

1992

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Larry R. Keller; Larry R. Keller & Associates; Attorney for Appellee.

John Walsh; Attorney for Appellant.

Recommended Citation

Brief of Appellee, *Woodard v. Fazzio*, No. 920456 (Utah Court of Appeals, 1992).
https://digitalcommons.law.byu.edu/byu_ca1/4417

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

BRIEF

ITAI
DOCUMENT
F U

IN THE UTAH COURT OF APPEALS

0
A10
DOCKET NO. 920456 -----oo0oo-----

IN THE MATTER OF THE INTEREST :
OF :

RICHARD ANTHONY FAZZIO,
DOB: 9/17/1986 :

KIM (FAZZIO) WOODWARD, :

Plaintiff and Appellee, :

vs. :

RICHARD CAMERON FAZZIO, :

Defendant and Appellant. :

COURT APPEALS NO. 920456CA

-----oo0oo-----
BRIEF OF APPELLEE
-----oo0oo-----

Appeal from the Third District Juvenile Court
in and for Summit County
State of Utah

Judge Olof A. Johansson - Presiding

Appeal from the Third Judicial District Court
in and for Salt Lake County
State of Utah

Judge Homer F. Wilkinson - Presiding

-----oo0oo-----
JOHN WALSH
Attorney for Defendant/Appellant
2319 Foothill Drive, #270
Salt Lake City, Utah 84109
Telephone: (801) 272-8425

Priority Classification No. 4

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

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

IN THE MATTER OF THE INTEREST :
OF :

RICHARD ANTHONY FAZZIO,
DOB: 9/17/1986 :

KIM (FAZZIO) WOODWARD, :

Plaintiff and Appellee, : COURT APPEALS NO. 900626CA

vs. :

RICHARD CAMERON FAZZIO, :

Defendant and Appellant. :

-----oo0oo-----

BRIEF OF APPELLEE

-----oo0oo-----

Appeal from the Third District Juvenile Court
in and for Summit County
State of Utah

Judge Olof A. Johansson - Presiding

Appeal from the Third Judicial District Court
in and for Salt Lake County
State of Utah

Judge Homer F. Wilkinson - Presiding

-----oo0oo-----

JOHN WALSH
Attorney for Defendant/Appellant
2319 Foothill Drive, #270
Salt Lake City, Utah 84109
Telephone: (801) 272-8425

Priority Classification No. 4

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

TABLE OF CONTENTS

STATEMENT SHOWING JURISDICTION	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	1
DETERMINATIVE STATUTE	2
NATURE OF THE CASE AND COURSE OF PROCEEDINGS	2
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	10
ARGUMENT	11
POINT I	11
DEFENDANT MISCONSTRUES AND MISUNDERSTANDS THE DECISION OF THE UTAH COURT OF APPEALS IN THE ORIGINAL APPEAL OF THIS CASE.	11
POINT II	15
THE TRIAL JUDGE’S AMENDED FINDINGS OF FACT SUPPLE- MENTING HIS ORIGINAL FINDINGS OF FACT IN THIS MATTER ARE SUFFICIENT TO JUSTIFY HIS CONCLUSIONS OF LAW AND JUDGMENT OF TERMINATION OF PARENTAL RIGHTS IN THIS CASE.	15
POINT III	30
ON REMAND, THE LOWER COURT ADDRESSED EACH AND EVERY CONCERN OF THE COURT OF APPEALS.	30
CONCLUSION	48
APPENDIX	

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<u>Gittens v. Lundberg</u> , 284 P.2d 1115 (Utah 1955)	23
<u>In the Interest of J.C.O. v. Anderson</u> , 734 P.2d 458, 462 (Utah 1987)	46
<u>State Ex Rel. Summers Children v. Wulffenstein</u> , 560 P.2d 331 (Utah 1977)	46
<u>State Ex. Rel. J.R.T. v. Timperly</u> , 750 P.2d 1234 (Utah App. 1988)	46
<u>State In Interest of D.M.</u> , 790 P.2d 562, (Utah App. 1990)	2, 12
<u>State, In Interest of M.S. v Lochner</u> , 815 P.2d 1325 (Utah App. 1991)	46
<u>State In Interest of M.S. v. Salata</u> , 806 P.2d 1216 (Utah App. 1991)	45
<u>State in Interest of P.H. and M.H. v. Harrison</u> , 783 P.2d 565 (Utah App. 1989)	12, 13, 14
<u>Woodward v. Fazzio</u> , 823 P.2d 474 (Utah App. 1991)	1, 3, 11, 16, 30, 31, 46, 47
 <u>STATUTES</u>	
U.C.A. § 78-2a-3(2)(c)	1
U.C.A. § 78-3a-48(2)	2
U.C.A. § 78-2a-3(2)(h)	1
U.C.A. § 78-3a-48	2
 <u>OTHER AUTHORITIES</u>	
J.I.F.U. § 3.12 (1957)	23

STATEMENT SHOWING JURISDICTION

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

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Plaintiff/Appellee strongly disagrees with the Statement of the Issues as presented by Defendant/Appellant in his opening brief. Defendant makes the statement that one issue is: "[H]as Plaintiff caused the lower court to blatantly violate this Court's mandate?" Plaintiff argues that such is not an issue in this case, because the lower court has made its decisions independently after input from the parties. Plaintiff's conduct in persuading the lower court judge as to the correctness of her position is not at issue in this matter.

The other claims by Defendant as to the Statement of the Issues constitute argument, and Plaintiff vehemently disagrees that the standards to be involved in this Court's review involve legal correctness as the Defendant argues.

Only one single issue is involved in this appeal: Did the trial judge, the Honorable Olof A. Johansson, Third District Juvenile Court Judge meet the requirements of the Utah Court of Appeals in its first decision in this case found at 823 P.2d 474 (Utah App. 1991) filed December 9, 1991, by providing "more detailed findings" of fact justifying his conclusions of law and judgment of termination of Defendant's parental rights?

Since Defendant challenges the trial court's Findings of Fact, Defendant must show that each challenged finding of fact was clearly erroneous and against the clear weight of the evidence. The standard of review in this appeal is set out in State, In Interest of D.M., 790 P.2d 562, (Utah App. 1990), as follows:

The challenge to a factual finding must be conducted in two steps: (1) Appellant must first marshal all the evidence that supports the finding, and (2) then demonstrate to us that, despite this evidence, the finding is so lacking in support as to be "against the clear weight of the evidence" and, thus, clearly erroneous. (Emphasis supplied).

790 P.2d at 567.

DETERMINATIVE STATUTE

U.C.A. § 78-3a-48(2) - set out in verbatim in Appendix 1. Although this statute was repealed effective July 1, 1992, it was in full force and effect at the time of the trial of this matter.

NATURE OF THE CASE AND COURSE OF PROCEEDINGS

This is a consolidated appeal to the Utah Court of Appeals from a determination by the Third District Juvenile Court, Judge Olof A. Johansson presiding, that Defendant/Appellant's parental rights be terminated pursuant to the provisions of U.C.A. § 78-3a-48 (as amended 1985) and subsequent Utah Supreme Court and appellate court decisions interpreting said statute. The Juvenile Court also ordered that a certified copy of the Juvenile Court Order should be filed with the Third District Court in Case No. 87-3798DA, Kim Fazzio (Woodward) v. Richard Cameron Fazzio. Said Order was filed on December 3, 1990, and the Honorable Homer F. Wilkinson entered an "Order Formally Adopting Order of Third District Juvenile Court Terminating Parental Rights" on October

26, 1990. Judge Wilkinson had previously entered a Minute Entry dated April 24, 1990, declaring "the Order of the Juvenile Court on the termination of parental relationship shall be filed in this case and shall be binding on the parties."

The Utah Court of Appeals considered Defendant's original appeal in this matter in Case No. 900626-CA filed December 9, 1991, 823 P.2d 474 (Utah App. 1991) (Appendix 2). In that case, the Utah Court of Appeals reversed and remanded "for more detailed findings".

Despite Defendant's statement in his opening brief in this matter that the Court of Appeals had reversed and remanded the matter to the trial court with instructions to make more detailed findings "[a]nd to redetermine the question of whether the father had abandoned the child . . . ", the Court actually only reversed and remanded with instructions to make more detailed findings. Although there is a hint in the decision that this Court "[i]s not all together confident that the trial court's final decision was correct . . . ", there is no statement in the decision reversing the judgment in the case. In addition, there is no statement in the decision suggesting that the lower court was required to "redetermine the question of whether the father had abandoned the child . . . " as stated by Defendant in his opening brief. While Plaintiff concedes that the Court of Appeals was interested in having the lower court review its decision, there was no mandate to reverse the judgment, and all that was required of the trial judge by the Court of Appeals was that he make more detailed Findings of Fact. 823 P.2d at 475, 479.

The trial judge responded to the Court of Appeals' mandate on June 15, 1992, by entering his Amended Findings of Fact (Appendix 3). Defendant/Appellant alleges in this appeal that despite the numerous additional Findings of Fact made by the trial judge, said

Findings of Fact are still insufficient to meet the requirement of the Utah Court of Appeals for more detailed findings. Plaintiff/Appellee argues in this appeal that the Amended Findings of Fact are indeed sufficient to provide a sound basis for the trial judge's Conclusions of Law, which were not explicitly reversed by the Court of Appeals, and its Judgment that Defendant had abandoned the minor child.

STATEMENT OF FACTS

1. Kim Woodward (hereinafter Plaintiff) learned she was pregnant with the minor child which is the subject of this action (hereafter R.A.F.) in February of 1986 (T. 95).

2. R.A.F. was born on September 17, 1986 (T. 19).

3. Plaintiff was married to Richard Cameron Fazzio (hereinafter Defendant) on November 3, 1986 (T. 19), and their marriage was annulled by the Honorable Homer F. Wilkinson in Civil No. D-87-3798 on November 19, 1987 (T. 19).

4. The Decree of Annulment provided, among other things:

(a) Plaintiff was awarded the custody of R.A.F. subject to reasonable visitation rights in Defendant as agreed upon between the parties;

(b) Defendant was ordered to pay to Plaintiff the sum of \$100.00 per month as and for child support until R.A.F. reached the age of majority;

(c) Defendant was ordered to maintain his existing medical and dental insurance for the benefit of R.A.F., and each party was ordered to assume and pay one-half of any medical or dental costs of R.A.F. not covered by insurance;

(d) Plaintiff was entitled to claim R.A.F. as a dependent on her income tax returns. (Appendix 4).

5. Defendant admitted that he urged Plaintiff to get an abortion when he first learned she was pregnant with R.A.F. (T. 585, 586).

6. Plaintiff testified that Defendant bragged to her that he had two former girlfriends who had also had abortions. Plaintiff informed Defendant she believed that abortion was murder and there was an argument over the subject. Plaintiff testified that there was more than one occasion when Defendant expressed a desire to have the child aborted (T. 20, 21).

7. The parties had numerous separations during the course of their brief one-year marriage (T. 21).

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

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

10. Defendant admitted during the course of the marriage that he "smacked Kim" but claimed that he never hit R.A.F. (T. 499). Defendant later admitted that on occasion he "slapped Kim" and that he did not make sure that either R.A.F. or the child Christopher were out of the room when he slapped her (T. 598).

11. Plaintiff testified that she talked Defendant into seeking marriage counseling during the marriage; but that not only did his abuse of her not change, he actually beat her

the day of the counseling because he didn't like the things she said to the counselor (T. 21, 22, 23).

12. Plaintiff testified that Defendant was never a parent to R.A.F. from the time he was born. She testified he refused to babysit the child, even though he was not working most of the time during their marriage. Plaintiff testified that Defendant played no part in the care or nurturing of R.A.F. during the one-year marriage; he would not get up at night with the child, he would not change a diaper, he would not feed a bottle (T. 23, 24, 25).

13. Mr. Holt testified that his son Christopher told him during his visitations that he was terrified of Defendant, and that Defendant had threatened him (Christopher) with a knife and hit him a number of times. Mr. Holt also testified Christopher told him Defendant at one point drove Plaintiff and Christopher out of Plaintiff's home with a gun and told them that if they came back, he (Defendant) would kill them (T. 151, 152, 153, 154, 155, 156, 157, 158). This testimony was corroborated by Plaintiff (See Fact No. 23 *infra*).

14. Mr. Holt testified that when he confronted Defendant about this abuse of his son Christopher, Defendant responded "[W]hile Christopher is in my house, I will treat him the way I want" (T. 154, 155). This testimony was corroborated by Plaintiff who described Defendant's attitude toward Christopher as "mean and hateful. . . cruel. . ." (T. 32).

15. When asked on cross-examination if, during these confrontations Mr. Holt had with Defendant, Defendant admitted he was the father of R.A.F., Mr. Holt responded "[H]e neither admitted he was his father nor denied it" (T. 161).

16. Plaintiff testified that she discussed Darren Holt's problems with the State of Utah as a result of Defendant's refusal to take responsibility for R.A.F., but Defendant still refused to take such responsibility (T. 27).

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

18. After the parties separated for the last time, Plaintiff testified she spoke to Defendant many times about needing money and child support, and he refused to give her anything whatsoever as child support (T. 30).

19. Plaintiff testified she never saw Defendant buy presents for the child during the course of the marriage or afterwards (T. 30).

20. Plaintiff testified that Defendant did not love or nurture R.A.F. during the time of the marriage in any way (T. 30).

21. The final separation of the parties came September 10, 1987, and on that date Defendant drove Plaintiff and her child Christopher from the marital home at gunpoint and took off with R.A.F. (T. 31, 49, 50, 51, 52, 53, 54, 55).

22. Plaintiff testified Defendant tried to commit suicide twice during the course of their marriage (T. 56, 57, 58, 59, 60, 61, 62).

23. Defendant admitted he tried to commit suicide on at least one occasion (T. 595, 596).

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

25. After these incidents of abuse, Plaintiff testified that she retained a lawyer and asked Defendant to accompany her to the lawyer's office to sign some papers, one provision of which would require him to pay child support. Plaintiff testified that he became angry and tore up the paper, although he later signed it (T. 63, 64, 65).

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

27. Plaintiff testified that although Defendant came around four or five times from the date of their last separation in September of 1987 through September of 1988, he spent very little time with R.A.F. She also testified that after September of 1988, he never came to see the child at all, nor telephoned, nor contacted the child in any way (T. 75, 76, 77, 78).

28. Although she allowed Defendant's parents, Richard and Steffany Fazzio, to see the child occasionally between September of 1988 and October of 1989, she gave Defendant's parents a note telling them that if Defendant wanted to see R.A.F., it was up to him to come and get him, and that she would allow Defendant's parents to see the child when she returned from a vacation (T. 76, 77, 78, 79, 80, 81).

29. Plaintiff testified that after the visitations with Defendant's parents, she would always ask R.A.F. if he had seen Defendant during the visitations, and R.A.F. would say "no" (T. 82, 83).

30. Plaintiff testified that after she gave Defendant's parents the note in October of 1989, Defendant never contacted her requesting any visitation whatsoever prior to his filing a Petition to Modify the Decree of Annulment (T. 84).

31. Plaintiff then sought the assistance of attorney Larry R. Keller and filed a Verified Petition to Terminate Parental Relationship, Rights and Duties on January 23, 1990.

32. Commissioner Sandra Peuler issued a Minute Entry Recommendation on February 7, 1990, later adopted by Judge Wilkinson, allowing visitation for Defendant only at Defendant's parents' residence, and only when Defendant was in Salt Lake for one weekend per month (see Appendix 5).

33. Defendant then exercised his visitation in 1990 in the months of March, May and June. He failed to exercise his visitation in April, and Plaintiff testified that she received no notice of a requested visitation in July. The Court had required in its Minute Entry of February 7, 1990, that "Defendant is to provide one week's advance notice of his intent to visit" (T. 131, 132 Appendix 5).

34. Plaintiff testified that only after she filed this Petition for Termination of Parental Rights, did she receive checks from Richard and Steffany Fazio, supposedly on behalf of Defendant, but her attorney advised her to return those checks (T. 133).

SUMMARY OF ARGUMENT

Plaintiff understands the concerns of the Utah Court of Appeals in the initial appeal of this matter, and the reasons for remand for more detailed Findings of Fact. Plaintiff argues in this brief that the Honorable Olof A. Johansson's original Findings of Fact (Appendix 6), as supplemented by his Amended Findings of Fact dated June 15, 1992 (Appendix 3), did indeed provide the necessary detail to support the original Conclusions of Law and Judgment of the Court terminating Defendant's parental rights in this matter.

Plaintiff argues that Defendant cannot meet the burden of demonstrating that Judge Johansson's original Findings and Conclusions, as supported by his Amended Findings and Conclusions, are so lacking in support as to be against the clear weight of evidence, thus making them clearly erroneous. Plaintiff submits that it would not have mattered what the additional Findings of Fact made by Judge Johansson in response to the directive of the Court of Appeals in the original appeal were, Defendant would not have been satisfied; and would have argued they were insufficient. This is because he totally misunderstood the directive of the Court of Appeals in its initial opinion regarding this matter.

Defendant mistakenly believes and argues to this Court in this second appeal that it was the mandate of the Court of Appeals in its first Opinion that the trial judge reverse his Judgment terminating the parental rights of Defendant, and so nothing short of that result, and Findings of Fact supporting that result, would have satisfied Defendant.

Plaintiff submits that the mandate of the Utah Court of Appeals in the first appeal was for the Court to make "more detailed Findings of Fact" to justify its Conclusions of Law and Judgment in this matter. The Court of Appeals suggested that if the trial judge were unable to make more detailed Findings of Fact supporting its Conclusions and Judgment, then it should consider reversing its original decision. However, the Honorable Olof A. Johansson was indeed able to make more detailed Findings of Fact responding to the directive of the Utah Court of Appeals, and thus maintained his Conclusions of Law and Judgment of termination of Defendant's parental rights as originally determined. It is Plaintiff's position that this was a perfectly acceptable procedure pursuant to the Court of Appeals first opinion in this case, and the trial judge has met all requirements necessary to establish the fact that the Judgment should be affirmed by this Court.

ARGUMENT

POINT I

DEFENDANT MISCONSTRUES AND MISUNDERSTANDS THE DECISION OF THE UTAH COURT OF APPEALS IN THE ORIGINAL APPEAL OF THIS CASE.

Defendant, in his opening brief, has misconstrued and misunderstood the decision of the Utah Court of Appeals in the original appeal of this matter entitled Woodward v. Fazzio, Case No. 900626-CA, filed December 9, 1991, 823 P.2d 474 (Utah App. 1991) (Appendix 2).

Defendant argues in his "Statement of the Issues" in his opening brief that "[H]ad the lower court followed the instructions regarding appropriate [sic] FINDING OF FACT, it could not have come to the conclusion that the Father had abandoned his child" He

then incorrectly states the standard of review to be a "question of law, and is reviewed for correctness with no deference to the lower Court's determination." (Defendant's Opening Br. p. xi). Further he claims "[T]here is no basis in any of the Findings of Fact to suggest that the Father destroyed the parent-child relationship. The standard of review is a question of law, and is reviewed for correctness with no deference to the lower Court's determination. . . ." (Defendant's Opening Br. p. x).

Plaintiff submits that Defendant has misstated and inaccurately presented the standard of review in this matter. As stated in Defendant's "Statement of the Issues Presented for Review" in this brief, the Utah Court of Appeals made the following statement regarding a challenge to factual findings in a juvenile court proceeding on appeal in the case of State, in Interest of D.M., 790 P.2d 562 (Utah App. 1990) as follows:

The challenge to a factual finding must be conducted in two steps: (1) Appellant must first marshal all of the evidence that supports the findings, and (2) then demonstrate to us that, despite this evidence, the finding is so lacking in support as to be "against the clear weight of evidence" and, thus, clearly erroneous. Doelle v. Bradley, 784 P.2d 1176, 1178 (Utah 1989); In Re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989).

790 P.2d at 567.

The Utah Court of Appeals in the aforementioned case was quoting standards established by the Utah Supreme Court in 1989 and applied to appeals from the Juvenile Court. See State Ex. Rel. P.H. and M.H., 783 P.2d 565 n.1 (Utah Ct. App. 1989).

There can be no question that what happened in the first appeal, and what is clearly happening in the second appeal by Defendant is that he is challenging the sufficiency of the Findings of Fact of the lower court. This being the case, the standard for review is not legal correctness as incorrectly stated by Defendant, but the "clearly erroneous" standard based

upon findings so lacking in support as to be "against the clear weight of the evidence." In applying this standard, the Utah Court of Appeals must provide a presumption of correctness to the Findings of Fact of the lower court. It seems clear, whether it be the Utah Court of Appeals or the Utah Supreme Court, an appellate court in Utah will not substitute its own Findings of Fact for those of the trial judge who heard the evidence directly, observed the demeanor of the witnesses, and judged their credibility.

The Court of Appeals made this great appellate principle clear in the case of State In Interest of P.H. and M.H. v. Harrison, 783 P.2d 565 (Utah App. 1989):

Moreover, we defer to the juvenile court because of its "advantaged position with respect to the parties and the witnesses." Robertson v. Hutchison, 560 P.2d 1110, 1112 (Utah 1977). . . We must accordingly "rely heavily on the presumption of correctness that attends these findings". In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989).

783 P.2d at 570.

As Defendant argued on page 21 of his opening brief this matter, never has a case more clearly demonstrated why it is essential for an appellate court to defer to the Juvenile Court on Findings of Fact than the instant case. It is the position of Plaintiff that Defendant stated numerous falsehoods and committed perjury during his testimony in the trial court. This was demonstrated through cross-examination, rebuttal witnesses and evidence which could not be overcome by Defendant. Furthermore, Plaintiff maintains that the physical manner in which the Defendant and his witnesses testified in this case was as important as the words they used in determining their credibility. The trial judge alone was in a position to judge the credibility of the witnesses, and his determination should not be disturbed by this Court without a demonstration by Defendant that the Findings are against the clear

weight of the evidence and thus clearly erroneous. State In Interest of P.H. and M.H. v. Harrison, Id.

This Court must not allow Defendant to get away with misstating and mischaracterizing the standard of review in this case as he does in his opening brief on pages xi, x, and in Argument No. One of his brief (pp.1-5), Argument No. Three of his brief (pp. 12-42), and his Conclusion (p. 49).

While counsel for Plaintiff respects an advocate who zealously represents his client's interest, it is inappropriate and bordering on misconduct for Defendant's attorney to misstate the standard of review on appeal of a Finding of Fact in a Juvenile Court matter. This is particularly true where Plaintiff's attorney is accused of causing "the lower court to blatantly violate (the Court of Appeals') mandate." (Defendant's Opening Br. Argument No. One pp. 1-5). Plaintiff submits that the only reasonable interpretation of the Court of Appeals' decision is that the Court of Appeals was uncertain of the Conclusions of Law and Judgment of the trial court based upon the then-existing Findings of Fact, and remanded the case for "more detailed findings." Plaintiff would once again submit that if the Court of Appeals had intended to reverse the judgment of the trial court, it could have done so. The Court of Appeals could have compelled the trial judge to enter an order of judgment in favor of Defendant, but it clearly did not do so! Despite having reservations based upon the then-existing Findings of Fact made by the lower court in the original proceeding, the Court of Appeals was suggesting that if more detailed Findings of Fact could be gleaned from the record so as to support the Conclusions of Law and Judgment of the lower court, then the Judgment may stand. However, if the lower court were unable to make the more detailed

Findings of Fact necessary to support its Conclusions of Law and Judgment, then it should reverse its decision.

Obviously, the Honorable Olof A. Johansson determined that his Conclusions of Law and Judgment could be supported by more detailed Findings of Fact, and he did indeed create an "Amended Findings of Fact" to supplement his original Findings of Fact for that purpose. Although the trial judge had the option of reversing his Conclusions of Law and Judgment because the more detailed Findings of Fact required by the Utah Court of Appeals were not available, Judge Johansson clearly rejected that approach and found that the more detailed Findings of Fact as required by the Court of Appeals did exist; and he so ruled by making his Amended Findings of Fact dated June 15, 1992 (Appendix 3).

Applying the correct standard of review, (which is providing Judge Johansson's Findings with a "presumption of correctness" and requiring Defendant to meet the burden of showing the Court that the Findings are "clearly erroneous, i.e., . . . against the weight of the evidence"), the Court should then turn to the next question, which is: Did Defendant meet his burden?

POINT II

THE TRIAL JUDGE'S AMENDED FINDINGS OF FACT SUPPLEMENTING HIS ORIGINAL FINDINGS OF FACT IN THIS MATTER ARE SUFFICIENT TO JUSTIFY HIS CONCLU- SIONS OF LAW AND JUDGMENT OF TERMINATION OF PARENTAL RIGHTS IN THIS CASE.

As indicated in Point I of this brief, Plaintiff reads the Utah Court of Appeals' decision in the first appeal as requesting the trial judge to determine if more detailed Findings can be made to support his Conclusions of Law and Judgment; and if not, he

should have reconsidered his original decision terminating Defendant's parental rights. The Court of Appeals determined that more detailed Findings needed to be made by the trial judge in paragraphs 7, 8, 10 and 11 of his original Findings of Fact in the above-entitled matter. Woodward v. Fazzio, supra at 478.

The Court of Appeals noted in its Opinion on the first appeal in this matter "[A]lthough the trial court's Findings of Fact constitute a full three pages of text, they nonetheless provide an inadequate account of the actual facts supporting the Court's decision." Woodward v. Fazzio, supra at 478. In responding to this critical observation by the Court, the Honorable Olof A. Johansson entered a full eight additional pages of text providing for no less than an additional 44 paragraphs finding separate facts in this case. On sheer volume alone, it must be concluded that Judge Johansson clearly attempted to meet the mandate of this Court by making more detailed Findings. Of course, the Court is not so interested in the quantity of Finding of Facts determined by the lower court as it is the quality of those facts, and we believe both Plaintiff and Judge Johansson understood this when addressing the Amended Findings of Fact issue.

Defendant, in several places in his opening brief, seems to make much of the fact that the lower court judge adopted, almost verbatim in many cases, the requested additional Findings of Fact presented to him by Plaintiff's counsel. Interestingly enough, Defendant points out that Judge Johansson gave each side the opportunity to propose additional Findings of Fact to meet the requirements of the Court of Appeals in its Opinion in the first appeal in this case. As Plaintiff understands Defendant's argument, because the lower court judge decided to adopt many or most of the proposals made by Plaintiff's counsel, the judge

was in error and Plaintiff's counsel should be somehow chastised for causing "the lower court to blatantly violate (the Court of Appeals' mandate)." (Argument No. One Defendant's Opening Br. p. 1). Obviously, Judge Johansson believed that the additional detailed Findings of Fact submitted by Plaintiff's counsel were sufficient to meet the requirements of the Court of Appeals and to allow him to conclude that his original Conclusions of Law and Termination Order in this case were indeed justified by the facts. In fact, Defendant's counsel literally insults Judge Johansson by making it appear that he did not use his own best judgment in this case, but was somehow inappropriately or unduly influenced by Plaintiff's counsel. In fact, Defendant's counsel further insults Judge Johansson by claiming that "[t]he lower court blindly rubber stamped the parade of horrors that the mother's counsel submitted in his Proposed Additional Findings of Fact . . ." (Defendant's Opening Br. p. 7). Further, Defendant's counsel states "[A]ppellant submits that the lower court merely rubber stamped what Appellee's counsel submitted . . ." (Defendant's Opening Br. p. 23).

These efforts at insulting the trial court, and refusing to give the trial judge credit for any independent intelligence regarding this matter, is an example of the lengths to which Defendant will go to attempt to get this Court to substitute its judgment for that of Judge Johansson. Defendant submits that the record in this case is replete with these kinds of tactics; and frankly, such tactics have no place in a court of law.

Defendant spends much of time arguing in his brief that it is improper for this Court to draw the conclusion that the matters involved in this case were matters "[o]f credibility, where only the trial judge can see things mysteriously unknown to the appellate court

because the appellate court only has the hard, cold record . . ." (Defendant's Opening Br. p. 3). The objective answer to the question posed by Defendant's counsel is a resounding yes! Credibility is a significant issue in this case and the lower court judge assessed the demeanor and the credibility of the witnesses carefully. Defendant spends much of his brief alleging that the lower court judge decided to disregard certain testimony of the father, the grandmother and the grandfather in this matter. Defendant is outraged by the fact that Judge Johansson chose to believe witnesses Ken and Barbara Kresser (the mother's in-laws by the mother's second marriage), Christy Tinnin, Darren Holt, Scott Ortar, and Plaintiff herself.

Most of the arguments made by Defendant in his opening brief revolve around the fact that the lower court should have believed him and his parents and because it didn't, the lower court committed error. However, in response to these arguments, Judge Johansson made specific and detailed Findings of Fact regarding the credibility of Defendant and his parents. Prior to making these additional Findings of Fact, the Court stated "Although there was disputed evidence admitted during the course of the trial, the Court finds the following facts by clear and convincing evidence to be believable . . ." (Appendix 3 at p. 1). The trial judge indeed recognized that the Utah Court of Appeals in its first Opinion in this matter questioned whether or not he had considered certain evidence from the mother and the grandparents in this case; and whether or not the Court considered the opposing evidence sufficiently clear and convincing to meet the standards of law required to terminate parental rights in the State of Utah. Judge Johansson therefore made a clear and distinct statement that accomplished two things: first he recognized there was contradictory evidence

presented by Defendant and his parents; and secondly, he recognized (as he did in his original Findings in this case) that he must exclude that contradictory evidence by finding that the evidence presented by Plaintiff and her witnesses was "clear and convincing" before he could terminate parental rights in this case. There is no question that the judge clearly recognized the standards to be used here, and also recognized the burden of proof that the Plaintiff had to carry in order to convince the Court it should terminate the Defendant's parental rights (see Appendix 3 in its entirety).

The Court went on to make several specific and detailed findings regarding the credibility of the Defendant father of the child in this case in paragraph 7:

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

...

t. The Court finds that rather than Petitioner's movements from different residences as being the cause of Respondent's failure to visit with the child, Respondent failed to have contact with the child to avoid paying child support. On one occasion, Christy Tinnin, Petitioner's sister, testified she accidentally ran into Respondent at a truck stop in February 1989, at a time when she was aware Petitioner was looking for him to get him to pay child support. Respondent said to Ms. Tinnin during that conversation "... do me a favor and don't tell Kim you saw me, because I am supposed to be in Nevada."; (T. 182, 183). (Citation added). (Appendix 3 at pp. 2, 4).

The Court also made the following observations regarding the Defendant father's credibility in his Amended Findings of Fact paragraph 8 (see Appendix 3 at pp. 5, 6)(Transcript page references are added and not part of the Judge's Amended Findings):

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

1. Respondent claimed to have provided a car worth \$600.00 to Petitioner in lieu of two months child support (T. 564, 565). However, rebuttal witness Scott Ortar testified that in fact Respondent sold the car in question to Sommers Auto Wrecking approximately three months after the parties' marriage was annulled for \$75.00 (T. 475-482). Respondent admitted on cross-examination that he indeed sold the very same vehicle he claimed to have given Petitioner in lieu of child support to Sommers Auto Wrecking for \$75.00; and further admitted that he did not give the \$75.00 to Petitioner (T. 571, 572, 573, 574).

2. Related to, but in addition to the foregoing regarding the car, Respondent testified on direct examination he did not give Petitioner title to the 1979 Mercury he was providing her in lieu of child support after the annulment, because he did not have the title. Despite this clear testimony by Respondent, Petitioner introduced at trial Exhibit 7 which is a Utah Certificate of Title to the 1979 Mercury in question and related documents. This exhibit clearly showed that the Utah Certificate of Title was issued in the name of Respondent, and was never in the name of Petitioner. Furthermore, this exhibit showed that Respondent signed the document as "transferor" before a notary public on February 5, 1988. This was the very date of the check introduced as Plaintiff's Exhibit 6 made out to Respondent from Sommers Auto Wrecking. Moreover, the VIN number of the vehicle on the Certificate of Title and the check made out to Richard D.

Fazzio from Sommers Auto Wrecking are exactly the same, and clearly establish that this was the same vehicle Respondent claimed to have given Petitioner in lieu of child support. When confronted with the title to the car and the check from Sommers Wrecking on cross-examination by Petitioner's attorney, Respondent testified he wished to changed his testimony about not having the title to the vehicle and giving it to Petitioner in lieu of child support (T. 564, 571).

3. Pursuant to the Decree of Annulment issued by the Honorable Homer F. Wilkinson in Civil No. D-87-3798 on November 19, 1987, Petitioner alone was entitled to claim R.A.F. as a dependent on her income tax return (Decree of Annulment paragraph 2, Appendix 4).

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

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

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

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

The trial judge found in his Amended Findings for paragraph 10, (see Appendix 3 at p. 7):

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

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

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

that was rightfully that of Respondent. (Transcript citations added).

Judge Johansson found then, approximately nine separate specific facts relating to the incredibility and unbelievability of Defendant in the trial in the lower court. In most cases, Defendant was directly impeached with documentary evidence or the testimony of other witnesses. Certainly it is true that the specific areas in which the Court found the Defendant to have been lying and/or intentionally misrepresenting the truth were significant in and of themselves; but it is also true that a trier of fact has the right to call into the question the whole of the testimony of any witness found to have wilfully testified falsely as to any material matter. Gittens v. Lundberg, 284 P.2d 1115 (Utah 1955); J.I.F.U. § 3.12 (1957). Thus, it can be seen that where Judge Johansson specifically determined that Defendant had wilfully testified falsely on several occasions, he was at liberty under Utah law to disregard the whole of Defendant's testimony. He did not have to do so, but it is clear from the Findings of Fact and Conclusions of Law that Defendant's testimony was so badly impeached that he chose to disregard it in many areas.

Since the Court then had every right to disregard the testimony of Defendant on any subject he chose, not just the subjects he was directly impeached on, Defendant's argument in his opening brief that the Court has disregarded or ignored his testimony is hollow and empty. In each case where Defendant claims his testimony was ignored or not considered, the Court found that there was credible, reliable and trustworthy evidence from Plaintiff or her witnesses. For example, Defendant argues on page 17 and 18 of his opening brief that he had testified regarding the number of visits he had with the minor child and how often he had allegedly seen the minor child. He then draws the conclusion that the Court was in

error in accepting the mother's testimony on direct examination and rejecting the father's regarding the number of visits or the frequency of the visits. Nevertheless, disregarding the father's testimony was the prerogative of the trial judge, given the number of material falsehoods testified to by the Defendant father during the course of the trial.

In addition, Defendant attempts to impeach the Amended Finding of Fact paragraph 7(h) and (i) in regard to the Defendant's visitation with the minor child during times when he was at Defendant's mother and father's home, by quoting his testimony regarding his having fed and diapered the child. (Defendant's Opening Br. p. 21). Again, it is the prerogative of the trier of fact to determine whether or not the Defendant's testimony was believable, and to disregard it totally if found not to be believable.

Defendant also cites his testimony regarding visitation matters (Defendant's Opening Brief p. 30); child support matters (Defendant's Opening Br. p. 33); and acknowledgment of paternity (Defendant's Opening Brief p. 41), as examples of areas in which his own testimony directly contradicted the testimony of Plaintiff and her witnesses; and he complains the Court apparently disregarded his testimony. Again, the trial judge had every prerogative to disregard Defendant's testimony in light of his untruthfulness; and in doing so, if the Court believed the mother and her witnesses on these issues, the Court would have been able to find by clear and convincing evidence that the facts were as the mother testified.

Finally with regard to the credibility of the Defendant Father, Defendant notes in his Opening Brief at page 33 that he was "critically injured in an automobile accident." Plaintiff's counsel has searched the record and is unable to see where he testified to this fact or how it prevented him from paying child support for over two years, and no citation to the

record exists. Furthermore, Defendant used as an excuse for not paying child support to the mother that he believed "[a]ny monies payable would be paid to Recovery Services and not the mother, and that the payment or lack of payment to them did not increase or decrease any sums to the mother." (Defendant's Opening Brief p. 33). Apparently, Defendant believes that he should not have been required to pay child support to the mother if he knew it simply was going to go to Recovery Services and "not the mother." Such lame justifications for not paying his child support obligations, coupled with his outright false statements on numerous other occasions during the trial, led the trial judge to become convinced that his lamentations about efforts to see the minor child and meet his support obligations were consistent with his pattern of falsehoods and lies during the trial. It would be a terrible injustice to the mother and child in this case for this Court to substitute its judgment regarding the credibility of the father for that of the trial judge under circumstances where this Court could not view the demeanor of the Defendant.

Defendant alleges that his own testimony, particularly with regard to visitation of the minor child, was supported and corroborated by that of his parents, Richard and Steffany Fazzio. With regard to the parents, it is again important to note that the trial judge was in the position to observe the demeanor and manner of testimony of these witnesses. He was also in a direct position to analyze their trustworthiness, reliability, and general credibility.

In that regard, Judge Johansson stated in paragraph 7 (see Appendix 3 p. 2):

j. The grandparents' testimony in regard to their son's visitations seemed unreliable and unbelievable in light of their own great interest in maintaining contact with R.A.F., and in light of the fact that their testimony was impeached on several occasions. For instance the grandparents' willingness to exaggerate the truth regarding their son's contact with the child was shown by their

testimony regarding the court-ordered visitation occurring between March and the time of the trial in the instant case in August 1990. While suggesting that Petitioner was hard to find, Mrs. Fazzio admitted that Petitioner brought the child to her and her husband for visitation for approximately one year (T. 340, 348, 349, 351). Furthermore, Mrs. Fazzio admitted on cross-examination that she really did not know when Respondent (Defendant) did or did not see R.A.F. (T. 351). Mrs. Fazzio admitted that she and her husband were paying the attorney's fees for the instant action and not Respondent (T. 350);

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

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

n. Further testimony showing the unreliability and unbelievability of the testimony of the paternal grandparents came during cross-examination involving court-ordered visitation commenced in June of 1990, after the instant actions were filed. Mrs. Fazzio admitted that she was aware that visitation with R.A.F. was to be at her residence by court order (T. 373). Upon cross-examination, she admitted that on one occasion, she and her husband left Salt Lake City with a boat attached to their truck, but dropped off the boat prior to picking up R.A.F. at Respondent's residence. She admitted that after picking up R.A.F., she and her husband went back and picked up the boat and went boating on Echo Reservoir with R.A.F. (T. 399, 400), Mrs. Fazzio stated that her boat was her home and so she didn't feel that she and her husband were violating Commissioner Peuler's (and Judge Wilkinson's) Order

that visitation be at their residence (T. 400). She indicated that "[s]ummer weekends, our boat is our home. . . It's an overnight boat, it has cooking and sleeping facilities, and we live in it weekends" (T. 400). However, when Mrs. Fazzio was asked how many weekends they had slept overnight on the boat that year, 1990, through August 17, (the day of the trial), she admitted that they had not slept on the boat once that year (T. 400);

o. Richard Bruce Fazzio, the paternal grandfather, agreed with his wife that his boat was his personal residence and their exercising visitation in June of 1990, by taking the child boating rather than to their home in Salt Lake City was not a violation of the District Court's Order (T. 468). Such testimony shows the incredulity and unbelievability of the paternal grandparents, Steffany Fazzio and Richard Bruce Fazzio; (Transcript citations and designation "Defendant" and "Plaintiff" as well as emphasis added) (Appendix 3 at pp. 2, 3).

Furthermore, the trial judge assessed the credibility of Richard and Steffany Fazzio in paragraph 8 of his Amended Findings (Appendix 3 p. 5):

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

Given Judge Johansson's assessment of the credibility of Richard and Steffany Fazzio, it is clear that he had the right to also disregard the whole of their testimony, having believed that they testified falsely on numerous occasions during the course of the trial. Certainly, Judge Johansson was sympathetic with Mr. and Mrs. Fazzio and understood why they might come to the support of their son in this kind of action with inaccurate testimony. He found that their testimony was unreliable and unbelievable in light of their own great

interest in maintaining contact with the minor child. (Finding of Fact, ¶ 7 (j)). The trial judge believed that it was the paternal grandparents who were thoughtful enough to purchase the few toys presented in Court for the minor child (Finding of Fact ¶ 7(l)). Furthermore, the Court found in paragraph 7(p):

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

While the trial judge and this Court should find it commendable that Mr. and Mrs. Fazzio have a strong desire to maintain contact with their grandchild, R.A.F., it should be noted that the termination in this case related to parental rights only, and not grandparents' rights. In fact, the grandparents chose to petition the District Court for specific visitation rights independent of their son, the Defendant father in this case. Furthermore, on November 14, 1991, the Honorable Homer F. Wilkinson accepted a recommendation by the Honorable Michael S. Evans, Domestic Relations Commissioner, and entered an Order providing the grandparents with specific visitation rights. (See Appendix 7). No orders to show cause for violation of this Order have been presented to the Third District Court, and it is Plaintiff's understanding that these visitations have occurred as required.

Nevertheless, despite the good intentions of the Fazzios, their inherent bias made them untrustworthy, unreliable and incredible as witnesses in this case, as found by Judge Johansson. In his opening brief, Defendant maintains that the mother's testimony, believed by the trial judge, should be disregarded by this Appellate Court, and the testimony of the Defendant's mother and father, which contradicted her, should be believed instead. He says this is also true with regard to the mother's statements about the father's lack of efforts to

visit the minor child. Mrs. Fazzio, the paternal grandmother, testified that during many of the occasions when she and the paternal grandfather would bring R.A.F. to their home for visits, the Defendant father would visit the child at that time also. However, the trial judge chose to believe the testimony of Plaintiff when she testified that after September 1988, and up to the time of the trial in August 1990, Respondent never came to see the child nor telephoned, nor otherwise contacted the child (T. 75). The trial court had every right to disregard Mrs. Fazzio's testimony, given her exaggerations and inherent incredibility. Again, Defendant would have this Court disregard the determinations of the trial judge with regard to the demeanor of witnesses and their credibility and believability and find that Defendant's mother was the more believable of the witnesses. This would be inappropriate for this Court to do in light of the standards of review regarding the presumption of correctness of the lower court's determination; as well as the requirement of the Defendant to show in this appeal that the Judge Johansson's conclusions were clearly erroneous and against the clear weight of the evidence.

Defendant also cites the testimony of the mother with regard to the relationship of the father with the child. Despite the testimony of Plaintiff that Defendant was never a parent to R.A.F. from the time he was born; that he refused to babysit the child, even though he was not working most of the time during their marriage; that Defendant played no part in the care or nurturing of R.A.F. during the one-year marriage; that he would not get up at night with the child, he would not change a diaper, and he would not feed a bottle (T. 23, 24, 25), Defendant argues in his opening brief that his mother (the grandmother's) statements regarding how he had allegedly nurtured the child and played with the child

should be believed over that of the Plaintiff. (Defendant's Opening Br. p. 21-23). Again, the believability of the witnesses was the prerogative of the trial judge, and he chose to believe Plaintiff and disregard the testimony of Mrs. Fazzio due to her inherent bias and unbelievability.

It is clear that the trial judge was in the most advantaged position to make the determination to believe the witnesses, evidence and testimony presented by Plaintiff in this case, and to disbelieve the majority or even the whole of the testimony of the Defendant and his parents. The Court found by clear and convincing evidence that the Defendant had indeed abandoned his obligations and responsibilities to his child and that such abandonment led to the destruction of the parent-child relationship, and his Findings of Fact should be sustained and affirmed by this Court.

POINT III

ON REMAND, THE LOWER COURT ADDRESSED EACH AND EVERY CONCERN OF THE COURT OF APPEALS.

Defendant goes through the concerns of the Court of Appeals in his opening brief and makes certain observations about the deficiencies of the trial judge in responding to them. Plaintiff will now review those concerns and show this Court where and how the trial judge did indeed respond.

In its Opinion in Woodward v. Fazzio (the first appeal supra Appendix 2), the Court of Appeals found "conflicting" testimony about the frequency and duration of Fazzio's visits with the child; his treatment of the child during those visits, Woodward's attempts to prevent Fazzio from visiting with the child, Fazzio's payment of child support; and Fazzio's provision

of gifts to the child -- all facts important to the lower court's ultimate decision that Fazzio's conduct had destroyed the parent-child relationship.

The Utah Court of Appeals opined that:

[T]he trial court's findings of fact should resolve these conflicts unequivocally, by stating the specific subsidiary facts as the trial court found them. The findings should set forth with as much precision as possible, the number of times Fazzio visited the child during particular periods; the length of each of the visits; the number of visits Woodward intentionally prevented; the sums Fazzio provided as child support, either personally or through his parents; the number and type of gifts Fazzio gave to the child and the occasions on which he gave them; and the specific statements, acts, or omissions that demonstrate Fazzio's intent to either accept or disregard his obligations as a parent (e.g. instances of Defendant performing child care functions like changing his diaper or feeding him, denying that the child was his responsibility, etc.).

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

823 P.2d at 478, 479.

It is the position of the Plaintiff that the trial judge did respond to each and every one of these concerns of the Utah Court of Appeals as follows:

1. The number of times Fazzio visited the child during particular periods and the length of each of the visits. In paragraph 7(g), the trial court found: "Although Respondent came around four or five times from the date of their separation in September of 1987 through September of 1988, he spent very little with R.A.F. After September of 1988, Respondent never came to see the child nor telephoned, nor contacted the child;" (T. 75, 76, 77, 78) (Appendix 3 p. 2 - citations added).

The trial court also found Finding of Fact 7(h) as follows: "Petitioner would allow Respondent's parents, Richard and Steffany Fazzio, to see the child occasionally between September of 1988 and October of 1989, as they requested. However, after the visitations with Respondent's parents, Petitioner would always ask R.A.F. if he had seen Respondent during the visitations and R.A.F. would say 'no';" (T. 82, 83) (Appendix 3 p. 2 - citations added).

Although Defendant challenges the mother's testimony which formed the basis for these findings, he fails to give any specific reasons as to why the testimony should have been disregarded by the trial court; and why the testimony of the Defendant and Mr. and Mrs. Fazzio should have been believed by the trial court. Again, credibility is the key to these Findings of Fact, and the trial judge chose to believe the mother in this regard. As to Defendant's argument that the mother would not have had knowledge of whether or not the father visited with R.A.F. during the times the child visited with his paternal grandparents, the child himself denied having seen the father on these occasions. Defendant would have this Court disregard the statements of the child in that respect, but it seemed to the trial judge to be consistent with the believable evidence, and he chose to give them credibility.

Besides, if a minor child is questioned by his parents, and is old enough to talk and conceivably understand the questions, it seems unbelievable that the child would lie about having seen his father. No evidence whatsoever was presented in the lower court to impeach the credibility of the mother in this regard, or to prove that the child was too young to really understand the questions. The mother testified that the child understood the questions, and that was all that mattered to the trial judge given the lack of believability of Defendant's witnesses. Certainly the evidence was clear and convincing in this regard and should not be disturbed by this Court.

Despite Defendant's self-serving testimony that he "visits R.A.F. every chance he gets," his testimony was unbelievable and directly contradicted the testimony of Plaintiff, whom the trial judge found to be believable.

The trial judge made additional precise findings with regard to the number of times Fazzio visited and the length of those visits:

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

Furthermore, in Finding of Fact 7(j) the trial judge also found:

- j. [T]he grandparents testimony in regard to their son's visitations seemed unreliable and unbelievable in light of their own great interest in maintaining contact with R.A.F., and in light of the fact that their testimony was impeached on several occasions. For instance, the grandparents willingness to exaggerate the truth regarding their son's contact with the child was shown by their testimony regarding the court-ordered visitation occurring between March and the time of the trial in the instant case in

August 1990. While suggesting that Petitioner was hard to find, Mrs. Fazzio admitted that Petitioner brought the child to her and her husband for visitation for approximately one year (T. 340, 348, 349, 351). Furthermore, Mrs. Fazzio admitted on cross-examination that she really did not know when Respondent did or did not see R.A.F. (T. 352). Mrs. Fazzio admitted that she and her husband were paying the attorney's fees for the instant action and not Respondent (T. 350). (Appendix 3 p. 2 - citations and emphasis added).

Therefore, it should seem clear to this Appellate Court that the trial judge found that he could not determine with any reliability or credibility the number and frequency of the visits of Fazzio with the child due to lack of credibility of the witnesses in that regard. He found that the only credible testimony in this regard was that of the mother who testified that Defendant came around only four or five times from the date of their last separation in September of 1987 and through September 1988; and then never bothered to see R.A.F., nor telephone, nor contact the child in any way after that. Therefore, the trial judge has specifically and directly addressed this concern of the Court of Appeals.

With regard to the duration or length of each of the visits, Plaintiff would submit there was little, if any, testimony regarding the time actually spent with the child. The only credible testimony in this regard resulted in Finding of Fact paragraph 7(u):

Even though Respondent was provided with court-ordered visitation after filing of the instant lawsuit, he did not make an effort to spend much time with the child during the court-ordered visitations. Ken Kresser, the husband of Barbara Kresser and step-father of Mark Woodward and Petitioner's present husband, testified that after the May 1990 court-ordered visitation with Respondent, he asked R.A.F. about the visitation. R.A.F. replied that he had gone to the park. When Mr. Kresser asked him if Cameron (Respondent) was there with him, R.A.F. stated "No, he was sleeping."; (T. 173). (Appendix 3 pp. 4, 5 - citations added).

While Defendant would have the Court disregard this as merely a single isolated incident, the trial judge, assessing the credibility and believability of the witnesses, chose not to disregard it and felt it was significant enough to make a detailed Finding of Fact about this incident.

With regard to the quality of the visits or length of the visits, the trial judge also made these additional Findings in paragraph 7:

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

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

s. Witnesses Barbara Kresser and Ken Kresser, the parents of R.A.F.'s step-father, Mark Woodward, testified that R.A.F. has never mentioned Respondent or anything about his natural father, and that contrary to the claims of the Respondent, R.A.F. has not been taught anything by the family with regard to who his father is, that it is just a natural relationship and a happy family (T. 138); (Appendix 3 p. 4 - citations added (except in ¶ q.)).

Therefore, it can readily be seen that the trial judge did indeed make specific detailed findings of subsidiary facts and resolved the conflicts and the evidence unequivocally.

2. **The number of visits Woodward intentionally prevented.** The trial judge made the following detailed specific finding in this regard in paragraph 7:

t. The Court finds that rather than Petitioner's movements from different residences being the cause of Respondent's failure to visit with the child, Respondent failed to have contact with the child to avoid paying child support. On one occasion, Christy Tinnin, Petitioner's sister, testified she accidentally ran into Respondent at a truck stop in February of 1989, at a time when she was aware Petitioner was looking for him to get him to pay child support. Respondent said to Ms. Tinnin during that conversation "[D]o me a favor and don't tell Kim you saw me, because I am supposed to be in Nevada."; (T. 182, 183) (Appendix 3 p. 4 - citations added).

Thus, Judge Johansson determined specifically that Defendant had failed to visit with the minor child intentionally; and that Defendant's desire to avoid paying child support motivated his lack of visitation and contact with the child. Again, it was the trial judge's prerogative to believe the Plaintiff in this case, and he did believe her. He also ruled that the evidence she presented was clear and convincing with regard to her good faith in not intentionally preventing Defendant from visiting with the child.

Plaintiff would like to address one additional point made by Defendant in his opening brief on this subject. Defendant argues that the only way the father was going to receive visitation was through Court orders after Plaintiff had provided a letter (which was Exhibit 4 during the course of the trial) which is characterized in Defendant's brief as "terminating all visitation with the minor child." This statement by Defendant is absolutely false! Appendix 8 is the note submitted by Plaintiff to Mr. and Mrs. Fazzio on one occasion after she voluntarily allowed the Fazzios to visit with the minor child. THERE IS ABSOLUTELY NOTHING IN THIS NOTE WHICH INDICATES THAT PLAINTIFF INTENDED TO TERMINATE THE VISITATION OF THE GRANDPARENTS OR THE DEFENDANT WITH THE MINOR CHILD UNILATERALLY. That note simply discusses the problems

that Plaintiff observed with regard to Mr. and Mrs. Fazzios' visitation with the minor child. The note ends by stating "As you know, I am leaving soon and I am not sure when I will be back, but when both Mark and I are back, we will bring Tony to see you." It is to be noted here that the following exchange occurred between Plaintiff's counsel and Defendant on cross examination in the trial of this case regarding Defendant's Exhibit 4:

"Q. When your parents got the note suggesting that this voluntary visitation they'd been given for the few months prior was going to be terminated (at least for awhile), why didn't you call Kim personally and say, Okay, maybe you don't want to give the child to my parents, but I want to exercise my visitation?

...

A. Because I had agreed, this was an arrangement where I -- we had agreed that my visitation would take place at my parents' house, being as I am out of town, in and out of town a lot. That way, I don't have to -- I can come in, I can come in at night, I can sleep, I can wake up, R.A.F. can be there, I can spend the day with R.A.F.

...

Q. Why then didn't you personally get involved and contact Kim?

A. I was in Las Vegas.

Q. What, you can't pick up a phone and call her from Las Vegas? You had her telephone number.

A. When you don't have -- not at first when I went down there I didn't, Mr. Keller.

Q. As a matter of fact, you haven't called Kim and requested visitation yourself personally since September of 1988, isn't that true, Mr. Fazio? Yes or No.

A. Yes."

(T. 616, 617).

This exchange clearly shows that Defendant admitted that he had not personally called Plaintiff for visitation for well in excess of one year. He then admits that he made no effort whatsoever to contact Plaintiff for visitation between September 1988 and the court-ordered visitation beginning in March of 1990. This has to be the most damaging evidence of all against Defendant.

3. The sums Fazzio provided as child support, either personally or through his parents. With regard to this concern of the Court of Appeals, the trial judge made the following additional Findings in paragraph 7:

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

m. Mrs. Fazzio admitted that she never concerned herself with whether or not Petitioner had enough money to meet the basic needs of R.A.F., her grandson (T. 320, 321). Mrs. Fazzio suggested this was because she felt it was "a matter between Kim and Cameron . . . [A]nd I did not know that he was not providing for her. I had no need to do [sic know] that." Despite this testimony, on at least two different occasions during Petitioner's attorney's cross-examination of her, Mrs. Fazzio admitted that she knew Respondent was not paying child support to Petitioner, making her testimony less credible (T. 318); (Appendix 3 pp. 2, 3 - citations added).

Furthermore, the Court went on to make a great many detailed specific Findings of Fact in paragraph 8 in support of the conclusion that "Respondent has paid no child support to Petitioner or anyone else on behalf of the minor child, Richard Anthony Fazzio. Due to space limitations, these findings will not be detailed here, and the reader is directed to Appendix 3 and paragraph 8 in its entirety, where Judge Johansson makes 10 very specific and detailed Findings of Fact regarding this issue.

In his brief, Defendant attempts to argue that he did not pay child support to Plaintiff because he thought it would simply be obtained by Recovery Services and somehow he

believed that excused him from paying his child support (Defendant's Opening Br. at 33; T. 556 and following). He further states that he simply was financially unable to pay child support and so virtually the entire allegation of Defendant that he paid some child support rests totally on his own credibility (which the Court has found to be non-existent) and also upon his justifications (which are not logical or reasonable).

Finally on this point, a specific finding made by Judge Johansson in paragraph 8 addresses child support allegedly provided by Defendant through his parents:

c. Only after Petitioner filed her Petition for Termination of Parental Rights did she receive any checks from anyone regarding child support. She did receive certain checks from the grandparents, Richard and Steffany Fazzio, at that time, supposedly on behalf of Respondent, but her attorney advised her to return those checks (T. 133). The evidence is uncontroverted that no monies were ever submitted to Petitioner on a checking account with Respondent's name on it. Nor was there any evidence that Respondent had provided any money to Petitioner; (Appendix 3 at p. 5).

Therefore, the Court has made specific and detailed Findings of Fact with regard to alleged payment of child support in this case.

4. The number and type of gifts Fazzio gave to the child and the occasions on which he gave them. Judge Johansson found in Finding of Fact paragraph 7 as follows:

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

Again, the matter comes down to a question of the credibility of the witnesses. It is true, as Defendant states in his opening brief, that a few toys and trinkets were produced

before the Court as alleged evidence of items purchased by the father for his minor child. However, given the inherent lack of credibility of both the father and the paternal grandparents, the Court chose to disbelieve that these toys were all purchased by Defendant. It obviously seemed just too convenient to the judge that at the time of trial, when the father's relationship with the child is in question, the parents bring a few toys and trinkets and claim the father purchased them. There was no corroboration whatsoever for their testimony. Given the totality of the circumstances and evidence of this case, it was appropriate for the judge to make the Finding of Fact he did in regard to these few trinkets and toys.

5. The specific statements, acts, or omissions that demonstrate Fazzio's intent to either accept or disregard his obligations as a parent. The trial judge addressed this issue specifically with detailed findings. In paragraph 7, the trial judge made the following Amended Findings of Fact:

- a. Respondent admitted that he urged Petitioner to get an abortion when he first learned she was pregnant with R.A.F. Respondent urged Petitioner to get an abortion on more than one occasion (T. 20, 21, 585, 586);
- b. Respondent did not actively participate in the parenting of R.A.F. from the time he was born. He refused to babysit the child, even though he was not working most of the time during the parties' marriage. Respondent would not get up at night with the child, would not change a diaper, and would not bottle feed the child (T. 23, 24, 25);
- c. Respondent refused to take financial responsibility of R.A.F. during the course of the marriage and never gave her any money for the child, except as mentioned in paragraph (m) (T. 29, 30);

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

f. Petitioner received no child support received from Respondent and she tried constantly to locate him, but was unable. Even though Respondent's parents, Richard and Steffany Fazzio, lived at the same address during this entire period of time, they would refuse to tell her Respondent's address. When Petitioner saw Respondent, she asked him for child support and he refused to give it to her (T. 71, 72, 73, 74) (Appendix 3 pp. 1, 2 - citations added).

Plaintiff could actually cite as responses to this particular concern of the Court of Appeals virtually every single one of the 44 additional specific and detailed Findings of Fact made by Judge Johansson in his Amended Findings of Fact dated June 15, 1992. However, because of space limitations and to avoid repetition, nothing more than what has been set out here will be presented in this portion of the brief.

6. **The impact of the relocation of the parties on Fazzio's visitation.** As indicated previously in this brief, the detailed Amended Findings of Fact of Judge Johansson addressed this issue specifically in paragraph 7 as follows:

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

j. [W]hile suggesting that Petitioner was hard to find, Mrs. Fazzio admitted that Petitioner brought the child to her and her husband for visitation for approximately one year. Furthermore, Mrs. Fazzio admitted on cross-examination that she really did not know when Respondent did or did not see R.A.F. . . . (T. 340, 348, 349, 350, 351, 352);

t. The Court finds that rather than Petitioner's movements from different residences being the cause of Respondent's failure to visit with the child, Respondent failed to have contact with the child to avoid paying child support. On one occasion, Christy Tinnin, Petitioner's sister, testified she accidentally ran into Respondent at a truck stop in February of 1989 at a time when she was aware Petitioner was looking for him to get him to pay child support. Respondent said to Ms. Tinnin during that conversation "[D]o me a favor and don't tell Kim you saw me, because I am supposed to be in Nevada" (T. 182, 183) (Appendix 3 pp. 2,4 - citations added).

In paragraph 8, the Court made the following Findings relevant to this instruction from the Court of Appeals:

b. Petitioner made significant efforts to contact Respondent to get him to pay child support and was regularly informed by Respondent's parents, Richard and Steffany Fazzio, that they did not know how to contact Respondent and could not give her an address or telephone number for him (T. 71, 72). This Court finds it unbelievable that Mr. and Mrs. Fazzio never knew where their son was so as to allow Petitioner to contact him for purposes of obtaining her court-ordered child support; (Appendix 3 p. 5 - citations added).

It is clear that Judge Johansson did not believe that the allegations about Plaintiff's moving several times during the two or three year period in question had any significant impact on Defendant's ability to exercise his visitation rights if he had chosen to do so. In fact, since the Fazzios testified that they had visitation with the child for approximately one year (T. 340, 348, 349, 351), it seems clear that it was not either the Plaintiff's or the Defendant's moving from place to place and from time to time that had an impact on the father's exercise of his visitation rights. He could have visited with the child if he had wanted to, but the Court found it believable that he had not exercised said visitation rights.

7. The manner and effect of any refusal on Fazzio's part to legally acknowledge his paternity. This issue was specifically addressed by the trial judge in paragraph 10 of his Amended Findings of Fact. (See Appendix 3 p. 7). The entirety of paragraph 10 will not be set out in this portion of the brief, but the judge clearly found that "[S]ubsequent to the birth of said child, Respondent had the opportunity to legally declare his paternity for the minor child, but he failed to do so in order to prevent the State of Utah or other persons or agencies from requiring him to meet his financial obligations as a parent." The judge then sets out two other specific findings in paragraph 10 which address this point.

8. Other factors bearing on whether Fazzio consciously disregarded the child to such an extent that the parent-child relationship was destroyed. Again, in addressing this particular issue, Plaintiff is inclined to simply request that the Court review all of the 44 additional Findings of Fact made by Judge Johansson in the Amended Findings of Fact dated June 15, 1992 (Appendix 2). Specifically however, the Court is asked to review the detailed and specific Findings of Fact in paragraph 7, subsection (b), regarding Defendant's failure to actively participate in the parenting of R.A.F. from the time he was born; paragraph 7, subsection (c), regarding his failure to take financial responsibility for R.A.F.; paragraph 7, subsection (e), which reads as follows:

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

this incident (T. 42, 43, 44) (Appendix 3 pp. 1, 8 - citations added).

Although Defendant seems to make light of this situation by suggesting that the minor child was only a year old at the time, it is arrogant and irresponsible for Defendant to believe that this could not have had an effect on the minor child. Certainly, this kind of abuse is emotional abuse and child psychologists and scientists are just now determining what a large impact the viewing of such a violent and traumatic scene by a small child can have on the child for literally the rest of his life. To suggest that such violence does not in any way create a destruction of the parent-child relationship as Defendant does in his opening brief, is in and of itself irresponsible and indicative of his attitude toward R.A.F.

The Court further addressed the specific point of the Court of Appeals regarding the destruction of the parent-child relationship in paragraph 7(g) as it relates Defendant's failure to spend much time with the child after the parties separated; and paragraphs 7(h), (i), (j), (q), (r), (s) and (u), all relating to the fact that the child simply had not seen his father during the course of the visitations with his grandparents.

Certainly, the refusal of Defendant to acknowledge the paternity of his child by signing a simple statement to the Department of Recovery of Services as requested by witness Darren Holt, has to have had a bearing on the destruction of the parent-child relationship, simply by virtue of the father refusing to accept his responsibilities and obligations for the child. Paragraph 10 with its subparagraphs (a) and (b) are clear indications of this refusal to accept responsibility. Furthermore, the Amended Findings of Fact in paragraph 11 with all of its subparagraphs are clear evidence of physical abuse to Petitioner and her children, including R.A.F. Again, to suggest that the mere fact that Defendant "smacked Kim" when

R.A.F. was present could not have affected the parent-child relationship because R.A.F. was too small as Defendant does in his opening brief, is irresponsible and certainly not supported by evidence in the lower court or anywhere else. Defendant would have this Court dismiss what he terms as the "parade of horrors" set out specifically and in detail by Judge Johansson in his Amended Findings of Fact in paragraph 11. However, Plaintiff submits that the violent and abusive nature of Defendant during the course of the time he lived with R.A.F. and the minor child's step-brother, Christopher Holt, are clear indications that Defendant is an unfit parent whose physical and emotional violence towards his wife and his children contributed to the destruction of the parent-child relationship. It remains uncontroverted, that no parent-child relationship exists at the present time with regard to Defendant and R.A.F. R.A.F. does not consider Defendant his father, as found specifically and in detail by Judge Johansson. In the case of State In Interest of M.S. v. Salata, 806 P.2d 1216 (Utah App. 1991), the Utah Court of Appeals held that the termination of a father's parental rights was supported by evidence of his failure to recognize deficiencies in his life-style choices or parenting abilities, persistent denial of any justification for the State's intervention, rejection of all advice from professionals, and unpredictable behavior and severe mood swings. Plaintiff would argue that the instant case is similar in that Defendant in the lower court denied the emotionally and physical abusive activities with respect to his wife and the minor children under his care as a parent. Defendant, it seems, would thus not be amenable to treatment for these conditions. His persistent falsehoods in the trial of this matter are clear indications that he is a person who will say anything to support his own point of view, and one who refuses to recognize his deficiencies. Although the Salata case

involved a termination of parental rights through State action, the principal is similar to the instant case.

According to Utah case law, abandonment of a child can be proven by "either objective evidence of the parent's conduct or by the expressed, subjective intent of the parent". State, In Interest of M.S. v Lochner, 815 P.2d 1325 (Utah App. 1991); In the Interest of J.C.O. v. Anderson, 734 P.2d 458, 462 (Utah 1987). In the instant case, the clear and convincing evidence of Defendant's objective conduct relative to his child convinced the trial court that the parent-child relationship had been destroyed; and thus the second prong of the test for abandonment of a child set out in State Ex Rel. Summers Children v. Wulffenstein, 560 P.2d 331 (Utah 1977) has been met in the instant case. Plaintiff submits there is no question that there was clear and convincing evidence in the lower court that "the parent's conduct evidenced a conscious disregard for his parental obligations" to the child, which is the first prong of the termination test. Wulffenstein, Id. at 1159 citing State Ex. Rel. J.R.T. v. Timperly, 750 P.2d 1234 (Utah App. 1988); Woodward v. Fazzio, supra at 477..

The true attitude of the father is demonstrated by his continual request in his opening brief in this matter for the Court of Appeals to "reverse and remand this matter once again to the trial court, with instructions to set out meaningful visitation with the father" (Defendant's Opening Br. p. 50). The father requests that this Court give him his visitation, but does not suggest that this Court should order that the trial court upon remand should order the payment of back child support, or order the father to pay child support on a regular and ongoing basis, or order the father to acknowledge paternity of the child officially with agencies of the State of Utah, or order the Defendant to accept any of the other

obligations and responsibilities attendant to fatherhood. The Defendant in this case is the typical example of the "dead beat dad" who refused to accept his parental obligations. Judge Johansson found that his overall course of conduct with his child destroyed the parent-child relationship.


A final word needs to be said about the statement of the Court of Appeals that "[T]he timely assertion of such a petition (for specific visitation) is hardly the conduct of a disinterested parent." Woodward v. Fazzio, 823 P.2d at 479. In light of Judge Johansson's Findings of Fact that it was the grandparents who desired visitation with the child (Findings of Fact 7(j)); that it was the grandparents who were paying for the instant action and not the Defendant (Finding of Fact 7); that Defendant had only reimbursed the grandparents for three of nine checks for child support sent to Plaintiff after this action was begun (none were accepted as being untimely given this litigation) (Finding of Fact 7(k)); that the Court believed that it was the "grandparents who were thoughtful enough to purchase the few toys in question for R.A.F." (Finding of Fact 7(l)); that during a court-ordered visitation in May 1990, the grandparents took the child to a park while Defendant was sleeping (Finding of Fact 7(u)); the Court of Appeals needs to revisit the idea that Defendant was really responsible for the request for specific visitation rights.

Judge Johansson made the most telling Finding of Fact of all on this point in paragraph 7(p): "The Court believes that the instant action was filed only as a response to Respondent's parent's concern about their own visitation with the child, and not their son's." (Appendix 3 p. 4).

CONCLUSION

The Utah Court of Appeals gave Judge Olof A. Johansson a mandate to make more detailed Findings of Fact supporting his Conclusions of Law and Judgment terminating the Defendant's parental rights in this case; or reverse his decision if he was unable to make such additional detailed Findings of Fact. The Honorable Olof A. Johansson has responded with some 44 additional Findings of Fact which clearly and convincingly show that the Defendant's parental rights with regard to R.A.F. should be terminated. The Defendant has failed to meet his burden of showing that the trial judge's Findings of Fact were "clearly erroneous" and "against the great weight of the evidence". Thus, the Utah Court of Appeals is urged by Plaintiff to affirm the lower court's Findings of Fact, Conclusions of Law and Decree terminating Defendant's parental rights in this case.

DATED this 24 day of May, 1993.

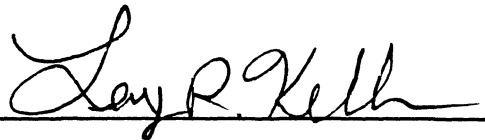


LARRY R. KELLER
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, first class
postage prepaid, on this 24 day of May, 1993, to:

John Walsh
Attorney for Defendant
Suite 270, 2319 Foothill Drive
Salt Lake City, Utah 84109



APPENDIX 1

their minor children and parents petitioned for restoration of custody on grounds of changed conditions, refusal of juvenile court to grant parents a hearing was an abuse of discretion. In re State ex rel. L.J.J., 11 Utah 2d 393, 360 P.2d 486 (1961).

Cited in State ex rel. A.H. v. Mr. & Mrs. H., 716 P.2d 284 (Utah 1986).

78-3a-48. Termination of parental rights — Grounds — Hearing — Effect of order — Placement of child — Voluntary petition of parent.

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

(a) that the parent or parents are unfit or incompetent by reason of conduct or condition which is seriously detrimental to the child;

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

(c) that after a period of trial, during which the child was left in his own home under protective supervision or probation, or during which the child was returned to live in his own home, the parent or parents substantially and continuously or repeatedly refused or failed to give the child proper parental care and protection; or

(d) has failed to communicate via mail, telephone, or otherwise for one year with the child or shown the normal interest of a natural parent, without just cause.

(2) A termination of parental rights may be ordered only after a hearing is held specifically on the question of terminating the rights of the parent or parents. A verbatim record of the proceedings must be taken and the parties must be advised of their right to counsel. No hearing may be held earlier than ten days after service of summons is completed inside or outside of the state. The summons must contain a statement to the effect that the rights of the parent or parents are proposed to be permanently terminated in the proceedings. The statement may be made in the summons originally issued in the proceeding or in a separate summons subsequently issued.

(3) Unless there is an appeal from the order terminating the rights of one or both parents, the order permanently terminates the legal parent-child relationship and all the rights and duties, including residual parental rights and duties, of the parent or parents involved.

(4) Upon the entry of an order terminating the rights of the parent or parents, the court may (a) place the child in the legal custody and guardianship of a child placement agency or the department of public welfare for purposes of adoption, or (b) make any other disposition of the child authorized under Section 78-3a-39. All adoptable children shall be placed for adoption.

(5) The parent-child relationship may be terminated upon voluntary petition of one or both parents if the court finds that the termination is in the best interests of the parent and the child. This termination with respect to one parent does not affect the rights of the other parent.

APPENDIX 2

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

CONCLUSION

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

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



Kim (Fazzio) WOODWARD,
Plaintiff and Appellee,

v.

Richard Cameron FAZZIO, Defendant
and Appellant.

No. 900626-CA.

Court of Appeals of Utah.

Dec. 9, 1991.

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

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

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

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

Reversed and remanded.

1. Infants ⇐180

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

2. Parent and Child ⇐2(8)

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

3. Trial ⇐395(5)

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

4. Appeal and Error ⇐1008.1(1)

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

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

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

OPINION

Appeal and Error §757(3)

Appellant need not go through the fu-
exercise of marshalling evidence when
lings are so inadequate that they cannot
meaningfully challenged as factual de-
minations; appellant can simply argue
legal insufficiency of the findings as
med.

Infants §210

Trial court's findings of fact in support
termination of noncustodial father's pa-
tal rights were inadequate, though con-
taining three pages of text, where most
the "findings" were conclusory and
re akin to conclusions of law, and pro-
ed no insight into the evidentiary basis
the trial court's decision. Rules Civ.
c., Rule 52(a).

Appeal and Error §1106(5)

Unless record clearly and uncontro-
tedly supports trial court's decision, ab-
ce of adequate findings of fact ordinari-
equires remand for more detailed find-
s by the trial court. Rules Civ.Proc.,
e 52(a).

Infants §254

Affirmance of noncustodial father's
ental rights as a matter of law was
ossible, thus requiring remand where
lings of fact were inadequate, where
re was conflicting testimony about mat-
such as frequency and duration of
ier's visits with the child, his treatment
he child during those visits, and custodi-
mother's attempts to prevent father
n visiting with the child.

ohn Walsh, Salt Lake City, for appel-

arry R. Keller, Salt Lake City, for ap-
ee.

efore JACKSON, ORME, and
SSON, JJ.

Such a provision is not terribly helpful to
rties, like these, whose breakup is accompa-
ed by considerable rancor.

ORME, Judge:

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

FACTS

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

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

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

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

....

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

....

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

....

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

....

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

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

....

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

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

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

LAW GOVERNING TERMINATION OF PARENTAL RIGHTS

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

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

....

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

....

Utah Code Ann. § 78-3a-48 (1987).

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

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

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

FINDINGS GENERALLY

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

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

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

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

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

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

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

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

INADEQUACY OF TRIAL COURT'S FINDINGS OF FACT

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

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

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

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

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

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

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

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

of each of the visits; the number of Woodward intentionally prevented; ms Fazio provided as child support, personally or through his parents; mber and type of gifts Fazio gave child and the occasions on which he them; and the specific statements, or omissions that demonstrate Fazio's intent to either accept or disregard his tions as a parent (e.g., instances of ant performing child care functions ranging his diaper or feeding him, g that the child was his responsibility).

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

If we possess this information, we can intelligently evaluate whether the visits have been sporadic, the child support payments insufficient, Fazio's conduct unacceptable, and, ultimately, whether Fazio abandoned the child. Accordingly, we refer for more detailed findings by the court.

We do not intend our remand to be an exercise in bolstering and supporting the conclusion already reached." *Id. v. Allred*, 797 P.2d 1108, 1112 (Utah 1990).

This court is not altogether confident that the trial court's final decision was

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

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

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

JACKSON, J., concurs.

RUSSON, J., concurs in the result.



LeBARON & ASSOCIATES,
INC., Plaintiff,

v.

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

v.

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

No. 910120-CA.

Court of Appeals of Utah.

Dec. 18, 1991.

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

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

APPENDIX 3

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

U.S. District Court

JUN 15 1992

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Darren Holt, Petitioner's husband from a prior marriage, and the father of Petitioner's child Darren Christopher Holt, received notice in approximately December of 1986 from the Department of Recovery Services stating he was responsible for child support for R.A.F.. Mr. Holt

testified that he approached Respondent numerous times regarding this situation and asked him to submit to tests or sign a legal document admitting to the paternity of R.A.F. Respondent steadfastly refused to ever sign a document with the Department of Recovery Services acknowledging his paternity of R.A.F.. Mr. Holt contacted Respondent some 14 or 15 times attempting to get him to admit to his paternity of R.A.F. with the State and Respondent consistently refused;

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

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

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

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

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

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

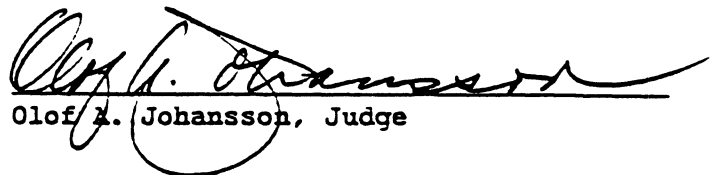
e. Darren Holt testified that his son, Christopher, told him during his visitations that he was terrified of Respondent, and that Respondent had threatened him (Christopher) with a knife and hit him a number of times. Mr. Holt also testified Christopher told him Respondent at one point drove Petitioner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

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

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

Dated this 15th day of June, 1992.

BY THE COURT


Olof A. Johansson, Judge

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

APPENDIX 4

FILMED

ELLIOTT LEVINE, USB#1939
Attorney for Plaintiff
4168 South 1785 West
West Valley City, Utah 8411906
Telephone: 966-3502



Filed: 8-16-90
FILED IN CLERK'S OFFICE
Salt Lake County Utah

NOV 19 1987

H. Dixon Higley, Clerk
By [Signature] Deputy Clerk

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

KIM FAZZIO,

Plaintiff

RICHARD CAMERON FAZZIO,

Defendant.

:

:

:

:

DECREE OF ANNULMENT

Civil No. D-87-3798

Judge Homer F. Wilkinson

BK 213 No. 5854
11-23-87 8:24

The above action came on for hearing before the Honorable Homer F. Wilkinson, District Judge, on Friday, November 13, 1987. The Plaintiff appeared with her counsel, Elliott Levine. The Defendant appeared in person without counsel. Defendant filed his Acknowledgement that he had been served with a copy of the Complaint and waived service of process; said Defendant also consented that default may be entered against him ~~and that this matter may be heard on the Complaint of the Plaintiff without further notice to Defendant.~~

Upon entry of the default of the Defendant and the taking of the proofs of the Plaintiff and made its Findings of Fact and Conclusions of Law, and being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the marriage ceremony entered into between the parties on November 3, 1986, is hereby declared to be null and void and of no force or effect.

2. Plaintiff is awarded of the minor child of the parties, RICHARD ANTHONY, subject to reasonable visitation rights in the Defendant as agreed upon between the parties. Defendant is ordered to pay to the Plaintiff the sum of \$100.00 per month as and for child support until said child reaches the age of majority. Defendant is ordered to maintain his existing medical and dental insurance for the benefit of the minor child of the parties. Each party is ordered to assume and pay one half (1/2) of any medical or dental costs of the minor child not covered by insurance. Plaintiff shall be entitled to claim the minor child of the parties as a dependant on her income tax returns.

3. The marital property is awarded to the party having possession of the same.

4. The parties are ordered to assume and pay all marital debts pursuant to agreement. Each party is ordered to assume and pay any debts or obligations incurred by themselves after the filing of this action, and hold the other party harmless therefrom.

5. No alimony is awarded to either party.

6. Defendant is ordered to maintain Plaintiff and her minor children by a prior marriage on his existing medical insurance until Plaintiff remarries.

7. The Court hereby authories the withholding of income as a means of collecting any child support ordered by the Court in this Decree. It is further ordered that when child support is delinquent, as defined by Subsection 78-45d-1(4), Utah


Page -3-

, that appropriate income withholding procedures shall apply
existing and future payors of withheld income and that all
held income shall be submitted to the Office of Recovery
ces, Utah State Department of Social Services.

DATED: Nov. 17, 1987

ATTEST
H. DIXON HINDLEY

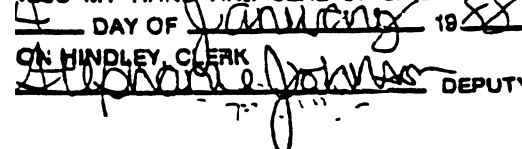
Clerk


Homer F. Wilkinson
District Judge

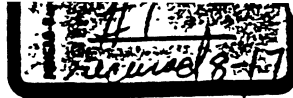

Deputy Clerk

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the
ing document was served upon the Defendant by mailing a
hereof to him at 5334 Leprechaun Lane, SLC, Utah, 84118,
prepaid, this _____ day of November, 1987.

CITY OF SALT LAKE) ES
I, THE UNDERSIGNED, CLERK OF THE DISTRICT
COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY
CERTIFY THAT THE ANNEXED AND FOREGOING IS
A TRUE AND FULL COPY OF AN ORIGINAL DOCU-
MENT FILED IN MY OFFICE AS SUCH CLERK.
WITNESS MY HAND AND SEAL OF SAID COURT
THIS _____ DAY OF _____ 1988
H. DIXON HINDLEY, CLERK
 DEPUTY

APPENDIX 5



M Kelly

Dated: 8-16-90
bag

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

FAZZIO, KIM	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 874903798 DA
	:	DATE 02/07/90
VS	:	HONORABLE SANDRA PEULER
	:	COURT REPORTER WRITTEN NO TAPE
FAZZIO, RICHARD CAMERON	:	COURT CLERK SPO
DEFENDANT	:	

TYPE OF HEARING: MOTION HEARING
PRESENT:

P. ATTY. KELLER, LARRY R.
D. ATTY. WALSH, JOHN

ON MOTION OF
PLTF & DEFT

COMM. RECOMMENDS:

1. THAT PLTF'S MOTION TO TRANSFER THE ISSUE OF VISITATION TO JUVENILE COURT BE DENIED.
2. THAT ON A TEMPORARY BASIS, DEFT'S REASONABLE VISITATION BE DEFINED AS FOLLOWS: ONE WEEKEND PER MONTH, SATURDAY 10:00 A.M. - 5 P.M. AND SUNDAY 10:00 A.M. - 5 P.M., TO BE EXERCISED AT DEFT'S PARENT'S RESIDENCE. FURTHER, THAT DEFT BE RESPONSIBLE TO TRANSPORT THE CHILD FOR VISITATION. THIS VISITATION IS TO BE EXERCISED ONLY WHEN THE DEFT IS IN SALT LAKE, AND UNLESS THE PARTIES AGREE OTHERWISE, IS TO BE THE THIRD WEEKEND OF EACH MONTH, BEGINNING IN FEBRUARY, 1990. DEFT IS TO PROVIDE 1 WEEK ADVANCE NOTICE OF HIS INTENT TO VISIT.
3. THAT BOTH PARTIES BE PERMANENTLY ENJOINED, PERSONALLY OR THROUGH AGENTS, FROM HARASSING, ANNOYING, OR THREATENING THE OTHER.

Sandra Peuler

APPENDIX 6

IN THE THIRD DISTRICT JUVENILE COURT
SUMMIT COUNTY, STATE OF UTAH

IN THE MATTER OF THE INTEREST OF	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW
	:	AND DECREE
FAZZIO, RICHARD ANTHONY	:	
DOB: September 17, 1986	:	CASE NO. 786412
	:	
	:	Judge Olof A. Johansson

The above-entitled matter came before the Court for trial on August 16, 17, and 28, 1990, with Petitioner Kim Woodward being present and represented by her attorney, Larry R. Keller, Esq., and Respondent Richard Cameron Fazzio being present and represented by his attorney, John Walsh, Esq. The Court, after receiving evidence from the parties and their witnesses, hearing arguments of counsel and reviewing the exhibits and such memoranda of counsel as submitted, and good cause appearing herein enters its

FINDINGS OF FACT

1. Petitioner Kim (Fazzio) Woodward and the minor child, Richard Anthony Fazzio, the subject of this action, are residents of Summit County, State of Utah.
2. Respondent Richard Cameron Fazzio is a resident of Clark County, State of Nevada.
3. Petitioner and Respondent were married on November 3, 1986.
4. Subsequent to the marriage, the Honorable Homer F. Wilkinson of the Third Judicial District Court in and for Salt Lake County, State of Utah, issued a Decree of Annulment of said marriage dated November 19, 1987.
5. As a result of the union of Petitioner and Respondent, a single child was born, Richard Anthony Fazzio, date of birth, September 17, 1986.

6. Petitioner has subsequently remarried, and Petitioner's name is now Kim Woodward.

7. Petitioner and Respondent separated for the last time on approximately September 10, 1987, and Respondent has failed to make a serious effort to see the minor child, Richard Anthony Fazzio since that time.

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

His contacts with the child have been inconsistent, sporadic and token. Except for time periods early in the child's life, the father's contact with the child has been minimal and only when his parents, Mr. and Mrs. Richard Fazzio, the paternal grandparents, had the child. It appears to be a relationship of convenience for the father. The Court has observed no firm intent or manifestation from the conduct of the father that he was serious about establishing a meaningful parent/child relationship or to resume care of the child.

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

The record reflects significant investment of time, love, interest, and concern for the child by the paternal grandparents, Mr. and Mrs. Richard Fazzio. But their altruistic efforts cannot be ascribed to the father, as the Court must look to the father's conduct alone in reaching its judgment. The Court is convinced ~~that the father's~~ conduct has led to the destruction of the parent/child relationship.

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

9. Petitioner attempted to locate and contact Respondent since the date of the parties' annulment so that she might collect child support, but she was unsuccessful in locating him.

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

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

Based upon the foregoing FINDINGS OF FACT, the Court makes the following:

CONCLUSIONS OF LAW

1. Respondent Richard Cameron Fazzio's overall conduct constitutes a "conscious disregard" of the parental obligation to the child.
2. Such "conscious disregard" of the parental obligation to the child has led to the destruction of the parent-child relationship between Respondent and the minor child.
3. Therefore, the minor child has been abandoned by his natural father within the purview of the requirements of U.C.A. 78-3a-48 of the Juvenile Court Act, and subsequent Utah Supreme Court and Appellate Court decisions interpreting said statute.
4. The trial held in this case met the requirements of U.C.A. 78-3a-48(2) as a "hearing held specifically on the question of terminating the rights of the parent," Richard Cameron Fazzio.
5. Richard Cameron Fazzio was properly represented by competent legal counsel and present during all proceedings conducted herein.

In viewing the totality of the circumstances, and based upon the Findings of Fact and Conclusions of Law, a careful review of the evidence, the exhibits and the arguments of Counsel, the Court is convinced by clear and convincing evidence that said child has been legally abandoned by his father, and therefore, enters the following decree:

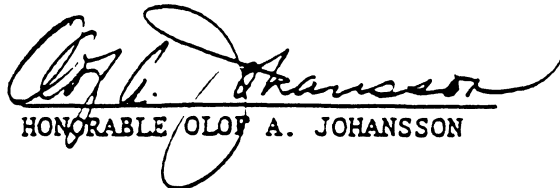
DECREE

1. It is hereby Ordered that the parental rights of Richard Cameron Fazzio, as to said minor child, are hereby permanently terminated including any and all residual parental rights.

2. The decision of this Court does not rest upon U.C.A. 78-30-5, as this Court is without jurisdiction to entertain proceedings under that Section.

3. It is further directed that Mr. Larry Keller, counsel for Petitioner, file a certified copy of this Order and the Interim Order of October 1, 1990 with the District Court in Case No. 874903798DA, Kim Fazzio v. Richard Cameron Fazzio.

BY THE COURT,


HONORABLE OLOF A. JOHANSSON

CLERK OF DISTRICT COURT
COUNTY OF SALT LAKE, UT
I, THE UNDERSIGNED CLERK OF DISTRICT COURT
DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE AND CORRECT COPY OF THE
ORIGINAL AS FILED IN THE DISTRICT COURT
THIS 28th DAY OF November, 1990
BY Deputy Clerk DEPUTY CLERK

APPENDIX 7

NOV 14 1991

JOHN WALSH
ATTORNEY AT LAW #3371
2319 SOUTH FOOTHILL DRIVE
SUITE 270
SALT LAKE CITY, UTAH
84109
Telephone: (801)467-9700

SALT LAKE COUNTY
By Clerk

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

-----oooOooo-----

KIM (FAZZIO) WOODWARD,	.	
Plaintiff,	:	O R D E R
vs.	:	
RICHARD CAMERON FAZZIO	:	Civil No. 87-3798
Defendant.	:	Judge Homer Wilkinson

-----ooooOoooo-----

The Intervenors, Richard Bruce Fazzio and Steffany J. Fazzio, Motion for Temporary Order re: Visitation, came on regularly for hearing before the Honorable Michael Evans, Domestic Relations Commissioner, on Tuesday, September 10, 1991, at the hour of 2:00 P.M., with the Plaintiff Kim Fazzio Woodward appearing and represented by Larry R. Keller, Attorney at Law, and the Intervenors, Richard Bruce Fazzio, and Steffany J. Fazzio, appearing and represented by John Walsh, Attorney

at Law, and the Court after reviewing the file, the affidavits, exhibits, etc., and being fully advised as to the facts and circumstances, and then after hearing argument of Counsel on all the following issues, and otherwise for good cause appearing, it is hereby

ORDERED, ADJUDGED, AND DECREED, as follows:

1. That there is no legal basis to conclude that the rights of the Grandparents to visit the subject child and to otherwise have a meaningful relationship with the subject child, are foreclosed by virtue of the fact that the Juvenile Court has entered an order terminating the parental right of Richard Cameron Fazzio.

2. That as a matter of law, the Grandparents are entitled to liberal and meaningful visitation with the minor child as is in the best interest of the minor child.

3. That the Juvenile Court made a specific finding regarding the Paternal Grandparents of a minor child, Intervenor herein, as follows: "The record reflects significant investment of time, love, interest, and concern for the child by the paternal grandparents, Mr. and Mrs. Richard Fazzio."

4. That it is in the best interest of the minor child that the Intervenor be granted liberal and meaningful visitation on a temporary basis as follows with no restriction as to where the said visitation is to occur:

a. Saturday, September 28, 1991, from the hours of 9:00 A.M. to 6:00 P.M.

b. Saturday and Sunday, October 5 and October 6, 1991, from the hours of 9:00 A.M. to 6:00 P.M. each day.

c. Friday, Saturday, and Sunday, October 18 through October 20, 1991, from Friday at 6:00 P.M. to and including Sunday at 6:00 P.M. and every third weekend of each month thereafter.

The picking up and delivering back of the minor child shall occur as the parties can resolve amongst themselves.

That the foregoing is a Temporary Order, until the relationship with the minor child has been re-established.

5. The Plaintiff's Motion for a Change of Venue is hereby denied.

6. The Plaintiff's Motion to Certify this matter to the Juvenile Court is hereby denied.

7. The Plaintiff's Motion for child support is hereby denied, as there is no legal basis to require grandparents to pay child support or grandchild support.

8. On a temporary basis, Intervenor, until further order of this court, shall not allow visitation between the Defendant, Richard Cameron Fazzio, and the minor child, Richard Anthony Fazzio, born September 17, 1986.

Each side is to bear their own costs and attorneys fees associated with this action.

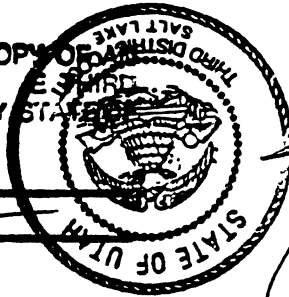
Dated this 14 day of ^{Nov.} ~~October~~, 1991.

BY THE COURT:

I CERTIFY THAT THIS IS A TRUE COPY OF THE
ORIGINAL DOCUMENT ON FILE IN THE
DISTRICT COURT, SALT LAKE COUNTY, STATE OF
UTAH.

DATE

5-21-93
[Signature]
DEPUTY COURT CLERK



Michael L. Evans 11/13/91
DOMESTIC RELATIONS COMMISSIONER

[Signature]
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing ORDER to the Plaintiff, by mailing the same, postage prepaid, addressed to: LARRY R. KELLER, ATTORNEY AT LAW, 257 TOWER SUITE 340, 257 EAST 200 SOUTH - 10, SALT LAKE CITY, UTAH, 84111.

Dated this 29th day of October, 1991.

[Signature]
JOHN WALSH
ATTORNEY AT LAW

APPENDIX 8

4
FBI 8-16-90

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

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

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

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

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

Kim
Kim