

1993

John Carl Putvin v. Karen Larie Thompson : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

JOHN CARL PUTVIN,

Plaintiff/Appellee,

VS.

KAREN LARIE THOMPSON,

Defendant/Appellant.

RESPONSE BRIEF

OF APPELLEE PUTVIN

Docket # 930359 CA

Priority Number 4

**APPEAL FROM THE CUSTODY DECREE AND SUBSEQUENT ORDERS
OF THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE TIMOTHY B. HANSON PRESIDING
UTAH COURT OF APPEALS**
BRIEF

1 Court Case Number: 910903188CS

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Utah Court of Appeals

JAN 28 1994


Mary T. Noonan
Clerk of the Court

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III. STATEMENT OF JURISDICTION

This Court has statutory jurisdiction pursuant to Section 78-2a-3(2)(i), Utah Code Annotated. However, as argued alter in the brief, John denies that the appeal is timely, or that the issues appealed were properly certified. If that is determined to be the case, the Court would be denied jurisdiction based on timeliness only. See also Rules 3 and 4, Utah Rules of Appellate Procedure.

IV. ISSUES PRESENTED FOR REVIEW

I. Can a party to a stipulated custody decree later attack it and appeal from it?

Legal question, judged for correctness. Settlement of a case bars attack or appeal. *Dury v. Lunceford*, 18 Utah 2d 74, 415 P.2d 662 (Utah 1966); *Ebert v. Ebert*, 744 P.2d 1019 (Utah App. 1987).

II. Must the trial judge enter comprehensive Findings in a custody determination arising from default and stipulation?

Legal question, correction of error standard. But abuse of discretion as to adequacy of specific findings. *Ebert v. Ebert*, 744 P.2d 1019 (Utah App. 1987).

III. When a litigant tells the court that she gives up, is it appropriate to allow her attorney to withdraw her answer and proceed by default?

Discretion afforded to trial court is broad in child custody awards. *Maughan v. Maughan*, 770 P.2d 156, 159 (Utah App. 1989).

IV. Was the appeal timely? Assuming to specific time limitation was exceeded, does the doctrine laches protect a two year old custody decree from attack?

As to time limitations, a question of law reviewed *de novo*. *Smith v. Smith*, 793 P.2d 407, 409 (Utah App. 1990). As to laches, abuse of discretion standard.

V. Was the trial court's custody award an abuse of discretion?

Discretion afforded to trial court is broad in child custody awards. *Maughan v. Maughan*, 770 P.2d 156, 159 (Utah App. 1989).

VI. Can evidence which is several months old be deemed to be "newly discovered" for purposes of a motion to alter or amend?

Mixed question of law and fact, applying Rule 52, URCP. (Utah App. 1989).

VII. If there is no newly discovered evidence, does an improper motion to alter or amend a judgment extend the time for appeal?

Question of law, applying Rule 4, Utah Rules of Appellate Procedure, and Rules 52 and 59, Utah Rules of Civil Procedure.

VIII. Does appeal time on a custody award run from the date of the custody decree, or from the denial a year later of a motion to set it aside?

Question of law, applying Rule 4, Utah Rules of Appellate Procedure, and Rules 52 and 59, Utah Rules of Civil Procedure.

IX. Where a Petition to Modify custody is pending, absent certification for appeal, is denial of a motion to alter or amend an order refusing to set aside a custody decree an appealable order?

Question of law, applying Rule 54, Utah Rules Civil Procedure.

V. DETERMINATIVE AUTHORITIES

All of these authorities are included in the Appendices and are therefore not set forth verbatim here.

VI. STATEMENT OF THE CASE

INTRODUCTION

This appeal is an assault on a custody award that is beyond attack, both legally and factually. The *Findings of Fact, Conclusions of Law* and a *Custody Decree* were entered by the trial court only after Karen's counsel agreed to them and approved them by his signature in November, 1991. Even if the time period within which she could have asked the court to consider setting aside the judgment had not already passed, her actions and those of her attorney waived any defect she might have otherwise claimed.

A. NATURE OF THE CASE

Stripped of irrelevancies, this is essentially an appeal from the motion of Defendant/Appellant Karen Thompson (hereinafter "**Karen**"), seeking to set aside a 2 year old stipulated custody decree, granting sole permanent custody of the parties' daughter, now age five, Deborah Putvin-Thompson (hereinafter "**Deborah**"), to Plaintiff/Appellee John C. Putvin (hereinafter "**John**").

John and Karen are Deborah's natural parents. Their relationship was a union of conscience, based on a belief in the religious fundamentalist practice of plural marriage. John and his wife Donna took Karen as a plural wife, and a few years later Karen

gave birth to Deborah. Karen and Donna, who lived side by side, both shared with John, by agreement, the care of and bonding with Deborah. John has since abandoned the practice of polygamy.

This case began one night in May, 1991, when Karen absconded unilaterally with Deborah, then age 3, and John sought through the justice system to continue raising Deborah. He received sole permanent custody by stipulation and decree in 1991, and now, much later, Karen wishes to undo the agreement. Deborah has lived with John and Donna for more than half of her young life. In the meantime, there was a multiple day trial on the issue of visitation. R. 709-715, transcripts of trial included in record on appeal. The trial changed visitation but not custody.

B. COURSE OF PROCEEDINGS

1. **Complaint.** John filed a complaint against Karen in May, 1991 and later amended it. He prayed for custody of Deborah, then age 3, asked for an injunction against Karen from removing Deborah from Salt Lake County, and for other relief. R. 2-6, 161-165. When he filed, Karen had absconded with Deborah while John slept, and was concealing her somewhere in the northwest United States and Canada. Id.; R. 9-12. The case was assigned to the Honorable Timothy R. Hanson, Third District Court, Salt Lake County.¹

2. **Restraining Order.** Concurrent with filing of the initial

¹ Initially Judge Leslie Lewis was assigned, but she granted John's unopposed *Motion for Recusal*. R. 179.

complaint, the Honorable Scott Daniels entered an *ex parte Temporary Restraining Order and Order to Show Cause*. R. 15-16. Karen and her family were ordered to refrain from holding Deborah outside Salt Lake County, concealing her from her father John, or otherwise interfering with his custodial rights. R. 16. Karen was ordered to appear on May 30, 1991 to show cause why the restraining order should not become a preliminary injunction.

3. **Show cause hearing.** Karen failed to appear before Third District Court Commissioner Michael S. Evans as ordered by Judge Daniels. Her attorney, Chase Kimball, appeared on behalf of Karen and her relatives. *Recommendation and Temporary Order*, R. 235-238. However, because Karen's family and associates were still successfully concealing her and Deborah from John, he was unable to accomplish personal service of the order upon Karen. R. 9-12.²

4. **Contempt.** When Karen failed to appear and continued to hide his child, John moved for a contempt finding. Commissioner Evans, though, found that service was not adequate.

Since the Court holds that she was not personally served with the Temporary Restraining Order, Karen Thompson cannot be held in contempt . . . , despite having continued to hold Deborah . . . outside the jurisdiction of the Court. The fact that [Karen] had actual notice of the restraint against withholding Deborah from [John], and of the hearing, but did not appear or comply, does not create contempt in the absence of personal service.

Recommendation and Temporary Order, June 25, 1991, p. 2 R. 236.³

² Service was made on Karen's family, others from her religious group and also at her last known address.

³ John timely rejected the recommendation, but Judge did not reverse this recommendation. *Id.* at R. 236 and 237.

5. **Temporary custody (initial).** Evans awarded temporary custody to Karen. R. 236. To get the court to restrict John to limited, supervised visits, her counsel stated that John presented a risk of flight with Deborah⁴, falsely calling him a violent criminal. R. 236. Karen's allegations were serious enough that despite the lack of any specific claim of violence by John, the supervision was extremely restrictive. John was required to pay the cost of using health care professionals to supervise his first several visits with Deborah after Karen brought her back to Utah under court order. The irony is that John ended up with sole permanent custody, and Karen's visitation was initially supervised to prevent harm to or abduction of Deborah by Karen.

This temporary award to Karen, an absent parent who was still concealing Deborah in knowing contempt of court, illustrates the "possession is everything" tendency to maintain the status quo that seems to exist in Third District Court. This unwritten, pervasive policy encourages steeling away by night with the child, as happened here. Attorneys who handle domestic cases in Utah know to advise clients that usually physical *de facto* custody at the start of a case translates into *de jure* temporary custody, which in turn nearly always becomes permanent legal custody. Fortunately, after great effort, that outcome was reversed here.

6. **Pretrial matters.** Many depositions were taken in the case,

⁴ She also called John a violent criminal, e.g. R. 94-133. This character attack was later discounted entirely. See, e.g. polygraph test of Dr. Raskin, attached to *Findings*, R. 419-470.

and from May to November, 1991 it was very hard fought by both sides. See generally, R. 1 through 413.

7. **Guardian *ad litem*.** The court appointed a guardian *ad litem* (at John's expense⁵), to independently represent Deborah's interests. Arnold Gardner, attorney with Littlefield and Peterson, was appointed by stipulation of the parties. R. 239-241. From that point on all agreements parties were approved by Mr. Gardner.

8. **Custody Evaluator.** Early on, the court ordered a custody evaluation, again at John's expense. The parties stipulated to use Dr. Patricia Smith, who was appointed by the trial court.⁶ R. 39-241. Dr. Smith did a thorough evaluation, with extensive testing and hours with the parties and others. John suggested and she requested a polygraph test to determine whether Karen's accusations had any basis (which was performed upon John by Dr. David Raskin, University of Utah). The parties stipulated that Dr. Raskin would do the testing, and the results would be admissible in any proceeding in the case. R. 335-336. The results were incorporated into the evaluation and the eventual stipulated *Findings of Fact*. *Id.* They showed Karen's fear to be unfounded.

9. **Stipulated custody change.** Dr. Smith strongly recommended that custody be permanently awarded to John, and expressed strong concerns about Karen's mental state and a possible future abduction

⁵ Although John has had to pay for virtually everything in this case, including other professionals, Karen's costs have been covered mostly by tithes of the Apostolic United Brethren.

⁶ Karen's counsel recommended Dr. Smith, and John agreed. *Supplemental Temporary Recommendation & Order*, R. 239-241.

by her. The parties then stipulated to change temporary custody to John, which was reduced to an order giving him temporary custody. R. 335-336, 351-352. Defense counsel Chase Kimball referred Karen to mental health therapy. Since September 1991 (some 2 and a half years) John has had continuous physical custody of Deborah.⁷

10. **Karen's letter.** On November 4, 1991 Karen delivered to John, the court, counsel and the guardian *ad litem* a very disturbing letter, the contents of which contributed to the Findings, Conclusions and Decree limiting Karen's visitation. R. 419-470. A copy is attached as Appendix A. In it, she:

- a. Relinquishes permanent custody of Deborah to John;
- b. States that she **continues to have the same fears that caused her to secretly take Deborah away.**
- c. Announces that the court system is evil, and implies that she will seek **extra-judicial relief.**
- d. In essence, announces her default and surrender. *Id.*

11. **Court Conference.** Judge Hanson ordered counsel to appear by phone at a scheduling and settlement conference on November 12, 1991. R. 370-371. Participating were Judge Hanson, Karen's counsel Kimball, John's counsel (undersigned) and Mr. Gardner, Deborah's attorney. R. 414.⁸ The court had before it Karen's letter announcing and accomplishing her default.

12. **Default.** Mr. Kimball orally withdrew Karen's *Answer and Counterclaim* and the court proceeded by default. R. 415, 419.

⁷ During that entire time, John has never requested nor has Karen ever paid any child support, and that remains the case.

⁸ See Affidavit of Arnie Gardner, attached as Appendix C.

13. **Findings and Custody Decree.** At that time respective counsel, including Deborah's guardian *ad litem*, agreed on behalf of their respective clients that Findings, Conclusions and a Decree be entered, giving sole permanent custody to John. *Id.* The parties also concurred (and the Court ordered) that Karen's visitation be supervised, due to emotional difficulties typified by her November 4 letter. *Findings of Fact, Conclusions* and a *Custody Decree* were entered to that effect the next day, November 13, 1991. R. 415-470. A copy of the findings and decree are included as Appendix B. As entered in the record, the findings attached and incorporated the custody evaluation and November 4 default letter. R. 415-470.⁹

14. **Evidence and support for findings.** The Findings and Conclusions, by stipulation of the parties, incorporate Dr. Smith's court ordered custody evaluation and Karen's default letter as supporting evidence. In total they occupy 55 pages of record. *Id.* Before Judge Hanson entered the *Findings of Fact, Conclusions of Law* and *Custody Decree*, Karen's attorney, Mr. Kimball, signed each, approving them as to form and content. *Id.*, Appendix B.

The following procedural history relates to post-judgment events. They are important as to Karen's attempt to set aside the judgment and then to alter or amend denial of that motion. They also relate, however, to Karen's current claim that, in retrospect, Mr. Kimball was not really her attorney.

⁹ Those attachments, while very important, are not included in Appendix B. The letter is Appendix A. The custody evaluation is too large to conveniently include. R. 415-417.

15. **No challenge to result.** Karen never withdrew the letter nor appealed the decree. This is not surprising since she agreed to the terms through her attorney. No effort was made to set aside the decree until well over five months after it was entered.

16. **Kimball representation.** Chase Kimball appeared for Karen from the May, 1991 outset of this case, R. 94, with an appearance in writing and in open court before she returned Deborah to Utah. The record attests that he continued to represent her until his April 30, 1992 withdrawal. R. 642-643. He withdrew 5 months after stipulating to default and approving the *Decree* for Karen.

17. **Letter.** In the November 4 letter announcing Karen's decision to stop fighting (the courts "are not courts of justice" but are controlled by money), she acknowledges who her attorney is. "I am going against the advice of Chase [Kimball]" in giving up. She wrote nothing about discharging Kimball. Appendix A.

18. **Kimball Letter.** On November 19, 1991 (a few days after the *Custody Decree* was entered), Mr. Kimball wrote to Judge Hanson as Karen's attorney. R. 471-476.¹⁰

19. **Further filings on Karen's behalf.** Kimball continued his very active representation in the case, filing:

* January 27 *Notice of Hearing and Change of Address*. R. 484, 485.

* January 30, 1992 *Motion for Expedited Hearing* - R.489-490.

20. **Kimball affirms his authority.** On January 31, 1992 Mr.

¹⁰ The oddness of Kimball's letter to the court evidences that it was drafted with Karen's approval. In addition to the letter, between the November decree and January 31, 1992 he filed 2 other documents as Karen's counsel. R. 484 and 489.

Kimball filed on Karen's behalf his *Memorandum in Support of Motion to Strike and Motion for Sanctions - Response to Motion to Require Proof of Authority*, along with a related motion and sworn affidavit.¹¹

Appendix D; R. 499-503. Karen (through him) stated:

[A]ttached hereto is the affidavit of Chase Kimball stating his representation of the defendants has continued from the time he answered the original complaint. . . . [T]his author will produce his client, Karen Thompson, at a hearing . . . , and the Court may satisfy itself that she is represented by the author at that time.

Id., Appendix D, R. 501-502 (emphasis added). Karen and Kimball are shocked that anyone would question that Mr. Kimball has always been Karen's attorney. Any doubt about that, they say, are "patently absurd". They seek sanctions against the undersigned for saying otherwise, stating that it should be "clear to the dullest intellect." Id. This was weeks after Mr. Kimball stipulated on Karen's behalf to withdraw her answer and settle the case.

21. **Court appearance.** On February 3, 1993, 2 1/2 months after he and Karen now say in hindsight that they think he was *de facto* discharged, Kimball met with the undersigned in Judge Hanson's chambers, asking on behalf of Karen for an expedited hearing and (again) for sanctions against the undersigned attorney. 2-3-92 Min. Entry, R. 505. Importantly, the record shows that Karen appeared at this hearing with her attorney, Mr. Kimball. Id.

22. **Continued representation.** Kimball then filed for Karen:

* February 10 motion for unsupervised visitation. R. 515.

¹¹ John's undersigned counsel had filed a *Motion to Require Proof of Authority* pursuant to Section 78-51-33, Utah Code. R. 506-507. That precipitated the documents in Appendix D.

* February 13 request for ruling on motion, and *Memorandum in Opposition to Motion to Relieve Guardian ad litem*. R. 516-520.

* March 23, 1992 objection to proposed order, R. 543-544, also *Response to Plaintiff's Motion for Psychological Evaluation*. R. 548-549.

* March 30, 1992 Karen's *Request for Ruling and Proffer of Credentials*. R. 577-592.

* April 14, 1992, Kimball approves order for Karen. R. 807.

* April 27 Karen's motion (again), *ex parte*, for sanctions against John and his undersigned attorney (alleging witness tampering), R. 609-631, accompanied by long, caustic memo. Id.

23. Withdrawal. April 30 1992 Kimball withdrew -- the only time. R. 642-643.¹² Only then did Karen retrieve from him her voluminous file. R. 643. The same day Kimball sent the court a copy of a letter he wrote for Karen's to psychologist Robert Howell, then newly appointed by Judge Hanson to evaluate Karen. R. 644. The next day, May 1, John filed a *Notice to Appear or Appoint New Counsel*. R. 645. Karen lacked counsel for only a week.

24. Daniel Darger appears for Karen, May 8, 1992.¹³ R. 651.

The following is the beginning of Karen's effort to attack the Custody Decree, entered nearly six months earlier and not attacked until May, 1992.

25. First attack on Decree, May 26, 1992 (6 months after

¹² This occurred after Mr. Kimball derided Karen for making a false police report, claiming John had stolen a car from Karen.

¹³ Mr. Darger has never filed an actual appearance in this case. R. 651. The appearance attached to Karen's appeal brief was captioned for a separate personal injury case.

permanent custody award). Darger filed Karen's *Motion to Set Aside Default Judgment*, one of the motions whose orders are appealed from. R. 658-704, Motion R. 707-708, Addendum R. 719-731.

26. **Trial.** At a multi-day trial in May through July, Karen had the opportunity to prove she had bettered herself and was prepared for unsupervised visitation. R. 709-715, transcripts of trial included in 7 volumes in the appeal record, 1517-2334.

27. **Testimony.** On May 9 and July 8, 1992 Karen testified supporting motion to alter visitation under *Decree*, claiming for the first time that Kimball acted without authority. R. 2170-2171.

28. **Modification.** Judge Hanson liberalized visits, though not as much as Karen requested. Bench ruling, July 16, 1992, R. 2260-2280. There was litigation over the appropriate content of the resulting visitation order. See, e.g. R. 855-882, 893-894.

29. **Findings and Order.** December 10 1992, a year after the original decree, Judge Hanson made *Findings of Fact, Conclusions of Law on Defendant's Motion to Modify Visitation*, R. 1125-1131, and his *Order on Motion to Modify Visitation*. R. 1132-1137. The order eased Karen's visitation restrictions, but left permanent custody with John. *Id.* Like the original, this was not appealed.

30. **Court denies relief from Decree.** Comprehensive November 18, 1992 Memorandum Decision, R. 1008, March 11, 1993 order. R. 1362. This is said to be one of the orders Karen appeals from.

31. **Petition to Modify.** On December 15, 1992 John petitioned the court to modify the *Custody Decree* and supplemental, liberalized visitation. R. 1140-1149. John requested certain injunctive

relief, relating primarily to Karen's then current psychological state, relocation to Wyoming and renewed polygamist practices, and their effect on Deborah during visitation.¹⁴ Id.

John's Petition to Modify is still pending and unresolved, and was pending when Karen filed this appeal.

32. **Motion to Dismiss.** Karen moved to dismiss the *Petition to Modify*. The motion was fully briefed, then stricken for failure of defense counsel to appear at the hearing he arranged. R. 1364.

33. **New motion.** On March 24, 1993, 16 months after entry of the Decree, 6 months after denial of her first motion for relief, 6 months after entry of the modified decree, 4 months after receiving "new" evidence from Mr. Kimball, 4 months after the court granted her own motion to modify visitation, and 13 days after the formal order denying her relief from the original decree, Karen filed her *Motion to Alter or Amend Judgment*. R. 1369-1370.

34. **"New" evidence.** Karen sought to alter or amend based on "newly discovered evidence which could not have been produced prior hereto". She also asked the court again to set aside the 1991 custody award. R. 1369. The "new" evidence was that Mr. Kimball would now swear that he believes Karen's November 4, 1991 default letter discharged him (directly contradicting his prior conduct, statements to the court and sworn affirmation). R. 1380-1382.

¹⁴ John tried to accomplish the further protection for Deborah by way of a *Motion to Reopen Visitation*, which was denied by the court on March 11, 1993. R. 1360-1361.

However, Mr. Kimball gave Mr. Darger the "new" information four months prior to the motion. Affidavit of Darger, R. 1403.

35. **Motion denied.** On May 4, 1993 Judge Hansen entered an order denying Karen's *Motion to Alter or Amend* the order denying her attack on the original *Decree*. R. 1494.

36. **Sanction.** The court found the motion frivolous or in bad faith, and entered a \$380 fee sanction against Karen.¹⁵ R. 1494.

37. **Late Appeal.** The Appeal was filed June 2, 1993, 30 months after the *Decree* and 3 months after the *Order* denying the attack on the *Decree*.¹⁶ R. 1504-1505.

C. STATEMENT OF RELEVANT FACTS

1. At issue is custody of Deborah Putvin-Thompson, age 5 1/2. Karen and John are her natural parents. She lived with both for the first 2 years of her life, with Karen the next 4 months and with John the last 2 and a half years -- most of her life. R.

2. Karen's family for generations has practiced religious polygamy. She belongs to a closed society, the "Allred Group" or "Apostolic United Brethren." R. 10-11, 72-73.

¹⁵ The motion, argued April 19, 1993, purported to arise from new evidence and incompetence of Karen's prior counsel, and lack of authority of counsel to agree to the custody and visitation. But the evidence was available to Karen 2 years earlier, and the sworn statement used to support the motion was directly contrary to earlier sworn statements by the same attorney in this same case.

¹⁶ There is a serious question about appealability. There was no Rule 54, URCP certification, and yet a *Petition to Modify*, filed in December, 1992 remains outstanding in the trial court.

3. John, his first partner ("Donna") and Karen lived in their union of conscience from 1982 to 1991. R. 1964-1969. A few years after John took Karen as a plural wife, Deborah was born on May 13, 1988. R. 10. Karen and Donna lived side by side, and by agreement shared with John the care of and bonding with Deborah. Id.

4. Karen was unhappy in the relationship, in large part because she resented the close bond Donna and Deborah developed. R. 1185-1188. She felt uninvolved in Deborah's life. R., Karen Thompson Depo. R.; trial testimony of Karen, beginning R. 1784.

5. On May 9, 1991, while John slept in the home, Karen surreptitiously absconded with Deborah around midnight, R. 10, walking a considerable distance with Deborah, Depo., R, despite being advised by her therapists of legal means to separate from John. Id.

6. Karen's father/religious leader¹⁷ picked them up on the highway and helped conceal Deborah with members of his sect. After a few days in Herriman, Utah Karen hid Deborah for about a month in the Northwest and Canada. Depo. She knew that the man who harbored them had been accused (not charged) with child sex abuse. Id.

7. When Karen left, she intended to permanently deprive John and Deborah of one another's company, and to further deprive Deborah from the society of Donna and her other significant persons, including her brother, David McConnell Putvin. Id.

8. The court issued an *ex parte Temporary Restraining Order and Order to Show Cause*, R. 15-16, ordering Karen and her family to refrain

¹⁷ Joe Thompson, Karen's father, has since been removed from the leading councils of that religion due to numerous accusations of sexual abuse of children over a number of years.

from holding Deborah outside Salt Lake County, concealing her from John, or interfering with his custody. R. 16. Karen was ordered to appear May 30, 1991 to show cause why the order should not become a preliminary injunction. Id.

9. Despite actual knowledge of the order, Karen failed to appear or produce Deborah at the hearing. R. 235-238. Commissioner Evans awarded temporary custody to Karen. R. 236. Because Karen accused John of being a criminal, his first several visits had to be supervised by a health care professional, at John's expense.

10. Even after Karen returned with Deborah under court order, she admitted might possibly abscond again if things went poorly, despite court orders to the contrary. R. 1803-1804, R. 101-114.

11. Arnold Gardner, a Salt Lake Attorney, was appointed as Deborah's guardian *ad litem* by stipulation. R. 239-241.

12. Deborah was found to suffer from post traumatic stress disorder as a result of the flight into the northwest, and her separation anxiety in being withheld from her father. R.1958-1969¹⁸

Deborah's post traumatic stress from being taken from John is continuing and undisputed.
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13. The Court ordered a custody evaluation, and the parties stipulated to use Dr. Patricia Smith, who was appointed by the court. R. 239-241. Dr. Smith met with, tested and evaluated the

¹⁸ Deborah's therapist is Karen Platis, LCSW, who specializes in treating and diagnosing small children. R. 1958-1959. Though Ms. Platis has been Deborah's therapist for a couple of years, for many months she had no attempted input from Karen.

parties exhaustively. John suggested and took a **polygraph** test to determine whether Karen's accusations were founded in fact. The parties stipulated that Dr. David Raskin of the University of Utah would do the test, and the results would be admissible in evidence. R. 335-336. The favorable findings were incorporated into the evaluation and the eventual stipulated *Findings of Fact*. Id.

14. Dr. Smith's evaluation strongly recommends permanent custody to John, and expressed strong concerns about Karen's mental state and a possible future abduction by her. Immediately, the parties stipulated to shift temporary custody to John, and that change became a court order. R. 335-336, 351-352. Mr. Kimball referred Karen to mental health therapy. Since September 1991 (2 1/2 years) John has had continuous physical custody of Deborah.

15. Despite giving up, Karen refused to sign any stipulation; even one giving her standard, unsupervised visits. R. 2067-2068.

16. On November 4, 1991 Karen sent to Putvin, the court, counsel and the guardian *ad litem* a very disturbing letter, the contents of which contributed to the Findings and Decree limiting Karen's visitation. See R. 419-470. The letter's contents caused great alarm, when coupled with the fact she refused to sign any stipulation, even if it gave her healthy, unsupervised visitation. R. 2066-2069. A copy of the letter is in Appendix A. In it, she:

- a. Relinquishes permanent custody of Deborah to Putvin;
- b. States that she continues to have the same fears that caused her to secretly take Deborah away.
- c. Announces that the court system is evil, and implies that she will seek extra-judicial relief.

d. In essence, announces her default and surrender. Id.

17. Judge Hanson set a telephone conference for November 12, 1991. R. 370-371. Involved were Judge Hanson, Karen's counsel Kimball, John's undersigned counsel and Deborah's counsel Gardner. Mr. Kimball orally withdrew his client's *Answer and Counterclaim*, allowing the matter to proceed by default. R. 415, 419.

Mr. Kimball agreed orally to Karen's default, made necessary by her strange posture. While refusing to fight further through legal means, she refused to sign any of a series of written stipulations offered to her. Most or all of them gave her better terms than she ended up with in the Custody Decree. Instead, she alluded to self help or even impending death of John in her November 4, 1991 letter.

18. Respective counsel, including Deborah's guardian *ad litem*, agreed for their clients that Findings, Conclusions and a Decree be entered giving John sole permanent custody. The parties concurred and the Court ordered that Karen's visits be supervised, due to her emotional condition, typified by her November 4 letter. *Findings of Fact, Conclusions* and a *Custody Decree* were entered to that effect the next day, November 13, 1991. R. 415-470. Appendix B. However, as entered the findings attached and incorporated the custody evaluation and the November 4 default letter. R. 415-470.

19. In October, 1993 Karen married into a new polygamist household, and moved to Lovell, Wyoming.¹⁹

¹⁹ The household is headed by Royston Hooper, who at last word was an alien without right to reside in USA. Hooper depo.

20. Karen's November 4 letter, besides announcing that she will stop fighting (since "the courts today are not courts of justice" but are controlled by money), identifies her attorney. "I am going against the advice of Chase [Kimball]", she said. The letter says nothing about discharging Mr. Kimball. Appendix A.

21. In December, 1992 *Findings of Fact and Conclusions of Law on Defendant's Motion to Modify Visitation*, R. 1125-1131, and *Order on Defendant's Motion to Modify Visitation*, R. 1132-1137, were entered. While relaxing Karen's visitation restrictions, the new order left intact the permanent sole custody award to John. It was not appealed. John was ordered to bring Deborah from New Zealand to Utah at his expense to visit with Karen 3 times yearly. Id.

VII. SUMMARY OF ARGUMENT

There is no legitimate basis for appeal. The Court should affirm Judge Hanson's ruling, with fees to John for the following reasons, any of which is enough to affirm Judge Hanson's actions:

- a. Karen has appealed from a stipulated decree, and cannot now complain about what she agreed to.
- b. The argument that her attorney did not really represent her is not credible, and the record is to the contrary.
- c. Karen's attacks on the decree were untimely.
- d. Karen's entire position is barred by laches and waiver.
- e. The trial court was in a position to judge the parties' fitness. Judge Hanson's broad discretion cannot be overcome here.

f. There is no "newly discovered evidence" for a motion to alter or amend. The "evidence" was known to Karen all along.

g. Any defect is harmless, and the later modification of visitation after trial, cures any claimed defect.

h. The Court lacks jurisdiction, because Karen was untimely and because there remains pending an unresolved *Petition to Modify*.

i. Deborah having been in John's sole custody since September, 1991, Karen cannot meet the high burden of showing that any ping pong custody award could be justified on remand.

VIII. ARGUMENT

1. Karen can't appeal a stipulated decree. Settlement bars appeal from denial of a motion to alter or amend. *Drury v. Lunceford*, 18 Utah 2d 74, 415 P.2d 662 (Utah 1966); *Karren v. Karren*, 25 Utah 87, 69 P. 465 (Utah 1902) (after colluding to settle, one can't set aside the decree under URCP 60(b))²⁰

2. The Court lacks jurisdiction,²¹ because the appeal was not timely. It should have been filed within 30 days after the date of entry of the order appealed from. Rule 4(a), Utah R. App. P. The

²⁰ What Karen is really saying is that the award was an error. Besides the fact that a stipulated result is beyond her attack, she has also failed to marshal the evidence.

²¹ The Court is responsible to examine and question its own jurisdiction, or lack thereof, at any stage of the proceedings when it appears that jurisdiction is, in fact, lacking. *Silva v. Department of Employment Security*, 786 P.2d 246 (Utah App. 1990).

appeal here challenges the November, 1991 *Custody Decree*. It is 2 years late. Karen's transparent attempt to extend the appeal time with her *Motion to Alter or Amend* does not restore jurisdiction.

If Karen had misgivings about the *Findings, Conclusions* and *Custody Decree*, or claimed her attorney had wronged her, she should have moved within 10 days for new or amended findings or order. URCP 52(b). Absent that, she could have timely appealed, but did neither. Her appeal came years after the custody award, months after the "new" evidence was known to Karen. Although it was filed within 30 days of denial of the *Motion to Alter or Amend*, that motion was filed 13 days after the order it seeks to reverse.

3. The post-judgment motion was untimely. Karen does not claim she appealed within 30 days of the *Decree*, but that she timely appealed under Rule 4(b), Utah R. App. P. (appeal time runs from denial of post-judgment motion). But Rule 4(b) applies only "[i]f a timely motion . . . is filed . . . under Rule 59 to alter or amend the judgment" Rule 4(b)(3), Utah R. App. P. Here the Rule 59 motion was not legitimate, since the judgment it attacked was the *Decree*, not the motion for relief. No extension was granted.²²

"An untimely motion for a new trial has no effect on the running of the time for filing a notice of appeal." *Burgers v. Maiben*, 652 P.2d 1320, 1321 (Utah 1982); *Vanjora v. Draper*, 30 Utah 2d

²² The *Motion to Alter or Amend* was filed March 24, 1993. This was 16 months after the *Decree*, 4 months after the Court announced its denial of the motion to set aside the *Decree*, and 13 days after entry of the order denying relief from the *Decree*. Since the *Notice of Appeal* was untimely, and is not helped by the *Motion to Alter or Amend*, this Court lacks jurisdiction.

364, 517 P.2d 1320 (Utah 1974). "This Court cannot take jurisdiction over an appeal which is not timely brought before it." *Burgers*, supra, 652 P.2d at 1322. Nor can this Court.

The motion to alter or amend was really a motion to reconsider, which is not found in the rules and does not extend the time for appeal under Utah R. App. P. 4.

4. There was no Rule 54 certification. John's *Petition to Modify* has not been ruled on. Since a key issue remains in the trial court, the appeal was improper. There was no URCP 54(b) certification. The remedy is dismissal of Karen's appeal. *A.J. Mackay Co. v. Okland Constr. Co.*, 817 P.2d 323 (Utah 1991); *Steck v. Aagaire*, 789 P.2d 708 (Utah 1990). The *Petition to Modify* may be eligible for certification as separate, but that was not requested. Nor was an interlocutory appeal sought.

5. Karen is bound by her stipulation and waivers. Changing attorneys does not excuse her from stipulations and proceedings that are long since final. In *Ebbert v. Ebbert*, the appellant was held bound by his custody agreement, though he sought release from it at trial. 744 P.2d 1019, 1021-22 (Utah App. 1987). In Mr. Ebbert's *Answer* he had conceded custody to his wife. The parties so stipulated, but after legal wrangling couldn't agree on *Findings, Conclusions* and a *Decree*. Trial was held, at which time Mr. Ebbert sought to amend his complaint to seek custody. The trial court appropriately did not permit reopening that issue, since he stipulated earlier (though not in writing) that his wife get custody. *Id.* at 1021. There are real similarities to Karen's

effort circumvent the changed circumstances standard by "appeal".

Howard v. Howard, 601 P.2d 931, 934 (Utah 1979) is also applicable here. There the husband signed a waiver, but he sued to set it aside later, claiming it was induced by trickery. The Supreme Court noted that he had made no record of the supposed unfairness until much later. In light of his signed consent to default, the court was unwilling to consider relief from the effects of that waiver. *Id.* Like Mr. Howard, Karen has claimed she was duped or caught unawares, and much later attacked her own agreement. There must be a limit to such cold and hot behavior. *Id.*

6. **Karen's own acts and omissions and law of the case bar her.** That is true of the original motion for relief from the *Custody Decree*, and more true of the later *Motion to Alter or Amend*. Again, Karen's litigation mode appears to be an effort to avoid the requirement that custody be modified only on showing a "substantial change of material circumstances." *Smith v. Smith*, 793 P.2d 407 (Utah App. 1990); *Walton v. Walton*, 814 P.2d 619 (Utah App. 1991).

Karen's ignores the fact that the 2 tier change of circumstances standard is meant to protect children like 5 year old Deborah against instability from ping pong custody. *Walton*, 814 P.2d at 622. She has made her bed, and now must sleep in it.

7. **Karen had every chance to protect herself.** Trial was in May, June and July 1992, and Karen testified that in January 1992 she learned of the documents approved by Mr. Kimball, and that he had agreed to default. See Tr. 150-160, R. 1857-1867. She even testified at that time that she had not considered Mr. Kimball to be

her counsel when the decree was entered in 1991. R. 1857.

She cannot wait still another year, take advantage of the parts of the orders she likes, then try again what failed before, hoping to undo it and start over in this 3 year old custody case. *Leaver v. Grose*, 610 P.2d 1262 (Utah 1980) (lack of diligence over time is laches); *Sandy City v. Salt Lake Co.*, 827 P.2d 227 (Utah 1992).²³ If permitted, the mischief such flip flops would do to custody of young children is frightening to contemplate.

Judge Hanson: "Mr. Darger I've got to interrupt you . . . I think this record needs to be clear that I don't think anyone pulled any fast ones on me by slipping a supervised visitation in front of me to sign. That was signed off on by both the lawyers. As a matter of routine, if both lawyers agree, and a brief reading of the document doesn't indicate that it's illegal, or immoral, or anything else, I generally sign it And I did have information regarding the November 4th letter. . . . there were some statements in there that would give any reasonable person some concern about not only her wellbeing, but the wellbeing of the child, particularly the reference in there that she may be required to take off again." Trial 10, 7-14-92, R. 2214.

Karen points to incompetence or lack of authority of Kimball as "new" evidence, but did not call him as a witness in her 1992 trial, nor depose him. Apparently she did not even interview him about the circumstances of the decree until that document was a year old. The record is before the Court and has always been available to Karen and her counsel, both current and former. These things were not

²³ This is not the only situation when Mr. Kimball was her counsel of record, but she later denied that he was representing her. ("I frankly did not consider him my attorney" at the point when she falsely reported two cars as having been stolen from her by John). May 29 tr., p. 155. See also p. 159. R. 1875-1879.

done in the dark, and there is no trickery or surprise.

At trial in Summer 1992 Karen testified that she knew Kimball was involved in a court conference, that Judge Hanson issued an order at that time changing visitation, which order ended the case and gave John sole custody. July 8 1992, 81-83, R. 2180-2182. Yet she has the audacity to claim that she was unaware until much later that her answer had been withdrawn and her default entered.

As the court observed at trial:

[T]he record shows that there was an agreement that the contesting papers on the part of Ms. Thompson would be withdrawn, and that this matter could go by default. And the court made a finding based upon I suppose [in part on this] letter.

Karen and her attorney did not protest this accurate observation. Tr. May 29, 1992, pp. 144-45. R. 1847-1849. Judge Hanson expressed the problem Karen created for the parties and court by trying to change her position. And he pointed out how untenable it is to now claim that Kimball did not or should not have allowed default.

BY THE COURT: What did you expect anyone to divine from this other than the fact that you had decided not to contest custody further going against the advice of your attorney number one? Did you expect anybody to read this letter, and get anything else besides that?

A: I didn't expect it to become controversial, and people to assume that I was a risk -- flight risk, and death risk to Deborah

Q: Doesn't that mean that you're not going to proceed further with the custody issue?

A: At that point, yes.

Q: So why were you surprised that your attorney had no other alternative but to agree to your default if you write a letter saying you're giving up? What did you want us to do? Think you weren't telling us the truth?

A: I don't understand the legal system that well. I was not doing too well with my attorney.

July 8 tr., p. 91, R. 2190-2191 (emphasis added). Amazingly, her

Motion to Alter or Amend, claiming Kimball was incompetent in allowing default, or that he was somehow not her attorney at all, was not filed until 8 months later in March, 1993. R. 1369-1428.

8. **Laches prevents what Karen seeks to do.** One who seeks relief from a decree because of mistake, fraud or the like must pursue her rights promptly and diligently. Karen has done quite the opposite. 24 AmJur2d *Divorce and Separation* Sec. 488, p. 518 and authority there cited. Without regard to deadlines in rules or statutes, delay in pursuing one's rights can result in laches and deprive the movant from having a decree set aside. *Karren v. Karren*, 25 Utah 87, 69 P. 465 (Utah 1908); 24 AmJur2d *Divorce and Separation* Sec. 487, p. 517 and authority there cited.

Laches bar relief even if a decree was based on some basic procedural defect, such as improper service. Here, of course, Karen claims the court failed to enter her default. *Id.* As Judge Hanson observed at the trial, **"If nothing else bars this, laches does.** This has got to come to an end sooner or later. " Tr. p. 42, hearing on *Motion to Alter or Amend*, April 19, 1993.

Much water has gone under the bridge since the decree. John has had sole custody for more than half of Deborah's life, most of that time under the *Custody Decree*. For several months, Karen's visits were supervised and limited. In 1992 John moved to New Zealand with Donna and Deborah, where they have lived ever since. Karen's brief gives the impression that the move was a sinister, illegal act, but it was approved by court order.²⁴ Deborah goes to

²⁴ Order dated September 25, 1992, R. 967

school, has friends and lives her life there. As a result of a 4 day trial in the summer 1992, Karen's visits became unsupervised late that year. John brings Deborah to Utah to visit with Karen at his expense 3 times a year for a total of 5 weeks. *Order on Defendant's Motion to Modify Visitation*, R. 1132-1137.

Karen had a duty to pursue her motion to resolution, and the delay from her filing of a *Motion to Set Aside* the decree in May, 1992 (R. 707-708) to entry of the order denying the motion in March, 1993 (R. 1362) should be charged to her. Failure to move it along to resolution constitutes further laches.

Since the initial decree giving John custody, the trial court docket reveals much about what has occurred, and how far removed the

In the 16 months between the Custody Decree and the motion appealed from, there were 200 documents of nearly 900 pages filed, including two multi-page, thoughtful and comprehensive *Memorandum Decisions* (R. 1007-1018, 1113-1118) and 8 formal orders. Many depositions covering 1000s of pages were taken, and an additional 780 pages of trial and hearing transcript. Subsequent findings, conclusions and

case is from what it would have been had Karen not delayed. It is hard to imagine a better example of laches.

9. **There is no "new evidence"**. The *Motion to Alter or Amend* is based on Rule 59(e), URCP, which requires "Newly discovered evidence, material for the party making application, which he could not, with reasonable diligence, have discovered and produced at trial." *Id.*, emphasis added. Here the claims that Mr. Kimball was not her attorney, or made a mistake, are all old. Karen and counsel

have had full access to Mr. Kimball for a year. And the evidence is not "material" in any event, especially after so much delay.

The many annotations under Rule 59 appear to be universally against the motion. To prevail Karen must (but cannot):

- * Show the evidence is **material and competent** *Universal Inv. Co. v. Carpets, Inc.*, 16 Utah 2d 336, 400 P.2d 564 (1965);

- * Demonstrate that it is **truly newly discovered** *Id.*;

- * Show that it **could not have been found** and presented at trial, *Kettner v. Snow*, 13 Utah 2d 382, 375 P.2d 28 (Utah 1962);

- * Demonstrate that the evidence is **not incidental or cumulative** of evidence already presented, *Universal*, *supra*;

- * Show that the evidence has substance, sufficient that it would reasonably have resulted in a **different outcome**, *Crellin v. Thomas*, 122 Utah 122, 247 P.2d 264 (Utah 1952).

Karen's failure to comply with Rule 59 or to show a basis to alter or amend is fatal and jurisdictional. Lacking that, there was no legitimate Rule 59 order, and the appeal was filed <u>83 days</u> after the order, and 16 months after the decree she really seeks to attack.

Here Karen has done none of those, either before or in her appeal. Her brief virtually ignores the requirements of URCP 59, and makes a token effort or none at all to show a need to alter or amend the order denying her motion to set aside the original decree.

10. **It's not a time or place to challenge stipulated findings.** Karen's first point (brief p. 21-23) is to claim the *Findings of Fact* are insufficient. She phrases the argument as if she were appealing the decree, which she did not. Her attack on the trial court's findings typifies the basic flaw of her case: she tries to twist procedure to allow what is essentially an appeal of a *Decree* entered

over 2 years ago. She could and should have raised any criticisms then by objection to the court and, if unsuccessful, by appeal. Instead she raises the issue on appeal from a motion to alter or amend an order denying her earlier motion for relief from the *Decree*.

11. **The Findings of Fact are not defective.** Karen's complaint here is that the *Findings of Fact* are not sufficiently detailed to be valid. Of course, if that is her position she could have objected to them or timely appealed. Instead, her attorney signed approving them as drafted, both as to form and content.

Karen's cited cases are inapplicable here, and worse than unhelpful to the Court. This is because her authorities relate to legitimate appeals from contested decrees, while in this case the findings and decree are stipulated. And there was no appeal.

She relies on *Hutchinson v. Hutchinson*, 649 P.2d 38 (Utah 1982) and *Smith v. Smith*, 726 P.2d 423 (Utah 1986) for the rule that trial courts should enter specific findings supporting custody awards. Br. 22-23. Sadly, she cites those cases as if they are squarely on point, ignoring the authority distinguishing them (see below).²⁵ She compounds the misinformation by quoting from *Martinez v. Martinez*, 728 P.2d 994 (Utah 1986), Br. 23, and stating, "This is exactly the instant case." *Id.* It certainly is not.²⁶

²⁵ To appeal a pretrial loss on the merits may violate Rule 33, Utah R. App. P. *Hunt v. Hurst*, 785 P.2d 414 (Utah 1990).

²⁶ Karen's *Martinez* itself (Br. p. 23) belies the statement that this "is exactly this case." It states that the findings must be more complete "when the custody award is challenged and an abuse of discretion is urged on appeal." *Martinez*, 728 P.2d at 994 (emphasis added). Here the award was not appealed nor challenged timely.

This Court has already compared and contrasted *Smith* and *Martinez* to a case much more similar to this one.

The *Smith* and *Martinez* cases are distinguishable from the instant case. In *Smith* and *Martinez*, custody was hotly contested and, therefore, detailed findings were required for appropriate review on appeal. In the instant case, custody was not at issue. . . . [T]he parties agreed custody should be awarded to defendant.

Ebbert v. Ebbert, 744 P.2d 1019 (Utah App. 1987). That distinction is even more pronounced here. Not only was custody not at issue when the findings were entered (having been agreed on); they were stipulated to and not appealed. Then the resulting *Decree* was lived by for a considerable period before Karen attacked them.

We hold that when custody is not an issue, the specific findings required when custody is contested are not necessary. To hold otherwise would burden the trial courts to prepare full, specific, detailed findings in every default divorce. We find the court's findings to be sufficient to support the custody decision.

Ebbert, 744 P.2d at 1021-22.²⁷ The findings in *Ebbert* which were deemed adequate contain language nearly identical to those here: "The Defendant is a good mother and a fit and proper person to have the care, custody and control of said two children." *Id.* at 1021.²⁸

It is impossible to place too much emphasis on Karen's express approval of the findings through her attorney.

²⁷ Karen didn't reveal that *Ebbert* controls this case on the issue of the detail required for stipulated findings. Frivolous appeals are discussed below. Rule 3.3(a)(3), Rules of Proff'l. Conduct, UCJA (candor requires that the court be informed of contrary applicable legal authority).

²⁸ Finding 2: "Putvin is a fit and proper parent to whom permanent custody and control of Deborah should be awarded." R. 420. # 3: "The evidence demonstrates that Thompson may flee with Deborah, and should be required to submit to mental health treatment."

Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

- (1) by default or by failing to appear at the trial;
- (2) by consent in writing, filed in the cause;
- (3) by oral consent in open court, entered in the minutes.

URCP 52(c). This is not a divorce case, so the exclusion from Rule 52(c) is inapplicable. Karen agreed to default, subsection (1), consented in writing, which writing filed in the cause, subsection (2), and consented in open court through counsel. *Id.* While that consent is not reflected in the brief minute entry, R. 414, it was memorialized by her attorney signing the findings themselves:

Respective counsel informed the Court of [Karen's] stated and written desire to withdraw her answer and proceed with this case by default. [Mr. Kimball], on behalf of [Karen], orally withdrew the Answer and Counterclaim.

Findings, R. 419 (Appendix C); also, *Decree*, R. 415, Appendix B.

12. **There were extensive findings.** They would be in compliance even if the matter had been contested and appealed. The body of the findings themselves includes not only the fact that Putvin is a "fit and proper parent to whom permanent custody and control of Deborah should be awarded" (*Findings*, par. 2, R. 420), as indicated by Karen's brief. The court also found, "[E]vidence demonstrates that Thompson may flee with Deborah, and should be required to submit to mental health treatment." *Id.* at par. 3.

Further, the trial court's findings are not limited to those contained within the body of the document. Rather, substantial evidence was incorporated by reference into the *Findings of Fact*.

The parties, through counsel, stipulated that the Court consider the court-ordered custody **evaluation** by Patricia Smith, Phd. and Thompson's November 4, 1991 **letter** to Putvin (both **attached hereto**) as evidence in the case.

Findings of Fact and Conclusions of Law, p. 1-2, R. 419-420. Karen failed to acknowledge those attachments in her brief. The evaluation is found at R. 413-466, and Karen's letter is R. 467-470. Incorporating those documents by reference and annexing them to the *Findings* was not required here, where custody was not at issue. *Ebbert v. Ebbert*, 744 P.2d 1019, 1021 (Utah App. 1987). However, it was done out of an abundance of caution.

As supplemented by the attachments, the *Findings* include the following as it relates to John's fitness for custody²⁹:

* John has above average expressive skills and frustration tolerance and is a motivated, efficient worker. R. 434.

* John's intelligence is in the 95th %, with superior memory, mental control, reasoning, visual reproduction, motor speed and ability to differentiate essential and inessential detail. Id. In other areas, such as spatial relationships, he is High Average. Id.

* John was guarded, defensive, and presenting himself in best light. He tends to misinterpret others' motives. He is sensitive, romantic, compassionate and artistic, in contrast with Karen's claim that he is aggressive and controlling. R. 435.

* John was independent and extroverted, but also impulsive and self righteous. Id. He likes to help others, but believes his intentions are misunderstood. Id. He had no depression, thought disturbance or intentional antisocial practices. R. 437.

* John had difficulty empathizing with Karen. R. 436. The religious plural marriage was uncomfortable for John, and he eventually rejected the polygamist lifestyle. R. 436.

* John's wife Donna lived with John and little Deborah during the marriage and helped raise her. R. 437. John shows caring dedication for family, exposing Deborah to good education, music, language and other opportunities. Id.

As to Karen's fitness for custody, she found:

²⁹ Dr. Smith's unusually comprehensive Custody Evaluation also lists many pages of evidence which she considered in concluding Putvin should have sole custody. R. 413-430; 438-442.

* Karen has had much mental health treatment, R. 434-435, 449, but now showed no thought disturbance. R. 441. She was depressed at puberty and while with John. At times she felt suicidal, and wrote a suicide note, got a gun but decided not to use it. R. 441.

* She is considerate and polite. R. 438. She is a member of an LDS fundamentalist group which espouses polygamy.³⁰ R. 440-441. She had many jobs, some ending in discharge. R. 439.

* Karen fled with Deborah, then age 3, in May, 1991, and spent 3 weeks with her in Washington. She said she felt John would blackmail her to prove her to be an unfit mother. R. 412. She feared John would flee with Deborah. R. 441. She would prefer to have custody, limiting John to supervised visitation. Id.

* Karen resented the close bond between Deborah and John's wife Donna. R. 441. She felt she was a "breeding cow" for John and Donna, who had no natural children together. R. 412.

* In taking tests, Karen showed good attention, perseverance and ability to understand directions. Id. She was cooperative, appropriate, socially engaging and emotionally responsive. She has superior immediate auditory memory and motor skills. R. 412.

* Her verbal and intelligence skills are High Average. R. 413. Despite a college education, she is weak in educational and cultural experiences. Overall she has average to high average intelligence, but has been employed beneath her potential. Id.

* Karen is defensive, unassertive, lacks self esteem and social awareness. R. 413. She was defensive in 1987 therapy, minimizing problems. She is socially inexperienced and feels inadequate. She felt John imprisoned her and stole Deborah. Id. She admits to no fault in failure of her relation with John. Id.

* Her MMPI may have been wrong. She answered "false" to so many questions that her profile was "subclinical". R. 413. She has a strong need for affection and attention, which makes her afraid to share her true feelings and beliefs. R. 414.

* Karen misperceives that both John and his wife Donna have emotionally hurt the child Deborah. R. 414.

* She is lonely, unfulfilled, bitter and resentful. R. 415. Taking Deborah shows poor problem solving. She fulfilled her own needs, but was unable to see that she caused Deborah stress and confusion by taking her from her home and loved ones. She is self righteous and immature about taking Deborah from John. R. 418.

³⁰ On October 24, 1992, Karen remarried into a polygamist family, with which she now lives in Wyoming.

* She seeks custody due to guilt and anger toward John for not promoting a normal mother-child bond, R. 415. She needs Deborah to see her as a loving mother whom John prohibited from caring for her. R. 415. She feels it was fine to take her to herself to make up for lost time. Id. She thrives on time with Deborah. R. 416.

* To Karen men are "persuasive, cunning, charming, devious and dishonest." R. 415. She believes John wants custody as a way to control Karen, and may resent John's bond with Deborah. Id.

* Karen shows poor judgment, use of community and family resources, unrealistic fantasies and problems holding a job. R. 416. She believes her happiness is based on custody, but "has not demonstrated the necessary skills for full time primary care." Id.

* Deborah bonded with John, and double bonded with Karen and her surrogate mother Donna. R. 463. John is involved in Deborah's development, support, education and cultural growth. Id. Karen's relationship with Deborah is more dependent, and Deborah shows regressive, immature, oppositional behaviors with Karen. R. 464.

* Deborah is bright, advanced, and needs the education and culture John gives. R. 464. His finances are superior to Karen's, who has sporadic employment, with jobs below her education level. R. 463-464. Her lifestyle is less stable than John's. R. 464.

There were also findings concerning John's wife Donna, R. 451-453, and concerning Deborah herself, R. 455-462.

* Karen's parenting skills are more limited than John's and his wife Donna's. R. 465. It is in Deborah's interest to continue in her environment with John and Donna, both of whom have been caretakers, with a non-custodial relationship with Karen. R. 465.

* If Karen received custody, Deborah may be raised in a plural marriage relationship. Karen had poorly handled the relationship with John and Donna. R. 465. He will likely alienate Deborah from polygamy. Karen is more likely to alienate Deborah from John. Id.

The parties stipulated that Dr. Smith's findings are evidence incorporated into the *Findings*, along with Karen's November 4, 1991 letter to John. That letter is telling reading. The highlights include (with all emphases added):

* "I will no longer fight with you to try and win custody. There is no reason to continue this battle in the courts. . . . I pray that the courts and you will be fair with my visitation and legal rights." R. 467. "I do not want to fight anymore because I

do not want Deborah being hurt any more. I could not stand before God, with my head held high, knowing that I stopped taking steps to protect and save my daughter." R. 470.

* "Those fears that I have of you, the fears that made me run from you in May, are still just as real today as they were back then." Id. "I also know that the courts today are not courts of justice, but they are controlled by those who have money." R. 468.

* "I am not giving up and neither is my family, but we cannot fight the devil on his own ground." Id. "I know that sometime, somewhere I will have my Deborah. You cannot travel down the same course you are on, doing what you do to people and expect to continue to survive." R. 469.

* "I now put Deborah into God's hands (not yours) and pray that the time will be short when I will be able to be a complete mother to her." R. 470.

The court, John, his counsel and Deborah's guardian *ad litem* were concerned by the letter, which concern led to visits that were temporarily supervised for Deborah's protection. They, along with Karen's own attorney, agreed on *Findings* that included the custody evaluation, John's polygraph and Karen's letter, making them very comprehensive. For Karen's brief to highlight the supposed inadequate findings as a first argument is appalling and meritless.

13. The Court entered Karen's default.

Respective counsel informed the Court of . . . Thompson's stated and written desire to withdraw her answer and **proceed with this case by way of a default matter.** Chase Kimball, Esq., on behalf of Thompson, then **withdrew the Answer and Counterclaim** on file in this case. The parties, through counsel (including the guardian *ad litem*), stipulated that the Court should consider the court-ordered custody evaluation by Patricia Smith, Phd. and Thompson's November 4, 1991 letter to Putvin . . . as evidence in the case.

Decree, p. 1-2; Findings, p. 1-2, executed by all counsel (emphasis added). Karen's agreement makes irrelevant the technical niceties about which she now complains. And the parties stipulated that

Karen's November letter, which itself constitutes a default, be attached to the *Findings of Fact*, and used as a basis for the custody decree. Karen's authorities are not on point. Each relates to a default judgment and timely motion to set aside which were appealed, or where default was a sanction in a contested matter.

Karen is concerned that the clerk did not enter a default. While URCP 55(b)(1) allows a default to be entered by the clerk, subsection (1) of the same rule provides for its entry by the court in "all other cases." URCP 55(b)(2). As Judge Hanson stated,

[W]hen people default, or say they aren't going to participate, like Ms. Thompson did in that letter, then I kind of take them at their word. And say if you don't want to be involved in it, the other side gets what they want. That's kind of what defaults are all about.

Transcript of trial, July 14, 1992, p. 10-11, R 2214-2215. As Judge Hanson recognized, Karen's letter itself is a default, or became one when it was so stipulated by Mr. Kimball.³¹ Karen's

The long and the short [is that] at the pre-trial conference in November . . . the record shows that there was an agreement that the contesting papers on the part of Ms. Thompson would be withdrawn, and that this matter would go by default. And the court made a finding based . . . in part on that letter. R. 1847.

argument that no default was entered, relying on *P & B Land, Inc. v. Klungervik*, 751 P.2d 274 (Utah App. 1988), can be charitably called

³¹ Karen expects the trial court to ignore her stipulation through counsel. This idea seems akin to a plain error doctrine, but such has not been argued and certainly does not apply.

misplaced and meaningless.³² The *Klungervik* defendants were not in default, had filed an answer (which was not withdrawn) and remained "full-fledged combatants". 751 P.2d at 276. That case merely points out that a default judgment should not be entered "where there is no default in law or in fact". *Id.*, 751 P.2d at 277. In *Klungervik* neither side asked the court to strike the answer or enter default, but it was. Here all 3 sides asked for that.

Here Karen withdrew all opposition. She did so in writing and directly, by sending her letter to the court, as well as through counsel, and actually stipulated to the relief granted. Karen calls *Klungervik* (supra) "squarely on point". Nonsense. Besides the differences pointed out, that court disregarded defendant's answer against his will, because his response to a summary judgment motion was deficient; there was no agreement as there is here.

14. The decree and findings accurately reflect the court's action. Karen cites *Darrington v. Wade*, stating that a court can always correct its error. 812 P.2d 452 (Utah App. 1991), cited at br. p. 26. She then makes a leap of logic, assuming that since the minute entry was less detailed than the Findings, error was made. This is not evidence of error. Not only is the minute entry consistent with the Findings and Decree, but Karen, through counsel, approved the content of both by signature. Actually

³² It is disturbing that Karen calls *Klungervik* "squarely on point". Such statements should be reserved for cases with similar facts and procedure. Similarly, after observing that in *Klungervik* the judge passed over part of the default process "by striking defendant's answer" and proceeding to default, she says, "This is precisely what the court did in this case". Br. p. 24. Not true. Judge Hanson did not strike anything, much less over objection.

Darrington stresses the importance of timely attacking a judgment by a prompt URCP 60(b) motion or its equivalent, which Karen did not do. *Id.*, 812 P.2d at 457. Without citing any applicable authority, she asks the Court to impose a new, burdensome but useless duty on the judge and clerk. She wants the Court to require minute entries to be as detailed as findings and decrees.

15. **There is no violation of Rule 4-504, UCJA.** That rule requires that a stipulation be written or on the record. That was done here. If there had been a defect, it was fully waived.

16. **The parties did stipulate.** It is disturbing that Karen could allege (through counsel) that the parties did not stipulate, when she and her counsel both know otherwise. Evidence of the stipulation includes, but is not limited to, the following:

a. The minute entry, which memorializes that the relief granted was upon "AGREEMENT OF COUNSEL" (capitols in original);

b. The signature of both Karen's counsel (Kimball) and Deborah's (Gardner) on the Findings, indicating "approved" (not "as to form", as would be used in the event a signataries' client disagreed with the terms), see Findings, page 4, Appendix B;

c. The signature of Karen's and Deborah's counsel on the Decree, approving it as to substance. See Decree, page 4;

d. The Court's execution of the Findings and Decree, relying on approval by all counsel, his the judge's own recollection and/or notes of the phone conference and the clerk's minute entry;

e. The recall and file notes of counsel³³; and

f. The parties' conduct, which has been wholly consistent with the mutual understanding reflected in the Decree.

How then can Karen (through her counsel) claim with a straight face that the parties did not stipulate, and that their agreement

³³ See, e.g. *Affidavit of Arnold Gardner*, Appendix C.

was not written?³⁴ "Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made." *Despain v. Despain*, 627 P.2d 526, 527, quoting *Land v. Land*, 605 P.2d 1248, 1250 (Utah 1980).

It is not necessary that a stipulation be read word for word into the record. The important thing is that the record reflect its existence. An agreement of the parties will not be enforced by the Court "unless it is evidenced by a writing subscribed by the party against whom it is alleged or made, and filed by the clerk or entered upon the minutes of the court." 73 Am.Jur2d *Stipulations* Sec. 2 (1974) (footnote omitted, emphasis added); quoted with approval in *Barker v. Brown*, 744 P.2d 333, 335 (Utah App. 1987).

17. **The parties' agreement cures any claimed defect.** For example, where an instrument is stipulated to as a legitimate judgment, the assent cures the formal requirements of a judgment. 73 AmJur2d *Stipulations* Sec. 16, p. 554 and authority there cited. Having agreed to it, a party cannot later attack its validity. *Id.* See, *McClelland v. Leahy*, 75 Colo. 542, 227 P. 549 (1908).

One is not generally released from her own stipulation.³⁵ It is especially inappropriate to allow a party to withdraw a stipulation the parties have acted on, and where it is impossible to return the parties to their *status quo ante*. 73 AmJur2d

³⁴The strong emotion of a custody dispute is no excuse for an inaccurate procedural history. Rule 33, Utah R. App. P.

³⁵ Karen never repudiated her letter, or asked to be released from her attorney's agreements. Rather, she attacks the *Decree*, as if the judge should paternalistically ignore her express desire to surrender custody, and counsel having signed the documents.

Stipulations Sec. 12, p. 547 and authority there cited. Here 5 year old Deborah has been in John's sole custody pursuant to the *Decree* for some two and a half years. Father and daughter have moved to New Zealand, and the Court requires that he bring her to Salt Lake thrice yearly for extended visitation with Karen.

So after taking advantage of portions of the *Decree* which favor her for 26 months, Karen wishes rid herself of the whole thing. A party will not be allowed to take advantage of the agreed terms she likes, and then withdraw the portions she does not. See, *Id.* at page 548; 73 *AmJur2d Stipulations* Sec. 13, p. 549; 24 *AmJur2d Divorce and Separation* Sec. 488, p. 518 and authority there cited.

Courts do not relieve one from a stipulation if the other party will be substantially prejudiced. 73 *AmJur2d Stipulations* Sec. 13, p. 548 and authority cited. This *Decree* has been in effect for over 2 years. The evidence present then may not be available for retrial. And the custody evaluation may be stale.

A stipulation settling a case is more durable and harder to attack than stipulations as to issues or procedure, and the party attacking it has a high burden of persuasion. *Id.*

18. **Mr. Kimball did represent Karen.** As demonstrated by the facts and procedure above, the record shows it, and Mr. Kimball's affidavit two years ago says so.³⁶ The Court and all counsel and parties have been consistently told the opposite.

³⁶ If the Court had to choose to believe Mr. Kimball when he swears he was Karen's counsel at the relevant time and the new one that says he thinks he was not, it is worthwhile to consider that the statement that he was her attorney was closer to the event.

Even if Mr. Kimball had been ostensibly fired, the court and respective counsel had no choice but to recognize him.

When an attorney is changed . . . written notice of the change and of the substitution of a new attorney or of the appearance of the party in person must be given to the adverse party; **until then he must recognize the former attorney.**

Section 78-51-35, Utah Code (1917) (emphasis added).

Kimball's affidavit is inconsistent with the record. Besides the obvious inaccuracy of claiming he was not Karen's attorney, the details show a lack of credibility. For example, he claims that "several days later" he was asked by John to sign approving the *Findings of Fact, Conclusions of Law and Custody Decree*. In fact, the record shows they were signed later that very **same day**, by him and the guardian, and the next day by Judge Hanson. Through counsel Karen has propounded that error throughout her papers.

It is maddening to go through the exercise of showing all the acts Mr. Kimball did for Karen, but she has raised his nonrepresentation as a serious appeal issue. Having so done, its bad faith nature and lack of merit cannot be assumed to be obvious to this Court. The following are included in the acts of Mr. Kimball which clearly belie the new claim that he did not represent his client:

a. Kimball appeared in this case from the outset, May, 1991. R. 94. He appeared in writing and at hearing before Karen returned from hiding. The record attests abundantly that his representation continued until he withdrew April 30, 1992, R. 642-643, **some 5 months after his stipulation to default and approval of Decree.**

b. In Karen's November 4 letter (Appendix A) announcing her default ("the courts today are not courts of justice" but controlled by money) she acknowledges who her attorney is: "I am going against the advice of Chase [Kimball]" in giving up, she said. The letter says nothing about discharging Mr. Kimball.

c. On November 19, 1991 (after the *Decree* was entered), Mr. Kimball wrote to Judge Hanson as Karen's attorney. R. 471-476.

d. Kimball continued very active representation in the case, including the following additional documents he filed for Karen:

* A January 27 *Notice of Hearing* and separate *Notice of Address Change*. R. 484, 485. January 30, 1992 *Motion for Expedited Hearing - Notice of Hearing*. R. 489-490.

e. January 31, 1992 Kimball filed *Memorandum Supporting Motion to Strike and for Sanctions - Response to Motion for Proof of Authority*, with related motion and affidavit. Appendix D; R. 499-503. He stated:

[A]ttached hereto is the affidavit of Chase Kimball stating his representation of the defendants **has continued from the time he answered the original complaint.** . . . [T]his author will produce his client, Karen Thompson, at a hearing to be held this coming Monday, and the Court may satisfy itself that **she is represented by the author** at that time.

Id., Appendix D, R. 501-502 (emphasis added). The papers express alarm that John doubted that Kimball **has always been** Karen's counsel. It calls any doubt "patently absurd", and seeks sanctions against the undersigned for suggesting uncertainty, since continuous representation is "clear to the dullest intellect." Id.

f. On February 3, 1993, 2 1/2 months after he and Karen now say in hindsight that he might have been discharged, Mr. Kimball appeared in Judge Hanson's court, seeking an expedited hearing and (again) sanctions against the undersigned attorney for John. 2-3-92 Min. Entry, R. 505. Importantly, the record shows that **Karen appeared at this hearing with her attorney**, Mr. Kimball. Id.

g. **Further representation.** February 10 he filed a motion for unsupervised visits. R. 515. February 13 he asked for hearing, filing a *Memorandum Opposing Motion to Relieve Guardian ad litem*. R. 516-520. **March 23, 1992** he objected to a proposed order. R. 543-544.

h. March 23 he filed *Response to Motion to Require Psychological Evaluation*. R. 548-549. **March 30, 1992** he filed her *Request for Ruling and Proffer of Credentials*. R. 577-592. **April 14, 1992** he approved one of several orders. R. 807. **April 27** he again moved, **ex parte**, for sanctions against John and his attorney (for "witness tampering"), R. 609-631, with a long, fiery memorandum. Id.

i. April 30, 1992 Kimball withdrew for the only time. R. 642-643. Attached to the withdrawal is a statement that then (so not before then), Karen retrieved from him her file. R. 643.

j. On the same date he wrote for Karen a letter to Dr. Robert Howell, appointed to psychologically evaluate Karen. R. 644. The next day, May 1, 1992, John filed his *Notice to Appear or Appoint New Counsel*. R. 645. Karen lacked counsel of record for only a week.

According to Karen's own testimony, in April 1992 she was "ready to fire" Kimball. Tr. of May 29, 1992 trial testimony, p. 155-156, R. 1857-1858. How can she now in good faith base a motion and now an appeal on the claim Kimball had already been fired and did not represent her back in November of the prior year?

19. If her attorney acted unwisely, Karen remains bound. It is very rare that incompetence of civil counsel is not attributed to the client. *Jennings v. Stoker*, 652 P.2d 912, 913 (Utah 1982). Besides showing exceptional circumstances, Karen would have to demonstrate a reasonable likelihood of a different verdict. *Id.* at 914. She repeatedly testified that giving up was her actual intent when the November Decree was entered. Her second thoughts were not raised until 6 months later. How could she claim the result would have been different if Mr. Kimball had not withdrawn her answer?

20. The motion to set aside the Decree was untimely as well. The only argument Karen has for appealing now rather than in 1991 when the Decree was entered is her Rule 60(b) URCP motion to set aside the judgment. R. 707-708, 658-704 and 719-731. Interestingly, Rule 60(b) is hardly mentioned in Karen's brief.

A party wanting Rule 60(b) relief faces 2 layers of time restrictions. The motion must be brought "within a reasonable time" and, where applicable, "not more than 3 months" after the order. URCP 60(b). Karen filed her 60(b) motion May 26, 1992, 6

months after the Decree, and failed to get an order on the motion until March 11, 1993. She is outside the 3 month limit, so she must show that her motion was brought within a "reasonable time".

21. **The motion is beyond a "reasonable time".** A reasonable time is a real limit on relief from domestic decrees for "other reason[s] justifying relief". *McGavin v. McGavin*, 27 Utah 2d 200, 494 P.2d 283 (1972) {motion for paternity retest and relief from decree not within 'reasonable time' was too late to consider}.

A "reasonable time" is determined according to the facts in each case, "considering such factors as the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to the parties." *Maertz v. Maertz* 827 P.2d 259 (Utah App. 1992). *Maertz* was an adoption case, which observed that the needs of finality in cases involving children create a special need for finality. *Id.*

22. **Karen is estopped from assailing the Decree.** This prevents her living with the Decree awhile, then undo it at whim. *Karren v. Karren*, 25 Utah 87, 69 P. 465 (Utah 1908) (attack divorce decree); 24 AmJur2d *Divorce and Separation* Sec. 488, p. 518.

23. **Deference is due the trial judge.** Judge Hanson had a unique view of all the factors, to see the parties, their support persons and professionals testify, and to sift through the hundreds of file papers. He deserves deference to protect against Karen's attacks, thinly disguised as legal arguments.

Judge Hanson heard the better part of 4 days of evidence. He was present and expressed on the record that he has actual recall

as to the settlement conference when the matter was settled. He dealt directly with Mr. Kimball and Karen, who now claim the former ceased representing the latter months before he withdrew. He was able to observe first hand whether there was some drastic incompetence as currently claimed by Karen.

24. **The attorney fee sanction was appropriate.** Karen moved to alter or amend based on "newly discovered evidence", knowing the evidence was not new. Earlier in this same case, Kimball swore under oath to the opposite effect. Likewise, such a sanction is appropriate for this appeal of the same nonissues. Karen is bound by the *Decree*. Her efforts to escape having to show a substantial change of material circumstances are unavailing.

A custody decree rendered by a court of this state which had jurisdiction . . . binds all parties who have been served As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law

Section 78-45c-12, Utah Code (1980). See also, Section 30-3-7(1), Utah Code (1992) (decree of divorce absolute upon entry).

25. **Sanctions should be imposed on appeal.** The many examples of irrelevant, frivolous and even misleading³⁷ assertions are set forth above and will not be set out in detail here. It's an appeal of a 1991 decree the court is dealing with, and neither it nor John should have to do so. Unless Karen can show a substantial change of material circumstances justifying a **modification**, John should be

³⁷ The effort to minimize the fact that Karen has perpetuated this sworn inconsistency on which Karen's whole effort is based, calling it "misperception in retrospect", is unhelpful.

finally left alone to raise and nurture Deborah, who suffers from post traumatic stress, so long as he continues as in the past to comply strictly with the court's visitation orders.

Where an appeal is brought from an action that was properly determined by the trial court to be in bad faith, the appeals court must **necessarily** find the appeal to be frivolous under Rule 33, Utah R. App. P. *Utah Dept. of Soc'l. Services v. Adams*, 806 P. 2d 1193 (Utah App. 1991). This is our case. Under that rule, double costs and/or attorney fees should be assessed. What Karen has filed and done is not grounded in fact or warranted by law.

Where, as here, a domestic appeal is taken without basis for the arguments presented, or where the law or facts are mischaracterized, damages under Rule 33 may be called for. See, *Eames v. Eames*, 735 P.2d 395 (Utah 1987).

IX. CONCLUSION & RELIEF SOUGHT

Karen has no basis for relief from her voluntary Decree. She really seeks to modify it without the changed circumstances required by 6-404, UCJA. Since Karen failed to appeal, she can change the Decree only through a petition to modify, showing changed circumstances. *Anderson v. Anderson*, 12 Utah 2d. 36, 368 P.2d 264 (1962). Yet she argues as if on appeal.

Karen fails to mention what an attack on a 26 month old custody award could do to her 5 year old daughter who, thanks to her ill-advised attempt to cut her off permanently from her father

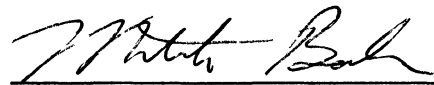
2 years ago, is already in therapy for separation anxiety.

Karen's effort seems at best based on revisionist history; a retrospective interpretation of events from her own narrow perspective, without due regard to the facts. Karen's poison pen brief does little to remedy her lack of substance and merit. The current Kimball affidavit states that he was not Karen's attorney on November 12th. But on January 31, 1992 he told the Court that he never stopped being Karen's attorney. That fact was available and a matter of public record when Karen filed her current motion.

The appeal was untimely, depriving the Court of jurisdiction. There is, therefore, no choice but to dismiss it, with costs to John. Further, John moves for an award of double costs and attorney fees on appeal. Rule 33, Utah R. App. P.³⁸ Since the appeal lacks jurisdiction, and is based on a motion that the trial judge already found to be frivolous, it should be characterized the same here. A frivolous appeal for Rule 33 purposes is one which has no reasonable basis in law or fact. *O'Brien v. Rush*, 744 P.2d 306 (Utah App. 1987). Bad faith is not required. *Id.*

John requests dismissal of the appeal and affirmance of Judge Hanson's various rulings Karen has appealed from, with double costs and attorney fees on appeal.

Respectfully submitted the 18th day of January, 1994.



Mitchell R. Barker
Attorney for Plaintiff

³⁸ The fee amount may be imposed by this Court, or determined upon submission of an attorney fee affidavit with the trial court.

X. CERTIFICATE OF SERVICE

Mitchell R. Barker
349 South 200 East, # 170
Salt Lake city, Utah 84111
Telephone 364-5145
Bar Number 4530

I Mitchell Barker, certify that on this 27th day of January, 1994 I served two copies of the attached Appellee's Response Brief upon Daniel Darger, Esq., counsel for the appellant in this matter, by mailing it to him by first class mail with sufficient postage prepaid, to the following address:

Daniel Darger, Esq.,
1000 Boston Building
9 Exchange Place,
Salt Lake City, Utah 84111



Mitchell R. Barker

APPENDIX A

Karen Thompson letter dated Nov. 4, 1991

November 4, 1991

John,

I have been doing some serious soul searching, especially since the events of the last few days, about what the future truly holds for Deborah and me. After considering these last ultimate demands you have made on me, particularly using blackmail, I have prayerfully and carefully come to the decisions that in order to save my daughter, as well as my own integrity, I know I have no choice but to do the following.

you know that you have dragged me through the dirt and the mire all through our so-called marriage, and through your vengeance I am once again being imprisoned by your unrelenting desire to control me, which is quickly choking my new-found life right out of me. Not only have you done everything you can, using every means in your hands to destroy me, but have also sought to destroy my loved ones and most particularly using such means to destroy Deborah.

Consequently, I have come to the decision I am forced to make in order to maintain my own peace of mind and integrity, as well as Deborah's welfare. I will no longer fight with you to try and win custody. There is no reason to continue this battle in the courts, and I pray that you will cease this legal nightmare. I pray that the courts and you will be fair with my visitation and legal rights.

I have become so frustrated with the "legal system". Those fears that I have of you, the fears that made me run from you in May, are still just as real today as they were back then. If I accept your offer I am putting myself in the exact same position that I was in before. Controlling my every action by using Deborah as the bait. The only difference now is that it is put in writing. And yet nobody seems the least bit concerned about my fears. How can I even expect a fair fight when everyone is only concerned for your rights.

John, you have an unlimited supply of money at your disposal, and you know I have no more money and neither does my family. I know that if we went before a judge and I were to win custody, that your wrath and destruction would increase ten-fold. So I will no longer fight you nor will I allow you to destroy my daughter in order to destroy me. Her vulnerable mind is being poisoned with so much hate towards me and my family, that it is starting to affect her all the time. It just kills me to hear my three-year-old child make hate statements about her favorite "significant others", such as James, Jared, both of her grandparents, and all of her aunts and uncles that she has grown to love. She has even made hate statements about people that she has not seen

for weeks! I do not understand how you can say that you love Deborah and then turn her against those that she loves. At least my family has enough human decency to use a different name when speaking about you when she is around, such as "Putvin"- a name that she is not familiar with.

You know and I know that any just judge or attorney would never consent to the demands that you have made upon me, making me literally and totally your slave. I also know that the courts today are not courts of justice, but they are controlled by those who have the money. And you know who has the money. It is sickening to realize that Dr. Smith and the courts can take a baby away from her rightful and perfectly fit mother and then give her to her father who is a known criminal, all on the basis that you make more money than me. If we were to throw out the money issue, you would not stand a chance. And I will warn you, Dr. Smith, Mitch and everyone else, if you even try and make an issue out of my religious beliefs, the ACLU will take up the battle with me. The only reason why you have custody now is because of your illegal money. John, you will one day find that what you have bought with money through the courts on earth will NOT ultimately be upheld in the courts in heaven. What you buy will never be yours. You have that yet to face.

I am going against the advice of Chase in making my decision not to sign your demands, and I know he will strongly disagree with me. He feels that I should sign and then wait for you to be arrested, but you are too smooth and untrustworthy for me to trust. And you have put too much fear into the hearts of the people that are eyewitnesses to your crimes, that nobody dares come forward with the truth. And without their testimony you will probably never be arrested.

I feel I am in the same situation as the mother who stood before Solomon in the bible, only this time justice has not been served. I would much rather die a thousand deaths than watch my child's mind, soul and general well-being be slowly butchered by you and this custody hell. You are tearing her apart and dividing her, making a scapegoat out of her mother in order to get your way and be able to boast of your own strength. I feel that the only humane thing I can do in order to stop this atrocity is to let you have your way. I have no choice but let go and let God be your judge.

I am not giving up and neither is my family, but we cannot fight the devil on his own ground. I know that you will tell Deborah that her mother gave her up, but I will have a written record of all that has happened and have witnesses that know the true facts in this matter. You have destroyed any love or respect that I could have had for you.

Not only is Deborah the only true love of my life, she is my best friend. It hurts so much to let go. But I do not feel that I have lost, nor that you have won. I know that sometime, somewhere I will have my Deborah. You cannot travel down the same course you are on, doing what you do to people and expect to continue to survive. One of these days you will fall, destroying yourself.

All I have ever wanted was to be loved and to give love. I have this with Deborah but with your poison I see it slipping away. I love Deborah with all of my heart and I will never stop loving her. I am sure you will use your silver tongue to convince her otherwise but the quiet language of love will always be heard over your shouting lies. I want to experience true love, honesty, kindness, caring, generosity, trust and partnership with a husband. I want to have more children. There is no way I can have this if you are still controlling my life in what I do and where I go. I want freedom to control my own destiny. I cannot have a normal relationship with anyone including Deborah under your conditions and demands. What good am I to Deborah if I can't even save myself; and if I accept your "offer" she will grow up having no respect for me. I cannot live with that.

I cannot live in a house that I feel is being bugged or accept the intimidation of being followed, watched, and wondering if you have entered the house in my absence. I ask you now John, to show some human decency and respect. I intend to leave your house in Copperton, leave your car and possessions as soon as possible. I know I am bound by contract to live there, and that you can legally sue me for back rent. I will ask that you not enforce the contract, but if you must then so be it. I want my name taken off all contracts, insurance bonds, property, mortgages, etc. I hope that you will have the decency to be satisfied that you have full custody, and stop the threats against my friends and family. And that you will keep your promise that you have made to Owen and Lamoine.

I will not turn my back on my friends, Jerry Raynor was one of the only few people that I could turn to in my hours of desperation. The only thing Jerry wanted to do was to help me, and he has sacrificed everything because of it. Please leave him alone. I WILL NOT turn my back on my friends, and my family absolutely will not agree to your wishes and let Jerry be devoured by you.

John, I want no part of your life from here on. And as far as Donna is concerned, I could not live with myself if I let my signature give Donna more rights to my own child than I have. Whatever rights she receives will never be sanctioned by me.

I now put Deborah into God's hands (not yours) and pray that the time will be short when I will be able to be a complete mother to her. It is truly sad to realize that the "system" can take away my rights to make decisions for my daughter, just because of my lack of wealth. Maybe if I had not been so devoted to our relationship for the past eight years, I would now be more financially secure. But because of my devotion to you, I am now broke.

I have no hard feelings towards David and Corina, and I hope that when David has his own child he will understand me better. I pray also that he will have the integrity to stand for what he honestly knows is right.

If this battle is allowed to continue, you will be destroying our daughter in order to satisfy your own selfish desires and insatiable need to control. You have even gone so far as to overdose Deborah on medication when she is returned to me, which knocks her completely out cold. I cannot let that go on. Nor will I allow you to destroy me. You are not my God, neither are you my husband, and I am not going to be your slave or conform to the demands you make of me which are bound to reflect on Deborah and destroy her. I do not want to fight anymore because I do not want Deborah being hurt anymore. I could not stand before God, with my head held high, knowing that I stopped taking steps to protect and save my daughter.

You may think you have fooled everyone, but you and I know and God knows what you really are. You offer a home without rent. You offer food, clothing and anything else that a slave-master offers his slaves. This is what you are trying to make of me and everyone around you, wanting them to conform to your whims and wishes. And the price we must pay is Deborah. I think you have been inspired by watching Kumblestiltskin movies. He promised to spin straw into gold at the price of the first-born child. (I have always wondered just what he wanted with the child and I can't help but wonder now.)

God will be your judge.

Sincerely,

Karen L. Thompson
Karen L. Thompson

APPENDIX B

Findings of Fact, Conclusions of Law and Custody Decree

FILED DISTRICT COURT
Third Judicial District

NOV 13 1991
Evelyn Thompson
SALT LAKE COUNTY
Deputy Clerk

Mitchell R. Barker, #4530
Attorney for Plaintiff
2870 South State Street
Salt Lake City, Utah 84115-3692
Telephone: 486-9638

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

JOHN CARL PUTVIN, Plaintiff, vs. KAREN LARIE THOMPSON, et al., Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 910903188CS Judge Timothy R. Hanson
--	---

On Tuesday November 12, 1991, by order of the Court, a telephonic pretrial scheduling conference was held. The Honorable Timothy R. Hanson presided. Plaintiff John Carl Putvin ("Putvin") was represented by Mitchell Barker; Defendant Karen Larie Thompson ("Thompson") was represented by Chase Kimball; the minor child Deborah Putvin-Thompson ("Deborah") was represented by Arnold G. Gardner, Guardian ad Litem.

Respective counsel informed the Court of the status of the case, including Thompson's stated and written desire to withdraw her answer and proceed by default. Chase Kimball, on behalf of Thompson, orally withdrew the Answer and Counterclaim. The parties, through counsel, stipulated that the Court consider the court-ordered custody evaluation by Patricia Smith, Phd. and

Thompson's November 4, 1991 letter to Putvin (both attached hereto) as evidence in the case. Having considered such evidence and the pleadings in this case, the Court now enters its Findings of Fact as follows:

1. The parties to this case, John Carl Putvin and Karen Larie Thompson, are the natural parents of Deborah Putvin-Thompson, who has been sometimes known in the past as Deborah Thompson.

2. Putvin is a fit and proper parent to whom permanent custody and control of Deborah should be awarded.

3. The evidence demonstrates that Thompson may flee with Deborah, and should be required to submit to mental health treatment. Visitation should be supervised by a responsible party approved by Putvin, and should be exercised in a location and environment conducive to Deborah's best interests. The supervising party should remain at all times in the physical presence of Deborah, to insure her safety and well-being.

4. Thompson should be permitted, after sufficient psychological treatment, to present to Putvin or his counsel such evidence as she believes establishes that her visitation should no longer be supervised. Putvin should be required to consider such information, and to make a reasonable determination as to the continued need for custodial supervision. If Thompson shall disagree with Putvin's determination, she should then be permitted to petition the Court, and an evidentiary

hearing shall be held to determine whether the Court should enter an order relieving her of the requirement of supervised visitation. If the Court enters such an order, and it becomes final, thereafter Thompson should be entitled to standard minimal visitation.

5. The Certification of Live Birth should be corrected by the State of Utah to identify John Carl Putvin, born December 26, 1948, as the natural father of Deborah, and to correct her name to read "Deborah Putvin-Thompson".

6. Arnold Gardner should be authorized to act as guardian ad litem in the event Thompson shall abduct Deborah.

7. Putvin should be required to arrange for Deborah to have psychological treatment.

8. The relationship of the parties was not recognized by the State of Utah. Such honorable relationship of conscience as did exist was terminated by Thompson on May 17, 1991.

Having made the foregoing Findings of Fact, the Court now enters the following

CONCLUSIONS OF LAW

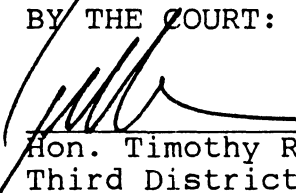
9. Sole custody of Deborah should be awarded to Putvin, subject to visitation by Thompson as set forth in the decree.

10. The Certification of Live Birth pertaining to Deborah should be ordered corrected, naming John Carl Putvin, born December 26, 1948, as the natural father, and correcting her name to read "Deborah Putvin-Thompson".


11. A Decree should be entered by the Court, incorporating the terms of these Findings and Conclusions.

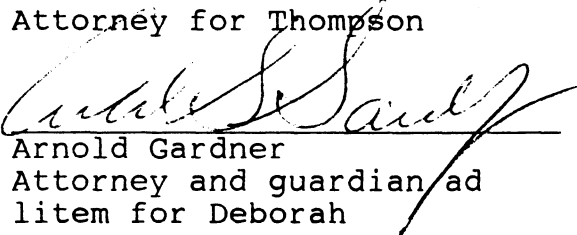
So found and concluded this 13 of November, 1991.

BY THE COURT:


Hon. Timothy R. Hanson
Third District Judge

Approved:


Chase Kimball
Attorney for Thompson


Arnold Gardner
Attorney and guardian ad
litem for Deborah

ATTEST

By



Deputy Clerk

FILED DISTRICT COURT
Third Judicial District

NOV 13 1991

Evelyn Thompson
SALT LAKE COUNTY
Deputy Clerk

Mitchell R. Barker, #4530
Attorney for Plaintiff
2870 South State Street
Salt Lake City, Utah 84115-3692
Telephone: 486-9638

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

JOHN CARL PUTVIN,

Plaintiff,

vs.

KAREN LARIE THOMPSON, et al.,

Defendants.

CUSTODY DECREE

Case No. 910903188CS

Judge Timothy R. Hanson

On Tuesday November 12, 1991, pursuant to order of the Court, a pretrial scheduling conference was held by telephone in this matter. The Honorable Timothy R. Hanson was presiding. Plaintiff John Carl Putvin ("Putvin") was represented by Mitchell R. Barker; Defendant Karen Larie Thompson ("Thompson") was represented by Chase Kimball; the minor child Deborah Putvin-Thompson ("Deborah") was represented by Arnold G. Gardner, court-appointed Guardian ad Litem.

Respective counsel informed the Court of the status of the case, including Thompson's stated and written desire to withdraw her answer and proceed with this case by way of a default matter. Chase Kimball, Esq., on behalf of Thompson, then withdrew the Answer and Counterclaim on file in this case.

The parties, through counsel (including the guardian ad litem), stipulated that the Court should consider the court-ordered custody evaluation by Patricia Smith, Phd. and Thompson's November 4, 1991 letter to Putvin (both attached to the Findings of Fact and Conclusions of Law) as evidence in the case. Having entered its Findings of Fact and Conclusions of Law, the Court now orders, adjudges and decrees as follows:

1. Sole permanent custody of Deborah, born May 13, 1988, is hereby awarded to Plaintiff John Carl Putvin.

2. Reasonable rights of visitation are hereby awarded to Defendant Karen Larie Thompson.

3. Until stipulation of the parties or further order of the Court, Thompson's visitation with Deborah must be supervised. Putvin shall supervise such visitation himself or shall allow supervision by some responsible party who shall be previously approved by Putvin. Such visitation must be exercised in a location and environment that is conducive to Deborah's best interests. The supervising party shall remain at all times in the physical presence of Deborah, sufficient to insure her safety and well-being.

4. Thompson shall submit herself to competent psychological counseling, by a mental health professional previously approved by respective counsel.

5. Thompson may, after sufficient psychological treatment, present to Putvin or his counsel such evidence as she

believes establishes that her visitation should no longer be supervised. Putvin shall consider such information, and shall make a reasonable determination as to the continued need for custodial supervision. If Thompson shall disagree with Putvin's determination, she may then petition the Court, and an evidentiary hearing shall be held to determine whether the Court should enter an order relieving her of the requirement of supervised visitation. If such an order is entered by the Court and becomes final, thereafter Thompson shall be entitled to standard minimal visitation.

6. Under the circumstances described in paragraph five above, Thompson shall have the burden of coming forward with evidence, and also shall have the burden of proof at such hearing. If, upon full hearing, the Court finds that Putvin was unreasonable in withholding his consent under paragraph five, then the Court may, in its discretion, require Putvin to reimburse part or all of Thompson's attorney fees reasonably incurred in petitioning the Court.

7. The Certification of Live Birth of Deborah shall be corrected by the State of Utah to identify John Carl Putvin, born December 26, 1948, as the natural father of Deborah, and to correct her name to read "Deborah Putvin-Thompson".

8. In the event that Thompson, or her agents or those acting in concert with her, shall at any time abduct Deborah, or shall otherwise substantially interfere with Putvin's custodial


rights, Arnold Gardner is empowered to re-enter the case and seek relief from this Court as guardian ad litem.

9. Putvin shall submit Deborah to psychological counseling with a competent child psychologist.

10. Each party shall bear his or her own costs and attorney fees in this action.


SO ORDERED, ADJUDGED AND DECREED THIS 13 day of November, 1991.

BY THE COURT:

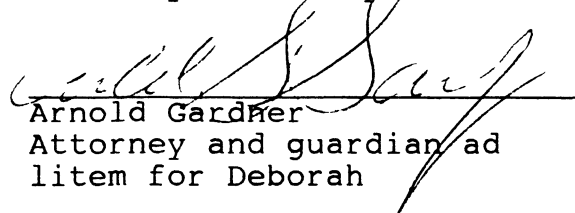


Hon. Timothy R. Hanson
Third District Judge

Approved:



Chase Kimball
Attorney for Thompson



Arnold Gardner
Attorney and guardian ad
litem for Deborah

ATTEST

By 

Evelyn Thompson

Deputy

APPENDIX C

Arnie Gardner Affidavit

AFFIDAVIT OF ARNOLD G. GARDNER, JR.

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Arnold G. Gardner, Jr., being first duly sworn upon oath deposes, and states as follows:

1. I am an attorney licensed to practice law in the State of Utah.

2. I was appointed to act as Guardian ad Litem for the child Deborah Putvin Thompson in the matter of John Carl Putvin v. Karen Larie Thompson, case no. 910903188CS, before Judge Hanson in the Third District Court in and for Salt Lake County, State of Utah.

3. That extensive settlement negotiations took place between John Putvin, represented by Mitchell R. Barker, Karen Thompson, represented by Chase Kimball and Deborah Putvin Thompson, represented by myself, during and preceding November 12, 1991.

4. On Tuesday, November 12, 1991, a Pre-Trial Scheduling Conference was held telephonically between all counsel and Judge Timothy R. Hanson.

5. Prior to the November 12, 1991, Pre-Trial, a letter from Karen Thompson was circulated to all parties dated November 4, 1991. The gist of the letter was that Karen Thompson no longer wished to litigate the matter. During the Pre-Trial Conference, this letter was discussed together with the results of the Court Ordered Custody Evaluation performed by Patricia Smith, Ph.D.

6. During the discussions with Judge Hanson and counsel, Mr. Kimball made no indication that he felt he no longer authorized to act on Karen Thompson's behalf. In fact, his statements were to the effect that he did not agree with what his client was instructing him to do, but he felt he had no choice in the matter. My recollection is, that albeit reluctantly, Mr. Kimball on his client's behalf agreed that his client's default in the matter could be entered. In order to allow his client's default, Mr. Kimball agreed that her Answer to Mr. Putvin's Complaint could be withdrawn as well as her Counterclaim in the matter. Furthermore, Mr. Kimball agreed that in order to support the Findings of Facts to be made in this matter as required by law, Karen Thompson's letter of November 4, 1991, together with the custody evaluation of Patricia Smith, Ph.D. could be entered as evidence in the matter.

7. I further recollect that during the telephonic conference all parties stipulated to the withdrawal of Ms. Thompson's Answer and Counterclaim and to the entry of her Default and agreed that Findings of Fact, Conclusions of Law, and an Order in the case would be prepared and circulated among counsel. It is my recollection that because the matter was settled the matter was then not set for Trial.

8. Later in the action, when Mr. Kimball's authority to act on behalf of Karen Thompson came in to question, Mr. Kimball filed with the Court an Affidavit a copy of which is attached hereto.

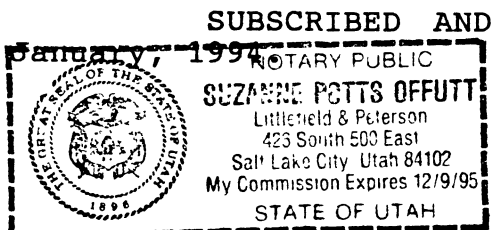
9. I was relieved of my duties as Guardian ad Litem by the Court on April 8, 1992. From the time of my appointment as

Guardian ad Litem until my release, there was never any indication given by any party or counsel that Mr. Kimball was not authorized to act as counsel of record for Karen Thompson.

DATED this 4 day of January, 1994.

LITTLEFIELD & PETERSON


ARNOLD G. GARDNER, JR.



My Commission Expires:

12/9/95

SWORN to before me this 4th day of


NOTARY PUBLIC
Residing at: SLC, UT

13756.aff\1

APPENDIX D

*Motion to Strike, Motion for Sanctions, Proof of Authority,
Affidavit of Chase Kimball*

CHASE KIMBALL, of counsel (4993)
WOODBURY & KESLER
265 East 100 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 364-1100

4 57 PM '92
CLERK

Attorney for Defendants

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

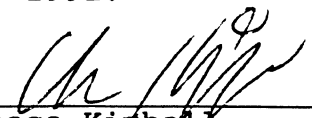
* * *

JOHN CARL PUTVIN,	:	MOTION TO STRIKE
	:	RESPONSE TO MOTION TO REQUIRE
Plaintiff,	:	PROOF
	:	MOTION FOR SANCTIONS
v.	:	
	:	
KAREN LARIE THOMPSON, et alii,	:	Civil No. 910903188 CS
	:	
Defendants.	:	Judge Timothy R. Hanson

* * *

COME NOW THE DEFENDANTS, and hereby move this court to strike the plaintiff's Motion to Require Proof of Authority. In the absence of the striking of said Motion, defendants hereby respond to said motion in the accompanying memorandum. Furthermore, as the Motion of plaintiff is obviously improper, defendant further requests that plaintiff and counsel be sanctioned pursuant to URCP 11 and UCA §78-27-56.

DATED this 31 day of January, 1992.



Chase Kimball
Attorney for Defendants

00001

CHASE KIMBALL, of counsel (4993)
WOODBURY & KESLER
265 East 100 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 364-1100

FILED
JAN 31 4 57 PM '92
COURT
Blum

Attorney for Defendants

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * *

JOHN CARL PUTVIN,	:	MEMORANDUM IN SUPPORT OF
Plaintiff,	:	MOTION TO STRIKE AND MOTION
	:	FOR SANCTIONS
v.	:	RESPONSE TO MOTION TO REQUIRE
	:	PROOF OF AUTHORITY
	:	
KAREN LARIE THOMPSON, <i>et alii</i> ,	:	Civil No. 910903188 CS
Defendants.	:	Judge Timothy R. Hanson

* * *

COME NOW THE DEFENDANTS, and hereby request the court to strike the Motion to Require Proof of Authority of plaintiff. UCA §78-51-33 requires that a party show reasonable grounds for making the motion, which is not shown in the motion. Furthermore, plaintiff has complained that defendant's motion for a hearing on visitation was made without a memorandum of support, even though the motion had been discussed with the court, and now plaintiff neglects to prepare a memorandum in support of his own motion.

In response to the Motion to Require Proof, attached hereto is the affidavit of Chase Kimball stating his representation of the defendants has continued from the time he answered the original complaint. Pursuant to the above statute, an attorney

may offer his own oath to prove authority. Furthermore, this author will produce his client, Karen Thompson, at a hearing to be held this coming Monday, and the court may satisfy itself that she is represented by the author at that time.

Counsel for plaintiffs, Mitchell Barker, is acutely aware that defendants are represented by this author. He sat next to this author and argued against a temporary restraining order against his client as recently as ten days ago. It is patently absurd for him to now claim he is unsure as to this author's authority, and it is embarrassingly obvious that the only reason for his motion is to delay a hearing on visitation next week.

Barker should be sanctioned pursuant to URCP 11, which states in part:

The signature of an attorney...constitutes a certificate by him that he has read the pleading,... that to the best of his knowledge formed after reasonable inquiry it is well grounded in fact and is warranted by existing law...and that it is not interposed for any improper purpose,...If a pleading... is signed in violation of this rule, the court, upon motion...shall impose...an appropriate sanction.

It is clear to the dullest intellect that the instant action has one purpose and one purpose only, to harass the defendant and slow down her process to gain normal healthy unsupervised visitation with her only child. This is particularly reprehensible in view of the fact that he is slowing down the defendant in order to give his client time to move to Australia and deny visitation altogether and in perpetuity. Barker knows this, and could not fail to know this.

00512

UCA §78-27-56 allows for a party to recover his fees from another party that brings an action in bad faith, to wit: "In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought...in good faith." The instant action is a textbook example of a bad faith action.

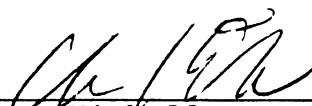
CONCLUSION

Plaintiff's motion should be stricken as improper, as it contains neither memorandum, nor a showing of reasonable grounds for doubt as to whether defendant is represented by this author. In the absence of the court striking the motion, attached hereto is the affidavit of this author giving his authority.

Plaintiff and his counsel should be sanctioned for filing frivolous motions with only an intent to delay behind them. This delay becomes much more callous when it is made clear that the delay will only have the effect of allowing plaintiff to move 10,000 miles away in order to deny reasonable visitation of the defendant Karen Thompson.

WHEREFORE, defendant requests that the motion of plaintiff be denied or stricken. Defendant further requests sanctions be imposed against plaintiff and his counsel.

DATED this 31 day of January, 1992.



Chase Kimball
Attorney for Defendants

CHASE KIMBALL, of counsel (4993)
WOODBURY & KESLER
265 East 100 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 364-1100

FILED
JUN 10 4 57 PM '94
CLERK

Attorney for Defendants

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * *

JOHN CARL PUTVIN,	:	
	:	AFFIDAVIT OF CHASE KIMBALL
Plaintiff,	:	
	:	
v.	:	
	:	
KAREN LARIE THOMPSON, et alii,	:	Civil No. 910903188 CS
	:	
Defendants.	:	Judge Timothy R. Hanson

* * *

* * *

STATE OF UTAH)
 : .ss

COUNTY OF SALT LAKE)

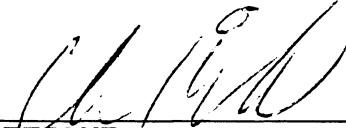
COMES NOW YOUR AFFIANT, CHASE KIMBALL, WHO DULY SWEARS:

1. That I am a licensed attorney in the state of Utah.
2. That I am representing defendant Karen Thompson in the above-entitled case.
3. The other defendants have been dismissed from this case.
4. That only ten days ago I was arguing a motion in front of the court on behalf of Karen Thompson.
5. That plaintiff and his counsel were both present at this argument.

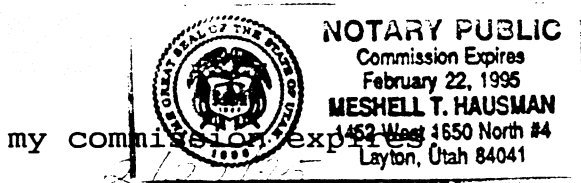
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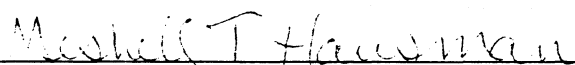
6. That they have absolutely no reasonable grounds to question that I have authority to represent Karen Thompson, as they have been dealing with me from the inception in this matter, or for nigh onto a year.

FURTHER AFFIANT SAYETH NAUGHT.


AFFIANT

SUBSCRIBED AND SWORN TO before me this 31 day of January, 1992.




Notary Public
Residing in Salt Lake County

DELIVERY CERTIFICATE

The undersigned hereby certifies that he telefaxed a copy of MOTION, MEMORANDUM AND AFFIDAVIT to M. Barker, 2870 S. State, SLC, UT 84115, and A. Gardner, 426 S. 500 E., SLC, UT 84102 on the above date.



00500

APPENDIX E

Determinative Statutes and Rules

custody or visitation may not be rendered until a report on that investigation is received by the court. That investigation shall be conducted by the Division of Family Services within 30 days of the court's notice and request for an investigation. In reviewing this report, the court shall comply with Section 78-7-9.

History: C. 1953, 30-3-5.2, enacted by L. 1988, ch. 90, § 1; 1990, ch. 183, § 14; 1992, ch. 213, § 1.

Amendment Notes. — The 1990 amendment, effective April 23, 1990, substituted

"Human" for "Social" in the first sentence.

The 1992 amendment, effective April 27, 1992, added the last sentence and made a punctuation change.

NOTES TO DECISIONS

ANALYSIS

Evidence.
Investigation.
— Time for request.

Evidence.

Trial court's finding that child had not been sexually abused was reversed and the case was remanded for a redetermination of custody because the finding was against the clear weight

of evidence indicating that the child had been sexually abused by her half-brother. *Linam v. King*, 804 P.2d 1235 (Utah Ct. App. 1991).

Investigation.

— Time for request.

Husband's request for an investigation was untimely when he did not request an investigation until after the court had decided the case. *Riche v. Riche*, 784 P.2d 465 (Utah Ct. App. 1989).

30-3-5.5. Petition to protect abused child — Jurisdiction under this chapter.

(1) A person who has filed a complaint under this chapter may also file a petition with the district court for a protective order for the protection of any children residing with either party to the action under this chapter. The petition and procedures shall be the same as for the issuance of protective orders in the juvenile court under Sections 78-3a-20.5, 78-3a-20.6, 78-3a-20.7, 78-3a-20.8, 78-3a-20.9, and 78-3a-20.10. The court or the cohabitant may use the protections provided in this chapter and Title 78, Chapter 3a, Juvenile Courts, and when necessary, those protections under Title 76, Chapter 5, Offenses Against the Person, which provide for criminal prosecution.

(2) A person who has obtained a protective order pursuant to this section shall notify any other court in which another action is pending or order is issued pertaining to the same family member named in the protective order.

History: C. 1953, 30-3-5.5, enacted by L. 1991, ch. 180, § 1.

came effective on April 29, 1991, pursuant to Utah Const., Art. VI, Sec. 25.

Effective Dates. — Laws 1991, ch. 180 be-

30-3-7. When decree becomes absolute.

(1) The decree of divorce becomes absolute:

(a) on the date it is signed by the court and entered by the clerk in the register of actions if both the parties who have a child or children and the plaintiff has filed an action in the judicial district as defined in Section 78-1-2.1 where the pilot program is administered and have completed attendance at the mandatory course provided in Section 30-3-11.3 except if the court waives the requirement, on its own motion or on the motion of

shall be served with process or otherwise notified in accordance with Section 78-45c-5.

History: L. 1980, ch. 41, § 10.

78-45c-11. Ordering party to appear — Enforcement — Out-of-state party — Travel and other expenses.

(1) The court may order any party to the proceeding who is in this state to appear personally before the court. If that party has physical custody of the child the court may order that he appear personally with the child. If the party who is ordered to appear with the child cannot be served or fails to obey the order, or it appears the order will be ineffective, the court may issue a warrant of arrest against such party to secure his appearance with the child.

(2) If a party to the proceeding whose presence is desired by the court is outside this state with or without the child the court may order that the notice given under Section 78-45c-5 include a statement directing that party to appear personally with or without the child and declaring that failure to appear may result in a decision adverse to that party.

(3) If a party to the proceeding who is outside this state is directed to appear under Subsection (2) or desires to appear personally before the court with or without the child, the court may require another party to pay to the clerk of the court travel and other necessary expenses of the party so appearing and of the child if this is just and proper under the circumstances.

History: L. 1980, ch. 41, § 11.

78-45c-12. Parties bound by custody decree — Conclusive unless modified.

A custody decree rendered by a court of this state which had jurisdiction under Section 78-45c-3, binds all parties who have been served in this state or notified in accordance with Section 78-45c-5 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this act.

History: L. 1980, ch. 41, § 12.

Meaning of "this act." — See note following same catchline in notes to § 78-45c-1.

COLLATERAL REFERENCES

A.L.R. — Liability of legal or natural parent, or one who aids and abets, for damages resulting from abduction of own child. 40 A.L.R.4th 7.

Written instructions.**—Failure to tender.****—Waiver.**

Where plaintiff had failed to tender a written instruction on burden of proof he could not claim error in the lack of such instruction. *Fuller v. Zinik Sporting Goods Co.*, 538 P.2d 1036 (Utah 1975).

Cited in *Wellman v. Noble*, 12 Utah 2d 350, 366 P.2d 701 (1961); *Hill v. Cloward*, 14 Utah 2d 55, 377 P.2d 186 (1962); *Ortega v. Thomas*, 14 Utah 2d 296, 383 P.2d 406 (1963); *Meier v. Christensen*, 15 Utah 2d 182, 389 P.2d 734 (1964); *Memmott v. U.S. Fuel Co.*, 22 Utah 2d 356, 453 P.2d 155 (1969); *Telford v. Newell J. Olsen & Sons Constr. Co.*, 25 Utah 2d 270, 480 P.2d 462 (1971); *Flynn v. W.P. Harlin Constr.*

Co., 29 Utah 2d 327, 509 P.2d 356 (1973); *McGinn v. Utah Power & Light Co.*, 529 P.2d 423 (Utah 1974); *Henderson v. Meyer*, 533 P.2d 290 (Utah 1975); *Lamkin v. Lynch*, 600 P.2d 530 (Utah 1979); *State v. Hall*, 671 P.2d 201 (Utah 1983); *Highland Constr. Co. v. Union Pac. R.R.*, 683 P.2d 1042 (Utah 1984); *Gill v. Timm*, 720 P.2d 1352 (Utah 1986); *Penrod v. Carter*, 737 P.2d 199 (Utah 1987); *King v. Fereday*, 739 P.2d 618 (Utah 1987); *State v. Cox*, 751 P.2d 1152 (Utah Ct. App. 1988); *Ramon ex rel. Ramon v. Farr*, 770 P.2d 131 (Utah 1989); *Anton v. Thomas*, 806 P.2d 744 (Utah Ct. App. 1991); *Reeves v. Gentile*, 813 P.2d 111 (Utah 1991); *Hodges v. Gibson Prods. Co.*, 811 P.2d 151 (Utah 1991); *Home Sav. & Loan v. Aetna Cas. & Sur. Co.*, 817 P.2d 341 (Utah Ct. App. 1991).

COLLATERAL REFERENCES

Am. Jur. 2d. — 75A Am. Jur. 2d Trial § 1077 et seq.

C.J.S. — 88 C.J.S. Trial §§ 266 to 448.

A.L.R. — Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 A.L.R.3d 10.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 A.L.R.3d 88.

Sufficiency of evidence, in personal injury action, to prove permanence of injuries and to warrant instructions to jury thereon, 18 A.L.R.3d 170.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 A.L.R.3d 1081.

Verdict-urging instructions in civil case

stressing desirability and importance of agreement, 38 A.L.R.3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise, 41 A.L.R.3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence or reflecting on integrity or intelligence of jurors, 41 A.L.R.3d 1154.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 A.L.R.3d 128.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 A.L.R.3d 101.

Federal Rules of Civil Procedure, construction and effect of provision in Rule 51, and similar state rules, that counsel be given opportunity to make objections to instructions out of hearing of jury, 1 A.L.R. Fed. 310.

Key Numbers. — Trial ⇌ 182 to 296.

Rule 52. Findings by the court.

(a) **Effect.** In 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, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional find-

—Child custody.

The trial court must enter specific findings on the factors relied upon in awarding or modifying the custody of a child. *Hutchison v. Hutchison*, 649 P.2d 38 (Utah 1982).

—Contempt.

This rule and § 78-32-3 require, for contempt committed in the presence of the court, written findings of facts, conclusions of law and judgment. It is not enough that the court in open court announce in detail its findings, conclusions and decree. *Brown v. Cook*, 123 Utah 505, 260 P.2d 544 (1953).

Written findings are necessary to support a contempt judgment. *Thomas v. Thomas*, 569 P.2d 1119 (Utah 1977).

—Credibility of witnesses.

Credibility itself is not a factual issue that is appropriately the subject of the trial court's findings; rather, the findings of the ultimate facts implicitly reflect consideration of the believability of the witnesses' testimony. *Adoption of McKinstry v. McKinstry*, 628 P.2d 1286 (Utah 1981).

—Denial of motion.

Subdivision (a) does not require that the denial of a motion be accompanied by specific findings of fact and conclusions of law. *State v. Poteet*, 692 P.2d 760 (Utah 1984).

—Divorce decree modifications.

Where the modification of a divorce decree is granted, the trial court should make findings to indicate the reasons why modification was found to be appropriate. *Christensen v. Christensen*, 628 P.2d 1297 (Utah 1981).

Court action on a request to modify a divorce decree is not included in those "decisions on motions" referred to in Subdivision (a), and therefore the trial court is not exempt from the requirements of Subdivision (a). *Stoddard v. Stoddard*, 642 P.2d 743 (Utah 1982); *Montoya v. Montoya*, 696 P.2d 1193 (Utah 1985).

—Easement.

In a suit to establish right of way for an irrigation ditch by prescriptive easement, where the pleadings made an issue of whether easement had been acquired and it was clear that the ditch had been used for more than twenty years to irrigate lands of plaintiffs, trial court was required to make a direct finding on that issue. *Harmon v. Rasmussen*, 13 Utah 2d 422, 375 P.2d 762 (1962).

—Evidentiary disputes.

Although findings should be made on all material subordinate and ultimate factual issues, it is not necessary that a court resolve all conflicting evidentiary issues. *Sorenson v. Beers*, 614 P.2d 159 (Utah 1980).

—Juvenile action.

In juvenile action, court must not only make findings to support the proof of every fact necessary to constitute the offense charged, but also make findings to support the preliminary adjudication that the child is within the jurisdiction of the juvenile court. *In re R.N.*, 527 P.2d 1356 (Utah 1974).

—Material issues.

Failure to find upon all material issues raised by the pleadings is reversible error.

LeGrand Johnson Corp. v. Peterson, 18 Utah 2d 260, 420 P.2d 615 (1966).

It is the duty of the trial judge in contested cases to find facts upon all material issues submitted for decision unless findings are waived. *Boyer Co. v. Lignell*, 567 P.2d 1112 (Utah 1977).

Although findings should be made on all material subordinate and ultimate factual issues, it is not necessary that a court resolve all conflicting evidentiary issues. *In re Estate of Grimm*, 784 P.2d 1238 (Ct. App. 1989), cert. denied, 795 P.2d 1138 (Utah 1990).

—Harmless error.

Trial court's failure to make findings on a material issue was harmless error where the evidence was clear, uncontroverted, and only capable of supporting a finding in favor of the judgment. *Kinkella v. Baugh*, 660 P.2d 223 (Utah 1983).

—Submission by prevailing party.**—Court's discretion.**

It is in the discretion of the trial court to adopt the findings as submitted to that court by the prevailing party, as long as the findings are not clearly contrary to the evidence. *Boyer Co. v. Lignell*, 567 P.2d 1112 (Utah 1977).

—Water dispute.**—Findings of state engineer.**

Where a court adopts findings by a state engineer which adequately define the rights of all parties involved in a water dispute, it is not necessary for the trial court to make its own, independent findings of fact and conclusions of law. *In re Use of Water*, 12 Utah 2d 102, 363 P.2d 199 (1961).

Amendment.**—Motion.****—Caption.**

A document entitled "Plaintiffs' Objections and Additions to Proposed Findings of Fact and Conclusions of Law" filed after entry of judgment against plaintiffs was properly construed by the trial court as a motion pursuant to Subdivision (b) because, regardless of how it is captioned, a motion filed within 10 days of the entry of judgment that questions the correctness of the court's findings and conclusions is properly treated as a post-judgment motion: the substance of a motion, not its caption, is controlling. *DeBry v. Fidelity Nat'l Title Ins. Co.*, 828 P.2d 520 (Utah Ct. App. 1992).

—Conformance with original findings.

Where court on its own initiative amended jury's finding but within 10 days the defendant filed a motion to amend the judgment back to conform to the original findings, court had power, under this rule, to grant the motion. *National Farmers' Union Property & Cas. Co. v. Thompson*, 4 Utah 2d 7, 286 P.2d 249, 61 A.L.R.2d 635 (1955).

—New trial.

Motion for amendment of findings, timely made and served upon all parties, invokes the continuing jurisdiction of the court and suspends the finality of the judgment until the motion is ruled upon; if the interests of justice require setting aside the findings and judg-

ment of judgment, was not fatal to the defendants' appeal from a proceeding in equity. *Dugan v. Jones*, 724 P.2d 955 (Utah 1986).

How findings entered.

In assessing the sufficiency of the findings, the appellate court is not confined to the contents of a particular document entitled "Findings"; rather, the findings may be expressed orally from the bench or contained in other documents. *Erwin v. Erwin*, 773 P.2d 847 (Utah Ct. App. 1989).

This rule does not mandate the entry of signed, written findings and conclusions. On the contrary, the court may even state its findings orally if it chooses. *Martindale v. Adams*, 777 P.2d 514 (Utah Ct. App. 1989).

Judgments upon multiple claims or parties.

Pursuant to the requirement of Subdivision (a) that the trial court "find the facts specially," in order to facilitate appellate review of judgments certified as final under Rule 54(b), the trial court should enter findings supporting the conclusion that such orders are final and the findings should explain the lack of factual overlap between the certified and remaining claims. *Bennion v. Pennzoil Co.*, 826 P.2d 137 (Utah 1992).

Judicial review.

On review, the appellate court is not limited to written findings, and may properly examine findings expressed solely from the bench or contained in other court documents, such as court memoranda. *Merriam v. Merriam*, 799 P.2d 1172 (Utah Ct. App. 1990).

—Equity cases.

The "clearly erroneous" standard of review stated in Subdivision (a) is applicable in equity cases. *Bellon v. Malnar*, 808 P.2d 1089 (Utah 1991).

—Standard of review.

In reviewing an interlocutory order permitting discovery where issues of fact are involved and there are no findings of fact, the court does not review the facts but assumes that the trier of facts found them in accord with its decision, and will affirm the decision if from the evidence it would be reasonable to find facts to support it. *Mower v. McCarthy*, 122 Utah 1, 245 P.2d 224 (1952).

A finding is clearly erroneous if it is against the great weight of the evidence or if the court is otherwise definitely and firmly convinced that a mistake has been made. *State v. Walker*, 743 P.2d 191 (Utah 1987); *Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376 (Utah 1987); *Stevens v. Stevens*, 754 P.2d 952 (Utah Ct. App. 1988); *Southland Corp. v. Potter*, 760 P.2d 320 (Utah Ct. App. 1988); *T.R.F. v. Felan*, 760 P.2d 906 (Utah Ct. App. 1988); *State, In re N.H.B.*, 777 P.2d 487 (Utah Ct. App.), cert. denied, 789 P.2d 33 (Utah 1989); *Bountiful v. Riley*, 784 P.2d 1174 (Utah 1989); *State v. Burk*, 839 P.2d 880 (Utah Ct. App. 1992).

The "clearly erroneous" standard applies whether the case is one in equity or one at law. *Barker v. Francis*, 741 P.2d 548 (Utah Ct. App. 1987); *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896 (Utah 1989); *Bountiful v. Riley*, 784

P.2d 1174 (Utah 1989); *Grahn v. Gregory*, 776 P.2d 320 (Utah Ct. App. 1990).

If there is a reasonable basis in evidence, a trial court's award of damages will be affirmed on appeal. *Gillmor v. Gillmor*, 745 P.2d 461 (Utah Ct. App. 1987), cert. denied, 765 P.2d 1278 (Utah 1988).

Application of the "clearly erroneous" standard in Subdivision (a) does not eliminate the deference traditionally accorded the fact finder to determine the credibility of witnesses. *State v. Wright*, 744 P.2d 315 (Utah Ct. App. 1987); *Henderson v. For-Shor Co.*, 757 P.2d 465 (Utah Ct. App. 1988).

The "clearly erroneous" standard in Subdivision (a) applies to review of competency proceedings because they are civil rather than criminal in nature. *State v. Lafferty*, 749 P.2d 1239 (Utah 1988), aff'd, 776 P.2d 631 (Utah 1989).

On appeal of a judgment from the bench after trial, the appellate court defers to the trial court's factual assessment unless there is clear error. *Copper State Leasing Co. v. Blacker Appliance & Furn. Co.*, 770 P.2d 88 (Utah 1988); *Eskelsen v. Town of Perry*, 819 P.2d 770 (Utah 1991).

When reviewing trial court's finding based solely on written materials and involving no assessment of witness credibility or competency, the Court of Appeals is in as good a position as the trial court to examine the evidence de novo and determine the facts, rather than review the determination under the standard set forth in Subdivision (a), which would defer to the trial judge's ability to assess the credibility of witnesses and set aside the finding only if clearly erroneous. *In re Infant Anonymous*, 760 P.2d 916 (Utah Ct. App. 1988).

When reviewing a bench trial in a criminal action for sufficiency of the evidence, the appellate court must sustain the trial court's judgment unless it is against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made. *State v. Goodman*, 763 P.2d 786 (Utah 1988).

Findings of fact are clearly erroneous if the appellant can show that they are without adequate evidentiary foundation or if they are induced by an erroneous view of the law. *Western Capital & Secs., Inc. v. Knudsvig*, 768 P.2d 989 (Utah Ct. App.), cert. denied, 779 P.2d 688 (Utah 1989).

Findings of fact are clearly erroneous if it can be shown that they are against the clear weight of evidence or that they induce a definite and firm conviction that a mistake has been made. *Maughan v. Maughan*, 770 P.2d 156 (Utah Ct. App. 1989); *Monroc, Inc. v. Sidwell*, 770 P.2d 1022 (Utah Ct. App. 1989); *Weston v. Weston*, 773 P.2d 408 (Utah Ct. App. 1989); *Butler v. Lee*, 774 P.2d 1150 (Utah Ct. App. 1989).

A finding attacked as lacking adequate evidentiary support is deemed "clearly erroneous" only if the appellate court concludes that the finding is against the clear weight of the evidence. *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896 (Utah 1989); *In re Estate of Grimm*,

was insufficient to support the findings. *Fitzgerald v. Critchfield*, 744 P.2d 301 (Utah Ct. App. 1987).

To mount a successful challenge to trial court findings under Subdivision (a) of this rule, an appellant must marshal the evidence supporting the trial court's findings. Only then can the appellate court determine whether those findings are clearly erroneous. *Cornish Town v. Koller*, 758 P.2d 919 (Utah 1988).

The challenging party must marshal all relevant evidence presented at trial that tends to support the findings and demonstrate why the findings are clearly erroneous. *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311 (Utah Ct. App. 1991).

The way to attack findings that appear to be complete and that are sufficiently detailed is to marshal the supporting evidence and then demonstrate that 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. Fazio*, 823 P.2d 474 (Utah Ct. App. 1991).

—Found insufficient.

Divorce case was remanded for adequate findings on the issues of alimony and fees, where no findings had been made regarding the wife's financial condition and needs, and, although the record contained substantial evidence regarding the parties' financial situation and the reasonableness of the fees, the findings were deficient because they failed to evaluate these factors. *Rudman v. Rudman*, 812 P.2d 73 (Utah Ct. App. 1991).

In divorce action, where trial court record did not reveal whether order regarding assignment of retirement benefits was intended as an enforcement or a modification of a previous order, appellate court remanded the issue for the court below to make findings of fact and conclusions of law. *Adelman v. Adelman*, 815 P.2d 741 (Utah Ct. App. 1991).

—Vacation of judgment.

The failure of a trial court to enter adequate findings requires that the judgment be vacated. *Anderson v. Utah County Bd. of County Comm'rs*, 589 P.2d 1214 (Utah 1979).

—Found sufficient.

Finding that "claim of plaintiff of the relationship of attorney client is not supported by the weight of credible evidence and the court finds said issue in favor of defendant and against plaintiff" was sufficient in action in which plaintiff claimed the attorney had established a professional relationship with her and was to purchase property at foreclosure sale for her; although more detailed factual findings would have been appropriate, such additional findings in this case were not mandatory. *Sorenson v. Beers*, 614 P.2d 159 (Utah 1980).

Sufficient evidence to support the finding as to division of marital property. See *Colman v. Colman*, 743 P.2d 782 (Utah Ct. App. 1987).

Findings of fact, based on expert testimony, and not "clearly erroneous," accepted on ap-

peal. See *O'Brien v. Rush*, 744 P.2d 300 (Utah Ct. App. 1987).

In divorce action, value of retirement benefits, as found by trial court, substantiated by record. See *Canning v. Canning*, 744 P.2d 301 (Utah Ct. App. 1987).

In a fraud action, because there was substantial competent evidence to support the trial court's finding that no false representations were knowingly made, and because the appellate court was convinced that the factfinder made no mistake, the finding was not disturbed on appeal. *Brown v. Harry Heathman Inc.*, 744 P.2d 1016 (Utah Ct. App. 1987).

Evidence found sufficient in a bench trial to support the trial court's judgment convicting defendant of second-degree murder. *State v. Goodman*, 763 P.2d 786 (Utah 1988).

Findings of fact, though not model of clarity, were sufficiently detailed to reveal trial court's reasoning processes. See *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896 (Utah 1989).

—Opinion or memorandum of decision.

An opinion or memorandum of decision filed by a court sitting as trier of the fact may be consulted where the findings of fact and conclusions of law are inadequate; and, if the opinion or memorandum contains the findings of fact, that is sufficient compliance with Subdivision (a). *Sprague v. Boyles Bros. Drilling Co.*, 4 Utah 2d 344, 294 P.2d 689 (1956).

A trial judge's memorandum decision can be regarded as findings of fact but only as to those findings recited therein. *Thomas v. Thomas*, 569 P.2d 1119 (Utah 1977).

—Recitals of procedures.

"Findings of fact" must be more than simple recitals of the procedures involved in the development of the case. *Anderson v. Utah County Bd. of County Comm'rs*, 589 P.2d 1214 (Utah 1979).

—Technical error.

Trial court's mere clerical oversight in failing to sign its findings and conclusions did not require disturbing the judgment. *Martindale v. Adams*, 777 P.2d 514 (Utah Ct. App. 1989).

—Ultimate facts.

Findings should be limited to the ultimate facts and if they ascertain ultimate facts, and sufficiently conform to the pleadings and the evidence to support the judgment, they will be regarded as sufficient. *Pearson v. Pearson*, 561 P.2d 1080 (Utah 1977).

Summary judgment.

Findings of fact are unnecessary in connection with summary judgment decisions. *Taylor v. Estate of Taylor*, 770 P.2d 163 (Utah Ct. App. 1989).

—Statement of grounds.

For an appellate court, a statement of grounds found by the trial court to justify summary judgment would be of great assistance, and in an appropriate case, failure to do so may justify remand to the trial court. *Masters v. Worsley*, 777 P.2d 499 (Utah Ct. App. 1989).

Under Subdivision (a) the trial court is required to make a brief written statement to explain which alternative theory it accepted in granting summary judgment. However, failure

PART VII. JUDGMENT.

Rule 54. Judgments; costs.

(a) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment upon multiple claims and/or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment.

(1) **Generally.** Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(2) **Judgment by default.** A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) Costs.

(1) **To whom awarded.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(2) **How assessed.** The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(3), (4) [Deleted.]

(e) Interest and costs to be included in the judgment. The clerk must include in any judgment signed by him any interest on the verdict or decision

that party's costs, not a process for appeal of the award. *State ex rel. State Dep't of Social Servs. v. Ruscetta*, 742 P.2d 114 (Utah Ct. App. 1987).

—Challenge of award.

If a memorandum of costs is filed before judgment and costs in specific amounts are requested in that judgment, then a party dissatisfied with those costs may have the right of asking to alter or amend the costs in the judgment under Rule 59(a)(3), enjoying thereby the same period of ten days to do so rather than the more restricted period of seven days under subdivision (d)(2) of this rule. *Nelson v. Newman*, 583 P.2d 601 (Utah 1978).

—Depositions.

Where depositions were taken but witnesses have testified at trial, costs of the depositions were not properly includable within the cost bill. *Hull v. Goodman*, 4 Utah 2d 163, 290 P.2d 245 (1955).

Expenses of taking depositions of defendants and general contractor in materialman's action under § 14-2-2 were assessable as costs where necessary to protect plaintiff's rights. *Lawson Supply Co. v. General Plumbing & Heating Co.*, 27 Utah 2d 84, 493 P.2d 607 (1972).

Defendant was not entitled to the cost of taking depositions where the depositions were not used at trial and there was no evidence presented that they were necessarily incurred for the preparation of defendant's case. *Nelson v. Newman*, 583 P.2d 601 (Utah 1978).

Costs of depositions are taxable subject to the limitation that the trial court is persuaded that they were taken in good faith and, in light of the circumstances, appeared to be essential for the development and presentation of the case; deposition costs should be allowable as necessary and reasonable where the development of the case is of such a complex nature that discovery cannot be accomplished through the less expensive methods of interrogatories, requests for admissions and requests for the production of documents. *Highland Constr. Co. v. Union Pac. R.R.*, 683 P.2d 1042 (Utah 1984).

The party claiming entitlement to the costs of depositions has the burden of demonstrating that the depositions were reasonably necessary; determining whether that burden is met is within the sound discretion of the trial court. *Lloyd's Unlimited v. Nature's Way Mktg., Ltd.*, 553 P.2d 507 (Utah Ct. App. 1988).

—Discretionary.

Subdivision (d) leaves the question of costs somewhat in the discretion of the courts. *Hull v. Goodman*, 4 Utah 2d 163, 290 P.2d 245 (1955).

The trial court can exercise reasonable discretion in regard to the allowance of costs, but has a duty to guard against any excesses or abuses in the taxing thereof. *Frampton v. Wilson*, 605 P.2d 771 (Utah 1980); *Hatanaka v. Struhs*, 738 P.2d 1052 (Utah Ct. App.), cert. denied, 765 P.2d 1277 (Utah 1987).

In modification of divorce decrees under the continuing jurisdiction of the trial court, the question of the ability or inability of a party to pay costs is a factual matter that lies in the

discretion of the trial court. *Hardy v. Hardy*, 776 P.2d 917 (Utah Ct. App. 1989).

—Expenses of preparation for action.

In a habeas corpus proceeding by parents against a child-placement agency to obtain custody of a child, expense items incurred by the agency in the taking of depositions and securing certified copies of a marriage license and divorce decree in preparing for the action appeared to be reasonable and incurred in good faith, and these costs should have been allowed to the prevailing agency as a matter of course. *Thomas v. Children's Aid Soc'y*, 12 Utah 2d 235, 364 P.2d 1029 (1961).

The trial court did not err in not awarding the costs incurred by a wife in a divorce action who, after the suit was filed, secured the services of an appraiser who was able to testify at length about his opinion of the identity, nature and net value of the marital estate after his inspection of various property and documents. His research and preparation, although essential to the presentation of the case, could not be considered a "cost." *Stevens v. Stevens*, 754 P.2d 952 (Utah Ct. App. 1988).

—Failure to object.

Defendant waived any error as to the costs allowed the plaintiff where defendant waited 23 days after filing of cost bill before filing any objection. *Suniland Corp. v. Radcliffe*, 576 P.2d 847 (Utah 1978).

—Liability of state.

The general terms of a statute giving costs to the prevailing party do not include the state. *Tracy v. Peterson*, 1 Utah 2d 213, 265 P.2d 393 (1954).

The state is not liable for costs unless there is some statute or rule of court which expressly or by clear implication includes it. Section 78-27-13 does not authorize the taxation of costs against the state but only provides the source from which such costs shall be paid when authorized. *Tracy v. Peterson*, 1 Utah 2d 213, 265 P.2d 393 (1954).

The Uniform Act on Paternity, Chapter 45a of Title 78, makes no provision for an award of costs against the state. *State ex rel. State Dep't of Social Servs. v. Ruscetta*, 742 P.2d 114 (Utah Ct. App. 1987).

—Service on adverse party.

This rule requires that only one verified copy be served and it is to be served to the court; there is no requirement that the copy served upon the party from whom costs are claimed be verified. *Barton v. Carson*, 14 Utah 2d 182, 380 P.2d 926 (1963).

—Statutory limits.

Award of costs in excess of those expressly allowed by statute for service of subpoena, witness fees and preparation of model, photographs and certified copies of documents was improper even though the costs represented the actual expenses incurred; fact that Supreme Court has on occasion approved taxing of expense of depositions as costs should not be taken as opening the door to other expenses of the character claimed in the instant case. *Frampton v. Wilson*, 605 P.2d 771 (Utah 1980).

Witness fees, travel expenses, and service of process expenses are chargeable only in accor-

No just reason for delay.

Pursuant to the requirement in Subdivision (b) that the trial court "may direct the entry of a final judgment . . . only upon an express determination by the court that there is no just reason for delay" and, because this determination by the trial court is subject to judicial review under an abuse of discretion standard, a brief explanation should accompany all future certifications so that the appellate court may render an informed decision on that question. *Bennion v. Pennzoil Co.*, 826 P.2d 137 (Utah 1992).

Review of finality.

The initial question of whether an order is eligible for certification under Subdivision (b), i.e., whether the order is "final," is a question of law. Therefore, the appellate court will review the trial court's decision on this point for correctness. *Kennecott Corp. v. State Tax Comm'n.*, 814 P.2d 1099 (1991).

Separate claims.

When the degree of factual overlap between the issue certified for appeal and the issues remaining in the trial court is such that separate claims appear to be based on the same operative facts or on the same operative facts with minor variations, they are not separate claims for purposes of Subdivision (b). *Kennecott Corp. v. State Tax Comm'n.*, 814 P.2d 1099 (1991); *FMA Leasing Co. v. Citizens Bank*, 823 P.2d 1065 (Utah 1992).

To be eligible as an appealable order under Subdivision (b), the court's ruling must dispose of a "separate claim." A "separate claim" must arise from different facts than those underlying the remaining causes of action. *Webb v. Vantage Income Properties*, 818 P.2d 1 (1991).

Plaintiff's alleged three causes of action, all of which arose out of the same set of operative facts, constituted only one "claim" for purposes of this rule. *Furniture Distribution Ctr. v. Miles*, 821 P.2d 1165 (Utah 1991).

A claim is not separate if a decision on claims remaining in the trial court would render moot the issues on appeal. *Bennion v. Pennzoil Co.*, 826 P.2d 137 (Utah 1992).

Pursuant to the requirement of U.R.C.P. 52(a) that the trial court "find the facts specially," in order to facilitate appellate review of judgment certified as final under Subdivision (b) of this rule, the trial court should enter findings supporting its determination that such an order is final and the findings should explain the lack of factual overlap between the certified and remaining claims. *Bennion v. Pennzoil Co.*, 826 P.2d 137 (Utah 1992).

Where the substance of plaintiff's lawsuit was that defendant defamed him several times, each alleged defamation was a separate injury giving rise to a separate and distinct claim; the resolution of a given libel claim arising from one statement would not have a res judicata effect on other libel claims arising from other statements and therefore such claims could be severed from the claim remaining before the trial court. *West v. Thomson Newspapers*, 835 P.2d 179 (Utah Ct. App. 1992).

Inconsistent oral statements.

Oral statements of opinion by the trial court

inconsistent with the findings and conclusions ultimately rendered do not affect the final judgment. *McCollum v. Clothier*, 121 Utah 311, 241 P.2d 468 (1952).

Interest on judgment.

Interest follows a judgment as a matter of law and is collectible even though the clerk of court fails to include the same in the judgment signed by him. *Dairy Distribs., Inc. v. Local 976, Western Conference of Teamsters*, 16 Utah 2d 85, 396 P.2d 47 (1964).

In an action on an oral contract, a party's failure to specifically plead a request for pre-judgment interest was of no consequence because the interest issue is injected by law into every action for the payment of past due money. *Fitzgerald v. Critchfield*, 744 P.2d 301 (Utah Ct. App. 1987).

When a judgment is reversed on appeal, the new judgment subsequently entered by the trial court may bear interest only from the date of entry of that new judgment. *Mason v. Western Mtg. Loan Corp.*, 754 P.2d 984 (Utah Ct. App. 1988).

Judgment based on unpleaded theory.

Where plaintiff alleged only an express contract and he sought no amendment of his pleadings nor offered any proof to establish a quantum meruit theory, court erred in granting judgment for plaintiff based on the theory of quantum meruit. *Taylor v. E.M. Royle Corp.*, 1 Utah 2d 175, 264 P.2d 279 (1953).

Although a complaint may sound in contract, it is not prejudicial error for a court to allow recovery on the basis of quantum meruit, where defendant was not denied a fair opportunity to meet the change in theory of recovery. *PLC Landscape Constr. v. Piccadilly Fish 'n Chips, Inc.*, 28 Utah 2d 350, 502 P.2d 562 (1972).

Complaint for foreclosure of a lien was defective because of the nature of relief sought even though it did not demand judgment for personal liability on contract and judgment was granted for such personal liability, since this rule provides that a judgment shall grant the relief to which a party is entitled even though it is not demanded. *Motivated Mgt. Int'l v. Finney*, 604 P.2d 467 (Utah 1979).

In a dispute over the appropriation of assets and goodwill of a business corporation, it was error for trial court to liquidate assets of the corporation where the issues upon which such action rested were neither pleaded nor raised by parties, nor tried. *Combe v. Warren's Family Drive-Inns, Inc.*, 680 P.2d 733 (Utah 1984).

Judgment in favor of nonparty.

Subdivision (c)(1) is consistent with the general principle that a trial court may not render judgment in favor of a nonparty. Courts can generally make a legally binding adjudication only between the parties actually joined in the action. *Hiltsley v. Ryder*, 738 P.2d 1024 (Utah 1987).

Subdivision (c)(1) cannot dispense entirely with the necessity that a claimant make some claim in the lawsuit against the defendant. *Butler v. Wilkinson*, 740 P.2d 1244 (Utah 1987).

A court may not grant relief to a nonparty.

600 P.2d 550 (Utah 1979); *Myers v. Morgan*, 626 P.2d 410 (Utah 1981); *Bernard v. Attebury*, 629 P.2d 892 (Utah 1981); *Bailey v. Sound Lab. Inc.*, 694 P.2d 1043 (Utah 1984); *GMAC v. Martinez*, 712 P.2d 243 (Utah 1986); *Williams v. State*, 716 P.2d 806 (Utah 1986); *Owen v. Owen*, 734 P.2d 414 (Utah 1986); *Tebbs, Smith & Assocs. v. Brooks*, 735 P.2d 1305 (Utah 1986); *Katz v. Pierce*, 732 P.2d 92 (Utah 1986); *Freegard v. First W. Nat'l Bank*, 738 P.2d 614 (Utah 1987); *Crosland v. Peck*, 738 P.2d 631 (Utah 1987); *Elder v. Triax Co.*, 740 P.2d 1320 (Utah 1987); *Mascaro v. Davis*, 741 P.2d 938 (Utah 1987); *Payne ex rel. Payne v. Myers*, 743 P.2d 186 (Utah 1987); *McKee v. Williams*, 741 P.2d 978 (Utah Ct. App. 1987); *Galloway v. Mangum*, 744 P.2d 1365 (Utah 1987); *Davies v. Olson*, 746 P.2d 264 (Utah Ct.

App. 1987); *Kathy's Food Stores, Inc. v. Equitable Life & Cas. Ins. Co.*, 753 P.2d 501 (Utah 1988); *Williams v. Public Serv. Comm'n.*, 754 P.2d 41 (Utah 1988); *OK Motors, Inc. v. Hill*, 762 P.2d 1102 (Utah Ct. App. 1988); *Redevelopment Agency v. Daskalas*, 785 P.2d 1112 (Utah Ct. App. 1989); *Wade v. Burke*, 800 P.2d 1106 (Utah Ct. App. 1990); *City Consumer Serv., Inc. v. Peters*, 815 P.2d 234 (Utah 1991); *Cornish Town v. Koller*, 817 P.2d 305 (Utah 1991); *Town of Manila v. Broadbent Land Co.*, 818 P.2d 2 (Utah 1991); *Peterson v. Peterson*, 818 P.2d 1305 (Utah Ct. App. 1991); *Quinn v. Quinn*, 830 P.2d 282 (Utah Ct. App. 1992); *King v. Searle Pharmaceuticals, Inc.*, 832 P.2d 858 (Utah 1992); *Watson v. Watson*, 837 P.2d 1 (Utah Ct. App. 1992); *J.H. ex rel. D.H. v. West Valley City*, 840 P.2d 115 (Utah 1992).

COLLATERAL REFERENCES

Brigham Young Law Review. — Multiple Claims Under Rule 54(b): A Time for Reexamination?, 1985 B.Y.U. L. Rev. 327.

Am. Jur. 2d. — 5 Am. Jur. 2d Appeal and Error § 1009 et seq.; 20 Am. Jur. 2d Costs §§ 14.26 to 36.87 et seq.; 46 Am. Jur. 2d Judgments § 1.

C.J.S. — 4 C.J.S. Appeal and Error §§ 46 to 166; 20 C.J.S. Costs § 1 et seq.; 49 C.J.S. Judgments § 1.

A.L.R. — Attorney's personal liability for expenses incurred in relation to services for client, 15 A.L.R.3d 531; 66 A.L.R.4th 256.

Effect on compensation of architect or building contractor of express provision in private building contract limiting the cost of the building, 20 A.L.R.3d 778.

Recoverability under property insurance or insurance against liability for property damage of insured's expenses to prevent or mitigate damages, 33 A.L.R.3d 1262.

Dismissal of plaintiff's action as entitling defendant to recover attorney's fees or costs as "prevailing party" or "successful party," 66 A.L.R.3d 1087.

Who is the "successful party" or "prevailing party" for purposes of awarding costs where both parties prevail on affirmative claims, 66 A.L.R.3d 1115.

Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party, 9 A.L.R.4th 1144.

Running of interest on judgment where both parties appeal, 11 A.L.R.4th 1099.

Allocation of defense costs between primary and excess insurance carriers, 19 A.L.R.4th 107.

Authority of trial judge to impose costs or other sanctions against attorney who fails to appear at, or proceed with, scheduled trial, 29 A.L.R.4th 160.

Allowance of attorneys' fees in mandamus proceedings, 34 A.L.R.4th 457.

Retrospective application and effect of state statute or rule allowing interest or changing rate of interest on judgments or verdicts, 41 A.L.R.4th 694.

Obduracy as basis for state-court award of attorneys' fees, 49 A.L.R.4th 825.

Modern status of state court rules governing entry of judgment on multiple claims, 80 A.L.R.4th 707.

Recoverability of cost of computerized legal research under 28 USC § 1920 or Rule 54(d), Federal Rules of Civil Procedure, 80 A.L.R. Fed. 168.

Modern status of Federal Civil Procedure Rule 54(b) governing entry of judgment on multiple claims, 89 A.L.R. Fed. 514.

Key Numbers. — Appeal and Error ≈ 24 to 135; Costs ≈ 78 et seq., 195 et seq., 221 et seq.; Judgment ≈ 1.

Rule 55. Default.

(a) Default.

(1) **Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter his default.

(2) **Notice to party in default.** After the entry of the default of any party, as provided in Subdivision (a)(1) of this rule, it shall not be necessary to give such party in default any notice of action taken or to be taken or to serve any notice or paper otherwise required by these rules to be served on a party to the action or proceeding, except as provided in Rule 5(a), in Rule 58A(d) or in the event that it is necessary for the court to conduct a hearing with regard to the amount of damages of the nondefaulting party.

Judgment.

Judgments by default are not favored by the courts nor are they in the interest of justice and fair play. *Heathman v. Fabian & Clendenin*, 14 Utah 2d 60, 377 P.2d 189 (1962).

—Conduct of counsel.

When defendant's counsel was 27 minutes late on morning trial was commenced because he was unable to obtain from the Supreme Court a writ of prohibition to prevent the holding of the trial on that day due to absence of defense witnesses, the trial court erred in granting a default judgment to plaintiff and refusing to allow defense counsel to participate in the proceedings or challenge plaintiff's evidence, notwithstanding any ill-advised, irritating or contemptuous conduct from defense counsel during the action, since the law prefers that a case be tried on its merits and the parties litigant should not be made to suffer for the misconduct of their counsel. *McKean v. Mountain View Mem. Estates, Inc.*, 17 Utah 2d 323, 411 P.2d 129 (1966).

—Default entry necessary.

No default judgment may be entered under Subdivision (b)(2) unless default has previously been entered. The entry of default is an essential predicate to any default judgment. *P & B Land, Inc. v. Klungervik*, 751 P.2d 274 (Utah Ct. App. 1988).

—Failure to follow rule.

Rule 54(c)(2) and this rule prescribe the procedure to be followed by trial courts in entering judgments against defaulting parties, and courts are not at liberty to deviate from those rules just because one party is in default and is not entitled to be heard on the merits of the case. *Russell v. Martell*, 681 P.2d 1193 (Utah 1984).

Judgment against defaulting party must be reversed where plaintiffs' claims for damages were not for sums certain and a hearing was not conducted by the trial court to ascertain the amount of damages to which the plaintiffs were entitled. *Russell v. Martell*, 681 P.2d 1193 (Utah 1984).

The entry of a default judgment by a court with jurisdiction over the parties and the subject matter, where there is no default in law or in fact, is improper and voidable. *P & B Land, Inc. v. Klungervik*, 751 P.2d 274 (Utah Ct. App. 1988).

—Hearing on merits.

No one has an inalienable or constitutional right to a judgment by default without a hearing on the merits. The courts, in the interest of justice and fair play, favor, where possible, a full and complete opportunity for a hearing on the merits of every case. *Heathman v. Fabian*, 14 Utah 2d 60, 377 P.2d 189 (1962).

—Punitive damages.

Lower court's award of punitive damages without proof and upon default judgment was in and of itself justification for vacating judgment. *Security Adjustment Bureau, Inc. v. West*, 20 Utah 2d 292, 437 P.2d 214 (1968).

Notice.

This rule provides that a party in default need not be given notice of the entry of default

judgment. *Central Bank & Trust Co. v. Jensen*, 656 P.2d 1009 (Utah 1982).

Setting aside default.

An entry of default may be set aside under this rule for good cause shown by the court; once a judgment by default has been entered, however, it may be set aside only in accordance with Rule 60(b). *Calder Bros. Co. v. Anderson*, 652 P.2d 922 (Utah 1982).

Once a default judgment has been entered, it can only be set aside in accordance with Rule 60(b). *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950 (Utah Ct. App. 1989).

—Collateral attack.

Where affidavit for publication of summons presented no evidentiary facts, a default judgment entered against the defendant could be attacked collaterally. *Bowen v. Olson*, 122 Utah 66, 246 P.2d 602 (1952).

Where affidavit for publication of summons contained some evidence upon which the order for publication of summons could reasonably be based, a default judgment against the defendant could not be attacked collaterally, even if the evidence was insufficient to persuade the judge or clerk of the necessary facts. *Bowen v. Olson*, 122 Utah 66, 246 P.2d 602 (1952).

—Direct attack.

An action brought to vacate a default judgment on ground that service of summons by publication was obtained by fraud is a direct and not a collateral attack. *Bowen v. Olson*, 122 Utah 66, 246 P.2d 602 (1952).

—Discretion of court.

A trial court is endowed with considerable latitude of discretion in granting or denying a motion to set a default judgment aside. *Board of Educ. v. Cox*, 14 Utah 2d 385, 384 P.2d 806 (1963).

Where plaintiff sought relief from a default judgment pursuant to Rule 60(b) on three occasions before three different judges and his motions were denied in the first two proceedings, the third judge was barred by the law of the case from overruling the previous orders. *Mascaro v. Davis*, 741 P.2d 938 (Utah 1987).

—Grounds.**—Excusable neglect.**

A default certificate may be set aside upon grounds of excusable neglect. *Heathman v. Fabian*, 14 Utah 2d 60, 377 P.2d 189 (1962).

While reliance on an attorney's assurances that one's rights are being protected could, in the appropriate circumstances, be seen as excusable neglect, trial court properly refused to excuse the neglect of a defendant who failed to establish that she was so represented. *Miller v. Brocksmith*, 825 P.2d 690 (Utah Ct. App. 1992).

—Judicial attitude.

Where any reasonable excuse is offered by defaulting party, courts generally tend to favor granting relief from a default judgment, unless to do so would result in substantial prejudice or injustice to the adverse party. *Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor*, 544 P.2d 876 (Utah 1975).

—Movant's duty.

Party who seeks to have a default judgment

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) **Time for motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Compiler's Notes. — This rule is similar to Rule 59, F.R.C.P.

Cross-References. — Fee for filing motion for new trial, § 21-2-2.

Harmless error not ground for new trial, Rule 61.

Juror's competency as witness as to validity of verdict or indictment, Rules of Evidence, Rule 606.

NOTES TO DECISIONS

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Abandonment of motion.

Abandonment of motion for new trial must be intentional, and the facts must indicate this intention. *Bailey v. Sound Lab. Inc.*, 694 P.2d 1043 (Utah 1984).

Accident or surprise.

This section requires that the moving party show that ordinary prudence was exercised to guard against the accident or surprise. *Powers v. Gene's Bldg. Materials, Inc.*, 567 P.2d 174 (Utah 1977).

Plaintiff was not entitled to a new trial on the basis of surprise concerning testimony of the defendant's expert witness where the plaintiff failed to object to the testimony either before, or immediately after, it was given. *Jensen v. Thomas*, 570 P.2d 695 (Utah 1977).

A "surprise" at trial which could have been easily guarded against by utilization of available discovery procedures may not serve as a ground for a new trial under Subdivision (a)(3). *Anderson v. Bradley*, 590 P.2d 339 (Utah 1979).

Failure to interpose a timely objection to testimony challenged on the ground of surprise would be a sufficient reason to deny a motion for a new trial on that ground. *Chournos v. D'Agnillo*, 642 P.2d 710 (Utah 1982).

Claim of error based on accident or surprise, never brought to the attention of the trial court by objection, motion to strike, motion for a new trial, or otherwise, was asserted for the first

is well established. This discretion is necessary to allow the court an opportunity to cause reexamination or correction of jury verdicts or findings which it believes to be in error, or where there is substantial doubt that the issues were fairly tried. *Page v. Utah Home Fire Ins. Co.*, 15 Utah 2d 257, 391 P.2d 290 (1964).

Granting of a plaintiff's motion for a new trial after a jury verdict for the defendant in a rear-end collision case was not an abuse of discretion on the theory that the verdict for the plaintiff at the second trial showed conclusively that there were jury questions and that the motion therefore should have been denied after an errorless first trial. *Brown v. Johnson*, 24 Utah 2d 388, 472 P.2d 942 (1970).

A ruling on a motion for a new trial will not be disturbed on appeal except when there is a clear abuse of the court's discretion. *Jensen v. Thomas*, 570 P.2d 695 (Utah 1977); *Lembach v. Cox*, 639 P.2d 197 (Utah 1981), overruled in part on other grounds, *Pusey v. Pusey*, 728 P.2d 117 (Utah 1986).

On review of a trial court's denial of a motion for a new trial alleging an excessive jury award, the Supreme Court's function is limited to a determination of whether the trial court's denial of the motion was an abuse of discretion. *Batty v. Mitchell*, 575 P.2d 1040 (Utah 1978).

Orders granting or denying motions for a new trial will not be reversed by the Supreme Court unless there has been a manifest abuse of discretion. *Schmidt v. Intermountain Health Care, Inc.*, 635 P.2d 99 (Utah 1981).

Both the granting of, and the refusal to grant, a new trial is a matter left to the discretion of the trial judge, and the decision will be reversed only if the judge has abused that discretion by acting unreasonably. *Christenson v. Jewkes*, 761 P.2d 1365 (Utah 1988).

A trial court has no discretion to grant a new trial absent a showing of at least one of the circumstances specified in Subdivision (a). *Moon Lake Elec. Ass'n v. Ultrasystems W. Constructors, Inc.*, 765 P.2d 125 (Utah Ct. App. 1988); *Schindler v. Schindler*, 776 P.2d 84 (Utah Ct. App. 1989).

The trial court has broad discretion to grant or deny a motion for a new trial. *Crookston v. Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991).

Effect of order granting new trial.

An order granting a new trial is not a final judgment; it only sets aside the verdict and places the parties in the same position as if there had been no previous trial. *Haslam v. Paulsen*, 15 Utah 2d 185, 389 P.2d 736 (1964).

Effect of untimely motion.

When an untimely motion for a new trial is made, the trial court's only alternative is to deny the motion; an untimely motion for a new trial has, however, no effect on the running of the time for filing a notice of appeal. *Burgers v. Maiben*, 652 P.2d 1320 (Utah 1982).

Evidence.

—Sufficiency.

In an action for injuries to a child who was struck by the defendant's automobile, evidence relating to the time when the defendant saw the child and to his precautions to avoid the child was ample to support a verdict for the

child; and, therefore, it was proper to grant a new trial on the ground that the evidence was insufficient to justify a verdict of no cause of action. *Holmes v. Nelson*, 7 Utah 2d 435, 326 P.2d 722 (1958).

Where a verdict is not justifiable under the evidence, the remedy is to order modification of the verdict and the adverse party is given the choice of accepting it or taking a new trial; this alternative does not infringe upon right to trial by jury. *Bodon v. Suhrmann*, 8 Utah 2d 42, 327 P.2d 826 (1958).

Where there are divergent elements of competent evidence before the jury, its findings based on its belief as to which preponderates will be respected on appeal; however, the verdict must be supported by some competent evidence. *Weber Basin Water Conservancy Dist. v. Skeen*, 8 Utah 2d 79, 328 P.2d 730 (1958).

Trial court did not abuse its discretionary power in refusing a new trial on the ground of insufficient evidence to support the verdict where reasonable men could draw different conclusions from conflicting evidence. *Pollesche v. Transamerican Ins. Co.*, 27 Utah 2d 430, 497 P.2d 236 (1972).

Where the trial court has denied a motion for new trial claiming insufficiency of the evidence to support the verdict, its decision will be sustained on appeal if there was an evidentiary basis for the jury's decision and will be reversed only if the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust. *Nelson v. Trujillo*, 657 P.2d 730 (Utah 1982); *Egbert & Jaynes v. R.C. Tolman Constr. Co.*, 680 P.2d 746 (Utah 1984).

Where the trial court has granted a new trial motion based on insufficiency of evidence, its decisions will be sustained on appeal if the record contains substantial competent evidence which would support a verdict for the moving party. *Nelson v. Trujillo*, 657 P.2d 730 (Utah 1982); *Goddard v. Hickman*, 685 P.2d 530 (Utah 1984).

In breach of contract action against a construction company, based upon allegedly defective workmanship in drilling a well, there was an evidentiary basis for the trial court's ruling in the defendant's favor where a videotape of the well site and expert testimony indicated that there was no proof of defective workmanship, and that problems with the well could have been caused by factors outside of the defendant's control. *Egbert & Jaynes v. R.C. Tolman Constr. Co.*, 680 P.2d 746 (Utah 1984).

When a new trial is granted based on the weight of the evidence, the standard for reviewing the trial court's ruling is much narrower than the trial court's standard in granting the new trial. *Goddard v. Hickman*, 685 P.2d 530 (Utah 1984).

The decision of the trial court to grant a new trial will not be disturbed on appeal when the record contains substantial competent evidence which would support a verdict in favor of the moving party. This substantial evidence standard requires that the evidence be sufficient in amount and credibility that, when considered in connection with the other evidence

—Punitive damages.

Any motion for a new trial on the question of punitive damages requires that the trial court engage in a two-part inquiry: (i) whether punitives are appropriate at all, i.e., whether the evidence is sufficient to support a lawful jury finding of defendant's requisite mental state; and (ii) whether the amount of punitives is excessive or inadequate, appearing to have been given under the influence of passion or prejudice. *Crookston v. Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991).

If the ratio of punitive to actual damages falls within the range that the Supreme Court has consistently upheld, then the trial court may assume that the award is not excessive. In denying a Subdivision (a)(5) motion for a new trial, the trial court need not give any detailed explanation for its decision if the punitive damage award falls within this ratio range. If the award exceeds the ratios set by the past pattern of decision, the trial court is not bound to reduce it. However, if such an award is upheld, the trial judge must make a detailed and reasoned articulation of the grounds for concluding that the award is not excessive in light of the law and the facts. *Crookston v. Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991).

The general rule appears to be that where the punitives are well below \$100,000, punitive damage awards beyond a 3 to 1 ratio to actual damages have seldom been upheld by the Supreme Court and that where the award is in excess of \$100,000, the court has indicated some inclination to overturn awards having ratios of less than 3 to 1. *Crookston v. Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991).

Failure to object to findings of fact.

The failure to object to the findings of fact, in the form of a motion for a new trial or amendment of judgment, was not fatal to the defendants' appeal from a proceeding in equity. *Dugan v. Jones*, 724 P.2d 955 (Utah 1986).

Filing of affidavits.

Motion for new trial on grounds of newly discovered evidence was properly denied by the lower court where movant did not comply with Subdivision (c) in timely filing an affidavit. *Thorley v. Kolob Fish & Game Club*, 13 Utah 2d 294, 373 P.2d 574 (1962).

Grounds for new trial.

In passing on a motion for a new trial, if the trial court cannot reasonably find that the jury erred, it should deny the motion. On the other hand, if the trial court can reasonably conclude that there was insufficient evidence to justify the verdict or it is manifestly against the weight of the evidence in violation of Subdivision (a)(6) or that the jury acted with passion or prejudice contrary to Subdivision (a)(5), it may grant the motion and order a new trial. *Crookston v. Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991).

A motion for a new trial challenging the amount of a punitive damage award is most appropriately brought under Subdivision (a)(5), while a motion challenging an award of hard actual damages is more appropriately brought under Subdivision (a)(6). *Crookston v. Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991).

—Particularization in motion.

The only purpose for requiring particularization of grounds upon which a motion for new trial is made is to inform the court and the other party of the theories upon which the new trial is sought, and where defendant filed an affidavit with his motions setting forth his theories and where the judgment was on the pleadings in the original case the court and parties were sufficiently advised as to the grounds for the motion. *Howard v. Howard*, 11 Utah 2d 149, 356 P.2d 275 (1960).

Arguments that affidavits and unpublished depositions "clearly establish the injustice that will be accomplished if said summary judgment is allowed to stand" and that the granting of the motion would be "in the interest of judicial economy and efficiency" did not constitute a "showing" of any of the circumstances specified by the provisions of Subdivision (a). *Moon Lake Elec. Ass'n v. Ultrasystems W. Constructors, Inc.*, 767 P.2d 125 (Utah Ct. App. 1988).

Incompetence or negligence of counsel.

While the general rule is that in civil cases a new trial will not be granted based upon the incompetence or negligence of one's own trial counsel, there are cases which recognize that under exigent or exceptional circumstances which appear to have resulted in an injustice, the court may be justified in granting a new trial; however, mere differences in the theory of trial techniques are not sufficient to warrant a new trial on the basis of incompetence or negligence of trial counsel. *Jennings v. Stoker*, 652 P.2d 912 (Utah 1982).

Misconduct of jury.

Claim of misconduct of the jury based upon affidavits of jurors that one of their number had performed an independent test at the scene of the injury in question and that such test influenced the decision of such juror did not meet the requirements for jury misconduct set out by this rule. *Smith v. Barnett*, 17 Utah 2d 240, 408 P.2d 709 (1965).

Although Subdivision (a)(2) allows for a new trial on the grounds of misconduct of the jury, with very limited exceptions, the conduct and deliberations in the jury room cannot be impeached, as it would be impracticable and lead to endless mischief to examine into the discussions and deliberations of the jury. *Hathaway v. Marx*, 21 Utah 2d 33, 439 P.2d 850 (1968).

Affidavits of five jurors which tended to show that the jury misconstrued and misunderstood the instructions were not sufficient grounds for a new trial since affidavits had to be based on the misconduct specified in Subdivision (a)(2), and jurors cannot impeach their verdict by what was said or done in the jury room. *Stringham v. Broderick*, 529 P.2d 425 (Utah 1974); *Deats v. Commercial Sec. Bank*, 746 P.2d 1191 (Utah Ct. App. 1987), cert. denied, 765 P.2d 1277 (Utah 1988).

Affidavits from jurors which would indicate that the jury was confused as to the applicable law as enunciated by the court in its instructions or that they disregarded the law in arriving at a verdict would not substantiate a claim of misconduct within the meaning of Subdivi-

the time of trial. *In re Disconnection of Certain Territory*, 668 P.2d 544 (Utah 1983).

Party was not entitled to a new trial based on newly discovered evidence that could not have been discovered and produced at trial, where the new evidence was merely cumulative to that elicited at trial with no new findings apparent so that there was no likelihood that the outcome of the trial would have been different if this evidence had been available. *Barson ex rel. Barson v. E.R. Squibb & Sons*, 682 P.2d 832 (Utah 1984).

Newly discovered evidence must be material, competent evidence which is in fact newly discovered. Secondly, it must be such that it could not, by due diligence, have been discovered and produced at trial. Finally, it must not be merely cumulative or incidental, but must be of sufficient substance that there is reasonable likelihood that with it there would have been a different result. *In re S.R.*, 735 P.2d 53 (Utah 1987).

Where, in post-judgment motions, the appellant claimed to have the articles of incorporation, the certificate of incorporation, minutes of the organizational meeting, checkbook records, stock transfers, and agreements between different companies available to prove his claim, it was held difficult to see how any of this could constitute "newly discovered evidence" as he claimed, particularly in view of his having signed five and six-year-old corporate minutes the day prior to trial. *Walker v. Carlson*, 740 P.2d 1372 (Utah Ct. App. 1987).

Newly discovered evidence must relate to facts in existence at the time of trial and cannot be based upon facts occurring after trial. *Hancock v. Planned Dev. Corp.*, 791 P.2d 183 (Utah 1990).

A deed executed after trial and thus not in existence at the time of trial is not newly discovered evidence. *Hancock v. Planned Dev. Corp.*, 791 P.2d 183 (Utah 1990).

New trial on initiative of court.

The 10-day time period in Subdivision (d) cannot be enlarged. *Boskovich v. Utah Constr. Co.*, 123 Utah 387, 259 P.2d 885 (1953).

Requirement that trial court shall specify the grounds therefor when ordering a new trial of its own initiative is satisfied by specifying the general grounds provided in the Rules of Civil Procedure; such order need not be supported by detailed findings of fact. *Goddard v. Hickman*, 685 P.2d 530 (Utah 1984).

Procedure for questioning grant of new trial.

If a trial court's authority with respect to a motion for a new trial is exercised arbitrarily, the proper redress is either in a petition for interlocutory appeal, which may be granted in a proper case, or in the preservation of error for review, if necessary, upon the final outcome of the case. *Haslam v. Paulsen*, 15 Utah 2d 185, 389 P.2d 736 (1964).

Reconsideration of motion for new trial.

The Rules of Civil Procedure do not provide for a motion for the trial court to reconsider or review its ruling granting or denying a motion for a new trial, and where the trial court granted a motion for a new trial in a negli-

gence action pursuant to regular procedure, and no inadvertence, mistake, or irregularity appeared (Rule 60) in connection with the obtaining of the order, the court had not authority to entertain and grant a motion to reconsider or review its ruling. *Drury v. Luncford*, 18 Utah 2d 74, 415 P.2d 662 (1966).

Settlement bars appeal.

Settlement of default judgment by parties' California counsel barred appeal from denial of motion under this rule. *Clive v. Mason*, 605 P.2d 763 (Utah 1980).

Summary judgment.

A motion for a "new" trial following summary judgment is procedurally correct and available to litigants. *Moon Lake Elec. Ass'n v. Ultrasystems W. Constructors, Inc.*, 767 P.2d 125 (Utah Ct. App. 1988); *Interstate Land Corp. v. Patterson*, 797 P.2d 1101 (Utah Ct. App. 1990).

Time for motion.

Rule 60(b) may not be used to extend the time in which a motion may be filed pursuant to this rule. *Goddard v. Bundy*, 121 Utah 299, 241 P.2d 462 (1952).

A court may not enter a nunc pro tunc pre-dating a motion for a new trial that is untimely filed so that the motion will be timely. *Kettner v. Snow*, 13 Utah 2d 382, 375 P.2d 28 (1962).

Pursuant to Rule 5(d), which allows the filing of any paper after the complaint required to be served upon a party within a reasonable time after service, a motion filed with the court two days after service is timely. *Dehm v. Dehm*, 545 P.2d 525 (Utah 1976).

Tolling time for appeal.

A timely motion under this rule terminates the running of the time for appeal of a judgment, and time for appeal does not begin to run again until the order granting or denying such a motion is entered. *Hume v. Small Claims Court*, 590 P.2d 309 (Utah 1979); *Interstate Land Corp. v. Patterson*, 797 P.2d 1101 (Utah Ct. App. 1990).

An unsigned minute entry is not a final judgment for purposes of appeal. The time for appeal from a judgment, tolled by a party's timely post-judgment motion, starts to run on the date when the trial court enters its signed order, denying the motion. *Gallardo v. Bolinder*, 800 P.2d 816 (Utah Ct. App. 1990).

Waiver.

Where the verdict made no award of general damages and was deficient in form, plaintiff's failure to demand that the jury be sent back for further deliberations, and her failure to object to the verdict at a bench conference regarding the correctness of the verdict constituted waiver of her right to a new trial or to appeal the verdict. *Cohn v. J.C. Penney Co.*, 537 P.2d 306 (1975).

Where a special verdict failed to mention damages in regard to one part of a cause of action but the plaintiff failed to raise this insufficiency before the jury was discharged, the issue was deemed waived and could not be raised in a motion for new trial. *Ute-Cal Land Dev. Corp. v. Sather*, 605 P.2d 1240 (Utah 1980).

(4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Compiler's Notes. — This rule is similar to Rule 60, F.R.C.P.

Cross-References. — Fee for filing motion to set aside judgment, § 21-1-5.

NOTES TO DECISIONS

ANALYSIS

Any other reason justifying relief."
 Default judgment.
 Impossibility of compliance with order.
 Incompetent counsel.
 Lack of due process.
 Merits of case.
 Mistake or inadvertence.
 Real party in interest.
 Appeals.
 Clerical mistakes.
 Computation of damages.
 Correction after appeal.
 Date of judgment.
 —Void judgment.
 Estate record.
 Inherent power of courts.
 Intent of court and parties.
 Judicial error distinguished.
 Order prepared by counsel.
 Predating of new trial motion.
 Court's discretion.
 Default judgment.
 Effect of set-aside judgment.
 Admissions.
 Fraud.
 Divorce action.
 Form of motion.
 Independent action.
 Constitutionality of taxes.
 Divorce decree.
 Fraud or duress.
 Motion distinguished.
 Invalid summons.
 Amendment without notice.
 Inequity of prospective application.
 Jurisdiction.
 Mistake, inadvertence, surprise or excusable neglect.
 Default judgment.
 Illness.
 Inconvenience.
 Merits of claim.
 Negligence of attorney.
 No claim for relief.
 Delayed motion for new trial.
 Failure to file cost bill.

—Failure to file notice of appeal.
 —Nonreceipt of notice and findings.
 —Trial court's discretion.
 —Unemployment compensation appeal.
 —Workmen's compensation appeal.
 Newly discovered evidence.
 —Burden of proof.
 —Discretion not abused.
 Procedure.
 —Notice to parties.
 Res judicata.
 Reversal of judgment.
 —Invalidation of sale.
 Satisfaction, release or discharge.
 —Accord and satisfaction.
 —Discharging representative of estate from further demand.
 —Erroneously included damages.
 —Prospective application of judgment.
 Timeliness of motion.
 —Confused mental condition of party.
 —Dismissal for lack of prosecution.
 —Fraud.
 —Invalid service.
 —Judicial error.
 —Jurisdiction.
 —Mistake, inadvertence and neglect.
 —Newly discovered evidence.
 —Order entered upon erroneous assumption.
 —"Reasonable time."
 —Reconsideration of previously denied motion.
 —Satisfaction.
 Unauthorized appearance.
 Void judgment.
 —Basis.
 —Lack of jurisdiction.
 Cited.

"Any other reason justifying relief."

Subdivision (7) embodies three requirements: First, that the reason be one other than those listed in Subdivisions (1) through (6); second, that the reason justify relief; and third, that the motion be made within a reasonable time. *Laub v. South Cent. Utah Tel. Ass'n*, 657 P.2d 1304 (Utah 1982); *Richins v. Delbert Chipman & Sons*, 817 P.2d 382 (Utah Ct. App. 1991).

rendered, trial court's denial of defendant's motion to set aside default judgment on grounds plaintiff was not the real party in interest, under Subdivision (b)(7) of this rule, was supported by evidence that plaintiff was the real party in interest and that defendant had knowledge thereof. *Robinson v. Myers*, 599 P.2d 513 (Utah 1979).

Appeals.

An order denying relief under Subdivision (b) is a final appealable order. Moreover, improper or untimely motions do not toll the time for appeal from final orders. *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950 (Utah Ct. App. 1989).

Clerical mistakes.

—Computation of damages.

Where damage award was based on the sum of four separate amounts listed in a letter exhibit, and the sum of the amounts was in error, the error was within the definition of a clerical mistake and was subject to correction by the trial court. *Stanger v. Sentinel Sec. Life Ins. Co.*, 669 P.2d 1201 (Utah 1983).

—Correction after appeal.

Trial court may correct clerical error made in recording of decree after Supreme Court has affirmed erroneous decree on appeal. *Bagnall v. Suburbia Land Co.*, 579 P.2d 917 (Utah 1978).

—Date of judgment.

—Void judgment.

Where later judgment was void and different from earlier valid judgment, no appeal could be taken on ground that defendants were appealing from the earlier judgment and that insertion of date of void judgment was merely a clerical error which court could correct. *Nunley v. Stan Katz Real Estate, Inc.*, 15 Utah 2d 126, 388 P.2d 798 (1964).

—Estate record.

The correction of the record in an estate is properly made in the probate court in which the errors occurred, and the court was justified in accepting parol evidence as to the incorrectness of the record. *Harmston v. Harmston*, 5 Utah 2d 357, 302 P.2d 270 (1956).

—Inherent power of courts.

The courts of this state had recognized the inherent right of a court to enter a judgment nunc pro tunc to correct clerical errors. *Frost v. District Court ex rel. Box Elder County*, 96 Utah 106, 83 P.2d 737 (1938).

—Intent of court and parties.

The correction contemplated by Subdivision (a) of this rule must be undertaken for the purpose of reflecting the actual intention of the court and parties. *Lindsay v. Atkin*, 680 P.2d 401 (Utah 1984).

—Judicial error distinguished.

The distinction between a judicial error and a clerical error does not depend upon who made it; rather, it depends on whether it was made in rendering the judgment (judicial error) or in recording the judgment as rendered (clerical error). *Richards v. Siddoway*, 24 Utah 2d 314, 471 P.2d 143 (1970).

Question of whether an error is "judicial" or

"clerical" depends not on who made it, but on whether it was made in rendering the judgment or in recording the judgment. *Lindsay v. Atkin*, 680 P.2d 401 (Utah 1984).

—Order prepared by counsel.

Erroneous assumption by judge in signing order that the order as prepared by counsel correctly reflected his judgment was a mistake of a perfunctory or clerical nature which the court could and properly did correct upon its own motion. *Meagher v. Equity Oil Co.*, 5 Utah 2d 196, 299 P.2d 827 (1956).

—Predating of new trial motion.

A court may not enter a nunc pro tunc predating a motion for new trial that is untimely filed so that the motion will be timely. *Kettner v. Snow*, 13 Utah 2d 382, 375 P.2d 28 (1962).

Court's discretion.

The trial court is afforded broad discretion in ruling on a motion for relief from judgment under Subdivision (b), and its determination will not be disturbed absent an abuse of discretion. *Birch v. Birch*, 771 P.2d 1114 (Utah Ct. App. 1989).

Default judgment.

Once a default judgment has been entered, it can only be set aside in accordance with Subdivision (b). *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950 (Utah Ct. App. 1989).

Effect of set-aside judgment.

—Admissions.

Subdivision (b) does not provide that as part of the order setting aside a judgment any admissions are also set aside; those matters are covered exclusively by a motion made as provided by Rule 36(b). *Whitaker v. Nikols*, 699 P.2d 685 (Utah 1985).

Fraud.

—Divorce action.

Motion to set aside provisions of divorce decree concerning child custody and support based upon allegation that wife had perpetrated a fraud upon the court by falsely claiming husband was child's father did not comply with Subdivision (b) and should have been denied. *McGavin v. McGavin*, 27 Utah 2d 200, 494 P.2d 283 (1972).

The wife in a divorce action was entitled to have the decree set aside on the ground of fraud where the assets of the parties may have been more than five times the amount disclosed by the husband who prevented the wife from gaining full and accurate knowledge of his total assets by transferring his corporate holdings to family members without relinquishing control of those assets, by understating the true value of jointly held property, and by avoiding compliance with court-ordered discovery. *Boyce v. Boyce*, 609 P.2d 928 (Utah 1980).

Form of motion.

Trial court did not err in vacating judgment in response to defendants' supplemental statement of objections, which, though clearly mislabeled, was the functional equivalent of a motion to set aside the judgment under Subdivision (b), was filed in contemplation of the rule, contained the same kinds of arguments and assertions one would normally expect to find in a

Refusal to set aside default judgment on ground of excusable neglect was not error where defendant failed to contact his counsel from February to time of trial in September, and counsel did not attempt to contact defendant until ten days before trial even though both had long been informed of approximate time of trial, notwithstanding claim that defendant was unable to contact defendant due to defendant's long working hours and his custom of visiting his wife who was terminally ill with cancer. *Airkem Intermountain, Inc. v. Parker*, 30 Utah 2d 65, 513 P.2d 429 (1973).

Motion for relief from default judgment was properly denied to cosigner (father) who claimed that his son was the proper defendant and took no steps to file an answer to the complaint. *Pacer Sport & Cycle, Inc. v. Myers*, 534 P.2d 616 (Utah 1975).

A trial court is justified in denying relief from a default judgment because of lack of timely request, long passage of time before making such request, general procedural neglect, urgency of hypertechnicality about a statute, or an almost complete absence of substance or merit in the relief for which he prayed. *Heath v. Heath*, 541 P.2d 1040 (Utah 1975).

Motion to set aside default judgment was properly denied in case where defendant offered no reasonable excuse for his nonappearance, failed to respond to repeated attempts to contact him regarding status of the lawsuit he knew was pending, and knew that a hearing had been scheduled and that his counsel had withdrawn. *Heath v. Mower*, 597 P.2d 855 (Utah 1979).

Where defendant claimed default judgment was due to his attorney's failure to communicate with him, and the record showed that defendant failed to contract his attorney for one and half years after he filed his answer and counterclaim, trial court did not abuse its discretion in denying defendant's motion to set aside the default judgment. *Gardiner & Gardiner Bldrs. v. Swapp*, 656 P.2d 429 (Utah 1982).

In order for defendant to be relieved from a default judgment, he must not only show that the judgment was entered against him through any reason specified in Subdivision (b), but he must also show that his motion to set aside the judgment was timely, and that he has a meritorious defense to the action. A meritorious defense is one which sets forth specific and sufficiently detailed facts which, if proven, would have resulted in a judgment different from the one entered. *State ex rel. Utah State Dep't of Social Servs. v. Musselman*, 667 P.2d 1053 (Utah 1983).

Default judgment should not have been entered in tort case arising out of injuries inflicted upon plaintiff by defendant where contradictions surrounding adequacy of service of process and other factors resulted in genuine mistake on part of defendant, in the absence of which the default would not have occurred. *May v. Thompson*, 677 P.2d 1109 (Utah 1984).

Default judgment was proper where statements of defendant demonstrated indifference on his part, and lack of diligence in pursuing

his opportunity to defend. *Russell v. Martell*, 681 P.2d 1193 (Utah 1984).

Neither the Utah Foreign Judgment Act, § 78-22a-1 et seq., nor this rule, permits a court to set aside a foreign default judgment because of alleged inadvertence, mistake, or neglect absent a showing of fraud or the lack of jurisdiction or due process in the rendering state. *Data Mgt. Sys. v. EDP Corp.*, 709 P.2d 377 (Utah 1985).

Failure to reserve rights under § 70A-3-606(1)(a), which governs impairment of recourse or of collateral in regard to commercial paper and does not apply to judgments, could not be used to set aside default judgments against debtors under Subdivision (b)(6) of this rule. *First Sec. Bank v. Aarian Dev. Corp.*, 738 P.2d 1019 (Utah 1987).

—Illness.

Illness alone is not a sufficient excuse to make neglect in failing to defend a cause of action a ground for vacating a default judgment. *Warren v. Dixon Ranch Co.*, 123 Utah 416, 260 P.2d 741 (1953).

—Inconvenience.

Mere inconvenience or the press of personal or business affairs is not deemed as an excuse for failure to appear at trial. *Valley Leasing v. Houghton*, 661 P.2d 959 (Utah 1983).

—Merits of claim.

Usually, it is not appropriate on Subdivision (b) motions to examine the merits of the claim decided by the default judgment. *Larsen v. Collina*, 684 P.2d 52 (Utah 1984).

—Negligence of attorney.

An oral promise made by the attorney for the plaintiff to the effect that defendant could have more time in which to answer, where the plaintiff already had obtained a default judgment, was now sufficient excusable neglect so as to allow the vacation of the default judgment. The defendants were deprived of nothing by the alleged promise inasmuch as the default judgment had already been entered. Such a promise could in no way bind a client who already had a judgment. *Warren v. Dixon Ranch Co.*, 123 Utah 416, 260 P.2d 741 (1953).

Where defendant's counsel withdrew at pre-trial conference and defendant claimed it received no notice to appoint counsel and had no notice of trial until it received notice of default judgment, the default was set aside in the interest of justice, the court stating that where there is doubt about whether a default should be set aside, the doubt should be resolved in favor of doing so. *Interstate Excavating, Inc. v. Agla Dev. Corp.*, 611 P.2d 369 (Utah 1980).

Where plaintiff's attorney and insurance adjuster for defendant's insurance company were engaged in settlement talks at time plaintiff's petition was filed, defendant was entitled to relief from subsequent summary judgment on grounds of "excusable neglect" since plaintiff's attorney had duty to notify adjuster of potential default and did not do so. *Helgesen v. Inyangumia*, 636 P.2d 1079 (Utah 1981).

Party may not claim his attorney's neglect in failing to notify him of proceeding as grounds for setting aside a default judgment where the party has been negligent by not communicat-

tract warranted vacation of default judgment upon purchaser's motion. *Kelly v. Scott*, 5 Utah 2d 159, 298 P.2d 821 (1956).

Satisfaction, release or discharge.

—Accord and satisfaction.

A judgment defendant is not constrained to raise an alleged accord and satisfaction only as an affirmative defense to further attempts by a judgment creditor to enforce the terms of a judgment. Rather, the issue may be raised seeking direct judicial sanction of the satisfaction by motion or independent action pursuant to Subdivision (b)(6). *Sugarhouse Fin. Co. v. Anderson*, 610 P.2d 1369 (Utah 1980).

When a judgment creditor accepted a promissory note with greater consideration and different performance from the earlier judgment, he released the judgment debtor from the judgment in an accord and satisfaction. *Brimley v. Glasser*, 754 P.2d 97 (Utah Ct. App. 1988).

—Discharging representative of estate from further demand.

Relief under this rule is available with regard to an order under § 75-3-1001 discharging a personal representative of an estate from further claim or demand after a final order has been entered. *Morgan v. Zions Nat'l Bank*, 711 P.2d 261 (Utah 1985).

—Erroneously included damages.

Defendant, whose insurance company had satisfied judgment against him in automobile accident action which erroneously included amounts plaintiff had received as PIP benefits under its insurance policy, could not seek to modify judgment to exclude erroneously included amount by way of motion pursuant to either Subdivisions (b)(6) or (7). *Laub v. South Cent. Utah Tel. Ass'n*, 657 P.2d 1304 (Utah 1982).

—Prospective application of judgment.

Rule permitting relief from a judgment on the basis that it is no longer equitable that the judgment have prospective application was inapplicable between the parties when the judgment had been satisfied by the party seeking relief. *Laub v. South Cent. Utah Tel. Ass'n*, 657 P.2d 1304 (Utah 1982).

Timeliness of motion.

A motion to set aside a judgment that is based on a reversed judgment must be made within a reasonable time. *Guardian State Bank v. Stangl*, 778 P.2d 1 (Utah 1989).

—Confused mental condition of party.

There was no abuse of discretion in trial court's denial of plaintiff's motion to vacate order dismissing action entered pursuant to release and stipulation of parties where motion was filed six and one-half years after plaintiff's physician detected plaintiff's confused mental condition urged as basis for vacating motion. *Young v. Western Piling & Sheeting*, 680 P.2d 394 (Utah 1984).

—Dismissal for lack of prosecution.

Where the evidence indicated that plaintiff had not gotten in touch with his attorney for two years after filing complaint, it was proper for court to deny plaintiff's motion to set aside a judgment, dismissing his complaint for lack

of prosecution. *Putman v. Bonham*, 677 P.2d 1126 (Utah 1984).

A trial court's refusal to set aside a dismissal for failure to prosecute will not be overturned absent an abuse of discretion. *Meadow Fresh Farms v. Utah State Univ. Dept. of Agric.*, 813 P.2d 1216 (Utah Ct. App. 1991).

Trial court did not abuse its discretion in refusing to set aside a dismissal for failure to prosecute, where the underlying events occurred in 1981, an initial action filed in 1983 was dismissed for lack of prosecution, and the instant action based on the same facts was not filed until 1988, by which time many of the potential witnesses might have moved out of state and/or their recollection of the circumstances and events might have dimmed. *Meadow Fresh Farms v. Utah State Univ. Dept. of Agric.*, 813 P.2d 1216 (Utah Ct. App. 1991).

—Fraud.

A cross-complaint seeking to set aside a judgment for fraud in its procurement may be brought after the time limit in Subdivision (b) for a motion to set aside a judgment. *Bowen v. Olson*, 122 Utah 66, 246 P.2d 602 (1952).

Motion by ex-husband to order paternity blood test to furnish evidence on possible modification of support decree, based on fraud on court, was governed by time limit in this rule and was too late when filed 14½ months after divorce decree, even though baby was unborn and blood test could not have been performed before the divorce. *McGavin v. McGavin*, 27 Utah 2d 200, 494 P.2d 283 (1972).

—Invalid service.

The three-months provision provided for in Subdivision (b) for motions to vacate a judgment has no application to a judgment which is void because of invalid service of summons. *Woody v. Rhodes*, 23 Utah 2d 249, 461 P.2d 465 (1969).

Where the judgment is void because of a fatally defective service of process, the time limitations of Subdivision (b) have no application. *Garcia v. Garcia*, 712 P.2d 288 (Utah 1986).

—Judicial error.

Where judgment contained no clerical error amendable under Subdivision (a) but may have contained judicial error, trial court erred in granting motion to amend the judgment filed nine years after judgment was entered, since the error was not corrected by timely motion for new trial, appeal or suit in equity. *Richards v. Siddoway*, 24 Utah 2d 314, 471 P.2d 143 (1970).

—Jurisdiction.

In suit for injunction, wherein it appeared that parties stipulated that hearing on damages be deferred and tried later, and court made order that plaintiff might later file amended or supplemental complaint with respect to issue of damages, district court did not lose jurisdiction of case because damage issue was not determined during term of court at which injunction was granted and no application for relief "in furtherance of justice" was made within six months after term. *Utah Oil*

entry of judgment, nor was it a final judgment for purposes of appeal. *Wilson v. Man-*
ning, 646 P.2d 655 (Utah 1982); *Utah State*
Bank v. Erickson, 714 P.2d 1151 (Utah
1986); *Smith v. Gross*, 727 P.2d 212 (Utah
1987); *Abraham v. Anderson*, 728 P.2d 979

An unsigned minute entry does not constitute a final order for purposes of appeal. *State v. Crowley*, 707 P.2d 498 (Utah 1985).

Cited in *Huston v. Lewis*, 818 P.2d 531 (Utah 1991); *Boggs v. Boggs*, 824 P.2d 478 (Utah Ct. App. 1991).

COLLATERAL REFERENCES

A.R. — Appealability of order suspending execution or execution of sentence, 51
 A.R. 408.939.

Rule 4. Appeal as of right: when taken.

a) Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

b) Motions post judgment or order. If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court by any party (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

c) Filing prior to entry of judgment or order. Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

d) Additional or cross-appeal. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date at which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

e) Extension of time to appeal. The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal on motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. The extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) **Damages for delay or frivolous appeal.** Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) **Definitions.** For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) Procedures.

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

Advisory Committee Note. — Rule 33 is substantially redrafted to provide definitions and procedures for assessing penalties for delays and frivolous appeals.

If an appeal is found to be frivolous, the court must award damages. This is in keeping with Rule 11 of the Utah Rules of Civil Procedure. However, the amount of damages — single or double costs or attorney fees or both — is left to the discretion of the court. Rule 33 is amended to make express the authority of the court to

impose sanctions upon the party or upon counsel for the party. This rule does not apply to a first appeal of right in a criminal case to avoid the conflict created for appointed counsel by *Anders v. California*, 386 US 738 (1967) and *State v. Clayton*, 659 P.2d 168 (Utah 1981). Under the law of these cases, appointed counsel must file an appeal and brief if requested by the defendant, and the court must find the appeal to be frivolous in order to dismiss the appeal.

NOTES TO DECISIONS

ANALYSIS

Frivolous appeal.

—Defined.

—Sanctions.

Cited.

Frivolous appeal.

A husband's appeal from a judgment relating to alimony and distribution of marital property was frivolous, where there was no basis for the argument presented and the evidence and law was mischaracterized and misstated. *Eames v. Eames*, 735 P.2d 395 (Utah 1987).

Plaintiff's counsel violated rule and was therefore subject to sanction when, after he investigated plaintiff's malpractice action against defendant orthodontist and found that he could not prove breach of duty or causation,

the record was devoid of any relevant, admissible evidence showing negligence, and after losing on summary judgment, he persisted in filing an appeal. *Hunt v. Hurst*, 785 P.2d 414 (Utah 1990).

An appeal brought from an action that was properly determined to be in bad faith is necessarily frivolous under this rule. *Utah Dep't of Social Servs. v. Adams*, 806 P.2d 1193 (Utah Ct. App. 1991).

—Defined.

For purposes of this rule, a "frivolous" appeal is one having no reasonable legal or factual basis. Lack of good faith is not required. *O'Brien v. Rush*, 744 P.2d 306 (Utah Ct. App. 1987).

A frivolous appeal is one without reasonable legal or factual basis. *Backstrom Family Ltd.*

6-403. Shortening 90-day waiting period in domestic matters.

To establish a procedure for shortening or waiving the 90-day waiting period in domestic cases.

Applicability:

This rule shall apply to the district courts.

Statement of the Rule:

1) Proceedings on the merits of a divorce action shall not be heard by the district courts unless 90 days have elapsed from the time the complaint was filed or unless the Court finds that there is good cause for shortening or eliminating the waiting period and enters a formal order to that effect prior to the hearing date.

2) Application for a hearing less than 90 days from the date the complaint is filed shall be made by motion and accompanied by an affidavit setting forth the factual matters constituting good cause. The motion and supporting affidavit(s) shall be served on the opposing party at least five days prior to the scheduled hearing unless the party is in default.

3) In the event the Court finds that there is good cause for hearing in less than 90 days from the filing of the complaint, the facts constituting such cause shall be included in the findings of fact and presented to the Court for signature.

Rule 6-404. Modification of divorce decrees.

Intent:

To establish procedures for modification of existing divorce decrees.

Applicability:

This rule shall apply to all district courts.

Statement of the Rule:

1) Proceedings to modify a divorce decree shall be commenced by the filing of a petition to modify in the original divorce action. Service of the petition and summons upon the opposing party shall be in accordance with the requirements of Rule 4 of the Utah Rules of Civil Procedure. No request for a modification of an existing decree shall be raised by way of an order to show cause.

2) The responding party shall serve the reply within twenty days after service of the petition. Either party may file a certificate of readiness for trial. Upon filing of the certificate, the matter shall be referred to the domestic relations commissioner prior to trial, or in those districts where there is not a domestic relations commissioner, placed on the trial calendar.

3) No petition for modification shall be placed on a law and motion or order to show cause calendar without the consent of the commissioner or the district judge.

NOTES TO DECISIONS

ANALYSIS

Modification of support.
Subject matter jurisdiction.

Modification of support.

Plaintiff was required to file a petition to modify her divorce decree pursuant to this rule when she sought to enforce, by order to show cause, a provision in the decree that provided

that future child support would be automatically adjusted to reflect changes in income. Such a provision violates § 78-45-7(1), which provides that a child support order can only be modified based upon a showing of a material change in circumstances. *Grover v. Grover*, 839 P.2d 871 (Utah Ct. App. 1992).

Subject matter jurisdiction.

A district court other than the court issuing

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Case No. 930359-CA

~~James Z. Davis Judge~~

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of April, 1994, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

Daniel Darger
Attorney at Law
9 Exchange Place, Suite 1000
Salt Lake City, UT 84111

Mitchell R. Barker
Attorney at Law
349 South 200 East, Suite 170
Salt Lake City, UT 84111

Dated this 12th day of April, 1994.

By

Shari Knackton
Deputy Clerk