

2002

# Walter John Horton v. Tamriko Khvtisiashvili : Brief of Appellant

Utah Court of Appeals

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Walter J. Horton; Appellant Pro Se.

Suzanne Marelius; Littlefield & Peterson; Attorney for Appellee.

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**ORIGINAL**

**IN THE UTAH COURT OF APPEALS**

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Walter John Horton

Petitioner and Appellant

Case No.964904582-DA

vs.

Appellant Case No.20020275-CA

Tamriko Khvtisiashvili

Respondent and Appellee

Priority No. 4

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**BRIEF OF APPELLANT**

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**ON APPEAL FROM AN ORDER OF THE THIRD DISTRICT COURT**

**STATE OF UTAH**

**JUDGE GLENN K. IWASAKI**

---

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LITTLEFIELD AND PETERSON  
426 SOUTH 500 EAST  
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APPELLANT PRO SE

**FILED**  
Utah Court of Appeals

DEC 09 2002

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APPELLANT PRO-SE

## **PARTIES**

The original complaint filed in this matter included Walter John Horton as plaintiff/APPELLANT and Tamriko Khvtisiashvili as respondent/APPELLEE.

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United States v. Tucker 716 F.2d 576 (9th Cir 1983)	5, 43

## **APPELLANT COURT JURISDICTION**

This Court has jurisdiction Pursuant to Utah Code, Ann.78-2a-3.

### **ISSUES PRESENTED FOR REVIEW & STANDARD OF REVIEW**

**I. DID COUNSEL FOR THE APPELLEE OFFER DEROGATORY AND UNTRUE STATEMENTS TO THE TRIAL COURT AND THEREFORE MISLEAD THE TRIAL COURTS AND PREJUDICE THE TRIAL COURTS BASED ON THESE UNTRUES?**

Standard of Review: In Rule 4.1 (a), Ut. Rules of Judicial Review, It clearly states that the making of a false statement of a material fact. Chapter 13, Rule 3.3 a (1) Ut. Rules of Judicial Review, states: A lawyer shall not knowingly make a false statement of material fact or law to a tribunal and Rule 3.3 a (4) Ut. Rules of Judicial Review states that offering of evidence that lawyer knows to be false or if the the lawyer offered evidence and comes to know of its falsity, the lawyer shall take reasonable steps remedial measures.

**II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ITS REMOVAL OF THE PETITIONERS JOINT CUSTODY OF A MINOR CHILD, WITHOUT DUE PROCESS OF LAW AND DID THIS TERMINATION INFLUENCE LATER CUSTODY PROCEEDINGS?**

Standard of Review: "A mere finding that the parties are or are not "fit and proper persons to be awarded the care, custody and control"



of the child cannot pass muster when the custody award is challenged and an abuse of the trial court's discretion is urged on appeal".

(Martinez v. Martinez, 728 P.2d 994 (Utah 1986) at page 994.)

Rule 5 (1) of URCP provides that papers shall be served upon all parties and that without service due process was not proper process.

### **III. DID THE TRIAL COURT ABUSE ITS DISCRETION IN BIFURCATING PETITIONERS DIVORCE AND WITHOUT DUE PROCESS OF LAW?**

Standard of Review According to 75 Am Jur 2d Statute 133, states that a bifurcation of a divorce in matrimonial cases is not suggested and cites Finkel v. Finkel, 120 Misc 2d 936, 466 NYS2d 906.

Rule 5 (1) of URCP provides that papers shall be served upon all parties and that without service due process was not proper process.

### **IV. DID COUNSEL FOR THE PETITIONER ERR IN HIS REPRESENTATION OF THE RIGHTS OF THE PETITIONER AND JUSTICE.**

Standard of review: In United States v. Tucker, 716 F.2d 576 (9th Cir.1983) paragraph 50, ineffective assistance of counsel: "did counsel act in a reasonably competent and effective manner and, if not, was his incompetence prejudicial to the defense". "A lawyer shall provide competent representation to a client, chapter 13, Rule 1.1 U.R.J.A. . Competent representation requires the

legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. "A lawyer shall abide by a client's decisions concerning the objectives of representation" Ch.13, Rule 1.2 (a) U.R.J.A .

**V. DID TRIAL COURT ABUSE ITS DISCRETION IN ITS REFUSAL TO HEAR EVIDENCE TO PROVIDE AN ANNULMENT OF THE MARRIAGE AN ABUSE OF THE RIGHTS OF THE PETITIONER.**

Standard of Review: Utah Rules of Evidence, Rule 102 states, "promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined". The federal rules of evidence Article IV: Rule 402, states: "All relevant evidence is admissible".

**VI. DID TRIAL COUNSEL MISREPRESENT PETITIONER IN HIS UNTIMELINESS IN FORWARDING ON THE SUPPLEMENTAL DECREE OF DIVORCE CAUSING PETITIONER TO LOOSE CERTAIN RIGHTS UNDER THE LAW.**

Standard of Review: Utah Code of Judicial Administration Rule 1.4 (a), states a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

**VII. THE TRIAL COURT'S REFUSAL TO SET ASIDE THE JUDGMENT ENTERED AGAINST THE PETITIONER WAS CONTRARY**

**TO THE CONCEPTS OF JUSTICE AND EQUITY AND AN ABUSE OF DISCRETION WHERE THE PROCESS OF JUSTICE HAD GONE AWRY BECAUSE OF INCOMPETENCE OF COUNSEL THAT MANIFEST INJUSTICE WILL RESULT OTHERWISE?**

Standard of Review: Incompetence or ineffective of counsel claims present a mixed question of fact and law. Therefore, in a situation where a trial court has previously heard a motion based on ineffective assistance of counsel, reviewing courts are free to make an independent determination of the trial court's conclusions. The factual findings of the trial court, however, shall not be set aside unless clearly erroneous. State v. Templin 805 P.2nd 182, 186 (Utah 1991); State v. Crestani, 771 P.2nd 1085, 1089 (Utah App. 1989); State v. Goodman, 763 P. 2nd 786, 787 (Utah 1988); State v. Walker, 743 P.2nd 191, 193 (Utah 1987).

In Order to bring a successful incompetence of counsel claim. Appellant must show that prior counsel's performance was deficient in that it fell below an objective standard of reasonableness and that the deficient performance prejudiced the outcome.

Further, the appellant court must indulge in the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the Appellant must overcome the presumption that under the circumstances, the challenged action might be considered sound strategy.

In Order to demonstrate that trial counsel's deficient performance

prejudiced the appellant, it must be shown that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. State v. Templin, supra, 186; State v. Garrett, 207 U.R.A.45,46 (Utah App. 1993).

# **VIII. DID THE TRIAL COURT ABUSE ITS DISCRETION IN NOT GRANTING PETITIONER ATTORNEYS FEES?**

## Standard of Review:

Statement of the Rule: 4-911, 2 (a),(c). U.R.J.A. The court may grant the motion if the court finds that: (a). the moving party lacks the financial resources to pay for costs and fees; (c). the costs and fees are necessary for the proper prosecution of defense of the action.

## **CONSTITUTIONAL PROVISIONS, STATUTES & RULES**

### **REQUIRING INTERPRETATION**

Rule 5 (a)	Utah Rules of Civil Procedure	pg. 17
Rule 5 (1)	Utah Rules of Civil Procedure	pg. 5,35,36,42
Rule 37	Utah Rules of Civil Procedure	pg. 48
Rule 1.4 (a)	Utah Rules of Judicial Admins.	pg. 6
Rule 3.3 (a) (4)	Utah Rules of Judicial Admins.	pg. 4,34,40,41
Rule 3.3 (a) (1)	Utah Rules of Judicial Admins.	pg. 4,34,40
Rule 4.1(a)	Utah Rules of Judicial Admins.	pg. 4,37,40,45
Ch. 13, Rule 1.1	Utah Rules of Judicial Admins.	pg. 5

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Rule 37 (f)	Utah Rules of Civil Procedure	pg. 48
Rule 1.1	U.C.J.A. Chapter 13	pg. 5
Rule 1.2 (a)	U.C.J.A. Chapter 13	pg. 6
Rule 1.4 (a)	U.C.J.A. Chapter 13	pg. 6
Rule 3.3 (a) (1)	U.C.J.A. Chapter 13	pg 4,34,40
Rule 3.3 (a) (4)	U.C.J.A. Chapter 13	pg. 4,34,40,41

Rule 4.1(a)	U.C.J.A. Chapter 13	pg. 4,37,40,45
Rule 4-911,2 (a), (c)	U.C.J.A. Chapter 13	pg. 40,47
Rule 102	Utah Rules of Evidence	pg 6,36,44
Rule 502 4, B, iii	Utah Rules of Evidence	pg 37
Article I Rule 102	Federal Rules of Evidence	pg 6,44
Statute 133	75 AM JUR 2d	pg 5,42

### **STATEMENT OF THE CASE**

1).            Nature of the case        This case involves a custody dispute between parties who were in a relationship since 1993. The Appellee was at the time a foreign exchange student from Russia and the Republic of Georgia. Over the insueing months the relationship developed marriage was brought up. The Appellant brought up the age difference between the parties and was told by the Appellee that in her country she would be getting married right now. That the Appellee's grandfather was twice the age of her grandmother and that Appellee's mother was ten years older than her father.

In December of 1993 Appellant went to Russia to meet Appellee's family and ask about marriage. A few days prior to leaving for Russia the Appellant meet in passing, Roy Jesperson who at that time was the Appellee's sponsor as an exchange student. Mr. Jesperson asked the Appellant "how do you know she is not marring you to get into the country." Upon arriving in Russia the Appellant asked the Appellee about what Mr. Jesperson had said and the Appellee laughed and said

Ch. 13, Rule 1.2 (a)	Utah Rules of Judicial Admins.	pg. 6
Rule 4-911,2 (a), (c)	Utah Rules of Judicial Admins.	pg. 40,47
Rule 102	Utah Rules of Evidence	pg 6,36,44
Rule 502 4, B, iii	Utah Rules of Evidence	pg 37
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In December of 1993 Appellant went to Russia to meet Appellee's family and ask about marriage. A few days prior to leaving for Russia the Appellant meet in passing, Roy Jesperson who at that time was the Appellee's sponsor as an exchange student. Mr. Jesperson asked the Appellant "how do you know she is not marring you to get into the country." Upon arriving in Russia the Appellant asked the Appellee about what Mr. Jesperson had said and the Appellee laughed and said

it was a joke between them.

The Appellant and Appellee exchanged wedding rings in Russia and in March of 1994 returned together to the United States. On June 9th, 1994 Appellant and Appellee were married in Salt Lake City, Utah.

In October 1994 the Appellant had life threatening surgery and required the couple to move to California which they did after the birth of their daughter in January 1995. In December of 1994 the Appellee's mother Tanja came to stay the couple for three months and also made the move to California. Appellant required a second surgery which was had at the end of January 1995.

The couple lived in California near the Appellants mother from Jan. 1995 to Sept. 1995. In June of 1995 Appellee no longer nursing the child, wanted to do something and got a job in California.

All monies which the Appellee made was her money to use and spend how she liked. The Appellant was responsible for all family expenses.

In Sept. of 1995 the couple returned to Salt Lake City and stayed with a mutual friend until they found an apartment. In Oct. 1995 the family moved into a small apartment in Salt Lake City. The family consisted of Appellant and Appellee their daughter and the Appellee's mother. In late Nov. 1995 the Appellant left to go to California for work and returned just before Christmas 1995.

The day before the Appellant's return to Salt Lake City, the Appellee's mother moved out stating "she was having a nervous



breakdown caring for our 11 month old child all the time." Tamriko was away most of the time, with friends and left the child in the care of her mother. Upon the Appellants return the Appellee's schedule did not change and the Appellant from that day forward was the primary care giver for our child.

The relationship between the Appellant and the Appellee was not good. The Appellant found a journal belonging to the Appellee and read it for the purpose of understanding why his relationship with the Appellee was so bad. The journal revealed that the Appellee was having extra marital affairs with men she was acquainting herself with, and dated back to April of 1994.

The Appellant confronted the Appellee on this discovery of journal entries and the Appellee charged the Appellant and began hitting and pulling Appellant's hair. The Appellant had to jump out the second floor window of the apartment to escape the attack. The Appellee than went to stay with her mother.

Shortly thereafter, Appellant asked the Appellee to work things out, Appellee wanted some time alone. The Appellant and there child went to stay with family in California. Appellant and the child moved out of the apartment and the Appellee moved back in. The last time the Appellant and the child resided with the Appellee was middle February 1996 and to that point Appellant was responsible for all expenses.

While in California the Appellant read a journal of the Appellee's which stated;

The Appellee writes "I ain't in love with Walter. As always in my life, right now I have to make a lot of choices- and again and again and again Of course probably, the most clever thing for me to do would be to go back to the USA with Walter . For there this way, I can get education I want to get, work, hobbies and so on. All this will be much easier to get being next to Walter, for I know he will help me as much as he can." (rec.236-256)

In June of 1996 the Appellant confronted the Appellee on the discovery while in California. Shortly thereafter, the Appellee telephoned the Appellant and said "if you do not help me with my immigration I will fight you for custody of our daughter."

In July 1996 the Appellant returned to Salt Lake City with their daughter. After additional physical and verbal attacks by the Appellee, toward the Appellant, a Protective Order was filed against the Appellee. Custody of their daughter was given to the Appellant as well as child support order to be determined at trial, this was agreed to by the Appellee and granted by the Third District Court,Ut., case# 960906856 SA, filed Nov. 5th 1996 (attachment # 1 ).

Appellee writes "I am with Dagny all day...I want to just run away to N.Y. (rec 236-256).

Over the next 9 months the Appellee made no attempts to see their child. When the Appellant and the child were out and happened to see the Appellee, the Appellant would stop so that the child could see her

mother. There were a number of times when the Appellant would take the child to the Appellee's place of work so that the child could see her mother.

September through November of 1997 the Appellee called to see her daughter a couple of times a month and on a couple of those occasions Appellant assisted Appellee with transportation.

On one of the visits our daughter came home and asked Appellant why mommy says that daddy is a bad guy. After hearing this Appellant told Appellee that she should not be saying this to our daughter.

Shortly thereafter our child came home after a visit with the Appellee's mother, the Appellee was also there, and the child asked the Appellant

why does nana say that daddy is a bad guy. Again the Appellant telephoned the Appellee this time warned Appellee not to do it again.

In late November of 1997 after a visit with the Appellee the child came home saying that the Appellee had told her not to eat daddy's pepe. The child at this time is only 34 months old. The Appellant has been the only stable figure in the child's life to this point. IN THE CHILDS BEST INTEREST AFTER THESE THREE INCIDENTS THE APPELLANT TOLD THE APPELLEE SHE COULD NOT SEE OUR CHILD ALONE.

At this point, Appellant telephoned his attorney Robert Maeri told him of the situation and to have supervised visitation arranged. This was done by the Appellant on December 02, 1996 after which time Appellant and the child left to California for the Christmas holiday. Mr.

Macri never followed through with his use of the affidavit and supervised visitation was never requested.

Appellant received a call in California by Mr. Macri and was informed that Appellant needed to return as soon as possible.

Prior to this, it was agreed to by the Appellant and the Appellee that the child would be with the Appellant for the December Christmas and with the Appellee in January for the Orthodox Christmas.

When Appellant returned from Christmas vacation with the child Appellant was told that I had to give the minor child over to the Appellee which Appellant could not do. Appellant wanted first to go before the Judge.

On January 9th, 1997 Appellant wrote an Affidavit for the courts prior to the scheduled January 12, 1997 hearing date. The Appellant's affidavit of January 9th 1997 nor the Letter to the courts of December 02, 1996 appear on the record? Yet were provided by the Appellant to Appellants attorney Robert Macri.

The Affidavit of the Appellee dated December 22, 1996 is a document which Appellant was never made aware of, and the first time Appellant saw this document was in September of 2002. This document (Affidavit of Appellee 12-22-96, rec. 29-37) is so full of untruths and depicts Appellant as a bad guy.

That Appellant understands better why the trial court and later the custody evaluator has acted the way they have toward Appellant. And justifies the slant which the custody evaluator bases his later

decisions and conclusions and on.

2) Course of Proceedings and Disposition in Lower Court

On October 23, 1996 Petitioner files for annulment of divorce (rec.1-3). Appellant is granted custody of the minor child.

December 22,1997 Appellee files affidavit (rec. 29-37), and obtains temporary restraining.

Jan 12,1998 hearing before Judge Iwasiki, Appellant and Appellee ordered joint custody of child. January 12, 1998 hearing Appellee's attorney Suzanne Marelius spoke before Judge Iwasiki and made her remarks and two points come to mind which were completely and totally untrue;

1) the Appellee was not allowed to speak to her daughter on her birthday. This is not true.!

2) That the Appellant was in possession of Appellee's personal belongings and refused to give them to Appellee. This was not true! Appellant had tried for months prior to this asking the Appellee to come and pick-up these belongings, and reimburse Appellant the \$150 shipping expense from California. The Appellant was told by his attorney Mr. Macri to retain the journals for the future proceedings. The Appellant sees now how his actions in court before Honorable Judge Iwasiki January 12, 1997 were disrespectful of the courts, and apologizes for emotional this outburst. It was spirited by emotion and a reaction to the untrues verbalized to the courts Ms. Marelius.

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Appellants attorney Mr. Macri knew these statements were untrue and yet said nothing. Mr. Macri never informed the Appellant of the affidavit of the Dec. 22, 1997. Mr. Macri informed the Appellant that the judge placed him in contempt and told Appellant he could be put in jail. This scared the Appellant and nothing more was questioned by the Appellant, until this appeal.

The Appellant has never to or in front of the child any made any disparaging remarks about the childs mother. The child has asked "why" about the problems between her mom and dad. Appellant said "mommy did not tell daddy the truth, and that it is only between mommy and daddy". This is the only possible remark which could be construed as disparaging, but it is the truth and the only way Appellant could answer his childs question.

This custody arrangement ended on October 26th 2000 in a hearing before Commissioner Bradford.

It should be noted that the Appellant's Attorney Mr. Robert Macri died in March of 2000, he was Appellants only attorney.

MOTION OCTOBER 26, 2000

Hearing October 26, 2000, Appellant before commissioner Bradford asked the court was not knowing why he was there that day, (transcript on motion 10-26-00, pg 1, lines 8-22, attachment # 2 ).

Ms. Marelius "I know Mr. Horton's problem is he probably hasn't received a copy of my motion because the mailing address he gave the court and me is apparently not a good address and I got one pleading



back at least." (see attachment # 2, pg 1, line 25, pg 2, lines 1-6).

**There was no bad address!** The Appellant recited into the record his address, and court records will reflect that this is the same address already in the court record. The same address that Appellant had received the letter from the court notifying him of the hearing Appellant was at this day. There was no bad address!

Ms. Marelius made false statements disparaging the Appellant. Appellant recognizes 17-18 false statements made by the Ms. Marelius, about the Appellant (attachment# 2 , Pg 4, lines 15-25 & Pg. 5, lines 1-25 & Pg. 6, lines 1-10 & Pg. 7 lines 15-19).

What transpired on this day was Appellee being granting of sole custody and a bifurcation of the fault divorce. Both objected to at the time of hearing by Appellant. Appellant brought up to the courts that the Appellant was seeking to have the marriage annulled (transcript on motion, attachment #2 , 10-26-00, pg. 12, lines 5-6).

Appellant did not have the benefit of counsel, and was looking.

The Appellant did not have the benefit of a copy of the motion and was thereby was blind sided by the Appellee's Attorney, in violation of Rule 5 (a) U.R.C.P..

Let it also be noted that these motion or pleadings are not found in the courts record.

Over the ensuing months the child spent so much time with the Appellee's mother that the child's teacher asked the Appellant who in your family speaks another language. This continued and continues to

this day that the child is a good deal of the time in surrogate care. That the Appellant has never, never been called and asked to care of his child.

For the next 18 months a lot of activity took place in this case. Appellant was unaware of most of it. Mr. Macri did not inform the Appellant of the proceedings. Between April thru August 1999, Appellant was in California and was unaware of court filings.

Appellant and Appellee had themselves modified the visitation schedule and the child was in California half of the time with Appellant. Appellee knew of course that Appellant was in California and yet filings continued as Appellee's attorney Ms. Marelius tried to file motions and orders. Why did Appellee not inform Ms. Marelius of Appellants current status.

#### DIVORCE STIPULATION/SETTLEMENT JUNE 29, 2001

The Appellant engaged the services of attorney Martin Tanner by the time of pretrial which Mr. Tanner attended and also represented the Appellant at trial June 29th, 2001, before the Honorable Judge Iwasiki.

Mr. Tanner telephoned the Appellant on or about June 12th 2001 and said he had just gotten the evaluation that he had read the evaluation and said that the Appellee and the Appellant were even except that Appellant was unable to have a home visit with the evaluator and that the Appellee therefore appeared more stable. The Appellant told Mr. Tanner he wanted to go to trial on custody. The Appellant asked about the custody evaluator and Mr. Tanner said he

would have the evaluator at the trial.

June 28th, 2001 Mr. Tanner telephoned Appellant and said he received a fax from Ms. Marelius a finding and fact and conclusions of law and a decree of divorce. Appellant told Mr. Tanner he was going to trial. That Appellant had the evidence for trial. Where Appellant lived ,Where child friends were in the neighborhood. Mr. Tanner said ok, and that they should meet the next morning at 8:30 am, June 29th, 2001.

Mr. Tanner did not show up to his office until 8:55 am and said they would go over it on the walking to the court house. Upon arriving at the court house that Appellants custody evaluator was not present, Mr. Tanner responded he could not be there.

Appellant was taken aback.

Mr. Tanner lead Appellant into a conference room and was followed by Appellant's brother a member of the LDS church with a temple recommend and the Appellant's mother.

Mr. Tanner went over with the Appellant the, findings and fact and conclusion of law. Appellant, Appellant's brother, Appellant's Mother and Mr. Tanner for the next hour worked out stipulations to not have a trial.

Mr. Tanner told the Appellant the importance of the Custody Evaluation and that the judge decides 99% of the time with the Evaluators decision.

Mr Tanner told Appellant he would lose in a trial!

That Appellant would owe \$5000 to \$6000 in attorneys fees for

Appellee. This fact untrue, the finding and fact, state; each party pays own attorneys fees.

The following stipulations were worked out

- 1) Mr. Tanner would guarantee that Appellant would get "FIRST RIGHT OF REFUSAL". That if child's mother could not be with her then the child could come home. Appellant proposed sceneries, example: "when the child is home and her mother has to work past the child's bedtime would child be able to stay home?" and Mr. Tanner responded that the Appellee would pick up the child after school the next day.
- 2) Appellant was told that he would have the child 1/3 of the year under the proposed visitation schedule.
- 3) That the child support arrears would be computed against child support owed to Appellant by Appellee.
- 4) That marital debt was to be dropped
- 5) The Appellant was concerned about future child support that some months Appellant made little money and others more money. That \$800 would be a base and fluctuate with Appellants income. Mr. Tanner lead Appellant to believe that child support was for taking care of health insurance and care of the child.

Appellant strongly objected to marital debts and that while the Appellant and the Appellee were living under the same roof Appellant paid all expenses. The birthing of the child was paid for by Baby your

Baby. Appellant therefore challenges the marital debt. Mr Tanner told Appellant this section would be dropped.

- 6) The Appellant was told by Mr. Tanner that the Judge would not hear evidence and grant an annulment because "he would not make a bastard out of the child". Appellant had a problem with irreconcilable difference and believed it would be adultly for the Appellee had already admitted to that (see attachment #3).

The Appellant, Mr. Tanner D. Troy Horton and Katharine Horton were in the conference room for about an hour several times Mr. Tanner got up to discuss Ms. Marelius stipulations adjustments a number of times.

In the court room before Judge Iwasiki Mr. Tanner addressed the court and refers to the findings and fact and decree of divorce that they "will constitute the settlement agreement with the parties with a couple additions" rec. 362 Pg. 1 lines 21-22).

Mr. Tanner begins with "disparaging remarks" (rec. 362, Pg. 1 line 24).

Note: This stipulation already covered in (rec. 274-284  
Facts and Findings pg 7, #12)

Mr. Tanner and continues with curd side visitation, (rec. 274-484  
Pg. 2 line 1),

Note: This stipulation already exists in writing (rec.274-284  
pg. 8 #12)

Mr. Tanner continues, "OTHER ITEMS"-- (rec. 362, Pg. 2 , line 9).

Mr. Tanner is then cut off mid-sentence by Ms. Marelius.

Ms. Marelius "And I want to add a couple of items". Ms. Marelius reads into the record "address and telephone number" (rec. 362, , Pg. 2 , line 14).

Note: This is already covered (rec.285-294 ,decree of divorce pg. 4 ,K).

Ms. Marelius reads into the record "petitioner is restrained from interfering with the child including school enrollment, health matters, child care and other custodial issues and that just comes right out of the temporary orders"

Note: These were never discussed and no temporary orders were ever discussed in the pretrial conference room.  
Appellant is unaware of what this is.

Ms. Marelius continues "restraint of derogatory, demeaning, negative comments"(rec. 362, Pg. 2 , lines 21-22).

Note: This is already covered (rec.274-284, facts and finding pg. 7 #12)

Ms. Marelius continues "we've also discussed telephone contact" (rec. 362, Pg. 2 , line 23).

Note: This is already covered (rec.285-294, decree of divorce pg. 3 ,L)

Appellants contention is that the stipulations which were read

into the record already existed in writing, within the facts and findings rec.274-284 and the decree of divorce rec.285-294. It makes the Appellant wonder if it were not just for show.

The court returns to Mr. Tanner, Mr Tanner is asked if there is anything further Mr. Tanner answers "NO YOUR HONOR". (rec.362, Pg. 3 lines 16-17).

Mr. Tanners "other items" (rec. 362, Pg. 2 , line 9). never got read into the record and therefore Ms. Marelius did not include them in the final draft of the finds and fact and the decree.

The Judge asks the Appellant " do you under the terms and conditions of this stipulated settlement? (rec. 362 Pg. 4 lines 5-8). Appellant answers "I think I understand them and I'll read through them when they're written up and I think everything has been agreed upon". (rec. #360, Pg. 4 lines 14-16). Appellant says "I'll read through them when they're written up". Nothing that we agreed to in the outer conference room before trial was read into the record. That is why the Appellant answered "when they are written up".

The Appellant relied on his attorney to get these facts into the findings and the decree. Those items which he negotiated in the pretrial conference room.

Is this a stipulated settlement when there are no stipulations? The stipulations which was read into the record already existed in the proposed facts and finding and the decree. Therefore, how can it be a stipulated settlement?

Appellant told his daughter that she is going to still live with her mom. But now if she wanted to come home instead of going to nana's or other babysitters she could. That if mommy is working or can not be with you and you want to come home, you can!

When the child told her mother what she understood about being able to come home, the Appellee called the Appellant. The Appellee said to the Appellant that this is not the case.

The Appellant then telephoned Mr. Tanner and left a message for him to call (July 3rd, 2001), no return call. Appellant again telephoned Mr. Tanner (July 5th, 2001), no return call. Appellant again telephoned Mr. Tanner (July 6th, 2001), again no return call. Appellant again telephoned Mr. Tanner (July 9th, 2001), and again no return call. Appellant sent fax to Mr. Tanner (July 12th, 2001), and again no response. Appellant finally received a letter from Mr. Tanner (dated Aug. 03, 2001, (see attachment #4) 6 days after the facts and findings and the decree were already signed by Judge Iwasiki.

Appellant due to Mr. Tanner's untimeliness in responding to Appellants calls, lost certain rights. to challenge findings and fact and the Decree. This untimeliness is a clear violation of responsibilities of the attorney client relationship. It should be noted here that the stipulations were mailed by Ms. Marelius on July 6th, 2001. Mr. Tanner mailed a note to Appellant on August 03, 2001 (see Attachment#4). Mr Tanner's untimeliness made it impossible for Appellant to challenge the judgments under Rule 59 of U.R.C.P.



Mr. Tanner said he guaranteed (at trial June 29th, 2001) that he would have in writing that Appellant would have first right of refusal or first right to tend and for the minor child to come home to Appellant when the mother could not be with her.

Only one of the stipulations which were agreed to in the pretrial conference were made apart of the Facts and Findings and Decree. The one on marital debt. Marital Debts was put back in by Commissioner Bradfords ruling on Appellants 60 (b) motion and in amending it to a 60 a motion clerical errors.

If this were correct, that it was an issue of clerical error, would not the Appellee have made her own 60 (a) motion for this \$2000.

And the most important stipulation First Right of Refusal was negated by Appellee's attorney **Ms. Marelius when she inserted a paragraph of her own device.** (rec. 285-294, paragraph 2, subparagraph (a) ). Appellant contends this paragraph 2a was inserted by Appellee's attorney Ms. Marelius after the question arose between the Appellant and the Appellee over the first right of refusal issue.

After trial June 29th, 2001 Mr. Tanner walks Appellant over to his office where Mr. Tanner drafts up an affidavit for Appellant to sign, stating that this way he could get into the record the evidence of marriage fraud (rec. 236-256).

Mr. Tanner withdrew as counsel on October 04, 2001.

HEARING ON MOTIONS DECEMBER 20, 2001

Appellant hired attorney Steven Kuhnhausen to file a (U.R.C.P. 60 b) motion to set aside. Appellant discussed the case with Mr. Kuhnhausen told him of the missing stipulations. Mr. Kuhnhausen said he could not go for all of the stipulations right now, but would file on the First Right of Refusal and the Child Support. Why Mr. Kuhnhausen would bring up all the missing stipulations Appellant does not know.

Mr. Kuhnhausen said that he had looked at the file and that Appellant was a "bad guy" that Appellant had kept her stuff. Appellant told Mr. Kuhnhausen that this was not true. Appellant recalled back to the first time, in front of Judge Iwasiki January of 1998 when Ms. Marelius made this statement to Judge Iwasiki.

Mr. Kuhnhausen was given the necessary documents to file and was told that Appellant's mother Katharine Horton (attachment # 5 ) and brother Troy Horton (attachment # 6) who were also in the pretrial conference room and that they would provide written statements as to what was promised by Mr. Tanner in pretrial conference.

Appellant brought these written statements with him to the hearing on Dec. 20, 2001.

Mr. Kuhnhausen told the Appellant that he could not show them to the court because Mr. Kuhnhausen did not have them 3 days before the hearing.

Mr. Kuhnhausen was aware of this evidence and at no time did Mr. Kuhnhausen inform the Appellant that he needed them before the

trial. This evidence was so germane to the case that the 60 b motion was denied. These written statements were the backbone of the case for the 60b motion to set aside.

In addition under Rule 37 of U.R.C.P. these written statements could and should have been admitted. Appellants contention is that by Mr. Kuhnhausen in not offering these written statements to the courts did not sufficiently represented the Appellant.

Mr. Kuhnhausen made a mistake in not supplying these written statements to the court.

In transcript (rec.362, pg. 4 lines 14-16) Appellant when asked by Judge Iwasiki if he understands and agrees responds "I'll read through them when they are written up and I think everything has been agreed to". This was said because what was told to Appellant, by Mr. Tanner, was not mentioned and Appellant was therefore looking to the drafted facts and findings and decree, "when they are written up". Mr. Kuhnhausen makes this fact available to the court in (rec. 363 pg.3 lines 24-25).

It was not brought up by Mr. Kuhnhausen in the hearing that Mr. Tanner at trial in addressing the court as to the pretrial conference that Mr. Tanner continues with "OTHER ITEMS-" and at this point is cut off mid sentence by Appellee's attorney Ms.Marelius (rec. 362 , pg.2 line 9). When the court returns to Mr. Tanner he claims he has nothing more.

The court goes on to questions the Appellant on not having filed a Rule 59 motion "and he now wants to fix this with a 60 b motion" and

that "he didn't do all the things to make this right" (hearing on motions 12-20-01, rec. 363 pg.28 lines 6-9). Again, Mr. Tanner did not mail to the Appellant until Aug 03, 2001 notice that he had received the paperwork from Ms. Marelius and therefore was unable to meet the 10 day rule, and rule 59 motion. The court recognizes that there is problems with this and leaves it to the Appellant to file a Malpractice against Mr. Tanner(rec. 363 hearing on motions 12-20-01, pg.29 lines 19-24) and again suggests that Appellant should have "objected the first time around"(rec. 363 hearing on motions 12-20-01, pg.29 lines 20-23). This is an abuse of discretion on the part of the court

It was however, clear to the courts that there were problems The court set it aside under a 60 (a) motion. That there was no mention as to para. 2 (a) in either the proposed facts and finding or the decree of June 28, 2001. The court thereby ordered that new facts and finding and conclusions of law and decree be drafted that mirror the tape.

This order thereby completely negates the efforts of parties and counsel in the, 1 hour long pretrial conference to work out stipulations, which were recognized by the courts in Judge Iwasiki remarks of "herculean efforts", (rec. 362 pg.1 line 12-13).

It should be noted that again Ms. Marelius made false and derogatory statements to the court about the Appellant. Ms. Marelius asserts that the Appellant is "basically homeless" (rec. 363 pg.16 line 14), that Appellant "lived in his car half of the time" (rec. 363 pg.17 lines 2-3). Again and again Ms. Marelius makes these untrue statements to

the court. These and other statements are completely untrue and displays a lack of candor to the courts by Ms. Marelius and is against the U.R.J.A. chapter 13, 3.3 (a) (1).

Appellant placed full faith and reliance in all of his attorneys Mr. Macri, Mr Tanner, Mr. Kuhnhausen that there representation could be relied upon 100%. Appellant spent good money for the guidance and to protect his interests. Appellant is aware now that mistakes by counsel were made and in the interest of Justice, Appellant asks to Appeal this matter before the courts.

### 3. Statement of Facts

October 23, 1996 Appellant filed an Complaint for Annulment of divorce, which included

- a. a temporary and permanent award of custody to Appellant.
- b. child support

November 05, 1996 Appellant obtained protective order to against Appellee.

December 22, 1998 Appellee files affidavit and obtains restraining order against Appellant. This restraining order was issued based on the affidavit of Appellee. Attorney for the Mr. Macri never made Appellant aware of this document. Appellant now aware of this document recognizes the absence of truth.

January 12, 1998 Joint custody is ordered by the courts. A custody evaluation is ordered.

October 26, 2000 Court grants sole custody of child to Appellee. In this hearing before Commissioner Bradford attorney for the Appellee Ms. Marelius makes 18 false statements and swayed the courts to award custody of the child to the Appellee.

Court also bifurcates the divorce. This is objected to Appellant. Appellant is seeking an annulment. Ms. Marelius states her client wants to get remarried! That she can not because there is no bifurcation or divorce. Court granted bifurcation and reserves for trial on issue of annulment (see attachment #2, pg. 15 lines 23-24).

To date, the Appellee has yet to marry Appellee lives with her boyfriend and Appellants daughter. The conduct of which is not legal in the State of Utah. And should have been ruled as such by the custody evaluator as to moral character.

This proceeding took place without the Appellant having been served with pleading or motions prior to the hearing and therefore was without due process, and Appellant did not have the benefit of counsel.

June 29th, 2001, at trial Mr. Tanner was representing Appellant and Ms. Marelius was representing Appellee.

In the court room before Judge Iwasiki Mr. Tanner addressed the court and refers to the findings and fact and decree of divorce that they "will constitute the settlement agreement with the parties with a couple additions" (rec.362, June 29, 2001, Pg. 1 lines 21-22).

Mr. Tanner begins with "disparaging remarks" (rec. 362, Pg. 1 line 24).

Note: This stipulation already covered in (rec. 301-331, Facts and Findings pg 7, #12)

Mr. Tanner and continues with curd side visitation, (rec. 362, Pg. 2 line 1),

Note: This stipulation already exists in writing (rec.301-331, findings and finding pg. 8 ,#12)

Mr. Tanner continues, "OTHER ITEMS"-- (rec. 362, Pg. 2 , line 9).

Mr. Tanner is then cut off mid-sentence by Ms. Marelius.

Ms. Marelius "And I want to add a couple of items".

Ms. Marelius reads into the record "address and telephone number contact" (rec. 362, Pg. 2 , line 14).

Note: This is already covered (rec.301-331, decree of divorce pg. 4 , K ).

Ms. Marelius reads into the record "petitioner is restrained from interfering with the child including school enrollment, health matters, child care and other custodial issues and that just comes right out of the temporary orders"

Note: These were never discussed and no temporary orders were ever discussed in the pretrial conference room.  
Appellant is unaware of what this is.

Ms. Marelius continues "restraint of derogatory, demeaning, negative comments"(rec. 362, Pg. 2 , lines 21-22).

Note: This is already covered (rec.301-331, facts and finding pg. 7 #12)

Ms. Marelius continues "we've also discussed telephone contact" (rec. 362, Pg. 2 , line 23).

Note: This is already covered (rec. 301-331, decree of divorce pg. 3, L )

Appellants contention. The stipulations which were read into the record already existed in writing, within the facts and findings and the decree of divorce. So, where is the stipulated settlement?

The court returns to Mr. Tanner, Mr Tanner is asked if there is anything further Mr. Tanner answers "NO YOUR HONOR". (rec.362, Pg. 3, lines 16-17).

Mr. Tanners "other items" never get read into the record and therefore Ms. Marelius did not include them in the final draft of the finds and fact and decree.

Mr. Tanner did not sign off on the finding and fact or the decree.

Mr. Tanner failed follow through with seeing that the findings and fact and decree represented that which was agreed to in pretrial conference.

Mr. Tanner failed to respond many phones calls and a fax sent by Appellant.

Mr. Tanner failed to communicate, with the Appellant until a letter dated August 03, 2001(see attachment#4). This was 6 days after the findings and fact and the decree had already been signed by Judge Iwasiki. Appellant was thereby denied his rights to file a rule 59 motion. HEARING ON MOTIONS DEC. 20, 2001.



Appellant files rule 60 b motion. Appellant represented by Mr Kuhnhausen and Appellee represented by Ms. Marelius.

The court recognized problems with the proceeding of June 29th, 2001 and ordered Appellants 60 b motion to be amended to a 60 a motion. Ms. Marelius is ordered to rewrite the findings and fact and the decree to mirror the the tape of rec. 362.

The court recognized potential malpractice of attorney by Mr. Tanner and under 60 b motion should ease should have been set aside.

Court ruled against Appellant on failure to take first steps and file a Rule 59 motion. This option was never available to Appellant due to the untimeliness of Mr. Tanner's contact with Appellant 9 days after the facts and findings and decree had already been signed.

### **SUMMARY OF ARGUMENTS**

#### **I. DID COUNSEL FOR THE RESPONDENT OFFER DEROGATORY AND UNTRUE STATEMENTS TO THE TRIAL COURT AND THEREFORE MISLEAD THE TRIAL COURTS AND PREJUDICE THE TRIAL COURTS BASED ON THESE UNTRUES.**

A lawyer shall not knowingly make a false statement of material fact or law to a tribunal. Ms. Marelius has again and again has made statements to the tribunal that are out and out untruth. It is the Appellants belief that these untrue statements have prejudiced the

trial court against the Appellant. These acts are a clear violation of Chapter 13, Rule 3.3 a (1) Ut. Rules of Judicial Review

In October of 2001 after hiring Mr. Kuhnhausen, Mr. Kuhnhausen after reading Appellants file told the Appellant that "you are a bad guy, that you kept "Appellee's stuff." This is was not true and if is in the court record than it is put there by Ms. Marelius.

In a hearing before Judge Iwasiki January 12, 1998 made a untrue statements including that the Appellee was not allowed to speak with her daughter on her birthday, this was also untrue.

Ms. Marelius in a hearing before Commissioner Bradford (December 26, 2000) made to the trial court 17-18 absolutely false statements.

Ms. Marelius before Commissioner Bradford (December 20, 2001) made 2 more absolutely false statements to the trial court, all to disparage the Appellant, all untrue. All contrary to Rule 3.3 a (4), Ut. Rules of Judicial Review

In the interest of truth and justice, the findings and fact and the decree should be set aside.

**II. DID THE TRIAL COURTS ABUSE ITS DISCRETION IN ITS REMOVAL OF PETITIONERS JOINT CUSTODY OF A MINOR CHILD, WITHOUT DUE PROCESS OF LAW AND DID THIS TERMINATION INFLUENCE LATER CUSTODY PROCEEDINGS.**

The Appellant was in court October 26, 2000 without benefit of

counsel and without any pleading as to the proceeding that day. No procedural due process existed this day for the Appellant. This in itself is in violation of Rule 5 (1) of URCP, which provides for procedural due process to protect the rights of the parties.

The findings merely recite that Appellee is a fit and proper person to awarded custody. There were no current findings as to what would be in the best interest of the child. The only current facts were false statements made by the Appellee's attorney. There was a two year old custody evaluation which the courts deemed insufficient at the time and ordered a follow-up evaluation. There had been no evidentiary hearing on the issue of custody to allow the court to hear and weigh evidence and judge the credibility of witnesses or an ability to confront the statements made by Ms. Marelius, nor is there a signed stipulation signed by the parties as to what those facts are. That custody was not tried by the commissioner upon anymore than hearsay facts presented by Ms. Marelius on that day that. "A mere finding that the parties are or are not "fit and proper persons to be awarded the care, custody and control" of the child cannot pass muster when the custody award is challenged and an abuse of the trial court's discretion is urged on appeal". (Martinez v. Martinez, 728 P.2d 994 (Utah 1986) at page 994.)

Appellant contends that, had custody not changed, that upon the newly ordered custody evaluation, the evaluator would have after 3 years of joint custody, left custody the same joint custody.

**III. DID THE TRIAL COURT ABUSE ITS DISCRETION IN  
BIFICATING PETITIONERS DIVORCE AND WITHOUT DUE PROCESS  
OF LAW?**

The Appellant was in court October 26, 2000 without benefit of counsel and without any pleading as to the proceeding that day. No procedural due process existed this day for the Appellant on Oct 26, 2000, a clear violation of Rule 5 (1) of URCP.

There was no due process on this day for the Appellant. And that these proceedings should not have manifested any decisions by the Court.

**IV. DID COUNSEL FOR THE PETITIONER ERR IN HIS  
REPRESENTATION OF THE RIGHTS OF THE PETITIONER AND  
JUSTICE.**

The Appellant arrived at court on June 29, 2001 expecting to go to trial. Upon his arrival the one witness he was expecting to have was the custody evaluator. It turns out that Mr. Tanner failed to invite the custody evaluator.

In pretrial conference Mr. Tanner attorney for the Appellant beat down the Appellant into working out stipulations that would at least give the Appellant more time with his child. Mr. Tanner negotiated 1) 'First Right of Refusal', 2) child support would be based on Appellants income and a base income of \$800 per mo., 3) That Appellant would have custody of 1/3 of the year, 4) that marital debt was to be dropped 5)

that back child support for Appellee was to be offset by back child support owed to Appellant.

Mr. Tanner failed to read into the record the agreed stipulations.

Mr. Tanner failed to see that these stipulations were put into the drafted finding and fact and decree.

Mr. Tanner failed to timely forward on to Appellant the finding and facts and the decree drafted by the Appellee's attorney.

**V. DID THE TRIAL COURT'S ABUSE ITS DISCRETION IN ITS REFUSAL TO HEAR EVIDENCE TO PROVIDE THE PETITIONER WITH THE OPTION OF AN ANNULMENT IN HIS MARRIAGE AND THEREBY ABUSE THE RIGHTS OF THE PETITIONER.**

This point of issue rests squarely on Rule 102 of Utah Rules of Evidence. Appellant on the issue of seeking an annulment of his marriage was told by Commissioner Bradford, on Oct 26th, 2000, "with that later on it may be changed to a decree of annulment if you prove your case" (see attachment #2, pg. 15 lines 23-24). At trial June 26th before Judge Iwasaki Appellant is told judge will not allow evidence on this matter (see attachment # 3 ).

Rule 102 of U.R.E., states, "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined".

Under Rule 502 U.R.E. (4),(B). (iii) Petitioner was denied his right to provide evidence.

In a letter to Appellant Mr. Tanner writes "Judge Iwasiki was not about to revisit his decision to enter a divorce decree and made that clear several times" (see attachment # 3 ).

**VI. DID COUNSEL MISREPRESENT PETITIONER IN HIS UNTIMELINESS IN FORWARDING ON THE SUPPLEMENTAL DECREE OF DIVORCE CAUSING PETITIONER TO LOOSE CERTAIN RIGHTS UNDER THE LAW?**

Utah Code of Judicial Administration Rule 1.4 (a), states a lawyer shall keep a client reasonable informed about the status of a matter and promptly comply with reasonable requests for information.

Mr. Tanner not only did not return phone calls and a fax to the Appellant between the 3rd of July, 2001 and the 16th of July 2001 but did not communicate with the Appellant until a letter dated August 03, 2001(see attachment #4 ). This was 6 days after the Judge had already signed off on the findings and fact and the decree. 3 days in the mail and you are at the 10 days to file a rule 59 motion under U.R.C.P.. This lack of promptness by Appellant's attorney is misrepresentation and therefore qualifies under 60 (b).

The Appellant should not be held hostage by ineffectiveness of counsel and the 60 (b) motion should have been granted and set aside.

**VII. THE TRIAL COURT'S REFUSAL TO SET ASIDE THE JUDGMENT ENTERED AGAINST THE PETITIONER WAS CONTRARY TO CONCEPTS OF JUSTICE AND EQUITY AND AN ABUSE OF DISCRETION BECAUSE THE PROCESS OF JUSTICE HAD GONE AWRY BECAUSE OF INCOMPETENCE OF COUNSEL SO THAT MANIFEST INJUSTICE WAS THE RESULT.**

Commissioner held against the Appellant in seeking the 60 (b) motion hearing of December 20th, 2001 "Appellant didn't do an objection. He didn't do all of the things you're suppose to do to set it right. He's asking now to fix it by 60 (b), I am denying the 60 (b) motion"(rec. 363, pg. 28, lines 6-9).

Commissioner Bradford "be it malpractice issue or not" (rec. 363, pg. 29 line 19), therefore doubt existed and again should have been set aside under attorney neglect or malpractice.

The Appellant had telephoned Mr. Tanner and left a message for him to call (July 3rd, 2001), no return call. Appellant again telephoned Mr. Tanner(July 5th,2001), no return call. Appellant again telephoned Mr. Tanner (July 6th,2001), again no return call. Appellant again telephoned Mr. Tanner (July 9th, 2001), and again no return call. Appellant sent fax to Mr. Tanner (July 12th, 2001), and again no response. Appellant finally received a letter from Mr. Tanner (dated Aug. 03, 2001, see attachment # 4 ) 6 days after the facts and findings and the decree were signed by Judge Iwasiki.

## **VIII. DID THE TRIAL ABUSE ITS DISCRETION IN NOT GRANTING PETITIONER ATTORNEYS FEES?**

Statement of the Rule: 4-911, 2 (a),(c). U.R.J.A. The court may grant the motion if the court finds that: (a). the moving party lacks the financial resources to pay for costs and fees; (c). the costs and fees are necessary for the proper prosecution of defense of the action. Under this rule and the need of the Appellant should have been granted attorneys fees. The court told Appellee's attorney Ms. Marelius "I'm going to set you back to exactly what the video says"(rec. 363 pg 30 lines 3-4).

That without this action Ms. Marelius paragraph 2a would have stood. It was removed and the motion 60 (b) action was necessary for it to be removed. The trial court therefore should have awarded attorneys fees.

### **ARGUMENT**

#### **I. DID COUNSEL FOR THE RESPONDENT OFFER DEROGATORY AND UNTRUE STATEMENTS TO THE TRIAL COURT AND THEREFORE MISLEAD THE TRIAL COURTS AND PREJUDICE THE TRIAL COURTS BASED ON THESE UNTRUES.**

In Rule 4.1 (a), Ut. Rules of Judicial Review, It clearly states that the making of a false statement of a material fact. Chapter 13, Rule 3.3 a (1) Ut. Rules of Judicial Review, states: A lawyer shall not knowingly make a false statement of material fact or law to a tribunal and Rule 3.3 a (4)

Ms. Marelius has again and again has made statements that are



out and out untruths. The Appellant believes that these untrue statements have prejudiced the trial court against the Appellant.

In October of 2001 after hiring Mr. Kuhnhausen, Mr. Kuhnhausen after reading Appellants file told the Appellant that "you are a bad guy, that you kept "Appellee's stuff." This is was not true and if is in the court record than it is put there by Ms. Marelius.

In a hearing before Judge Iwasiki January 12,1998 made a untrue statements including that the Appellee was not allowed to speak with her daughter on her birthday, this was also untrue.

Ms. Marelius in a hearing before Commissioner Bradford (December 26, 2000) made to the trial court 17-18 absolutely false statements.

Ms. Marelius before Commissioner Bradford (December 20, 2001) made 2 more absolutely false statements to the trial court, all to disparage the Appellant, all untrue. All contrary to Rule 3.3 a (4), Ut. Rules of Judicial Review

In the interest of truth and justice, the findings and fact and the decree should not be used as a vehicle by which to rewrite history. That these untruths prejudiced the custody evaluator and therefore produced an inaccurate evaluation.

**II. DID THE TRIAL COURTS ABUSE ITS DISCRETION IN ITS REMOVAL OF PETITIONERS JOINT CUSTODY OF A MINOR CHILD, WITHOUT DUE PROCESS OF LAW AND DID THIS TERMINATION**

### **INFLUENCE LATER CUSTODY PROCEEDINGS.**

There was no due process for the Appellant on this day and that any action by the court was an abuse of the Appellants rights.

Rule 5 (1) of URCP provides that papers shall be served upon all parties and that without service due process was not proper process.

That had custody remained constant and therefore reflected period of 3 years of joint custody, without problems, the custody would have been different. And in the absence of the untruths made apart of the record by Appellee, and based on the joint custody guidelines provided by this state, (Utah code 30-3-10), custody would have been given to the Appellant.

### **III. DID THE TRIAL COURT ABUSE ITS DISCRETION IN BIFURCATING PETITIONERS DIVORCE AND WITHOUT DUE PROCESS OF LAW?**

There was no due process for the Appellant on this day and that any action by the court was an abuse of the Appellants rights.

Rule 5 (1) of URCP provides that papers shall be served upon all parties and that without service due process was not proper process.

According to 75 Am Jur 2d Statute 133, states that a bifurcation of a divorce in matrimonial cases is not suggested and cites Finkel v. Finkel, 120 Misc 2d 936, 466 NYS2d 906.

### **IV. DID COUNSEL FOR THE PETITIONER ERR IN HIS**

## **REPRESENTATION OF THE RIGHTS OF THE PETITIONER AND JUSTICE.**

Counsel for the Appellant failed to provide the custody evaluator to be present at the time of trial.

Counsel for the Appellant failed to read into the record those stipulation which were negotiated in pretrial conference, thereby denying Appellant those stipulations.

Counsel for the Appellant failed to return phone calls on half a dozen occasions.

Counsel for the Appellant failed to attempt to notify Appellant of the proposed findings and fact and the decree until 6 days after the findings and fact and the decree had already been signed by the Judge.

This untimeliness caused Appellant to lose rights under the law in regards to the rule 59 motion, a fact which was later held against the Appellant in the lower court.

In United States v. Tucker, 716 F.2d 576 (9th Cir.1983) paragraph 50, ineffective assistance of counsel: "did counsel act in a reasonably competent and effective manner and, if not, was his incompetence prejudicial to the defense".

That the Appellant was prejudiced by his attorney's representation. That the untimeliness by which the attorney represented the Appellant, causing the Appellant to lose the right to file a Rule 59 motion. Appellant was later denied a rule 60 (b) motion based on this lack of diligence by the lower court.

**V. IS THE TRIAL COURT'S ABUSE ITS DISCRETION IN ITS REFUSAL TO HEAR EVIDENCE TO PROVIDE AN PETITIONER WITH AN ANNULMENT OF THE MARRIAGE AND ABUSE THE RIGHTS OF THE PETITIONER.**

It was stipulated by the court on October 26, 2000 that addressing the annulment of the divorce would be reserved for trial.

At trial through Mr. Tanner, Appellant is told that the Judge will not listen to evidence on the issue of annulment and make a bastard out of the child. Utah law provides (Utah Code Ann.sec. 30-1-17.2) that if an annulment is obtained the child is still considered legitimate in the eyes of the court.

Utah Rules of Evidence, Rule 102 states, "promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined". The federal rules of evidence Article IV. Rule 402, states: "All relevant evidence is admissible".

In a hearing before commissioner Bradford October 26, 2001 the right to seek an annulment was reserved by the court for trial. (see attachment #2). At trial Appellant was told by his Attorney that the Judge will not revisit his decision the divorce (see attachment # 3)

This is an abuse of the rights of the petitioner by the courts! And, the judgment should be set aside.

**VI. DID COUNSEL MISREPRESENT PETITIONER IN HIS UNTIMELINESS IN FORWARDING ON THE SUPPLEMENTAL DECREE**

**OF DIVORCE CAUSING PETITIONER TO LOOSE CERTAIN RIGHTS  
UNDER THE LAW.**

Utah Code of Judicial Administration Rule 1.4 (a), states a lawyer shall keep a client reasonable informed about the status of a matter and promptly comply with reasonable requests for information.

Mr. Tanner did not attempt to notify the Appellant until 6 days after the facts and findings and decree had already been signed. Thereby, removing the rights of the Appellant to file a rule 59 motion. This apparent lack of action on the part of the Appellant was held against the Appellant by the courts in hearing before commissioner Bradford, where she sites;The court goes on to questions the Appellant on not having filed a Rule 59 motion "and he now wants to fix this with a 60 b motion" and that "he didn't do all the things to make this right" (hearing on motions 12-20-01, rec. 363 pg.28 lines 6-9). Again, Mr. Tanner did not mail to the Appellant until Aug 03, 2001 notice that he had received the paperwork from Ms. Marelius and therefore was unable to meet the 10 day rule, and rule 59 motion. The court recognizes that there is problems with this and leaves it to the Appellant to file a Malpractice against Mr. Tanner (rec. 363 , pg.29 lines 19-24) and again suggests that Appellant should have "objected the first time around"(rec. 363 hearing on motions 12-20-01, pg.29 lines 20-23). This single failure on the part of Appellants counsel resulted in a prejudice toward the Appellant by the court and therefore the judgment should be set aside.

**VII. THE TRIAL COURT'S REFUSAL TO SET ASIDE THE JUDGMENT ENTERED AGAINST THE PETITIONER WAS CONTRARY TO THE CONCEPTS OF JUSTICE AND EQUITY AND AN ABUSE OF DISCRETION WHERE THE PROCESS OF JUSTICE HAD GONE AWRY BECAUSE OF INCOMPETENCE OF COUNSEL THAT MANIFEST IN JUSTICE WILL RESULT OTHERWISE?**

Utah law recognizes that "under exigent or exceptional circumstances which appear to have resulted in an injustice, the court may be justified in granting a new trial" because of the negligence of counsel. Jennings v. Stoker, supra at page 913.

In recognizing this rule, the Jennings Court cited the earlier case of Maltby v. Cox Construction Co., 598 P2nd 36 (Utah 1979). In concurring opinion which was joined by two other justices, Chief Justice Crocket stated as follows:

The purpose of all court proceedings is, of course to do justice. If the processes have so clearly gone awry that an injustice has resulted, the court in charge of the trial, or the Court on review, should rectify such an unfortunate occurrence, whether the proceedings is criminal or civil.

In so saying, I am aware that it is generally said that mistake, error of judgment or negligence of counsel in presenting or defending a case is not sufficient cause of vacating a judgment and granting a new trial.

However, consistent with the principle stated above, it is held that,

under exigent circumstance, incompetence or negligence of counsel which appears to have resulted in an injustice, will justify the granting of a new trial. (at page 341, 342)

Ms. Marelius lack of candor to the tribunal.

Mr. Tanner's lack of follow through with respect to: 1) reading into the record the stipulations negotiated and agreed to by the parties, in the one hour long pretrial conference, and the 2) lack of response to repeated attempts of contact by the Appellant, and the 3) untimeliness in which Mr. Tanner contacted Appellant about the findings and fact and decree should be sufficient cause to remand for further proceeding and that the rule 60 b motion should have been granted.

Mr. Kuhnhausen's failure to provide the Appellant to present evidence supporting his Rule 60 b motion is neglect or a mistake and should have been presented by counsel under Rule 37 of U.R.C.P. This therefore adds to the validity of Appellants claim and justifies the granting of the judgment to be set aside.

#### **VIII. DID THE TRIAL COURT ABUSE ITS DISCRETION IN NOT GRANTING PETITIONER ATTORNEYS FEES?**

Statement of the Rule: 4-911, 2 (a),(c). U.R.J.A. The court may grant the motion if the court finds that: (a). the moving party lacks the financial resources to pay for costs and fees; (c). the costs and fees are necessary for the proper prosecution of defense of the action.

The rule 60 (b) motion was necessary to have removed the

paragraph 2 (a) (rec.285-294) which was devised by Ms. Marelius to take away those rights which were guaranteed to Appellant for visitation. The court agreed with Appellant and Ms. Marelius was ordered to redraft the findings and fact and the decree. Attorneys fees should therefore should have been granted.

### **CONCLUSION**

The trial court has apparently abused the rights of the Appellant on a number of occasions. First, on October 26, 2000 when orders were made against the Appellant, without the Appellant having had the benefit counsel or procedural due process. Second, when the trial apparently denied the Appellant the right to present evidence. Third when the trial court refused to grant Appellants 60 (b) motion even with the question of apparent attorney malpractice.

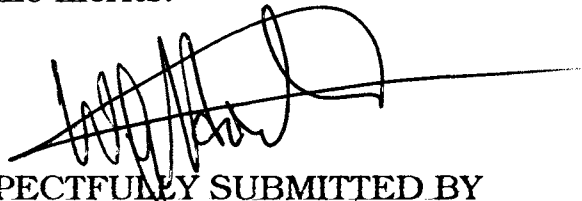
At trial the Appellant was most poorly represented by counsel. Mr. Tanners failure to read into the record the agreed upon stipulations, his total lack of response to Appellants attempts to reach him, and his gross incompetence with respect to providing the Appellant the finding and fact and decree days after they were already singed off by the judge.

At hearing on Appellants 60 (b) motion, Mr. Kuhnhausen's failure to allow Appellant to provide evidence germane to Appellants case. These results are a shameful indictment of a system gone awry that the interests of justice and the best interests of the child have been lost.



This court should set aside the Facts and Findings and  
Conclusions of Law and the Decree Divorce and allow this matter to be  
fairly decided, and the Appellant a trial on the merits.

Dated this 09<sup>th</sup> day of December 2002.



RESPECTFULLY SUBMITTED BY  
Walter John Horton  
Pro-Se

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of the  
appellant has been sent to Suzanne Marelius the counsel for the  
Appellee in this matter, by US mail to the below address:

Littlefield and Peterson  
c/o Suzanne Marelius  
426 South 500 East  
Salt Lake City, UT 84102

by:



Walter J. Horton

## **APPENDIX / ATTACHMENTS**

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Walter Horton

Petitioner's Name

962114 320 So # 216

Address (may be omitted for privacy)

511 1st St

City, State, ZIP

3643018

Telephone (may be omitted)

FILED DISTRICT COURT  
Third Judicial District

NOV 05 1996

SALT LAKE COUNTY

By

K. Sample  
Deputy Clerk

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

Walter Horton

WALTER HORTON  
Petitioner,

vs.

Tamrika Khutishashvili

TAMRIKA KHUTISHASHVILI  
Respondent.

PROTECTIVE ORDER

Civil No. 960906856 SA

Judge Wrasaki

This matter came for hearing on 10/21/96, before the undersigned. The following parties were in attendance:

☒ Petitioner      ☐ Petitioner's attorney Robert M. ...  
☒ Respondent      ☐ Respondent's attorney \_\_\_\_\_

The Court having reviewed Petitioner's Verified Petition for Protective Order and:

\_\_\_\_\_ having received argument and evidence,

☒ having accepted the stipulation of the parties

\_\_\_\_\_ having entered the default of the Respondent for failure to appear

and it appearing that domestic violence or abuse has occurred,

IT IS HEREBY ORDERED:  
(The Judge or Commissioner shall initial  
each section that is included in this Order.)

~~INA~~ 1. The Respondent is restrained from attempting, committing, or threatening to commit abuse or domestic violence against Petitioner.

\_\_\_\_\_ 2. The Respondent is restrained from attempting, committing, or threatening to commit abuse or domestic violence against the following minor children and members of Petitioner's family or household:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

TNA ☒ 3. The Respondent is prohibited from directly or indirectly contacting, harassing, telephoning, or otherwise communicating with the Petitioner.

TNA ☒ 4. *except on visitation*  
The Respondent shall be removed and excluded, and shall stay away, from Petitioner's residence, and its premises, located at:

*3669 Oakwood Dr. except for visitation*  
and Respondent is prohibited from terminating or interfering with the utility services to the residence.

\_\_\_\_\_ 5. The Respondent is ordered to stay away from the school, place of employment, and/or other places, and their premises, frequented by Petitioner, the minor children and the designated household and family members. These places are identified by the following addresses:

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_ 6. The Court having found that Respondent's use or possession of a weapon may pose a serious threat of harm to Petitioner, the Respondent is prohibited from purchasing, using, or possessing a firearm and/or the following weapon(s):

\_\_\_\_\_

\_\_\_\_\_ 7. The Petitioner is awarded possession of the following residence, automobile and/or other essential personal effects:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

This award is subject to orders concerning the listed property in future domestic proceedings.

8. An officer from the following law enforcement agency: \_\_\_\_\_ shall accompany Petitioner to ensure that Petitioner safely regains possession of the awarded property.
9. An officer from the same law enforcement agency shall facilitate Respondent's removal of Respondent's essential personal belongings from the parties' residence. The law enforcement officer shall contact Petitioner to make these arrangements. Respondent may not contact the Petitioner or enter the residence to obtain any items.
10. The Respondent is placed under the supervision of the Department of Corrections for the purposes of electronic monitoring. Within 24 hours of the execution of this Order, the Department of Corrections shall place an electronic monitoring device on Respondent and shall install monitoring equipment on the premises of Petitioner and in the residence of Respondent. Respondent is ordered to pay to the Department of Corrections the costs of the electronic monitoring required by this Order. The Department of Corrections shall have access to Petitioner's residence to install the appropriate monitoring equipment.

RESPONDENT'S VIOLATION OF PROVISIONS "1" THROUGH "10" MAY BE A CLASS A MISDEMEANOR.

Petitioner is granted the following temporary relief (provisions "a" through "l") which will (expire/be reviewed by the court) \_\_\_\_\_ days from the date of this order:

TNA

- ☒ a. The Petitioner is granted custody of the following minor children:

Dagny Hnta b. 1/8/95

TNA

- ☒ b. Visitation shall be as follows: To be arranged - reasonable  
According to Respondent's Schedule

\_\_\_\_\_ c. The Respondent is restrained from using drugs and/or alcohol prior to or during visitation.

TNA ☒ d. The Respondent is restrained from removing the parties' minor child/ren from the state of Utah.

TNA ☒ e. The Respondent is ordered to pay child support to the Petitioner in the amount of \$ pending divorce pursuant to the Utah Uniform Child Support Guidelines.

\_\_\_\_\_ f. The Respondent is ordered to participate in mandatory income withholding pursuant to Utah Code Annotated § 62A-11, Parts 4 and 5.

\_\_\_\_\_ g. The Respondent is ordered to pay one-half of the minor child/ren's day care expenses.

\_\_\_\_\_ h. The Respondent is ordered to pay one-half of the minor child/ren's medical expenses including premiums, deductibles and co-payments.

\_\_\_\_\_ i. The Respondent is ordered to pay Petitioner spousal support in the amount of \$ \_\_\_\_\_.

\_\_\_\_\_ j. The Respondent is ordered to pay Petitioner's medical expenses, suffered as a result of the abuse in the amount of \$ \_\_\_\_\_.

\_\_\_\_\_ k. The Respondent is ordered to pay the minor child/ren's medical expenses, suffered as a result of the abuse in the amount of \$ \_\_\_\_\_.

\_\_\_\_\_ l. Other: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Violation of provisions "a" through "l" may subject Respondent to contempt proceedings.**

\_\_\_\_\_ 11. The Division of Child and Family Services is ordered to conduct an investigation into the allegation of child abuse.

\_\_\_\_\_ 12. Other: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

TNA ✓ 13. Law enforcement agencies with jurisdiction over the protected locations shall have authority to compel Respondent's compliance with this Order, including the authority to forcibly evict and restrain Respondent from the protected areas. Information to assist with identification of the Respondent is attached to the Appendix to this Order.

TNA ✓ 14. Respondent was afforded both notice and opportunity to be heard in the hearing that gave rise to this order. Pursuant to the Violence Against Women Act of 1994, P.L. 103-322, 108 Stat. 1976, 18 U.S.C.A. 2265, this order is valid in all the United States, the District of Columbia, tribal lands, and United States Territories.

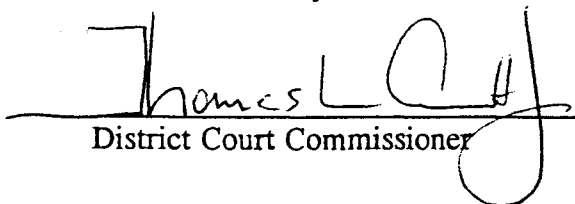
TNA ✓ 15. Three years after the date of this order, a hearing may be held to dismiss the remaining provisions of the order. Within 30 days prior to the end of the three-year period, the Petitioner should provide the court with a current address, which address will not be made available to Respondent.

DATED: 10-21-96

BY THE COURT:

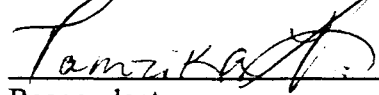
  
DISTRICT COURT JUDGE

Recommended by:

  
District Court Commissioner

10/21/96  
Date

By this signature, Respondent approves the form, and accepts service, of this Protective Order and waives the right to be personally served.

  
Respondent

Serve Respondent at:

1322  
E 1284 E 400 S upstairs (rear)  
SLE UT 84102

TNA ✓ 13. Law enforcement agencies with jurisdiction over the protected locations shall have authority to compel Respondent's compliance with this Order, including the authority to forcibly evict and restrain Respondent from the protected areas. Information to assist with identification of the Respondent is attached to the Appendix to this Order.

TNA ✓ 14. Respondent was afforded both notice and opportunity to be heard in the hearing that gave rise to this order. Pursuant to the Violence Against Women Act of 1994, P.L. 103-322, 108 Stat. 1976, 18 U.S.C.A. 2265, this order is valid in all the United States, the District of Columbia, tribal lands, and United States Territories.

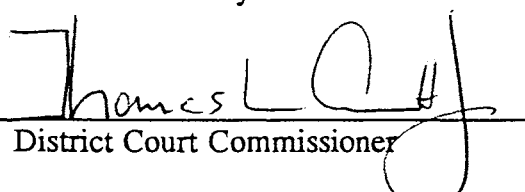
TNA ✓ 15. Three years after the date of this order, a hearing may be held to dismiss the remaining provisions of the order. Within 30 days prior to the end of the three-year period, the Petitioner should provide the court with a current address, which address will not be made available to Respondent.

DATED: 10-21-96

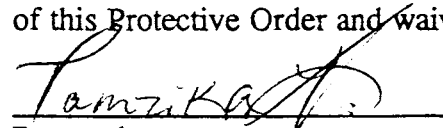
BY THE COURT:

  
DISTRICT COURT JUDGE

Recommended by:

  
District Court Commissioner      Date 10/21/96

By this signature, Respondent approves the form, and accepts service, of this Protective Order and waives the right to be personally served.

  
Respondent

Serve Respondent at:

1322  
E 1284 E 400 S upstairs (rear)  
SLC UT 84102





Salt Lake County Sheriff's Office  
Court Services Division



**RETURN OF SERVICE**

STATE OF UTAH }  
COUNTY OF SALT LAKE } s.s. SHERIFF'S OFFICE

☒ Original  
☐ Amended  
☐ Duplicate

1) SERVED Tamara Khushushuli ☒ Defendant ☐ Plaintiff  
☐ Witness ☐ Garnishee (3rd Party) ☐ Defendant ☐ Plaintiff ☐ Other \_\_\_\_\_

2) DATE RECEIVED 10-26-96 3) DATE SERVED 11-2-96

4) PROCESS ☐ Summons ☐ Complaint ☐ Criminal summons ☐ Amended summons ☐ Amended complaint  
☐ Verified complaint ☐ Order to show ☐ Sup-order ☐ Small claims—order & affidavit ☐ Order ☐ Garnishment  
☐ Notice ☐ Civil subpoena ☐ Affidavit ☐ Motion ☐ Petition ☐ Notice of hearing ☐ Information ☐ Testimony  
☐ Garnishee Order ☐ Criminal Subpoena ☐ Notice of Seizure ☒ Other Prot/Order  
☐ Decree ☐ Certificate ☐ Citation ☐ Exhibits ☐ Declaration

5) TYPE OF SERVICE ☒ Personal ☐ Left at residence with \_\_\_\_\_  
(name & relationship)

\_\_\_\_\_ at usual place of abode with a person of suitable age and  
discretion there residing ☐ Posted (see item 9) ☐ Company or Corp. \_\_\_\_\_  
(name & title)

\_\_\_\_\_ ☐ Other \_\_\_\_\_

6) LOCATION OF SERVICE 1332 E 400 S - Rear - Upstairs - Top ☒ Home ☐ Business  
☐ Other \_\_\_\_\_ (Specify, jail, hospital, etc.)

7) ☒ I further certify that at the time of service, on copy served, I endorsed the date, signed my name and official title thereto.

8) ☐ I tendered a fee of \$ \_\_\_\_\_, & took receipt which is hereto attached.

9) ☐ Mailed a copy of notice, postage prepaid, to said defendant on (date) \_\_\_\_\_  
at given address, (see item 6), by clerk \_\_\_\_\_

AARON D. KENNARD, Sheriff of Salt Lake County, State of Utah

DOCKET # 96-146074  
PROCESSED BY jm  
SHERIFF'S FEES:  
Service \$ \_\_\_\_\_  
Mileage \$ mtc  
Total \$ \_\_\_\_\_

I certify that the forgoing is true and correct and that this certificate  
is executed on (date) 11-4-96

By [Signature]  
(Deputy Sheriff)

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

---

WALTER JOHN HORTON,	:	Case No. 964904582 - DA
	:	
Petitioner,	:	Appellate Case No. 20020275-CA
	:	
v	:	
	:	
TAMRIKA KHVTISIASHVILI,	:	
	:	
Respondent.	:	

---

MOTION OCTOBER 26, 2000

BEFORE

COMMISSIONER SUSAN BRADFORD

---

*Attachment 2*

---

CAROLYN ERICKSON, CSR  
CERTIFIED COURT TRANSCRIBER  
1775 East Ellen Way  
Sandy, Utah 84092  
801-523-1186

**COPY**

APPEARANCES

For the Petitioner:

PRO SE

For the Respondent:

SUZANNE MARELIUS  
ATTORNEY AT LAW

\* \* \*

1 SALT LAKE CITY, UTAH - OCTOBER 26, 2000

2 COMMISSIONER SUSAN BRADFORD PRESIDING

3 P R O C E E D I N G S

4 THE COURT: Tamrika K. matter, and my apologies,  
5 ma'am, I would slaughter your name and it would be embarrassing  
6 for me and you would probably be insulted so I won't go there.

7 Go ahead, counsel.

8 MR. HORTON: I have a question before the Court if I  
9 may get an understanding of that before she continues?

10 THE COURT: What's the question, sir?

11 MR. HORTON: The law in motion,

12 THE COURT: Well, what does that mean?

13 MR. HORTON: Is that what we're doing here today?

14 THE COURT: What this is is parties may file for  
15 temporary relief while the case is pending and the law and  
16 motion is where people make motions and then there's a decision  
17 made on that while you're getting your case brought to trial  
18 and so this is sort of an interim step while you're waiting for  
19 your case to be completed. I hope that suffices. It's sort of  
20 an abbreviated -

21 MR. HORTON: - motions are something new since our  
22 last meeting within your chambers?

23 THE COURT: No. Most of this has always been in the  
24 law. It's just something that they brought today.

25 MS. MARELIUS: I know Mr. Horton's problem is he

1 probably hasn't received a copy of my motion because the  
2 mailing address he gave the Court and me, is apparently not a  
3 good address and so I got one pleading back at least. I think  
4 I've sent him three things. I got one thing back that said no  
5 such address, so I'm still a little uncertain as to that  
6 mailing address. So he may be confused about what's before the  
7 Court today. I know that he has consulted with counsel because  
8 an attorney spoke with me and said Mr. Horton, you know, talked  
9 to me about this OSC and when it was but now apparently he's  
10 not retained that attorney. So, I was a little concerned about  
11 notice but I think it's his duty to keep the Court informed and  
12 I would ask again that Mr. Horton give us a valid mailing  
13 address.

14 THE COURT: That is correct. And before we go on, Mr.  
15 Horton, for the record, what is your address?

16 MR. HORTON: It is 450 East Slade Place, 84102.

17 THE COURT: And it is your affirmative duty, sir, if  
18 you change addresses, phone numbers, you must let the Court  
19 know and counsel know that you have done that.

20 MR. HORTON: I understand.

21 THE COURT: It is presumed that that's a good  
22 address.

23 MR. HORTON: My bills arrive there. I receive mail  
24 there.

25 THE COURT: Go ahead, counsel.

1 MS. MARELIUS: I'm glad to have that. Your Honor, we  
2 were before you September 11 in this case for a Pretrial. Mr.  
3 Horton was present by himself at that time and the Court  
4 entered some orders, gave him 10 days to file a Financial  
5 Declaration, which he has not done; five days to return  
6 journals to my client, which he didn't do; three weeks to  
7 return property to the grandmother, which he didn't do; and  
8 ordered the parties to cooperate with an updated custody eval.

9 I was hoping after that, those admonishments, those  
10 deadlines by the Court, we may have an attorney on board or  
11 some effort to settle this and none of that happened. In fact,  
12 Mr. Horton went to California for 30 days so he just left and  
13 we've continue to have problems in this case.

14 The other piece of new information is I contacted the  
15 custody evaluator for an update. Apparently DCFS has one part-  
16 time social worker doing these. He had eight cases ahead of  
17 this. He said, if you're lucky, I'll start March, April,  
18 Spring and based on that I just could not imagine my client  
19 going that long or these parties without a temporary order in  
20 place. We've never had that. We had a protective order that  
21 long expired and a visitation order, so given the level of  
22 problems we're having, we just must have a temporary order.

23 I also ask this Court to certify it for trial. I  
24 think you probably did. You suggested an update but I jut  
25 think it's intolerable for these folks to wait that long and I

1 would like to just go ahead to Judge Iwasaki at this point, I  
2 mean, after this. He may send up back to the updated, you  
3 know, along those lines, but I think we have enough to complete  
4 the case.

5 So with that background, what we are requesting today  
6 is that petitioner - I'm sorry - respondent be awarded sole  
7 custody of this five and a half year old child. Astonishing as  
8 it is, we had one and half year old marriage and a four year  
9 separation. This case has been pending all that time. They've  
10 had a three day/four day exchange visitation order which worked  
11 pretty well most of the time for a child under five, not in  
12 school. As time has gone on, the child has been more and more  
13 with my client as Mr. Horton has been more and more in  
14 California and I would submit that there's no question that she  
15 is primary caretaker. That was certainly the finding of the  
16 custody evaluator that was dated April, '98 and these events of  
17 more time with my client have been certainly subsequent to  
18 that.

19 It's also very telling, parties have been under a  
20 Court order for four years. What do they do in those four  
21 years? My client has maintained a stable residence,<sup>3</sup>  
22 employment. She's had a couple jobs. She's always had  
23 earnings, income. She's been at the University of Utah  
24 maintaining a 3.8 average. She's just doing very well in the  
25 categories of having a goal in life and working towards it.

1 She's also entered into a new relationship and is now living  
2 with her fiancée'. She would love to get married. She can't  
3 because we don't have a bifurcation or a divorce here.

4 So, in those four years, my client I think has  
5 accomplished a lot. She's also been the sole financial support  
6 of this child.<sup>3</sup> She has done all of the caretaking,<sup>4</sup> all of the  
7 health appointments,<sup>4</sup> all of the arrangements for that.<sup>4</sup> She's  
8 enrolled the child in school.<sup>1</sup> As soon as that happened, we  
9 started to have a higher degree of interference. Mr. Horton  
10 thought she should skip kindergarten, be in first grade, tried  
11 to withdraw her a couple of times. My client finally convinced  
12 the school not to do that.<sup>4</sup> He's since changed her schedule at  
13 kindergarten, making her stay another hour without consulting  
14 my client and we don't think that's appropriate.

15 The big problem now by contrast is Mr. Horton - and  
16 I'm not even sure he's going to be arguing for custody today,  
17 but he has done nothing in four years. He had no job and no  
18 home four years ago.<sup>2</sup> He still has no job and no home.<sup>10</sup> I  
19 consider him homeless.<sup>4</sup> During the visits he seems to take the  
20 child in his car and drive between restaurants and coffee  
21 shops. When he has overnights, it's always at a home of a  
22 relative.<sup>1</sup> Most recently it's been at his brother's home and  
23 that could change. He has a father in the area too and so he  
24 does not have a home for the child and the child has no room or  
25 particular attachment to these relatives which is a very big



1 contrast to my client.<sup>11</sup> He's never provided any support,<sup>12</sup> never  
2 shown us that he can do that.<sup>13</sup>

3 His profession is apparently one of an inventor and a  
4 remodeler. His longest point of residing someplace was in a  
5 home he was remodeling that my client had real concerns about.<sup>14</sup>  
6 It was a construction site<sup>15</sup> with nails and equipment all around  
7 and she was very uncomfortable with the child visiting there.  
8 And at this point, I don't think Mr. Horton has met any basic  
9 standard of being a presentable custodial parent. So we seek  
10 sole custody.

11 I also believe we need to have a standard right of  
12 visitation here. This year we've had ten months this year. I  
13 think it's fair to say he spent half the year in California and  
14 so I think the visitation order should be no more than standard  
15 but my client would also accommodate his availability and she's  
16 shown a very great willingness to do that with this three and  
17 four days thing. We've not been to Court a thousand times on  
18 conflicts and contempt so I think we can trust in her to do  
19 that if there is a long absence.

20 Visitation I think has to be very limited here. I  
21 mean, not limited but defined so it is at a location that my  
22 client knows. The brother's home is fine. If it's going to be  
23 at a home or location other than that, I think she needs to  
24 know. If it's going to overnight, she should check it out in  
25 advance because we've had, you know, as I've indicated

1 historical concerns on the kind of dwelling he thinks is  
2 appropriate.

3 Child support has never been paid. I would like to  
4 file with the Court a copy of a worksheet based on my client.  
5 She filed a Financial Declaration. She earns \$1,416 a month.  
6 I am assessing minimum wage for Mr. Horton to support amount of  
7 \$141 and I think it's important that we begin that process of  
8 support order and see what happens.

9 I think the standard provisions, they have shared  
10 child care costs. It's not been a problem but that should be  
11 ordered. Sharing of out of pocket health insurance premiums  
12 and payments should be ordered. Restraint from petitioner  
13 interfering with school enrollment and the relationship between  
14 the child and mother must be ordered. We've had some very  
15 disturbing episodes. The child is telling the mother "Daddy  
16 tells me he hates you but I love you, <sup>16</sup>mom." And this shouldn't  
17 be happening. She's clearly having some emotional control here  
18 by the father and that really is terrible. <sup>17</sup>

19 We also have Mr. Horton dropping in unannounced. <sup>18</sup>The  
20 child, you know, he suggests the child calls him and says bring  
21 over my book or something. We need to have it very clearly  
22 understood that visitation is on the standard schedule or other  
23 times previously agreed, that he's not to just stop by the  
24 home.

25 Number 7, maintain addresses and telephone numbers.

1 I think we've made that request clear. Restraint from  
2 derogatory comments in the presence of the child. We've  
3 requested bifurcation. I, you know, or to just move ahead to  
4 trial. Both of those would be great.

5 And then Number 10, we've sought costs and fees in  
6 this matter. We're happy to reserve that for trial. We really  
7 are a little in the dark on the income issues as there's been  
8 no Financial Declaration.

9 And then last, we would request contempt for the  
10 refusal to return the journals and the grandmother's property  
11 and I think since you did also include the Financial  
12 Declaration be ordered within 10 days of September 11, that's  
13 not been done, I would reiterate that we need that ASAP. But I  
14 think for that contempt we should be awarded sanctions and  
15 attorney's fees for that.

16 If I might approach and hand you the support  
17 worksheet.

18 THE COURT: And counsel, for your review, it came to  
19 us, I believe it was this morning, it is a Financial  
20 Declaration affidavit of Mr. Horton. It's a very quick one  
21 page affidavit and in it he has a Financial Declaration. It  
22 looks like his monthly income is \$1,183.58 if I'm reading it  
23 correctly.

24 MS. MARELIUS: Okay.

25 THE COURT: But he has provided that. I'll let you

1 look at this now and then we'll make a copy for you.

2 MS. MARELIUS: Thank you, and I can just - maybe I'll  
3 take this back and (inaudible). Thank you.

4 THE COURT: Okay. Mr. Horton, your comments, sir.

5 MR. HORTON: Well, it's a little difficult to  
6 memorize all that Tamrika's attorney has gone over. I'd like  
7 to take them line by line.

8 THE COURT: Sir, I'm going to urge you as I urged  
9 everyone at the top of the hour, I have four minutes until the  
10 2:00 calendar starts and there's still another case to go.  
11 That means I'm going to have you go through this quickly. I  
12 have read what you've submitted, just tell me briefly if you  
13 have disagreements with what they've stated. If you do -

14 MR. HORTON: Absolutely.

15 THE COURT: - hit those points.

16 MR. HORTON: Let's take the contempt charge. It  
17 bothers me the most. I was at Tamrika's home at the specified  
18 time, the specified date, she was not there. I left a note on  
19 the doorstep, said I leave tonight for California to finish my  
20 job, we'll have to take care of it. She never mentioned  
21 anything. I put in my affidavit to the Court that I would  
22 bring those to Court today.

23 THE COURT: Do you have them with you?

24 MR. HORTON: Of course, so that everything can be  
25 taken care of before Your Honor so that no longer can I be

1 accused of -

2 THE COURT: Do you have the videos? Do you also have  
3 the videos, sir?

4 MR. HORTON: Yes, I do.

5 THE COURT: So you have journals, diaries and the  
6 photocopies of -

7 MR. HORTON: Personal properties which belong to  
8 Tamrika and I do have, I also have a receipt for property which  
9 I've altered. I'd like her to initial that it agrees that  
10 she's received things back. I changed the dates of course  
11 because she was not available on the other day.

12 It is true that I did work in California a good part  
13 of this summer. (inaudible) however, was with me for at least  
14 60 days of that time. Not being around, with Tamrika's having  
15 broken her leg, I've been doing all of the shuttling back and  
16 forth from Dagny to day care to Tamrika, to picking Tamrika up  
17 from her work or a class and taking her to her home, delivering  
18 Dagny at a time when it's convenient for Tamrika because of  
19 other obligations and no one else to take care of her. Of  
20 course, if there is ever a time when Tamrika cannot take care  
21 of her, I've always said that I am there to do so. The only  
22 exception is when I happen to be out of town working this past  
23 summer which is not an unusual thing. I don't go out of town  
24 like that necessarily for work. It has happened but this was a  
25 job for my sister and she was going through a difficult time

1 and her husband had passed away.

2 THE COURT: I don't need to hear about it. I just  
3 need you to stay very close to the facts.

4 MR. HORTON: Okay. As far as custody, as far as  
5 getting a separation done, I'd like at this time to submit  
6 photocopies supporting the reason per the request for an  
7 annulment for the marriage. And I have a few things here which  
8 if you read over, starting with the first one where she names  
9 me by name as being a good candidate to marry, for getting into  
10 the country.

11 THE COURT: Okay. Mr. Horton, on these issues, have  
12 you shown first of all these documents to counsel? Do you have  
13 a copy for her today?

14 MR. HORTON: No.

15 THE COURT: And the issue of an annulment is not  
16 before me today. That issue is something that will be  
17 determined at trial.

18 MR. HORTON: My attorney passed away, excuse me for  
19 interrupting, but my attorney passed away.

20 THE COURT: I know.

21 MR. HORTON: These copies were all that's in the file  
22 that I received from him. I assumed that they had gone to  
23 opposing counsel at that time. I've been trying to get this  
24 thing happening since 1996 and for two years while Dagny was in  
25 my sole custody, Tamrika was going back and forth with an

1 attorney, Mr. Allred, hiring him, firing him, hiring him and it  
2 put it off for years which you can read from the docket -

3 THE COURT: Tell me about custody. Do you challenge  
4 her having sole custody?

5 MR. HORTON: Yes, I do, Your Honor, and I seek to  
6 have this married annulled. I have an appointment with, not an  
7 appointment, but in two weeks I'll be meeting with immigration  
8 and her status is questionable. She does not have a valid  
9 status and therefore, I don't believe that custody should be  
10 awarded to someone who may be subject to deportation at their  
11 decision. According to one officer, she's out of status at  
12 this time and here illegally and subject to deportation.

13 THE COURT: Okay. So that would be hearsay.

14 MR. HORTON: She's not high on the priority list,  
15 however. So I still have custody to the best of my knowledge.  
16 She gave up custody three years ago when I first started this  
17 thing. I understand that only was valid for six months, I  
18 found out recently, but we have had this shared visitation. It  
19 is really difficult, emotional abuse toward my daughter from  
20 her mom. I can quote something last night. She -

21 THE COURT: Sir, that would be hearsay. I don't want  
22 to hear that.

23 MR. HORTON: Well, so is opposing counsel's statement  
24 on the same issue.

25 THE COURT: I want you to stay to the point. I'm

1 getting what you're saying.

2 MR. HORTON: Okay. Because of Tamrika's illegal  
3 status, possible illegal status, according to immigration law,  
4 she should not have custody of my child, our daughter, and  
5 therefore, I don't agree that the Court should give it up.  
6 I've always been there for my daughter. I had sole custody for  
7 two years while Tamrika was doing whatever else with her life  
8 and it wasn't until January of '98 when I was shot down when  
9 Judge Iwasaki was first assigned to this case and I first saw  
10 him.

11 THE COURT: Sir, let me ask you a question. Where  
12 you live presently, is it a place that you are remodeling?

13 MR. HORTON: No, I am not. When Dagny is with me, I  
14 live with my brother. He has a home up in Olympus.

15 THE COURT: Okay. And so that's where you would go  
16 when you have the child?

17 MR. HORTON: Yes, uh-huh (affirmative).

18 THE COURT: Okay.

19 MR. HORTON: And his children are there as well part  
20 of the time. He has only - so she has a good atmosphere.

21 THE COURT: I've heard enough unless you have  
22 anything more, Mr. Horton?

23 MR. HORTON: No, I suppose not.

24 THE COURT: Okay. Thank you, sir.

25 Counsel, I'm prepared to make a recommendation unless



1 you have something further and I will let you review this and  
2 we can make a copy of this for the Court.

3 Before the Court today is respondent's motion. She  
4 is seeking full custody. I'll note that this case has been  
5 going on what seems a lifetime. You've now been separated  
6 longer than your entire marriage. It continues to go on. It  
7 has to be greatly frustrating to everyone here. So that being  
8 the case, and I'm quite certain that Judge Iwasaki would  
9 request and want an update on the custody evaluation;  
10 therefore, since that looks like it is at least six to seven  
11 months off, minimum, and that's to start it, I'm going to  
12 address the custody issue and note that Judge Iwasaki very  
13 clearly left the issue of temporary custody up to the  
14 Commissioner and stated that earlier when he made his ruling on  
15 January 23, '98. That being the case, the child is now five  
16 and a half. She is school age. A three day/four day swap  
17 between the two is not in the best interest of this child. It  
18 simply is not. That is not - stability building is not  
19 consistent. It is disruptive to a child that is school age at  
20 this point and I think I heard both of you agree to the same  
21 point there.

22 MR. HORTON: Your Honor -

23 THE COURT: Sir, sit down. At this point I am giving  
24 my recommendation. If you have comments afterwards, I will  
25 entertain them, but not now.

1           For the child's best interest, the stability favors  
2 the mother. She's in one place. She is financially stable.  
3 The father is self-employed, has moved around, has been in  
4 California this year, has had more than one residence on  
5 several occasions. Stability favors the mother so therefore  
6 she is granted the temporary sole custody of the minor child.  
7 The father will have the statutory visitation. He is to take  
8 the child when he has the child overnight to the brother's home  
9 which he stated is where he is enjoined, seeing the child when  
10 he has her. Child support shall be set according to the  
11 mother's income of \$1,416 a month and the father's, I believe  
12 I've given you that copy, if memory serves me, it was \$1,183,  
13 but if you will prepare a worksheet as to those numbers. Per  
14 statute you will divide any day case costs equally, the same as  
15 to medical insurance and uninsured.

16           The issue of bifurcation, knowing that Judge Iwasaki  
17 will be adamant about a custody update, I see that there is no  
18 good reason not to bifurcate this.

19           MR. HORTON: What is the word?

20           THE COURT: It's a bifurcated divorce, sir, and what  
21 that means is I'm going to grant that a decree of divorce be  
22 entered in this case and I know you're asking for an annulment  
23 and with that condition that later on it may be changed to a  
24 decree of annulment if you prove your case, sir. At this point  
25 in time, you may proceed and prepare the paperwork for a

1 bifurcated decree of divorce. All issues in this case will be  
2 reserved to trial and specifically health insurance. You are  
3 not to change the coverage or effect one another's coverage  
4 effectuated through this bifurcation. Retirement issues,  
5 specifically a death benefit is not to be changed because of  
6 this bifurcation and lastly, the valuation of the marital  
7 estate is reserved until -

8 MR. HORTON: The what?

9 THE COURT: The valuation of the marital estate is  
10 reserved, sir.

11 MR. HORTON: What does that mean?

12 THE COURT: That means that anything that you have  
13 property wise is reserved until the time of trial. Otherwise,  
14 it would be for today and that doesn't make sense to me. You  
15 want it reserved until trial and that doesn't prejudice either  
16 of you.

17 Moving on. There will be no attorney's fees for  
18 today. The issue of contempt I believe has been resolved. Mr.  
19 Horton has brought with him the journals, diaries, and tapes  
20 and I believe you can take those matters out in the hall,  
21 exchange them, and sign off on the various paperwork but it  
22 looks like it's been provided. I believe those are the issues  
23 that were asked for.

24 Have I missed anything, Counsel?

25 MS. MARELIUS: We did want a restraint, Your Honor

1 from interference with the school and in the relationship  
2 between the parent and the child, restraint of derogatory  
3 comments, keep informed of address and phone.

4 THE COURT: And all of those things are appropriate  
5 and it should be a mutual restraining order on derogatory  
6 comments. Neither of you should make comments like that to a  
7 child. You should both keep one another appraised and the  
8 Court of your address and phone numbers and certainly there  
9 should be no interference with the child at school and other  
10 relationships that she has with both of you.

11 Thank you very much.

12 MS. MARELIUS: I'll prepare an order. Thank you.

13 THE COURT: Thank you.

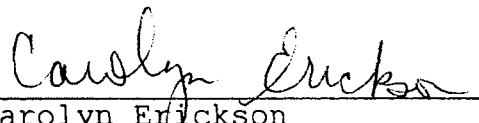
14 (Whereupon the hearing was concluded)  
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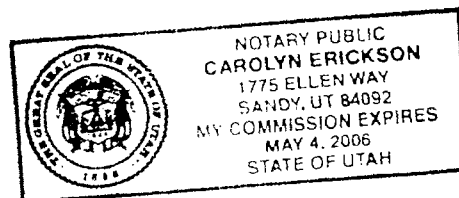
CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearing held before Commissioner Susan Bradford was transcribed by me from an audio tape and is a full, true and correct transcription of the requested portion of the proceedings as set forth in the preceding pages to the best of my ability.

Signed this 26<sup>th</sup> day of August, 2002 in Sandy, Utah.

  
Carolyn Erickson  
Certified Shorthand Reporter  
Certified Court Transcriber

My Commission expires May 4, 2006



# MARTIN S. TANNER

Admitted to Practice Law in  
ARIZONA  
CALIFORNIA  
DISTRICT OF COLUMBIA  
UTAH

ATTORNEY AT LAW  
340 BROADWAY CENTER  
111 EAST BROADWAY  
SALT LAKE CITY, UTAH 84111-5250

TELEPHONE:  
(801) 575-7100  
FACSIMILE:  
(801) 575-7150

October 4, 2001

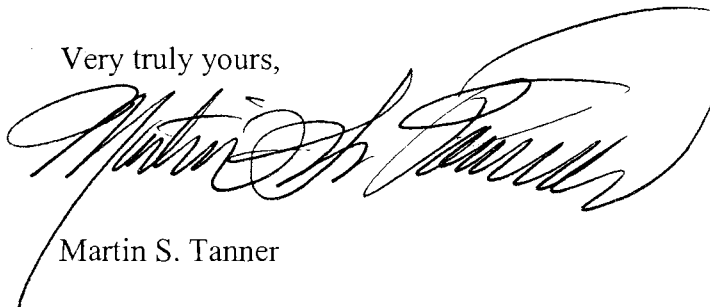
Walter Horton  
3357 Bernada Drive  
Salt Lake City, UT 84124  
Cell: (801) 558-1276  
Work: (801) 428-1777

Dear Walter:

Enclosed, please find, as you requested, a copy of your file. You will also find a copy of my withdrawal as your counsel in this matter. I am withdrawing, immediately for several reasons. First, you do not seem to like my advice. You have told me that you wanted to fight for an annulment, despite the fact that a divorce decree was entered in this case before I was ever contacted by you. Judge Iwasaki was not about to revisit his decision to enter a divorce decree and made that clear several times. Had we tried, he indicated in chambers to me and Suzanne Marelius at the pretrial conference that he would likely award costs and fees to your former wife. Second, you seem to want to revisit the stipulation agreed upon in open court. This cannot be done. Third, although I have told you that if your former wife is not acting as ordered in the supplemental decree of divorce, especially with respect to the advisory guidelines in connection with visitation, you have not taken my advice to schedule a hearing and take her back to court. Fourth, you are behind in your financial obligations.

Walter, I sympathize with your situation. You obviously care a great deal about your daughter and I hope you can have more time with her in the future. I wish you all the best in your future endeavors.

Very truly yours,



Martin S. Tanner

MST/as

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# MARTIN S. TANNER

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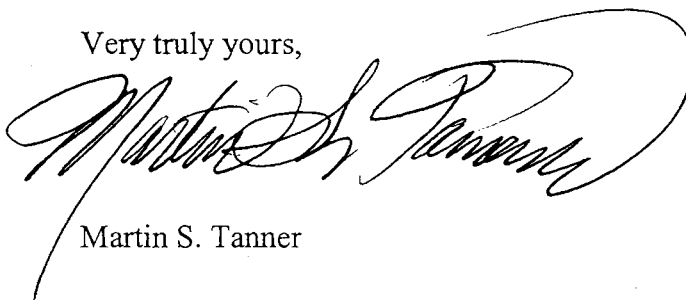
August 3, 2001

Walter Horton  
3357 Bernada Drive  
Salt Lake City, UT 84124  
Cell: (801) 558-1276  
Work: (801) 428-1777

Dear Walter:

Our offices have received in the mail a copy of the proposed Supplemental Findings of Fact, Conclusions of Law and Decree of Divorce from Suzanne Marelius. They appear to me to be consistent with the stipulation we reached in court to settle your case. If you would like to personally review them, please contact me so that you can come in and review them. I will hold them until I hear from you. We have ten days from the date of this letter to object if you believe they are not consistent with our agreement.

Very truly yours,



Martin S. Tanner

MST/as

C:\Domestic\HortonWalter\WalterHorton Letter1

To: Walter J. Horton

December 20, 2001

These are my recollections of your discussion and events with your attorney Martin Tanner in the pre-trial room on June 29, 2001. Also present was D. Troy Horton, my other son.

- 2 Walter was expecting to go to trial for physical custody of his daughter, Dagny Alexandria Horton. He was also asking for an annulment of his marriage to Tamriko Khvtisiashvili.
- 3 Walter's representing attorney Mr. Tanner was insistent that Walter give up on the annulment portion because "this Judge won't make a bastard of Dagny."
- 4 Walter had understood that the custody evaluator would be in court. He had not been subpoenaed. The custody evaluator had seen a school drawing by Dagny showing her-self wanting to live with her Dad.
- 5 The final assurance in regard to custody was that Walter would have Dagny anytime Tamriko was not able to be with her. "In other words, Dagny would be with Walter rather than being left with, grandma, Mom's boyfriend or an outside caretaker" when Tamriko works later or is unable to be with Dagny. "The father has preference over other care givers."
- 6 Walter feeling comfortable that Dagny would have more consistency in her life with the above arrangement of care, agreed to Dagny being with either her mother or himself. Attorney Tanner also stated that with standardized visitation Walter would have Dagny 1/3 of the time.

7 There was a discussion as to the legal term for the disillusion of marriage with Mr. Tanner stating it would be "irreconcilable differences" and Walter feeling fraud or adultery should be indicated. Walter, recognizing he was losing each of his concerns without being heard on any of his areas of facts was reluctant to accept "divorce." The attorney stated that if he goes to trial it would be \$5-6,000 in court costs and attorney fees. The attorney was not willing to present any of the facts Walter had of evidence because the "Judge was not interested." He stated he would get Walter's documents filed with the proceeding's documents so they would be apart of the court records. This was reluctantly acceptable to Walter.

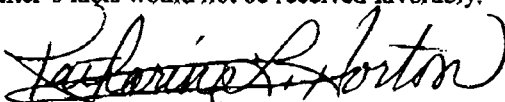
8 Finally child support was addressed. Child support was to be based on Walter's income of \$800 per month. Child support would be for the maintenance of Dagny, her child care and health insurance. Back child support was brought up with Walter asking about the two years that he was the provider and received no financial support.

9 In the court room Attorney Tanner began by saying an agreement had been reached without verbally spelling out what was agreed upon. At no time in the court proceedings were the areas of agreement from the pre-trial room verbalized.

10 Walter is an excellent parent. His concern is for Dagny's well being and her ability to grow to a well adjusted healthy adult. He has not kept Dagny from Tamriko or her grandmother as evidenced by the period when he was the sole caretaker from the time she was one to three years old. He felt it was important for Dagny to know her Mom so he took Dagny to Tamriko and grandma.

11 Walter's attorney was insistent that Walter would not get custody of Dagny, saying there was no reason for the Judge to change custody. Walter felt he should never have lost custody in the first place and wanted to be heard in this area. Attorney Tanner was in and out of the pre-trial room which made it difficult to maintain a flow of discussion. There was a tremendous sense that the Judge was annoyed by the length of time it was taking to come to agreement and further delays would only make him angrier. This time consuming process would make the Judge find against Walter and any of Walter's facts would not be received favorably.

Submitted by:

  
Katharine L. Horton  
916/780-5441



12-19-01

Re: June 29<sup>th</sup> 2001 Client Conference

To Whom It May Concern:

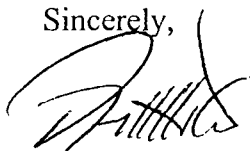
1 I, Troy Horton, was present on June 29<sup>th</sup>, 2001 in a conference between Walter Horton and Martin Tanner (attorney) on the details of the decree of divorce, as well as with my mother Katharine L. Horton.

2 It was clearly promised in that conference that the decree would be written up with the stipulation that Walter would be the first right of refusal to care for Dagny in the event that her mother was unavailable. It was made very clear that Walters fear was that once the divorce was final that if it was not in writing that the mother would take away that right and place Dagny in the care of Dagny's grandmother on her mothers side. Mr. Tanner assured Walter he would read the stipulations to the Judge to ensure that happened.

3 I know the issues and concerns of Walter, which were many (i.e. the above, reason for the divorce being annulment not irreconcilable differences-divorce, child support, phone contact, school involvement etc), and with each one that was brought up the attorney chided Walter and told him that the Judge was not going to rule in his favor on some of those issues stating, "that the court was not going to make a bastard out of the child and therefore an annulment was not going to be permitted, and that if he didn't agree to the decree as it currently stood with a few minor modifications that he would likely loose the chance to get the simple things as well." It was clear to me that Mr. Tanner was trying to pressure Walter into just folding and giving in. I spoke up at that point and told Mr. Tanner that I didn't personally think the Judge cared if it took 30 minutes or 2 hours to negotiate and work out the details. This decree is a forever document and if it is going to take a few extra minutes to get it right then so be it. All parties need to have the patience to do what is right and fair. Mr. Tanner then addressed the issues Walter wanted and wrote them down on his note pad to discuss with Tamrika's attorney as stipulations to be entered in the decree.

4 Not all of the stipulations Walter requested were even read to the Judge and before long it was over and in the hallway Walter was in tears wondering what just happened, feeling he'd been railroaded into the divorce leaving him without custody when clearly in my mind he should have never lost it in the firstplace.


Sincerely,



D. Troy Horton

*signed before me this  
19<sup>th</sup> day of Dec, 2001.*

*Joanne R. Douglas*  
Notary Public  
**JOANNE R. DOUGLAS**  
2091 Brent Lane  
Salt Lake City, Utah 84121  
My Commission Expires  
January 28, 2006  
State of Utah



#### **Rule 1.4. Communication.**

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

#### **Rule 3.3. Candor toward the tribunal.**

- (a) A lawyer shall not knowingly:

- (1) Make a false statement of material fact or law to a tribunal;

#### **Rule 3.3. Candor toward the tribunal.**

- (a) A lawyer shall not knowingly:

- (4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

#### **Rule 4.1. Truthfulness in statements to others.**

- In the course of representing a client a lawyer shall not knowingly:

- (a) Make a false statement of material fact or law to a third person; or

- (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

#### **Rule 4-911. Motion and order for payment of costs and fees.**

- (2) The court may grant the motion if the court finds that:

- (A) the moving party lacks the financial resources to pay the costs and fees;

- (C) the costs and fees are necessary for the proper prosecution or defense of the action; and

### **UTAH RULES OF EVIDENCE**

#### **ARTICLE I. GENERAL PROVISIONS**

## **Utah Rules of Civil Procedure**

### **Rule 5. Service and filing of pleadings and other papers.**

(a) Service: When required.

(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

## **Utah Rules of Civil Procedure**

### **Rule 37. Failure to make or cooperate in discovery; sanctions.**

(f) **Failure to disclose.** If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court may order any other sanction, including payment of reasonable costs and attorney fees, any order permitted under subpart (b)(2)(A), (B) or (C) and informing the jury of the failure to disclose.

## **PART I. JUDICIAL COUNCIL RULES OF JUDICIAL ADMINISTRATION**

### **CHAPTER 13. Rules of PROFESSIONAL CONDUCT.**

#### **Rule 1.1. Competence.**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

#### **Rule 1.2. Scope of representation.**

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, a lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

## **Rule 102. Purpose and construction.**

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

## **Rule 502. Husband-wife.**

(4) *Exceptions.* No privilege exists under subparagraph (b) of this rule:

(B) *Furtherance of crime or tort.* As to any communication which was made, in whole or in part, to enable or aid anyone

(iii) to conceal a crime or a tort;

## **Federal Rules of Evidence**

### **Article I**

## **Rule 102. Purpose and Construction**

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

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Section 133:

At first blush, a matrimonial action would appear to be most susceptible to bifurcation. In most such actions, a point is reached where there is no real dispute over ending the marriage itself. Most divorce actions could be settled if it were not for the task of resolving the ancillary issues such as custody.....

Accordingly, while bifurcation is an attractive procedural device in many tort proceedings, such is not the case in matrimonial disputes.