

1993

# Utah v. Mobley : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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THE STATE OF UTAH, Department :  
of Human Services, ex. rel.  
DIANA W. MOBLEY :

Plaintiff/Appellee, :

Priority No. 15

v. :

GEORGE C. MOBLEY, :

Case No. 930299-CA

Defendant/Appellant. :

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BRIEF OF APPELLANT

Appeal from findings of fact and order of contempt signed  
and entered on April 2, 1993, by the Honorable John A. Rokich,  
Judge, Third District Court, Salt Lake County, State of Utah.

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GEORGE C. MOBLEY, : Case No. 930299-CA

Defendant/Appellant. :

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**JURISDICTIONAL STATEMENT**

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. Sections 78-2a-3(2)(h) and 78-45-10(1992), whereby the parties in a district court domestic relations case may take an appeal to the Court of Appeals from a final order regarding child support. Further, a judgment of criminal contempt is appealable as a matter of right. Von Hake v. Thomas, 759 P.2d 1162, 1167 (Utah 1988). In this case, the final order was issued by the Honorable John A. Rokich, Judge, Third District Court in and for Salt Lake County, State of Utah.

**STATUTES, RULES AND CONSTITUTIONAL PROVISIONS**

The text of the following statutes, rules and constitutional provisions are contained in Addendum A:

Thirteenth Amendment to the U.S. Constitution  
42 U.S.C. § 1994 (1992)  
Rule 63(b) of the Utah Rules of Civil Procedure  
Utah Code Ann. § 78-32-12.1(5)

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

A. Did the court comply with the procedures mandated by Rule 63(b), Utah Rules of Civil Procedure, in the treatment of the Affidavit for the Removal of a Judge submitted by the Defendant/Appellant?

Standard of Review: No deference is accorded the trial court on questions of procedure. Barnard v. Murphy, 212 Utah Adv. Rep. 19 (Utah App. 1993).

B. Was the Defendant/Appellant denied due process of law through the court's failure to ground the Findings of Fact and Conclusions of Law in sufficient evidence, particularly the finding of ability to pay on the part of Defendant/Appellant and the finding of no just cause existing for failure to make child support payments.

Standard of Review: Findings of fact shall not be set aside unless clearly erroneous. Utah Rule of Civil Procedure 52(a). However, finding should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached. Rucker v. Dalton, 598 P.2d 1336, 1338 (Utah 1979).

C. Was the Defendant/Appellant denied due process of law when the court found Defendant/Appellant in contempt of court and ordered him to jail, by failing to address the difference between direct and indirect contempt and failing to address the alternative of community service, pursuant to Utah Code Ann. § 78-32-12.1(5).



Standard of Review: A trial court's determination of criminal contempt will be reversed for abuse of discretion. Boggs v. Boggs, 824 P.2d 478 (Utah App. 1991).

D. Does the enforcement of the child support laws of the State of Utah using criminal contempt powers conflict with the 13th Amendment to the United States Constitution and 42 United States Code 1994 (1992)?

Standard of Review: A question of law is reviewed for correctness, and accorded no particular deference. Carter v. Utah Power & Light Co., 800 P.2d 1095, 1097 (Utah 1990).

#### **STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS**

On March 30, 1993, the Honorable John A. Rokich found the Defendant/Appellant in contempt and ordered his commitment to the Salt Lake County Jail for thirty days forthwith. The Findings of Fact, Conclusions of Law, and Order of Contempt were signed April 2, 1993. The Notice of Appeal was filed on April 29, 1993.

#### **STATEMENT OF THE FACTS**

Following trial on July 19, 1989, a Decree of Divorce was entered on August 17, 1989, by the Honorable John A. Rokich, Judge, Third District Court in and for Salt Lake County, State of Utah. Among other things, the Defendant was ordered to pay child support and alimony in twice-monthly payments, and \$7,500.00 in past due temporary support. On December 13, 1989, the State of Utah filed an Ex Parte Motion for Joinder of Parties and on December 26, 1989, an Order for Joinder of Parties was signed by

the Honorable John A. Rokich, Judge, Third District Court in and for Salt Lake County, State of Utah.

On November 27, 1992, the State of Utah filed a Motion for an Order to Show Cause in the above-captioned case, in which the State sought judgment for child support and alimony arrearages and an order holding the Defendant in contempt of court. On November 30, 1992, the court issued an Order to Show Cause. A hearing on the Order to Show Cause was held on January 20, 1993, before Third District Court Commissioner Thomas N. Arnett. Defendant appeared pro se. The Commissioner recommended that the issue of contempt be certified for hearing before Judge Rokich.

On March 30, 1993, a hearing on the Order to Show Cause was held before Judge Rokich. Defendant again appeared pro se. No witnesses were present. The State made a proffer of evidence and asked that the Defendant be found in contempt and be subject to the powers of the court. The Defendant responded by making a Motion to Continue based on an Affidavit for the Removal of a Judge filed March 29, 1993. The Motion to Continue was denied by the court (T. 3), as was the request to remove the judge for bias (T. 3). The court declined to follow the procedure for removal of a judge outlined in Rule 63(b) of the Utah Rules of Civil Procedure. Rule 63(b) was cited by the Defendant in his oral argument and in his affidavit.

The court indicated that Defendant's memorandum, Written Arguments for Evidentiary Hearing March 30, 1993 (sic), had been read and found to be "meritless, absolutely meritless." (T. 4). The court found the Defendant in contempt of court and sentenced

him to jail for 30 days forthwith ("Put the handcuffs on him and take him over to jail.") (T.4). For the record the court found that the Defendant "failed to make payment; he has the ability to pay and has refused to acknowledge his obligation to provide for his family." (T. 4).

#### SUMMARY OF THE ARGUMENT

The Defendant argues that he timely filed an affidavit in support of a motion to recuse the judge, and that the judge failed to follow the clear mandate of Rule 63(b) of the Utah Rules of Civil Procedure. The trial court then held an Order to Show Cause hearing on the issue of Defendant's non-payment of child support, and failed to make adequate findings of fact. The trial court found Defendant in criminal contempt of court and committed him forthwith to jail for thirty days, without affording the Defendant his constitutional rights. Finally, the trial court's criminal contempt order violated the Defendant's rights under the Thirteenth Amendment to the U.S. Constitution.

#### ARGUMENT

##### POINT I: THE TRIAL COURT FAILED TO COMPLY WITH THE PROCEDURE MANDATED BY RULE 63(b), UTAH RULES OF CIVIL PROCEDURE, DESPITE DEFENDANT'S TIMELY REQUEST

Rule 63(b) of the Utah Rules of Civil Procedure provides:

Whenever a party to any action or proceeding, civil or criminal, or his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or

in favor of any opposite party to the suit, such judge shall proceed no further therein, except to call in another judge to hear and determine the matter.

Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is known. If the judge against whom the affidavit is directed questions the sufficiency of the affidavit, he shall enter an order directing that a copy thereof be forthwith certified to another judge (naming him) of the same court or of a court of like jurisdiction, which judge shall then pass upon the legal sufficiency of the affidavit. If the judge against whom the affidavit is directed does not question the legal sufficiency of the affidavit, or if the judge to whom the affidavit is certified finds that it is legally sufficient, another judge must be called in to try the case or determine the matter in question. No party shall be entitled in any case to file more than one affidavit: and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are in good faith.

Defendant first argues that his affidavit, filed March 29, 1993, the day before the Order to Show Cause hearing scheduled for March 30, 1993, was timely filed. On November 30, 1992, the State filed an Order to Show Cause with the court, resuming the litigation of this case. The Return of Service was filed December 18, 1992, and a hearing was set before Commissioner Arnett on January 20, 1993. At the hearing on January 20, 1993, the Commissioner certified the issue of contempt for hearing before Judge Rokich. On February 1, 1993, Defendant filed a pleading titled Objection to District Court Commissioner's Recommendation, and on February 2, 1993, filed a pleading titled Notice to Submit for Decision, among others. A hearing on Defendant's Notice to Submit for Decision on his Objection to

District Court Commissioner's Recommendation was set for February 26, 1993, and then continued by the court to March 30, 1993.

On February 17, 1993, Defendant filed a Motion for Waiver of Payment of Fees and a Notice to Submit for Decision, which was scheduled for March 12, 1993, before Judge Rokich. Although the court struck the hearing as improperly before the court, the court did rule to deny the Defendant's motion for waiver of payment of fees. In his Affidavit for Removal of Judge the Defendant cites the events of the March 12 hearing as part of the basis for his Affidavit. Defendant filed his Affidavit 17 days later on March 29, 1993, prior to the hearing on the Order to Show Cause and before any evidence was taken or rulings were made.

While Rule 63(b) imposes no specific time limitation on the filing of a motion for disqualification, in Madsen v. Prudential Fed. Sav. & Loan, 767 P.2d 538 (Utah 1988), the court held that timeliness is essential. "To be timely, a motion to disqualify a judge should be filed at counsel's first opportunity after learning of the disqualifying facts." Madsen at 543. In Madsen the moving party waited 39 days after the disqualifying facts were made known and the trial court had ruled on the substantive issues before filing their motion. As the reviewing court pointed out, "[A] party who has a reasonable basis for moving to disqualify a judge may not delay in the hope of first obtaining a favorable ruling and then complain only if the result is unfavorable. Madsen at 542. The court in Madsen indicated that the affidavit of prejudice and motion to disqualify should have

taken no more than ten days to prepare and file. In Birch v. Birch, 771 P.2d 1114 (Utah App. 1989), the trial judge, faced with a Rule 63(b) motion, reassigned the case to another judge who found the supporting affidavit to be legally insufficient and denied the motion. The reviewing court first considered timeliness. "As a prerequisite to considering the merits of Birch's claim, we must first determine whether his challenge was timely filed. Birch at 1116. Because Birch waited 88 days after the trial court had entered its judgment and after the facts alleged in the affidavit were known, the court found defendant's motion to be untimely and denied relief.

In the present case, Defendant's first appearance before Judge Rokich in four years came on March 12, 1993. Both parties were reprimanded by the judge for scheduling the hearing and Defendant's Motion for Waiver of Payment of Fees was summarily denied. See Affidavit for the Removal of a Judge. Defendant recalled the summary fashion in which his divorce trial had been handled by the judge, and was concerned that he was not being accorded due process as a party or as a pro se litigant. Defendant, proceeding pro se, then filed his affidavit under Rule 63(b) on March 29. Thus, Defendant filed his affidavit 17 days after the facts indicating bias became known to him. Although this is one week longer than the ten days cited in Madsen, the Madsen deadline was directed at counsel and presumes some familiarity with the Rules of Civil Procedure. Here the Defendant, proceeding pro se, was able to marshal facts, locate and cite the correct rule, and file the affidavit in a

comparatively reasonable time. Further, Defendant filed his affidavit prior to the pending hearing, and did not seek to disqualify the judge only after an unfavorable ruling had been made. See Madsen at 543. Finally, at no time did the State object to the timeliness of Defendant's Affidavit for the Removal of a Judge. The State, present at the hearing on March 30, 1993 and author of the Findings of Fact, Conclusions of Law and Order of Contempt, waived any objection by their failure to object on the issue of timeliness. See generally State v. Schreuder, 726 P.2d 1215 (Utah 1986).

For relief, the Defendant's affidavit requested that the evidentiary hearing be continued. He again moved to continue the hearing orally on March 30, 1993, and asked the judge to take notice of his affidavit and to follow the procedures outlined in Rule 63(b). The court denied both requests. First, as to Defendant's motion to continue, the court stated, "That's denied". (T. 3). The court next denied Defendant's motion under Rule 63(b), stating that, "[T]here's no bias[.]" (T.3), and "I am not recusing myself in the case[.] I have no basis upon which to recuse myself." (T. 4).

The trial court failed to comply with the procedures mandated by Rule 63(b). In Barnard v. Murphy, 212 Utah Adv. Rep. 19 (Utah App. 1993), the reviewing court made clear that the trial court must comply with the procedure outlined in Rule 63(b). "The clear import of Rule 63(b) is that a judge against whom the affidavit is directed must either recuse him- or herself, or if he or she questions the legal sufficiency of the

affidavit, certify the matter to another named judge for a ruling on its legal sufficiency." Barnard at 20. The trial court in the present case did neither, but rather ruled in its own favor on the issue of bias, which is error under Rule 63(b).

POINT II: THE DEFENDANT WAS DENIED DUE PROCESS OF LAW  
BY THE COURT'S FAILURE TO MAKE ADEQUATE FINDINGS OF  
FACT

At the evidentiary hearing on March 30, 1993, the Plaintiff proffered numerous facts in support of their allegation that the defendant was in contempt of court by his failure to pay child support. (T.2-3). When asked to respond, the Defendant made a motion to continue, essentially renewing the motion to continue contained in the Affidavit for Removal of Judge filed March 29, 1993. The Court denied the motion. (T. 3). Defendant next brought the affidavit to the attention of the Court, and the Court denied the motion to recuse, saying there was no bias. The Court then found Defendant in contempt of court and had him immediately handcuffed and taken to jail. Prior to leaving the courtroom, the Defendant asked the Court to state findings and conclusions. The Court stated, "The findings are that he failed to make payment; he has the ability to pay and has refused to acknowledge his obligation to provide for his family." (T. 4). The Defendant replied, "I have not refused. Your honor, I have not-- I do not have the ability to pay" (T. 5). He was then led away in chains.



The Plaintiff prepared a document titled Findings of Fact, Conclusion of Law and Order of Contempt, which was submitted to the Court for signature. The mailing certificate indicates that the document was mailed to the Defendant as his address of record, even though the Plaintiff had reason to know that the Defendant was incarcerated for 30 days in the Salt Lake County Jail. The document submitted by the Plaintiff is replete with errors. The Court made no findings on the record with respect to the findings of fact cited in paragraphs 1, 2, 3, 5, 6, 7, and 8. Although the Plaintiff made a general proffer in open court as to those facts, no evidence in support of the proffer was introduced and the Court cited no evidence in support of its oral findings. The Defendant certainly did not stipulate to the proffer, and he was not permitted to cross-examine the evidentiary basis of the proffer.

The Court also failed to address the evidence and argument presented by the Defendant. On March 29, 1993, the Defendant filed with the court a document titled Written Arguments for Evidentiary Hearing March 30, 1993 (sic). In the document the Defendant challenges the allegations against him, asserts defenses against the imposition of contempt, and provides documentary evidence of his income. The Court on the record fails to make findings as to any of the Defendant's contentions, either for or against.

The general rule governing findings of facts is that they must be sufficiently detailed for the reviewing court to understand how the trial court applied the proper rule of law to

specific facts in reaching its conclusions of law. "The importance of complete, accurate and consistent findings of fact in a case tried by a judge is essential to the resolution of dispute under the proper rule of law. To that end the findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." Rucker v. Dalton, 598 P.2d 1336, 1338 (Utah 1979). To challenge the trial court's factual findings the appellant must marshal the evidence. Where, however, as here, the trial court has failed to enter detailed findings, the appellant is excused from the marshaling effort. "There is, in effect, no need for an appellant to marshal the evidence when the findings are so inadequate that they cannot 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, appellant need not go through a futile marshaling exercise. Rather, appellant can simply argue the legal insufficiency of the court's findings as framed." Woodward v. Fazzio, 823 P.2d 474 (Utah App. 1991).

In the present case, the Court failed to articulate any subsidiary facts on the record in support of its findings. In Ostler v. Ostler, 789 P.2d 713 (Utah App. 1990) the court enunciated the seven factors the trial court must consider in awarding prospective child support after a material change of

circumstances under Utah Code Ann. § 78-45-7(2) (1987). "Because these factors 'constitute material issues upon which the trial court must enter findings of fact,' (citation omitted), the failure to enter specific findings on each of the factors is generally reversible error... ." Ostler at 715. In the present case the Court addressed none of these factors in finding that the Defendant had the ability to pay, despite the Defendants objections. The trial court abuses its discretion when it fails to enter detailed findings concerning child support determination. Allred v. Allred, 797 P.2d 1108 (Utah App. 1990). Again, in Woodward, a case involving the termination of parental rights, the court states, [U]nless 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. Id. at 478.

POINT III: THE DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT FOUND DEFENDANT IN CONTEMPT OF COURT AND ORDERED HIM TO JAIL, BY FAILING TO ADDRESS THE DIFFERENCES BETWEEN DIRECT AND INDIRECT CONTEMPT AND CIVIL AND CRIMINAL CONTEMPT

In finding that Defendant was in contempt of court, the Court said, on the record, "[T]he findings are that he failed to make payment; he has the ability to pay and has refused to acknowledge his obligation to provide for his family." (T. 4). The Court ordered the Defendant to jail for thirty days forthwith. Apart from the question of whether the court's findings of fact were adequate to support the order of contempt,

two issues must be considered in order to determine if due process was accorded the Defendant. First, was the contempt direct or indirect, and second, was the contempt civil or criminal?

The trial court's conclusions address the elements of contempt but fail to state specific facts in support thereof. "As a general rule, in order to prove contempt for failure to comply with a court order it must be shown that the person cited for contempt know what was required, had the ability to comply, and intentionally failed or refused to do so. Coleman v. Coleman, 664 P.2d 1155, 1156 (Utah 1973). Again, the trial court failed to make adequate findings of fact, since the above-quoted basis for imposing contempt is a conclusion of law and there are no subsidiary facts in support thereof on the record. Apart from the Plaintiff's proffer and the Plaintiff's Findings of Facts, there is no evidence that the Defendant had the ability to comply or that the Defendant intentionally failed or refused to do so.

The issue of whether contempt was direct or indirect is important because of the different procedural protections that must be afforded under the due process clause of the Fourteenth Amendment to the United State Constitution. See Burgers v. Maiben, 652 P.2d 1320, 1322 (Utah 1982). Contempt is direct when it is committed in the presence of the judge, and is indirect when it is committed outside the presence of the judge. Direct contempt may be punished summarily under Utah Code Ann. § 78-32-3 (1992). For indirect contempt to be found, however, the due process clause requires that, "the person charged be advised of

the nature of the action against him [or her], have assistance of counsel, if requested, have the right to confront witnesses, and have the right to offer testimony on his [or her] behalf." Burgers v. Maiben, 652 P.2d at 1322. Since the Plaintiff was required to provide evidence to the Court to prove that the Defendant was in contempt, the contempt was clearly indirect. Given what occurred in the courtroom, however, the Defendant was not accorded due process. The Defendant was not afforded a meaningful opportunity to confront the witnesses against him, nor was he able to offer testimony on his own behalf. Finally, he was not given the assistance of counsel, nor was he advised of such a possibility, and by proceeding pro se he seems to have earned the enmity of the court.

Similarly, the issue of whether the contempt is categorized as civil or criminal has due process consequences. Contempt is civil if it is remedial and for the benefit of the complainant, and if the sentence, whether jail or a fine, is conditioned upon a definite performance by the defendant and may be purged by such performance. Contempt is criminal if it is punitive and intended to vindicate the authority of the court, and if the sentence is limited to imprisonment for a definite period. See Hicks ex rel. Feiock v. Feiock, 485 U.S. 624, 108 S.Ct. 1423 (1988). "[W]e now, prospectively only, adopt the Feiock approach as a matter of state law. For all future cases, we will follow the rule that a contempt order is criminal if the fine or sentence imposed is fixed and unconditional, but is civil if the fine or imprisonment is conditional such that the contemner can obtain relief from the

contempt order merely by doing some act as ordered by the court. Further, a contempt order is civil if the order is to pay a fine to the other party rather than to the court." Von Hake v. Thomas, 759 P.2d at 1168, n.5. In the present case the contempt can only be characterized as criminal because the unconditional sentence was intended to be punishment, as the Defendant was ordered to jail forthwith for thirty days without any means to purge himself of the sentence by the court.

A further consequence of criminal contempt is, "the fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt." Feiock at 632. The Plaintiff in the present case has couched the findings of fact as 'clear and convincing evidence,' and thereby fails to meet the requisite burden of proof. The right to counsel attaches, and an indigent person charged with a criminal offense has a right to appointed counsel at public expense. Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006 (1972); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963); State v. Vincent, 202 Utah Adv. Rep. 31 (Utah App. 1992). The Defendant was not given the assistance of counsel, did not waive assistance of counsel, and was not questioned as to indigency. The Defendant was incarcerated at the request of the State and by the order of the Court without the constitutional protections and fundamental fairness required by due process when he was sent to jail for thirty days without the assistance of counsel, without

the opportunity to confront witnesses, without the opportunity to testify on his own behalf, upon inadequate factual findings, and under an erroneously low burden of proof.

POINT IV: THE ENFORCEMENT OF THE CHILD SUPPORT LAWS OF THE STATE OF UTAH USING CRIMINAL CONTEMPT POWERS CONFLICTS WITH THE THIRTEENTH AMENDMENT TO THE U.S. CONSTITUTION

Defendant, in his Written Arguments for Evidentiary Hearing March 30, 1993 (sic), raised the following defense to the imposition of contempt by the court. He asserts that the Plaintiff has alleged an artificially high imputed income for the Defendant, so that it appears that the Defendant has the financial means to pay his obligation to his children. Then, by failing to make payment, the logical inference is that the Defendant intentionally and willfully refuses to pay his obligation. Defendant contends the imputation of income creates an obligation of work, since if the Defendant does not work the court presumes willful refusal to pay. If the court enforces its order to pay through criminal contempt powers, the Defendant argues, the court violates the Thirteenth Amendment.

The Thirteenth Amendment to the U.S. Constitution states:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation.

The enabling legislation, 42 U.S.C. § 1994 (1992), states:

The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.

The term 'peonage' has its origins in Mexico, where a 'peon' was a person who was compelled to work for his creditor until his debt was paid. Peonage is a system of involuntary servitude based upon indebtedness. Clyatt v. United States, 197 U.S. 207, 25 S.Ct. 429 (1905). Indebtedness of one person to another is a condition precedent to the existence of peonage, and the subsequent compulsion of service or work may be enforced through physical threats or law. For the purpose of determining whether a system of peonage existed, work compelled under state law by the constant threat and fear of imprisonment under such law rendered the work compulsory. United States v. Reynolds, 235 U.S. 133, 35 S.Ct. 86 (1914).

The Thirteenth Amendment clearly excepts from its ambit those individuals convicted of a crime. The case law is full of examples of courts denying relief to individuals who challenged their incarceration as involuntary servitude. Where a person is duly tried, convicted, sentenced and imprisoned for a crime in accordance with law, no issue of peonage or involuntary servitude arises. Draper v. Rhay, 315 F.2d 193 (9th Cir. 1963). See also



Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966). However, imprisonment based upon a conviction where the defendant has not been afforded the fundamental right to assistance of counsel violates the thirteenth amendment prohibition against involuntary servitude. U.S. v. Morgan, 222 F.2d 673 (2d Cir. 1955). See also U. S. ex rel. Caminito v. Murphy, 222 F.2d 698 (2d Cir. 1955) (incarceration upon conviction without evidence imposes involuntary servitude).

Where the penalty for failure to perform services is other than incarceration or physical harm, the courts have held that the requirement of performance is not involuntary servitude. As an example, laws requiring attorneys to represent indigent defendants without compensation as a condition of practicing law have been held constitutional. Williamson v. Vardeman, 674 F.2d 1211 (6th Cir. 1982). Compulsory state work programs for recipients of public assistance have been held constitutional, where the reduction of benefits, not incarceration, is the consequence of failure to participate. Brogan v. San Mateo County, 901 F.2d 762 (9th Cir. 1990).

Courts have considered whether the obligation to work to pay child support is a form of involuntary servitude under the thirteenth amendment. In Freeman v. Freeman, 397 A.2d 554 (D.C. 1979), the court ordered the husband to seek gainful employment commensurate with his abilities and educational background, and indicated that failure to pay child support could result in incarceration. Imposition of contempt was stayed upon adequate payments, however, so that the payment option operated as a purge

clause, rendering the contempt civil, not criminal. Likewise, in Re Marriage of Smith, 396 N.E.2d 859 (Ill. 1979), the contempt order was stayed and could be purged by payment of child support.

In the present case the Defendant clearly had a lawful obligation to support his non-custodial children through payment of money. Further, the Court was free to fashion an order to compel the Defendant to pay that obligation, so long as the order did not involve incarceration. When the Court ordered the Defendant to jail unconditionally for non-payment of child support the Court violated the Defendant's Thirteenth Amendment rights. The Defendant was required by the Court to make payment or to work for money with which to make payment, and when the Defendant did not he was incarcerated. Further, as argued previously, Defendant was incarcerated without the assistance of counsel and without adequate evidence, which was held to be involuntary servitude in U.S. v. Morgan and U. S. ex rel. Caminito v. Murphy, above. The imposition of criminal contempt for non-payment of child support in this case violates the Thirteenth Amendment.

Finally, Defendant draws the court's attention to Utah Code Ann. § 78-32-12.1(5), which states:

If the court finds be a preponderance of the evidence that an obligor, as defined in Section 78-45-2, has refused to pay child support as ordered by a court in accordance with Title 58, Chapter 45, Uniform Civil Liability for Support Act, the court may order the obligor to:

- (a) perform community service; and
- (b) participate in workshops, classes, or individual counseling to educate the obligor about the

importance of complying with the court order and providing the children with a regular and stable source of support.

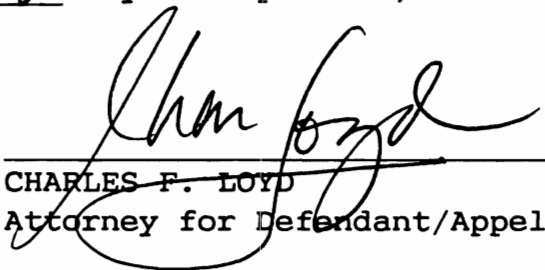
It appears the legislature has provided a remedy for non-payment of child support which is specifically included in the chapter as an alternative to contempt and which does not violate a defendant's thirteenth amendment rights.

### CONCLUSION

The trial court erred when it failed to follow the procedure outlined in Rule 63(b) of the Utah Rules of Civil Procedure. The trial court failed to make adequate findings of fact. The trial court erred when it found the Defendant in criminal contempt and ordered him to jail without constitutional protections. The trial court violated the Defendant's Thirteenth Amendment rights under the U.S. Constitution when it committed him to jail unconditionally for non-payment of child support.

Defendant requests the following relief from this court. Defendant asks that the case be remanded for reassignment to another judge consistent with Rule 63(b). Defendant asks that the case be remanded for further findings of fact pursuant to a hearing for modification of child support. Defendant asks that the court find that criminal contempt is an unlawful remedy for non-payment of child support.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of September, 1993.



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CHARLES F. LOYD  
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, CHARLES F. LOYD, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Utah Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 15 day of September, 1993.

  
\_\_\_\_\_  
CHARLES F. LOYD

DELIVERED/MAILED this 15 day of September, 1993.

## **ADDENDUM A**

Thirteenth Amendment to the U.S. Constitution:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation.

42 U.S.C. § 1994 (1992):

The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.

Rule 63(b) of the Utah Rules of Civil Procedure:

Whenever a party to any action or proceeding, civil or criminal, or his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed no further therein, except to call in another judge to hear and determine the matter.

Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is known. If the judge against whom the affidavit is directed questions the sufficiency of the affidavit, he shall enter an order directing that a copy thereof be forthwith certified to another judge (naming him) of the same court or of a court of like jurisdiction, which judge shall then pass upon the legal sufficiency of the affidavit. If the judge against whom the

affidavit is directed does not question the legal sufficiency of the affidavit, or if the judge to whom the affidavit is certified finds that it is legally sufficient, another judge must be called in to try the case or determine the matter in question. No party shall be entitled in any case to file more than one affidavit: and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are in good faith.

Utah Code Ann. § 78-32-12.1(5):

If the court finds be a preponderance of the evidence that an obligor, as defined in Section 78-45-2, has refused to pay child support as ordered by a court in accordance with Title 58, Chapter 45, Uniform Civil Liability for Support Act, the court may order the obligor to:

- (a) perform community service; and
- (b) participate in workshops, classes, or individual counseling to educate the obligor about the importance of complying with the court order and providing the children with a regular and stable source of support.