of that conversation was that the Appellant informed Mr. Bradbury not to under sell the property. (R at 553, T. at 27).

31. The Appellant ultimately testified on this issue that "there was never any tortious interference on [his] part" and that the Appellee was actually the one who interfered with the sale of the marital home. (R. at 553, T. at 31).

32. The court did not make a formal finding regarding the interference issue at the hearing but in its written findings the court stated that it found that the Appellant had interfered with the "marketing of the marital home" and that the Appellee had "suffered damages as a result of the interference." The court further found that the damages set forth on the exhibit presented by the Appellee to the court at the hearing were "acceptable and appropriate." (R. at 389 ¶ 2, 6-

7, and 14). Those damages included charges related to mortgage payments (the Appellant was assessed one half of the mortgage payments for an undisclosed period of time, homeowner's insurance, and maintenance and repair charges, among other things). (See R. at 465).

33. The court failed to make either an oral or written finding that the mortgage payment expense, maintenance/repair charge, or homeowners insurance were consequential damages as a result of the Appellant's alleged interference with the sale of the home. (R. at 553 and R. at 389)

D. Finding on medical expenses.

34. The Appellee's counsel commented briefly in his opening remarks to the court that the Appellee's alleged damages related to the parties' minor child's uninsured medical expenses was \$1,018. 00. (R. at 553, T. at 7).

35. No testimony or formal evidence was submitted on the medical expense issue besides these introductory comments and no formal finding was made at the hearing regarding the issue. (R. at 553).

36. The written Findings of Fact stated that the court found that the Appellant failed to pay uninsured medical expenses and that he was therefore in contempt. (R. at 389 ¶ 2, 12-13).

E. Finding on homeowner's insurance and mortgage payments

37. The Appellee's counsel made only brief remarks in his opening statement to the court regarding homeowner's insurance and mortgage payments as elements of the Appellee's alleged damages. (R. at 553, T. at 8-9).

38. No testimony or formal evidence was submitted on the homeowner's insurance expense or mortgage payment issues besides these introductory comments and no formal finding was made at the hearing regarding these issues. (R. at 553).

39. The written Findings of Fact do not mention homeowner's insurance or the mortgage payments to be consequential damage of the court's finding that the Appellant interfered with the sale of the marital home. The Findings of Facts do indicate that the damages on the Appellee's exhibit are "acceptable and appropriate." (R. at 389 ¶ 14). Homeowner's insurance and mortgage payments were listed on the Appellee's summary of damages. (See R. at 465).

F. Finding on Home Maintenance/Repair.

40. The Appellee's counsel explained the maintenance and repair element of the Appellee's alleged damages to be pool maintenance and roof repairs. The Appellee's counsel argued that but for the Appellant's alleged "tortious interference" the Appellee would not have incurred these expenses. (R. at 553, T. at 10).

41. No testimony or formal evidence was presented documenting the Appellee's alleged maintenance and repair costs despite the Appellee's counsel's representation that he had an itemization of the expenses the Appellee incurred. (R. at 553 T. at 9).

42. The written Findings of Fact do not mention that the court found the maintenance/repair charge to be consequential damage of the Appellant's alleged interference with the sale of the home. The Findings of Fact do indicate that the damages on the Appellee's exhibit are "acceptable and appropriate." (R. at 389 ¶ 14). The maintenance/repair charge was included on the Appellee's summary of damages. (See R. at 465).

43. Although the Appellee's counsel had witnesses as well as the Appellee herself present to testify in support of the Motion, none of the witnesses were called to the stand to so testify and no formal proffers of their testimony were made. (See R. at 553).

44. The Appellant was not given the opportunity to present his evidence or

question the Appellee's alleged damages, nor was he allowed to cross-examine any of the Appellee's witnesses. The proceeding was conducted in a summary fashion. (See R. at 553).

45. Based on the court's examination of the Appellant, the comments of counsel, and the document containing the Appellee's summary of her alleged damages, and without the presentation of any of the Appellee's witnesses in support of her claims, the court found the Appellant in contempt of court and ordered a thirty (30) day sentence commencing on that day to be served at the Washington County Purgatory Facility. (R at 389 ¶ 13 and Order of Commitment and Sentence).

46. The court also ordered a money judgment in the amount of \$40,550.95 representing unpaid medical and dental expenses, child support and alimony arrearages and attorney's fees and other damages as set forth on the Appellee's summary of damages document. (R. at 389 ¶ 1 of Judgment and Order).

47. The Court awarded all title and interest in the marital home located at 790 South 850 East, St. George, Utah 84790 to the Appellee. The court also awarded the Appellee a money judgment to the Appellee in the amount of \$4,030.95 representing the deficiency of the Appellant's equity in the marital home in satisfying the entire judgment amount of \$40,550.95. (R. at 389 ¶ 2-3 of Judgment and Order).

48. The court entered a Findings of Fact, Order, Judgment and Sentence of Commitment on January 22, 2002, summarizing its findings and order. (R. at 389).

49. The Appellant has served out his prison sentence for contempt at the Washington County Purgatory Facility.

50. The Appellant filed a Motion for Relief from the Judgment on or about April 22,

2002 on the basis that the judgment was the product of mistake and that the hearing had been conducted improperly. (R. at 474).

51. The hearing on that Motion was conducted on December 12, 2002. At the hearing the court ruled that there was in fact mistake regarding the calculation of child support and alimony arrears due to the fact that the Appellee had used an incorrect interest rate to calculate applicable interest and the judgment was amended accordingly. (See Order Re: Respondent's Motion For Relief From Judgment ¶ 7 attached hereto as an addendum).

52. The court also ruled that the \$7,480.33 property tax element of the Appellee's judgment was incorrect and that the actual amount the Appellant owed the Appellee for outstanding property taxes was \$2,344.67. The judgment was amended accordingly to give Appellant a credit of \$5,135.66 against the Appellee's judgment. (See Order Re: Respondent's Motion For Relief From Judgment ¶ 8 attached hereto as an addendum).

53. The court upheld the remainder of the judgment (i.e. mortgage payments, homeowner's insurance, maintenance/repair etc.) as consequential damages of the Appellant's alleged interference with the sale of the marital home. (See Order Re: Respondent's Motion For Relief From Judgment ¶ 9 attached hereto as an addendum).

SUMMARY OF THE ARGUMENT

When a person is accused of committing contempt outside the presence of the court, Utah statute and case law require the imposition of procedural safeguards to ensure the contemnor's due process rights. This statutory safeguard is a sworn affidavit, filed with the court, setting forth the alleged contempt. The district court's order finding the Appellant in contempt should be set aside because the Appellee failed to file the required affidavit.

Utah law requires that findings of fact regarding a contempt order set forth specifically each element of contempt as it relates to the alleged contemnor's conduct. The district court did not issue findings of fact for each necessary element of a claim for contempt. Therefore, the findings of fact are inadequate and the district court's order of contempt should be reversed.

Utah law requires the issuance of a notice or order to show cause prior to the issuance of a warrant of commitment for contempt. The district court failed to issue either and therefore its finding and sentence of commitment was inappropriate because the contempt issue was not properly brought before the court.

There was insufficient evidence presented at the hearing to support the district court's Findings of Fact and resulting Judgment. Neither party provided testimony or evidence as to the amount of child support or alimony the Appellant owed to the Appellee. In addition, there was little or no evidence provided regarding property taxes, mortgage payments, and other alleged damages. The court improperly relied upon an unsworn summary of damages provided at the hearing to the court by the Appellee's attorney, as well as the Appellee's counsel's comments. Neither were evidence, however. In short, the district court lacked sufficient evidence to support its judgment and finding of contempt against the Appellant.

The Appellee failed to properly notify the Appellant of the contempt proceeding as required by law. As a result, the Appellant's constitutional rights to due process were violated. In addition, the district court did not give the Appellant the opportunity to present evidence, examine the Appellee's evidence, or cross-examine the Appellee's witnesses, thereby further depriving the Appellant of his due process rights.

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ARGUMENT

- I. THE DISTRICT COURT ERRED IN FINDING THE APPELLANT IN CONTEMPT BECAUSE THE ALLEGED CONTEMPT WAS NOT COMMITTED IN THE PRESENCE OF THE COURT AND THE APPELLEE DID NOT SUBMIT AN AFFIDAVIT STATING THE BASIS FOR THE CONTEMPT PURSUANT TO UTAH CODE ANN. § 78-32-3.

The district court's finding of contempt against the Appellant should be reversed because the Appellee failed to follow express Utah law in order to establish the Appellant's alleged contempt. The Utah Code establishes two distinct procedures to be followed in contempt proceedings, one when the contempt is direct, i.e., committed in the presence of the court, and the other when the contempt is indirect, i.e., committed outside the presence of the court. Utah Code Annotated § 78-32-3 (2002).

In cases of direct contempt, "the court may summarily punish the contemnor." Von Hake v. Thomas, 759 P.2d 1162, 1169, 1170 (Utah 1988). In contrast, indirect contempt can only be properly determined in a proceeding "more tightly hedged about with procedural protections." Id. at 1170. Those "procedural protections" are set forth in the Utah Code. Utah Code Ann. § 78-32-3 states in pertinent part:

When the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit **shall** be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators or other judicial officers.

(emphasis supplied).

Thus, in Utah, the statutory requirement of an affidavit is a procedural prerequisite to the imposition of any sanctions for indirect contempt. See Von Hake, 759 P.2d at 1171. See also, Khan v. Khan, 921 P.2d 466 (Utah Ct. App. 1996); Boggs v. Boggs, 824 P.2d 478 (Utah Ct. App. 1991). The affidavit required by Utah Code Ann. § 78-32-3 satisfies the statute and due process only if "it sets forth the acts done or omitted that form the factual basis for the contempt

charge.” Von Hake, 759 P.2d, at 1171. As this Court stated in Khan, “[i]f no such affidavit is presented to the court, indirect contempt **cannot** be found.” 921 P.2d at 468 (emphasis supplied). In Khan this Court reversed a contempt judgment of the trial court entered against the noncustodial parent on the basis that the custodial parent failed to file the required affidavit thereby depriving the noncustodial parent of fair notice of the contempt proceeding. Id. at 470.

At the hearing conducted in this matter on January 3, 2002, the Appellee asserted that the Appellant should be held in contempt due to his alleged failure to comply with the terms of the Supplemental Decree of Divorce entered on October 16, 2001. Because this alleged contempt was committed, if at all, outside the purview of the district court it clearly constituted indirect contempt and thus the Appellee was required to file the affidavit mandated by Utah Code Ann. § 78-32-3.

A cursory review of the record reveals that the Appellee did not file the required affidavit. The only document filed by the Appellee was an unverified Motion for Damages. (See R. at 371). The Motion did not mention the issue of contempt until the last page and then only in summary fashion. (See R at 376). This Motion was the only pleading submitted by the Appellee regarding the Appellant’s alleged contempt and clearly did not satisfy the requirement that all indirect contempt allegations be set forth in a sworn statement. See Utah Code Ann. § 78-32-3; see also Crank v. Utah Judicial Council, 20 P.3d 307 (Utah 2001).

As is readily apparent, the Appellee has failed to comply with Utah Code Ann. §78-32-3. Accordingly, as this court stated in Khan, “indirect contempt cannot be found” and the district court’s order of contempt should be vacated. Id. at 468.

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II. THE DISTRICT COURT'S FINDINGS OF FACT REGARDING THE APPELLANT'S ALLEGED CONTEMPT ARE INADEQUATE AND FAIL TO SET FORTH THE ELEMENTS OF CONTEMPT, THEREFORE, THE DISTRICT COURT'S CONTEMPT ORDER SHOULD BE REVERSED.

The Findings of Fact entered by the district court fail to set forth the specific elements of contempt as applied to the Appellant. As a general rule, in order to prove contempt for failure to comply with a court order, it must be shown by clear and convincing evidence “that the person cited for contempt knew what was required, had the ability to comply, and intentionally failed or refused to do so.” Von Hake, 759 P.2d at 1172. Adjudication of contempt must be based on “written findings of fact and conclusions of law with respect to each substantive element.” Id.

In the instant case, the Appellant was found to be in contempt of court for failure to comply with the terms of the Supplemental Decree of Divorce. (R. at 389 ¶ 13). As a result of this finding the Appellant was ordered to serve, and did in fact serve, 30 days in jail. (R. at 389 Order of Commitment and Sentence). A simple analysis of the written Findings of Fact reveals them to be wholly defective with regard to the contempt order. The court's finding regarding contempt is as follows: “[T]his Court finds the Respondent in contempt of this court for his failure to abide by the provisions of the Decree, including the failure to pay child support and uninsured medical expenses as ordered.” (R. at 389 ¶ 13).

As is readily apparent, not one of the three substantive elements of contempt are fully set out in this finding. In fact, the finding does not even mention whether the court found that the Appellant *knew what was required* or that he had *the ability to comply* with the Supplemental Decree. There are findings regarding the Appellant's failure to comply with the Supplemental Decree, but no specific finding that his alleged failure to comply was intentional.

Indeed, the instant case is much like Von Hake. There, the trial court found the defendant in contempt for failing to comply with a court order. On appeal, the Utah Supreme

Court reversed. The court noted that there were adequate written findings regarding the defendant's knowledge of what was required of him and of his failure to comply. Id. at 1173. However, the court held that even though there was differing evidence in the record regarding the defendant's *ability to comply* with the court order, because there were no *specific written findings* and conclusions regarding this issue, the findings were inadequate and defective. Id.

As is readily apparent, Von Hake is directly on point and should be dispositive of the instant case. The district court's findings regarding its contempt order are wholly inadequate because they do not address the Appellant's ability to comply with the Decree. As Von Hake illustrates, the fact that there may be evidence in the record regarding the alleged contemnor's ability to comply is immaterial if there are no specific written findings to that effect. The case law is patently clear that an indirect civil contempt order will be reversed if there are no written findings and conclusions regarding the contemnor's ability to comply with the order he violated. Id. at 1173. Accordingly, the district court's contempt order should be reversed.

III. THE CONTEMPT ISSUE WAS NOT PROPERLY BROUGHT BEFORE THE DISTRICT COURT THEREFORE THE COURT'S CONTEMPT ORDER SHOULD BE VACATED.

The district court's order of contempt should be reversed because the issue of contempt was not properly brought before the court. Utah Code Ann. §78-32-4 specifically states:

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

In other words, in order for a contempt issue to be properly brought before the court, a notice or order to show cause must be issued by the judge and served on the party charged with

contempt. This court's decision in Boggs is illustrative of this proposition and is directly analogous to the instant case.

In Boggs the parties were divorced and the husband filed a petition seeking to have his child support obligation reduced. The wife filed a counter-petition seeking to have the child support amount increased and seeking arrearages. The wife's counter-petition had a section labeled "order to show cause", but the only factual allegation contained therein was that the husband had failed to pay child support. Id. at 481. The notice provided by the court of the hearing did not mention anything regarding contempt. At the hearing, the court ultimately found the husband in contempt for failure to pay child support and ordered a prison sentence for the husband. The husband appealed and this Court reversed the decision of the trial court. In support of its decision this Court noted:

The record does not reveal any copy of an order to show cause regarding contempt, court approval or authorization of an order, or service of any order on Husband requiring him to appear at any time or place to show cause why he should not be held in contempt for failure to pay child support.

Id.

This Court concluded that "[a]t most, this document [the wife's counter-petition] provided notice that Wife might request the trial judge to authorize and issue an order to show cause." Id. This Court ultimately held that the trial court did not comply with Utah Code Ann. §78-32-4 because no notice or order to show cause was issued by the court and served upon the husband. Boggs, 824 P.2d at 482. Accordingly, this Court reversed the trial court's contempt judgment. Id.

The instant case is remarkably similar to Boggs. The only document filed by the Appellee prior to the district court's January 3, 2002 hearing was a pleading called Motion for Damages and Memorandum in Support Thereof. (See R. at 371). There is no language regarding

the possibility of an order to show cause whatsoever in the Motion. The only reference to contempt is on the last page of the Motion wherein it states that “it is hereby respectfully requested that the Respondent be held in contempt of court for his willful failure to abide by the terms of the Decree of Divorce . . .” (See R. at 376). There is no request that an order to show cause issue as Utah Code Ann. §78-32-4 requires, and no such order to show cause was ever issued by the court. Furthermore, the Motion was simply mailed to the Appellant rather than served. (See R. at 376). Finally, the record is void of any court notice of the hearing or of the possibility that contempt would be one of the issues before the court. In short, the contempt issue was not properly brought before the district court and the court’s decision to rule on the contempt issue was therefore entirely inappropriate. Accordingly, as the Boggs decision illustrates, the contempt order must be overturned.

IV. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT THE HEARING FOR THE FINDINGS, ORDER AND JUDGMENT ENTERED BY THE DISTRICT COURT AND THEREFORE THE ORDER AND JUDGMENT SHOULD BE VACATED

The evidence presented at the January 3, 2002 hearing on the Appellee’s Motion for Damages was insufficient to support the district court’s findings and ruling. Therefore, the court’s order and judgment were clearly erroneous.

Utah law is clear that for a court’s order or judgment to stand on appeal there must be sufficient evidence in the record to support the court’s findings of fact. See Woodhaven Apartments v. Washington, 942 P.2d 918 (Utah 1997). In Woodhaven the landlord sought an award of liquidated damages (1 ½ months rent) pursuant to the lease after the tenant vacated the apartment after only six months of the one year lease period. The trial court found for the landlord and this Court affirmed that holding. The basis of this Court’s ruling was that it found that the liquidated damages clause was a reasonable forecast of the damages a landlord would

incur when a tenant vacates prior to the end of the lease as evidenced by the fact that cleaning and repair expenses, advertising expenses, time spent showing the apartment, and paperwork become necessary. Id. at 922.

On appeal, the Utah Supreme Court reversed. The Supreme Court held that there was insufficient evidence to support such a finding. Id. at 923. In support of its decision the Supreme Court noted that there was no evidence in the record regarding the “costs of advertising, showing the apartment, arranging for cleaning, preparing necessary paperwork, or performing various checks of prospective tenants.” Id. at 922. Therefore, the court concluded, it was impossible to determine the reasonableness of the liquidated damages clause. Id.

In other words, because there was no evidence regarding specific costs related to the various tasks necessary when a tenant prematurely breaches a lease, there was no evidentiary basis to find the liquidated damages to be reasonable. Likewise, as will be explained more fully below, in the instant case there was either no evidence or insufficient evidence presented on many of the Appellee’s elements of her alleged damages. Accordingly, the court’s judgment should be vacated.

A. There was insufficient evidence to support the district court’s finding regarding child support arrears or alimony.

As noted in the Statement of Facts above, the district court ruled at the hearing on the Appellant’s Motion for Relief from Judgment that there was mistake regarding the calculation of child support and alimony arrears due to the fact that the Appellee had used an incorrect interest rate to calculate applicable interest. The judgment was amended accordingly. (See Order Re: Respondent’s Motion For Relief From Judgment attached hereto as addendum). Nevertheless,

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out of an abundance of caution, the Appellant will set forth his argument regarding these issues for this Court's review.

1. Alimony

There was no evidence or testimony presented at the hearing regarding alimony whatsoever. Furthermore, there was no finding, either oral or written, regarding alimony other than the court's finding that it found "the damages identified on the exhibit presented by Petitioner acceptable and appropriate." (R. at 389 ¶ 4). That document did mention alimony as an element of the Appellee's damages. (See R. 465) However, it was never admitted into evidence and there was never any foundation established for the document. It simply was not evidence on which the court could base its decision.

The only other possible basis for the court's order on alimony is the Appellee's counsel's introductory remarks regarding unpaid alimony at the beginning of the hearing. (R. at 553, T. at 3). However, those comments were not a proffer and therefore did not constitute evidence. Otherwise, there is no reference at all in the transcript or Findings of Fact regarding unpaid alimony. As Woodhaven illustrates, without specific evidence on a particular issue—in this instance alimony--there is no basis for a judgment. Accordingly, there was no basis for the court make its finding that "the damages identified on the exhibit," part of which included unpaid alimony, were "acceptable and appropriate." Therefore, the court's judgment regarding alimony should be vacated.

2. Child Support

Just as with alimony, the only finding regarding the amount of arrearages owing by the Appellant for child support was that the court "finds the damages identified on the exhibit presented by Petitioner acceptable and appropriate." (R. at 389 ¶ 14). The only evidence

presented at the hearing regarding child support was via testimony given by the Appellant in response to the court's questioning. (R. at 553, T. at 11, 16, 18-19). However, similar to Woodhaven, this evidence failed to establish any actual amounts of child support arrears. The Appellant concedes that his testimony did establish that he had been delinquent in meeting his child support obligation. However, the Appellant disputes the amount that the Appellee represented to the court that he owed and which the court adopted without any evidence to support it.

Although the Appellee was presumably there to testify regarding the child support and alimony issues, she was not called to the stand. Instead the court relied on the comments of the Appellee's counsel as well as the one page summary of damages that indicated the amount of child support arrearages allegedly owed by the Appellant. Neither, however, were evidence. The document was not in affidavit form and was not a sworn statement affirming the accuracy of the representations thereon. And, as this court is well aware, the comments and arguments of counsel are not evidence. State v. Hall, 186 P.2d 970 (Utah 1947). Quite simply, just as in Woodhaven, there was insufficient evidence presented regarding this issue to support the district court's findings and order regarding child support arrearages. Therefore, the district court's findings and order are clearly erroneous and the court's judgment should be vacated.

B. There was insufficient evidence to support the district court's finding regarding property taxes.

It should first be noted that at the hearing on the Appellant's URCP 60(b) Motion, the district court decreased this portion of the Appellee's judgment from \$7,480.33 to \$2,344.67 due to the obvious mistake of the Appellee in his representation of the property taxes owing. (See Order Re: Respondent's Motion For Relief From Judgment attached hereto as an addendum). The Appellant will nevertheless set forth his argument on this issue for this Court's review.

The district court's finding regarding the property tax issue is as follows: "That the Respondent failed to pay by the 25th of December, 2000 all of the property tax arrearage assessed on the marital home. The Petitioner was then forced to borrow funds to prevent the marital home from being foreclosed by a Washington County tax sale." (R. at 389 ¶ 3). The findings do not mention the amount of property taxes owed by the Appellant to the Appellee other than the reference that "this Court finds that the damages identified on the exhibit presented by Petitioner acceptable and appropriate." (R. at 389 ¶ 14). Property taxes were included on the Appellee's summary of damages submitted to the Court. (R. at 465).

The only testimony or evidence presented at the hearing regarding property taxes was the Appellant's testimony that he paid \$2,500 or approximately one half of the outstanding taxes due on the home. (R. at 553 T. at 20-21). There was no testimony or evidence to establish that the property taxes owing on the home were \$7,480.33 as the Appellee represented in her document summarizing her alleged damages. The Appellee's counsel did make a preliminary statement that the Appellee had to borrow "\$7,400" to pay off the property taxes owing. (R. at 553, T. at 7). However, this can hardly be called a proffer. It is more akin to an opening statement of what the evidence would show. As this Court is well aware, however, the arguments of counsel are not evidence. State v. Hall, 186 P.2d 970 (Utah 1947)

In sum, no evidence was ever presented on the property tax issue other than the Appellant's testimony that he paid one half of what he estimated was \$5,000 in property taxes owing. (R. at 553, T at 20-21). There was simply no basis for the district court to find that the property tax element of the Appellee's alleged damages was \$7,480.33 and the district court's order to that effect was clearly erroneous.

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C. There was insufficient evidence to support the district court's finding regarding the mortgage payments assessed to the Appellant.

The district court's decision to assess the Appellant with one half of the Appellee's mortgage payments related to the marital home is apparently premised on the finding that the Appellant interfered with the sale of the home, although this is not spelled out in the findings. (R. at 389 ¶ 6-7). Once again, there was insufficient evidence presented at the hearing for this finding. The only evidence regarding this issue was limited testimony by the Appellant. The Appellant's testimony was that he marketed the property on a Wasatch Front listing, but not on a Washington County listing, that he did not interfere with the marketing or sale of the property, and that his discussion with the real estate agent who also marketed the home was simply to inform him that he did not want the home to be sold for less than it was worth. (R. at 553 T. at 25-27, and 31). Clearly, this testimony was insufficient to warrant a finding of interference.

The only other information the court had to counter this evidence were the comments of the Appellee's counsel at the beginning of the hearing. Those comments were that the home had been listed with Mr. Steve Bradbury, a local realtor, and that Mr. Bradbury was threatened by the Appellant regarding his involvement in the sale of the property and of the potential of litigation. (R. at 553, T. at 4-5). The Appellee's counsel then informed the court that Mr. Bradbury was there to testify regarding the allegations. (R. at 553, T. at 4-5). However, Mr. Bradbury never testified and his testimony was never formally proffered to the court, nor did the court formally accept the Appellee's comments as a proffer. The comments were more analogous to an opening statement of what the evidence would show. Accordingly, they should not have been considered in the court's determination of whether the Appellant interfered with the sale of the home.

In addition, there was never any testimony or evidence regarding the alleged consequential damages the Appellee incurred as a result of the Appellant's alleged interference

with the sale of the home. Once again, the Appellee's counsel commented on these items (i.e. mortgage payments, homeowner's insurance, and maintenance and repair charges), but it was not even arguably in the form of a proffer and the summary of damages the Appellee submitted to the court was not evidence the court could consider. (See R. at 553, T at 8-9).

Despite the Appellant's testimony and the fact that nobody testified regarding the interference issue on behalf of the Appellee, the court nevertheless found that the Appellant interfered with the sale of the home. In light of the Appellant's testimony, without testimony or evidence from the Appellee to counter such, any finding of damages based on alleged interference was unsupported and clearly erroneous.

In addition, there is no indication in the Appellee's summary of damages submitted to the district court at the hearing, nor was there any testimony at the hearing, regarding the time period the Appellant was assessed the mortgage payments, or when the alleged interference occurred. (See R. at 465). Just as the court held in Woodhaven, damages could not have been accurately assessed on this issue unless there was evidence and a specific finding regarding the same. In light of the Appellant's testimony, the fact that there was no evidence, testimony, or affidavits produced by the Appellee at the hearing is fatal to the Appellee's judgment. The court's finding is also defective because it does not state that as a result of its finding of interference it found the mortgage payments to be consequential damage. As is readily apparent, the district court's judgment is clearly erroneous and should be set aside.

D. There was insufficient evidence to support the district court's finding regarding the remaining elements of the Appellee's alleged damages.

Finally, there was insufficient evidence presented at the hearing to support the district court's finding and order regarding some of the remaining elements of the Appellee's alleged damages (i.e. medical bills, homeowner's insurance, and maintenance/repair). There was no

testimony from anybody whatsoever regarding homeowner's insurance or the medical bills. The only documentation of these items was the unsworn summary of damages provided by the Appellee at the time of the hearing to the court and the Appellee's counsel's introductory remarks regarding these issues. (See R. at 465, R. at 553, T. at .7-9). Once again, the document was not received into evidence and the Appellee's comments were not made in the form of a proffer. Therefore, neither constituted evidence on which the court could rely in making its findings and judgment. Nevertheless, that is exactly what the district court did.

In addition, the court's findings are also defective because there is no finding that the homeowner's insurance and maintenance/repair charges are consequential damages of the Appellant's alleged interference with the sale of the home. Furthermore, there was never any testimony regarding what specific maintenance was done to the home, only the comments of counsel. (R. at 553 T. at 9-10). Quite simply, there was insufficient evidence to support the district court's findings and order regarding these alleged damages and the district court's order and judgment was clearly erroneous.

As is readily apparent, there are many elements of the Appellee's alleged damages that are simply unsupported by the evidence. The district court improperly relied upon the comments of counsel and the Appellee's unsworn summary of damages in reaching its decision. Neither were evidence. Woodhaven is clear that a trial court's order or judgment will be vacated on appeal unless there is sufficient evidence in the record to support the court's findings of fact. Id. at 923. The district court's order and judgment should be vacated because it was clearly erroneous.

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V. THE DISTRICT COURT'S ORDER AND JUDGMENT SHOULD BE VACATED BECAUSE THE APPELLANT WAS DEPRIVED OF DUE PROCESS DUE TO THE FACT THAT HE WAS NOT GIVEN PROPER NOTICE OF THE HEARING NOR GIVEN THE OPPORTUNITY TO PRESENT HIS EVIDENCE, EXAMINE THE APPELLEE'S ALLEGED EVIDENCE, OR CROSS-EXAMINE THE APPELLEE'S WITNESSES.

The irregular manner in which the district court conducted the January 3, 2002 hearing deprived the Appellant of his due process rights. The Fourteenth Amendment to the United States Constitution states that no state may "deprive any person of life, liberty, or property, without due process of law[.]" Similarly, the Utah State Constitution states that "[n]o person shall be deprived of life, liberty, or property without due process of law. Utah Const. art. I § 7.

The due process provision of the federal constitution requires that in a prosecution for a contempt not committed in the presence of the court, "the person charged be advised of the nature of the action against him [or her], have assistance of counsel, if requested, have the right to confront witnesses, and have the right to offer testimony on his [or her] behalf." Burgers v. Maiben, 652 P. 2d 1320, 1322 (Utah 1982). In other words, a person charged with contempt is entitled to adequate notice and an opportunity to be heard in a meaningful manner. See Dairy Product Services, Inc. v. City of Wellsville, 13 P.3d 581 (Utah 2000).

The hearing conducted in the instant matter violated the Appellant's due process rights because the Appellant was not notified properly of the contempt charge and was not afforded the opportunity of presenting his case or confronting the Appellee's witnesses or "evidence."

A. The Appellee's failure to properly notify the Appellant of the contempt proceeding violated the Appellant's constitutional due process rights.

The Appellee did not follow well-established protocol in notifying the Appellant of what ultimately turned out to be a contempt proceeding. Accordingly, the contempt order should be vacated. As noted above, the only notification the Appellant received regarding the hearing was

the Motion for Damages mailed to him by the Appellee. He was not served with an order to show cause as required in an indirect contempt proceeding, nor was the required affidavit submitted. See Utah Code Ann. § 78-32-4 (2002); Utah Code Ann. § 78-32-3 (2002); Boggs, 824 P.2d 478. As this Court stated in Khan:

The requirement of an affidavit helps to ensure compliance with the Due Process requirement of adequate and timely notice of the charges made against the alleged contemnor. [citations omitted]. The notice required to satisfy Due Process includes notice of the court order allegedly violated, along with the facts supporting the contempt allegation.

Id. at 469.

The only reference to contempt was in the last page of the Appellee's Motion and this was only in summary fashion. (R. 376). Quite simply, the Appellant showed up at the motion hearing without any advance warning that the hearing would be transformed into a contempt trial. This Court noted in Boggs that converting a hearing into a contempt trial, even if there is some form of notice of such to the alleged contemnor, is inappropriate. Id. at 482.¹

The notice that the Appellant received violated his constitutional right to due process. Accordingly, this Court should vacate the decision of the district court because its decision to conduct a contempt trial without proper notice of such to the Appellant was unfair and violated the Appellant's due process rights.

B. The Appellant's constitutional due process rights were violated because he was denied the right to present his evidence and confront the Appellee's witnesses and evidence.

The hearing conducted by the district court was violative of the Appellant's due process rights because it was conducted in a summary fashion and the Appellant was never given the

¹ The court held that even though the wife's counter-petition for modification of the divorce decree had a section called "order to show cause" and stated that the husband's conduct was "contemptuous" it was insufficient to notify the husband that the hearing on the modification issue would also address contempt issues.

opportunity to present his own evidence or confront the Appellee's witnesses and "evidence." The Boggs case is instructive on this issue. There, this Court reversed a contempt judgment issued by a trial court in part due to the fact the trial court limited the contempt hearing to proffers rather than conducting a full evidentiary hearing. This Court noted that since it was a case of indirect contempt "it was not proper for the court to utilize summary procedures." Id. at 482. This Court further noted that when the husband appeared for the modification hearing, the judge inappropriately converted the proceeding into "a contempt trial based on proffers." Id. See also, State of Utah v. Starnes, 841 P.2d 712, 715 (Utah Ct.App. 1992) (stating that "[a] proffer of evidence simply does not equate with testimony of an eyewitness. A party should be allowed the opportunity to present testimony, and to cross-examine the other side's witnesses.").

Similarly, in the instant case the court utilized summary procedures to determine an issue of indirect contempt. A review of the record reveals that the Appellee did not call one witness to testify regarding her allegations of the Appellant's contempt. The Appellant was not given the opportunity to present any of his evidence or to call any witnesses. Furthermore, the Appellant was not given the opportunity to examine any of the Appellee's "evidence" or question any of the Appellee's purported damages. Much of what the district court relied on in making its judgment and order of contempt was based on the argument and comments of counsel. It is doubtful whether or not any of these comments could even be construed to be a proffer. As this Court is well aware, arguments of counsel are not evidence. See, State v. Hall, 186 P.2d 970 (1947). Even if this Court deems the Appellee's counsel's comments to have been a proffer, as the Boggs court indicates, it is improper for a district court to base its decision on proffers when the case is one of indirect contempt as in the instant matter.

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The manner in which the hearing was conducted was improper. Basic due process principles required that the Appellant be allowed to present his own testimony on the various issues and question the Appellee's witnesses regarding the same. The Appellant was denied this right and thus was deprived of due process.

The only testimony the Appellant was allowed to give was in response to the court's questioning. He should have been allowed to tell his own version of the story without the constraint of the court's questions. On two different occasions during the hearing the Appellant specifically mentioned that he had documentation he wanted to submit to the court regarding his position. On one occasion this was to document the amount he had paid for the property taxes on the home. (R. at 553, T. at 20-21). The court simply moved on, choosing not to address it. The Appellant was not even allowed to proffer the evidence. Had the court allowed the Appellant to present his evidence regarding this issue it would have realized that the Appellee's representation as to this particular amount of her alleged damages was incorrect by more than \$5,000.00.² However, the Appellant was never afforded the opportunity.

On another occasion the Appellant informed the court that he had three different market analyses to support the amount he listed the marital home for when he was trying to sell it. (R. at 553, T. at 26-27). Once again, the judge simply ignored his comment and the Appellant's evidence went unconsidered. Quite simply, the Appellant was never given the opportunity to present his side of the story. Accordingly, he was deprived of his constitutional due process right to a full and fair adjudication. Therefore, the court's judgment and order should be reversed.

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² The district court altered this portion of the Appellee's judgment at the hearing on the Appellant's URCP 60(b) motion from \$7,480.33 to \$2,344.67.

CONCLUSION

For the foregoing reasons, the district court's Judgment and Order of Contempt should be reversed.

DATED this 15 day of April, 2003.



Britt K. Beckstrom
of and for
GALLIAN, WESTFALL, WILCOX
& WELKER, L.C.

CERTIFICATE OF SERVICE

I, Britt K. Beckstrom, certify that on April 15, 2003, I served two copies of the attached Brief of Appellant upon Shawn T. Farris, the counsel for the Appellee in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

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ADDENDUM

Order Re: Respondent’s Motion For Relief From JudgmentI

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IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY, STATE OF UTAH	
MERETTA ADAMS, Petitioner, v. NOLAN DUANE ADAMS, Respondent.	ORDER RE: RESPONDENT'S MOTION FOR RELIEF FROM JUDGMENT Civil No. 994500045 Honorable James L. Shumate

A hearing on Respondent's Motion for Relief from Judgment was heard by this Court. The Petitioner was present with her counsel of record Shawn T. Farris. The Respondent was present along with his counsel of record, Britt Beckstrom. This Court, having heard the arguments of counsel and reviewing the evidence, hereby FINDS and ORDERS as follows:

1. That the Findings of Fact, Order, Judgment and Sentence of Commitment which was previously entered by this Court on the 22nd day of January, 2002 shall be modified in accordance with the paragraphs set forth below in this Order.
2. That the Lis Pendens recorded against the real property known to the parties as their "marital home" by the Respondent is ordered released by the Respondent.
3. That the Petitioner is hereby ordered to market the marital home for sale and the Respondent is hereby ordered not to interfere in any manner, directly or indirectly, with the

marketing and sale of the marital home. The Petitioner is in total control of the sale of the marital home.

4. That the real property taxes of the tax years 2001 and 2002 shall be paid from the closing of the sale of the marital home.
5. That any allocation and/or award of the real property taxes payable for the tax years of 2001 and 2002 and attorney's fees are hereby reserved by this Court for future determination.
6. That this Court shall review the matter of the possible sale of the marital home by the Petitioner on the 11th day of April, 2003 at 9 a.m.
7. That the interest calculation for the interest accrued against the judgment against the Respondent from the 12th of November, 1999 shall be adjusted to the statutory interest rate for the year 1999 of 6.513%. That the adjustment in the interest rate calculation applied to the judgment dated the 12th of November, 1999 from the date of entry of this judgment until the 3rd of January, 2002 (the date of the Hearing on the Petitioner's Motion for Damages) sums, judgment plus interest less garnishments credited, including the garnishments \$800.00 and \$1,220.00 (Garnishee Order dated January 24, 2002), and the post-judgment garnishment and fees, is \$7,549.27 plus a per diem interest rate of \$1.35 (based upon 6.513 % post-judgment rate). Therefore, the revised sum of \$7,549.27, plus interest accruing thereon, shall be substituted for the original figure of \$9,745.36 used in the Order made on the 3rd of January, 2002.
8. That there should be an adjustment made to the real property taxes awarded to the Petitioner by this Court at the hearing held on the 3rd of January, 2002. That Respondent


shall receive a credit of \$5,135.66 against the \$7,480.33 previously awarded to the Petitioner.

9. That, under the principles of good faith and fair dealings imposed by Utah law upon all contracts and consequential damage theory, all other amounts allocated and awarded to the parties, except for the amounts specified above in this Order, shall remain unchanged and shall accrue interest at the applicable statutory rates. This Court specifically finds and orders that all other amounts awarded to Petitioner at the hearing held on the 3rd of January, 2002 are upheld based upon the finding that Respondent breached the stipulation and interfered with the marketing and selling of the marital home.

DATED this _____ day of April, 2003.

Honorable James L. Shumate
District Court Judge

Approved as to form and content:



Britt Beckstrom
Attorney for Respondent