

1993

John Carl Putvin v. Karen Larie Thompson, Joseph Blaine Thompson : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

JOHN CARL PUTVIN

Plaintiff and Appellee

vs.

KAREN LARIE THOMPSON
JOSEPH BLAINE THOMPSON

Defendant and Appellant

Case No: 930359-CA

Priority No: 4

BRIEF OF APPELLANT

ON APPEAL FROM AN ORDER OF THE THIRD DISTRICT COURT

STATE OF UTAH

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FILED

Utah Court of Appeals

NOV 15 1993


Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

JOHN CARL PUTVIN	:	
Plaintiff and Appellee	:	
	:	
vs.	:	Case No: 930359-CA
	:	
KAREN LARIE THOMPSON	:	
JOSEPH BLAINE THOMPSON	:	
	:	Priority No: 4
Defendant and Appellant	:	
	:	

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PARTIES

The original complaint filed in this matter included Joseph Blaine Thompson, Eula Thompson, David G. Watson and Marianne (Thompson) Watson as defendants. Joseph and Eula Thompson are Appellant's parents. Marianne Watson is Appellant's sister and David Watson her brother-in-law. No order has been entered by the trial court as to these defendants and they do not join in this appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	2
JURISDICTION OF THE COURT.....	4
ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW...	4
DETERMINATIVE STATUTES, RULES AND REGULATIONS.....	10
STATEMENT OF THE CASE.....	11
<u>Nature of the case</u>	11
<u>Course of Proceedings and Disposition by Trial Court</u>	12
<u>Statement of Facts</u>	14
SUMMARY OF ARGUMENTS.....	18
ARGUMENT.....	21
I. THE TRIAL COURT’S REFUSAL TO SET ASIDE THE DEFAULT JUDGMENT ENTERED AGAINST DEFENDANT/APPELLANT AND WHICH AWARDS THE CUSTODY OF HER MINOR CHILD WAS AN ABUSE OF DISCRETION BECAUSE THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE NOT SUFFICIENT TO SUPPORT THE COURT’S CUSTODY DECISION.....	21
II. THE TRIAL COURT’S REFUSAL TO SET ASIDE THE DEFAULT JUDGMENT ENTERED AGAINST DEFENDANT/APPELLANT WAS AN ABUSE OF DISCRETION BECAUSE THE COURT FAILED TO ENTER HER DEFAULT PRIOR THERETO.....	23
III. THE TRIAL COURT’S REFUSAL TO SET ASIDE THE DEFAULT JUDGMENT ENTERED AGAINST DEFENDANT/APPELLANT WAS AN ABUSE OF DISCRETION BECAUSE THE JUDGMENT DOES NOT ACCURATELY REFLECT THE RESULT OF THE COURT’S JUDGMENT.....	25

IV. THE TRIAL COURT'S REFUSAL TO SET ASIDE THE DEFAULT JUDGMENT ENTERED AGAINST DEFENDANT/APPELLANT WAS AN ABUSE OF DISCRETION WHERE THE JUDGMENT FAILS TO COMPLY WITH THE REQUIREMENTS OF RULE 4-504 C.J.A.....	26
V. THE TRIAL COURT'S REFUSAL TO SET ASIDE THE DEFAULT JUDGMENT ENTERED AGAINST DEFENDANT/APPELLANT WAS AN ABUSE OF DISCRETION BECAUSE THE JUDGMENT WAS THE RESULT OF THE ACTS OF HER ATTORNEY OR FORMER ATTORNEY WITHOUT AUTHORITY AND/OR AFTER TERMINATION OF THE ATTORNEY/CLIENT RELATIONSHIP?.....	27
VI. THE TRIAL COURT'S REFUSAL TO SET ASIDE THE DEFAULT JUDGMENT ENTERED AGAINST APPELLANT CONTRARY TO CONCEPTS OF JUSTICE AND EQUITY AND AN ABUSE OF DISCRETION WHERE THE PROCESS OF JUSTICE HAS GONE AWRY BECAUSE OF INCOMPETENCE OF COUNSEL THAT MANIFEST INJUSTICE RESULTS?...	28
VII. THE TRIAL COURT'S AWARD OF SANCTIONS AGAINST APPELLANT FOR ATTEMPTING TO ALTER OR AMEND A PRIOR JUDGMENT IN ORDER TO BRING NEW EVIDENCE TO THE COURT'S ATTENTION WAS AN ABUSE OF DISCRETION.....	30
CONCLUSION.....	32

TABLE OF AUTHORITIES

<u>Cady v. Johnson</u> , 671 P.2nd 149,151 (Utah 1983)	(p. 10, 31)
<u>Canyon Country Store v. Bracey</u> , 781 P.2nd 414, 421 (Utah 1989)	(p. 10)
<u>Cummings v. Cummings</u> , 821 P.2nd 472, 476 (Utah App. 1991)	(p. 5)
<u>Darrington v. Wade</u> , 812 P.2nd 452 (Ut Ct. App. 1991)	(p. 25, 26)
<u>Hutchinson v. Hutchinson</u> , 649 P.2nd 38 (Utah 1982)	(p. 22)
<u>Jennings v. Stocker</u> , 652 P.2nd 912 (Utah 1982)	(p. 9, 29)
<u>Jeschke v. Willis</u> , 811 P.2nd 202, 203 (Utah App. 1991)	(p. 10, 31)
<u>Lamarr v. Utah St. Department of Transportation</u> , 828 P.2nd 535 (Utah App. 1992)	(p. 5,6,7)
<u>Maltby v. Cox Construction Co.</u> , 598 P.2nd 336 (Utah 1979)	(p. 29, 32)

<u>Martinez v. Martinez</u> , 728 P.2nd 994, 994 (Utah 1986).	(p. 5, 9, 23)
<u>Maughan v. Maughan</u> , 770 P.2nd 156, 159 (Utah App. 1989).	(p. 4)
<u>Mechan v. Benson</u> , 590 P.2nd 304 (Utah 1979)	(p. 28)
<u>Olson v. Salt Lake City School District</u> , 724 P.2nd 960, 964 (Utah 1986)	(p. 5, 6, 7)
<u>P & H Land, Inc. v. Klungervick</u> , 751 P.2nd 274 (Utah App. 1988).	(p. 23)
<u>Painter v. Painter</u> , 752 P.2nd 907, 909 (Utah App. 1988)	(p. 4)
<u>Peterson v. Peterson</u> , 818 P.2nd 1305 (Utah App. 1991).	(p. 5)
<u>Rimensburger v. Rimensburger</u> , 841 P.2nd 709 (Utah App. 1992)	(p. 5, 6, 7)
<u>Roberts v. Roberts</u> , 835 P.2nd 193, 195 (Utah App. 1992).	(p. 5)
<u>Russell v. Martell</u> , 681 P.2nd 1193 (Utah 1984)	(p. 24)
<u>Smith v. Smith</u> , 793 P.2nd 407, 409 (Utah App. 1990)	(p. 5,6,7,22)
<u>State v. Templin</u> , 805 P.2nd 182, 186 (Utah 1991)	(p. 7, 8, 9)
<u>State v. Crestani</u> , 771 P.2nd 1085, 1089 (Utah App. 1989)	(p. 7, 8)
<u>State v. Goodman</u> , 763 P.2nd 786, 787 (Utah 1988)	(p. 7, 8)
<u>State v. Garrett</u> , 207 U.A.R. 45, 46 (Utah App. 1993).	(p. 8, 9)
<u>State v. Walker</u> , 743 P.2nd 191, 193 (Utah 1987)	(p. 7, 8)
(Case Law of Other Jurisdictions)	
<u>Big Bend v. Anderson</u> , 308 N.W.2nd 887 (Wis 1981)	(p. 30)
<u>Day v. Allaire</u> , 31 NJ Eq 303 (1879)	(p. 30)
<u>Garrett v. Osborn</u> , 431 P.2nd 1012 (Colo. 1967)	(p. 29)
<u>Graham v. Loris</u> , 248 S.E.2nd 594 (SC 1978)	(p. 30)

Honolulu v. Bennett, 627 P.2nd 1136 (Hawaii 1981) (p. 9)
Linsk v. Linsk, 449 P.2nd 760 (Cal 1969) (p. 27)
Lopez v. Superior Court 223 Cal Rptr 798 (1986 2d Dist) (p. 29)
Manning Engineering, Inc. v. Hudson County Park Com, 376 A. 2nd 1194 (NJ 1977) (p. 30)

APPELLATE COURT JURISDICTION

This Court has jurisdiction pursuant to §78-2a-3(2)(i), Utah Code, Ann.

ISSUES PRESENTED FOR REVIEW & STANDARD OF REVIEW

I. IS THE TRIAL COURT’S REFUSAL TO SET ASIDE A DEFAULT JUDGMENT ENTERED AGAINST APPELLANT AND WHICH AWARDS THE CUSTODY OF HER MINOR CHILD AN ABUSE OF DISCRETION WHERE THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE NOT SUFFICIENT TO SUPPORT THE COURT’S CUSTODY DECISION?

Standard of Review: Trial courts are given broad discretion in making child custody awards. Maughan v. Maughan, 770 P.2nd 156, 159 (Utah App. 1989). The trial court’s decision regarding custody will not be upset "absent a showing of an abuse of discretion or manifest injustice." Id. at 159. "However, to ensure the court acted within its broad discretion, the facts and reasons for the court’s decision must be set forth fully in appropriate findings and conclusions." Painter v. Painter, 752 P.2nd 907, 909 (Utah App. 1988) The findings must be sufficiently detailed "to ensure that the trial court’s discretionary

determination was rationally based." Martinez v. Martinez, 728 P.2nd 994, 994 (Utah 1986).

"Specificity of findings is particularly important in custody determinations. This is so because the issues involved are highly fact sensitive." Roberts v. Roberts, 835 P.2nd 193, 195 (Utah App. 1992).

Under Rule 52(a) of the Utah Rules of Civil Procedure, the trial court's findings of fact "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." Peterson v. Peterson, 818 P.2nd 1305, 1307-08 (Utah App. 1991). A finding of fact will be found clearly erroneous when it is contrary to the clear weight of the evidence, or if the appellate court has a "definite and firm conviction that a mistake has been made." Cummings v. Cummings, 821 P.2nd 472, 476 (Utah App. 1991)

Nevertheless, in matters of equity, the appellate court may independently review the evidence and make its own findings. Martinez v. Martinez supra, at 994.

On the other hand, the correctness of a trial court's conclusions is a question of Law. Therefore, the appellate court reviews the question de novo and without affording any deference to the district court's conclusion. Smith v. Smith, 793 P.2nd 407, 409 (Utah App. 1990); Olson v. Salt Lake City School District, 724 P.2nd 960, 964 (Utah 1986); Lamarr v. Utah State Department of Transportation, 828 P.2nd 535 (Utah App. 1992); Rimensburger v. Rimensburger, 841 P.2nd 709 (Utah App. 1992)

II. IS THE TRIAL COURT'S REFUSAL TO SET ASIDE A DEFAULT JUDGMENT ENTERED AGAINST APPELLANT AN ABUSE OF DISCRETION

WHERE THE COURT FAILED TO ENTER HER DEFAULT PRIOR TO ENTRY OF THE DEFAULT JUDGMENT?

Standard of Review: Whether a trial court must first enter default before entry of default judgment is a question of law. Therefore, the appellate court reviews the question de novo and without affording any deference to the district court's conclusion. Smith v. Smith, 793 P.2nd 407, 409 (Utah App. 1990); Olson v. Salt Lake City School District, 724 P.2nd 960, 964 (Utah 1986); Lamarr v. Utah State Department of Transportation, 828 P.2nd 535 (Utah App. 1992); Rimensburger v. Rimensburger, 841 P.2nd 709 (Utah App. 1992)

III. IS THE TRIAL COURT'S REFUSAL TO SET ASIDE A DEFAULT JUDGMENT ENTERED AGAINST APPELLANT AN ABUSE OF DISCRETION WHERE THE JUDGMENT DOES NOT ACCURATELY REFLECT THE RESULT OF THE COURT'S JUDGMENT?

Standard of Review: This presents a question of law. Therefore, the appellate court reviews the question de novo and without affording any deference to the district court's conclusion. Smith v. Smith, 793 P.2nd 407, 409 (Utah App. 1990); Olson v. Salt Lake City School District, 724 P.2nd 960, 964 (Utah 1986); Lamarr v. Utah State Department of Transportation, 828 P.2nd 535 (Utah App. 1992); Rimensburger v. Rimensburger, 841 P.2nd 709 (Utah App. 1992)

IV. IS THE TRIAL COURT'S REFUSAL TO SET ASIDE A DEFAULT JUDGMENT ENTERED AGAINST APPELLANT AN ABUSE OF DISCRETION WHERE THE JUDGMENT FAILS TO COMPLY WITH THE REQUIREMENTS OF RULE 4-504 C.J.A.?

Standard of Review: This presents a question of law. Therefore, the appellate court reviews the question de novo and without affording any deference to the district court's conclusion. Smith v. Smith, 793 P.2d 407, 409 (Utah App. 1990); Olson v. Salt Lake City School District, 724 P.2d 960, 964 (Utah 1986); Lamarr v. Utah State Department of Transportation, 828 P.2d 535 (Utah App. 1992); Rimensburger v. Rimensburger, 841 P.2d 709 (Utah App. 1992)

V. IS THE TRIAL COURT'S REFUSAL TO SET ASIDE A DEFAULT JUDGMENT ENTERED AGAINST APPELLANT AN ABUSE OF DISCRETION WHERE THE JUDGMENT IS PURSUANT TO THE ACTS OF HER ATTORNEY OR FORMER ATTORNEY WITHOUT HER AUTHORITY OR APPROVAL AND/OR AFTER TERMINATION OF THE ATTORNEY-CLIENT RELATIONSHIP?

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

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

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

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

VI. IS THE TRIAL COURT'S REFUSAL TO SET ASIDE A DEFAULT JUDGMENT ENTERED AGAINST APPELLANT CONTRARY TO CONCEPTS OF JUSTICE AND EQUITY AND AN ABUSE OF DISCRETION WHERE THE PROCESS OF JUSTICE HAS GONE SO AWRY BECAUSE OF INCOMPETENCE OF COUNSEL THAT MANIFEST INJUSTICE WILL RESULT OTHERWISE?

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

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

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

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

However, under exigent or exceptional circumstances which appear to have resulted in an injustice, the appellate court may be justified in granting relief because of the negligence of counsel pursuant to its equitable powers. Jennings v. Stocker, 652 P.2nd 912 (Utah 1982)

Overriding all other principles is the rule that in matters of equity, the appellate court may review the evidence and make its own findings where justice so requires. Martinez v. Martinez, 728 P.2nd 994 (Utah 1986)

VII. IS THE TRIAL COURT'S AWARD OF SANCTIONS AGAINST APPELLANT FOR ATTEMPTING TO ALTER OR AMEND A PRIOR JUDGMENT IN ORDER TO BRING NEW EVIDENCE TO THE COURT'S ATTENTION AN ABUSE OF DISCRETION?

Standard of Review: Section 78-27-56 Utah Code Annotated (Supp. 1990) provides that "(1) 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 or asserted in good faith...."

To prove that a claim is "without merit" under the statute, the party asserting an award of attorney fees must first demonstrate that the claim is "frivolous" or "of little weight or importance having no basis in law or fact." Jeschke v. Willis, 811 P.2nd 202, 203 (Utah App. 1991), citing Cady v. Johnson, 671 P.2nd 149,151 (Utah 1983) The "without merit" determination is a question of law; and therefore the appellate court will review it de novo without affording any deference to the district court's conclusion.. Jeschke v. Willis, supra, 203, 204.

Second, it must be shown that the conduct in asserting the claim or defense was lacking in good faith. This lack of good faith turns on subjective intent, and for purposes of the statute, is synonymous with a finding of "bad faith" Jeschke v. Willis, supra, at 204, citing Cady v. Johnson, supra at 151-52. A finding of bad faith is a question of fact and is reviewed by the appellate court under the "clearly erroneous" standard. Jeschke v. Willis, supra, 204; Canyon Country Store v. Bracey, 781 P.2nd 414, 421 (Utah 1989) (determination of bad faith reviewed for an abuse of discretion).

CONSTITUTIONAL PROVISIONS, STATUTES & RULES REQUIRING INTERPRETATION

§30-3-10, Utah Code Annotated (p. 22)

§78-27-56, Utah Code Annotated (p. 10, 31)

§78-51-32, <u>Utah Code Annotated</u>	(p. 27)
Rule 52(a), <u>Utah Rules of Civil Procedure</u>	(p. 5)
Rule 54(c)(2), <u>Utah Rules of Civil Procedure</u>	(p. 25)
Rule 55, <u>Utah Rules of Civil Procedure</u>	(p. 25)
Rule 60(b), <u>Utah Rules of Civil Procedure</u>	(p. 13,17,23,24,25)
Rule 4-504, <u>Code of Judicial Administration</u>	(p. 2,6,20,26)

STATEMENT OF THE CASE

1. Nature of the Case This case involves a custody dispute between parties who were involved in a polygamous relationship since October, 1982. At that time Appellee and his wife Donna Putvin became acquainted with Appellant and her family, who were involved in polygamous practices out of religious belief. Appellee's wife could not have children and Appellee eventually entered a polygamous marriage with Appellant with the understanding that Appellant would be required to share children she might have with Appellee's wife. Donna..

On May 13, 1988, Debra Thompson was born to Appellee and Appellant. Between the date of her birth and May 10, 1991, Debra lived with Appellant, Appellee & Donna as a single household. Appellant was required to share the mothering of Debra equally with Donna.

By May 10, 1991. Appellant had concluded that continuation of this relationship was a threat to her and her daughter and on that date, she left with Debra in the dark of night and went into hiding. Shortly thereafter, Appellee instituted this action to gain custody of the

child and enjoin Appellant and her family from interfering with his custody of her. Appellee also filed a personal injury action against Appellant and her family for emotional distress resulting from Appellant's interference in his relationship with Debra, defamation and other alleged wrongs. That case is presently pending before the Hon. Judge Frank Noel in the Third District Court.

Shortly after the entry of the default decree at issue herein, Appellee and Donna Putvin moved with the child to New Zealand. From the entry of the decree on November 13, 1991, until July 30, 1992, Appellant had absolutely no personal contact with Debra but only limited phone conversations with her. From July 30, 1992 until January, 1993, Appellant had approximately three personal visits with Debra lasting one to three hours, always in the presence of Appellee.

On December 10, 1992, the trial court entered an order modifying the default decree so as to allow Appellant limited unsupervised visitation, restricted to the State of Utah or New Zealand. After over one year, Appellant was finally allowed to spend some time alone with her daughter for one week in January, 1993 and has enjoyed a two week visit in the Spring and two weeks in the Fall of 1993. However, the decree continues to require Appellant to take Debra for "counseling" twice a week during these visits, during which the child spends time with Appellee.

2. Course of Proceedings and Disposition in Lower Court

On or about June 7, 1991, Appellee filed an amended complaint against Appellant, praying for relief which included, inter alia:

"c. a temporary and permanent award to plaintiff of custody of Debrorah P. Thompson."

Appellant, through her attorney Chase Kimball, filed a timely answer and counterclaim which sought, inter alia, to deny Appellee custody and sought custody for Appellant instead. (Rec. 161-165)

On November 12, 1991 the trial court held a telephonic scheduling conference with Mr. Kimball and Mitchell Barker, attorney for Appellee and, thereafter, entered a minute entry that "based on agreement of counsel the plaintiff [Appellee] will have custody of the child subject to supervised visitation to the defendant until such time the defendant has resolved her problem." (Rec. 414)

On November 13, 1991, the trial court entered findings of fact, conclusions of law and a default decree of custody. These documents recited allegations that "Chase Kimball, Esq. on behalf of Thompson, then withdrew the Answer and Counterclaim on file in this case." Mr. Kimball signed these documents, purporting to approve them on behalf of Appellant. This decree gave permanent custody to Appellee and required that the visitation privileges granted Appellant be supervised in an onerous and oppressive manner. (Rec. 415-470)

On May 4, 1992, Mr. Darger entered an appearance as counsel for Appellant. (Attachment A, not found in the record)

On May 26, 1992, Mr. Darger filed, on behalf of Appellant, a motion to set aside the default custody decree pursuant to Rule 60(b) U.R.C.P. (Rec. [mot.] 707-708, [mem.] 658-704 & 719-731)

On March 11, 1993, the trial court entered an order denying Appellant's motion to set the default decree aside. (Rec. 1362)

On March 22, 1993, Appellant served upon Appellee a motion to alter or amend the judgment denying her motion to set aside pursuant to Rule 59 U.R.C.P. (Rec. 1369-1401)

On April 19, 1993, the trial court held a hearing at which the motion to alter or amend was considered. This constituted the only hearing at which the issue of custody was considered. (Rec.1458 & 2291-2334)

On May 4, 1993, the trial court entered an order denying Appellant's motion to alter or amend and awarded sanctions against her. (Rec. 1490-1493)

On June 2, 1993, Appellant's Notice of Appeal was filed. (Rec. 1504-1505)

3. Statement of Facts

On or about June 7, 1991 Appellee filed an Amended Complaint praying for relief, which included inter alia,

c. a temporary and permanent award to plaintiff of custody of Deborah P. (Putvin) Thompson.

d. permanent injunctive relief, prohibiting each of the defendants and their agents from removing or causing the removal of Deborah from Salt Lake County or the State of Utah without written permission of the Court. (Rec. 161-162) Appellant, through her attorney Chase Kimball, filed an answer and counterclaim.

On November 12, 1991 the trial court held a telephonic scheduling conference with the attorneys for the parties and, thereafter, entered an order holding inter alia that "based on agreement of counsel the plaintiff will have custody of the child subject to supervised

visitation to the defendant until such time the defendant has resolved her problem." (Rec. 414)

To date, the trial court has not entered Appellant's default.

On or about November 13, 1991 the trial court entered Findings of Fact, Conclusions of Law and a Default Custody Decree granting permanent custody to Appellee and requiring that Appellant's visitation be supervised by Appellee (Rec. 415-470)

Prior to and on November 4, 1991, Chase Kimball, Esq. was the attorney for the Defendant above-named and represented her in this litigation. (Aff. Kimball, Para. 2; Rec.1380-1383)

During August, September and October of 1991, Mr. Kimball represented said Defendant in settlement negotiations with Mitch Barker, attorney for Plaintiff. ("Aff. Kimball, Para. 3; Rec. 1380-1383)

On or about November 4, 1991, and prior to reaching any agreement with Plaintiff's counsel as to custody or visitation terms, Mr. Kimball received a letter from Defendant which directed that he not act further on her behalf in fighting Plaintiff. At that time, he claims that he did not realize that she was discharging him but, in retrospect, believes he was discharged as her attorney by this letter. (Aff. Kimball, Para 4; Rec. 1380-1383)

On Tuesday, November 12, 1991, Mr. Kimball participated in a telephonic pretrial scheduling conference in this matter with Judge Hanson, the trial court judge, and Mr. Barker. During this conference, Mr. Kimball did not stipulate or agree that Defendant's answer and counterclaim be withdrawn or stricken. (Aff. Kimball, Para. 5; Rec. 1380-1383)

Several days subsequent to the scheduling conference, Mr. Barker presented Mr. Kimball with findings of fact, conclusions of law and a default decree for his approving signature on behalf of Defendant. He initially refused to sign them since he felt that they misrepresented that he had orally withdrawn Ms. Thompson's answer and counterclaim during the scheduling conference and that he had stipulated that the Court consider the custody evaluation of Patricia Smith, Ph.D. and Defendant's letter of November 4, 1991 as evidence. These allegations were not true. (Aff. Kimball, Para. 6; Rec. 1380-1383)

Shortly after Mr. Kimball's refusal to approve the documents, Plaintiff John Putvin visited Mr. Kimball's office and became highly agitated, threatening to take the matter to trial and threatened that he would pursue his emotional distress personal injury suit. (Affid. Kimball, Para. 7; Rec.1380-1383)

In return for Putvin's promise that he would drop the personal injury suit and would make sure Defendant had ample time with her daughter, Mr. Kimball signed the approval line of the findings of fact, conclusions of law and default decree. He also called Mr. Barker on the phone and told him he was signing under extreme protest and further, obtained Mr. Barker's promise to send Mr. Kimball a letter acknowledging his disagreement with the language of these documents. (Affid. Kimball, Para 7; Rec. 1380-1383)

A few days after his conversation with Mr. Barker set forth in the paragraph immediately preceding, Mr. Kimball received a letter from him containing some extremely vague acknowledgements but which he felt did not acknowledge his disagreement with the language. However, by this time, he felt that there was no question that he was off the case and did not formally protest. (Affid. Kimball, Para 8. Rec. 1380-1383; 2170-2171)

At no time did Ms. Thompson authorize Mr. Kimball to approve the Findings of Fact, Conclusions of Law and Default Decree. Nor did she authorize him to withdraw her answer or counterclaim and he did not. (Affid. Kimball, Para. 9; Rec 1380-1383)

In spite of the fact that Defendant had not authorized him to approve these documents, Mr. Kimball signed his approval of them in order "to try and get [Defendant] some peace, and because Plaintiff made extremely grandiose promises of how wonderfully he was going to treat [Defendant] if [Mr. Kimball] would sign. (Aff. Kimball, Para. 10; Rec. 1380-1383)

Ms. Thompson never stipulated or agreed to the terms of the findings of fact, conclusions of law or decree entered by the trial court nor did she authorize Mr. Kimball to agree for her. (Aff. Kimball, Para. 12; Rec. 1380-1383; 2170-2171)

On May 4, 1992, Mr. Darger entered an appearance as counsel for Appellant. (Attachment A, not found in the record)

On May 26, 1992, Mr. Darger filed, on behalf of Appellant, a motion to set aside the default custody decree pursuant to Rule 60(b) U.R.C.P. The grounds for this motion were those set out as issues numbered I., II., III., and IV of this brief. (Rec. [mot.] 707-708, [mem.] 658-704 & 719-731)

On March 11, 1993, the trial court entered an order denying Appellant's motion to set the default decree aside. (Rec. 1362)

On March 22, 1993, Appellant served upon Appellee a motion to alter or amend the judgment denying her motion to set aside pursuant to Rule 59 U.R.C.P. The grounds for this motion were those set out as issues numbered V. and VI of this brief.(Rec. 1369-1401)

On April 19, 1993, the trial court held a hearing at which the motion to alter or amend was considered. This constituted the only hearing at which the issue of custody was considered. (Rec.1458 & 2291-2334)

On May 4, 1993, the trial court entered an order denying Appellant's motion to alter or amend and awarded sanctions against her. (Rec. 1490-1493)

SUMMARY OF ARGUMENTS

I. THE TRIAL COURT'S REFUSAL TO SET ASIDE THE DEFAULT JUDGMENT ENTERED AGAINST DEFENDANT/APPELLANT AND WHICH AWARDS THE CUSTODY OF HER MINOR CHILD WAS AN ABUSE OF DISCRETION BECAUSE THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE NOT SUFFICIENT TO SUPPORT THE COURT'S CUSTODY DECISION.

The Findings of Fact entered in this matter (Rec. 415-470) contains only one paragraph setting forth a basis for the trial court's ultimate decision to award custody to Plaintiff. That is paragraph 2. which states: "Putvin is a fit and proper parent to whom permanent custody and control of Deborah should be awarded." The Findings do not recite any specific factors which the trial court considered pertinent to the best interests of the child, the particular needs of the child or the ability of each parent to meet those needs. As a result, the findings and conclusions fail to adequately support the decree and the decree should be set aside and evidence taken for the court to make this determination according to law.

II. THE TRIAL COURT'S REFUSAL TO SET ASIDE THE DEFAULT JUDGMENT ENTERED AGAINST DEFENDANT/APPELLANT WAS AN

**ABUSE OF DISCRETION BECAUSE THE COURT FAILED TO ENTER HER
DEFAULT PRIOR THERETO.**

The trial court failed to enter default against Appellant pursuant to Rule 55 (a)(1) U.R.C.P. prior to entering default judgment. Therefore, the judgment is void and should be set aside.

**IV. THE TRIAL COURT'S REFUSAL TO SET ASIDE THE DEFAULT
JUDGMENT ENTERED AGAINST DEFENDANT/APPELLANT WAS AN ABUSE OF
DISCRETION BECAUSE THE JUDGMENT DOES NOT ACCURATELY REFLECT
THE RESULT OF THE COURT'S JUDGMENT.**

The minute entry of the trial court, which is the basis for entry of the default custody decree, merely awarded custody of Deborah to Appellee and restricted Appellant's visitation to "supervised visitation... until such time the defendant has resolved her problem." (Rec. 414) The minute entry does not refer to an award of permanent custody but implies that the arrangement is temporary until defendant could regain her resolve to continue the custody battle.

It is Appellant's contention that the findings of fact, conclusions of law and judgment actually entered, contained terms which went far beyond the trial court's judgment as reflected by the minute entry, especially as to the award of permanent custody. Therefore, the decree should be set aside.

**V. THE TRIAL COURT'S REFUSAL TO SET ASIDE THE DEFAULT
JUDGMENT ENTERED AGAINST DEFENDANT/APPELLANT WAS AN ABUSE OF**

**DISCRETION WHERE THE JUDGMENT FAILS TO COMPLY WITH THE
REQUIREMENTS OF RULE 4-504 C.J.A.**

Rule 4-504 C.J.A. provides in pertinent part:

(8) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

In the instant case, there is no such stipulation and the decree was, therefore, improperly signed and entered.

**VI. THE TRIAL COURT'S REFUSAL TO SET ASIDE THE DEFAULT
JUDGMENT ENTERED AGAINST DEFENDANT/APPELLANT WAS AN ABUSE OF
DISCRETION BECAUSE THE JUDGMENT WAS THE RESULT OF THE ACTS OF
HER ATTORNEY OR FORMER ATTORNEY WITHOUT AUTHORITY AND/OR
AFTER TERMINATION OF THE ATTORNEY/CLIENT RELATIONSHIP.**

The attorney who signed approval of the findings of fact and default decree, Chase Kimball, has submitted an affidavit stating that at that time, he had absolutely no authority from Appellant and, in retrospect, believes his representation had been terminated prior to his approval.

Appellant alleges that it was an abuse of discretion for the trial court to refuse to set the default decree aside under these circumstances.

**VII. THE TRIAL COURT'S REFUSAL TO SET ASIDE THE DEFAULT
JUDGMENT ENTERED AGAINST DEFENDANT/APPELLANT WAS CONTRARY TO
CONCEPTS OF JUSTICE AND EQUITY AND AN ABUSE OF DISCRETION BECAUSE**

THE PROCESS OF JUSTICE HAD GONE AWRY BECAUSE OF INCOMPETENCE OF COUNSEL SO THAT MANIFEST INJUSTICE WAS THE RESULT.

The attorney who signed approval of the findings of fact and default decree, Chase Kimball, has submitted an affidavit stating that at the time he had absolutely no authority from Appellant and, in retrospect, believes his representation had been terminated prior to his approval.

It is Appellant's position that these unauthorized acts denied her the opportunity to contest the custody of her child on the merits and derailed the system of justice so as to result in manifest injustice.

VII. THE TRIAL COURT'S AWARD OF SANCTIONS AGAINST APPELLANT FOR ATTEMPTING TO ALTER OR AMEND A PRIOR JUDGMENT IN ORDER TO BRING NEW EVIDENCE TO THE COURT'S ATTENTION WAS AN ABUSE OF DISCRETION.

Appellant contends that her attempt to bring the unauthorized and incompetent acts of her prior attorney to the attention of the trial judge so that he would have the opportunity to correct the error was not frivolous or without merit, but was done in good faith. An award of sanctions against her for doing so was an abuse of discretion.

ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO SET ASIDE THE DEFAULT JUDGMENT ENTERED AGAINST DEFENDANT/APPELLANT AND WHICH AWARDS THE CUSTODY OF HER MINOR CHILD WAS AN ABUSE OF

DISCRETION BECAUSE THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE NOT SUFFICIENT TO SUPPORT THE COURT'S CUSTODY DECISION.

The Findings of Fact entered in this matter (Rec. 415-470) contains only one paragraph setting forth a basis for the trial court's ultimate decision to award custody to Appellee. That is paragraph 2, which states: "Putvin is a fit and proper parent to whom permanent custody and control of Deborah should be awarded." The Findings do not recite any specific factors which the trial court considered pertinent to the best interests of the child, the particular needs of the child or the ability of each parent to meet those needs. As a result, the findings and conclusions fail to adequately support the decree and the decree should be set aside and evidence taken for the court to make this determination according to law §30-3-10, U.C.A.

In the case of Hutchinson v. Hutchinson, 649 P.2nd 38 [Utah 1982], the Utah Supreme Court set forth several of the factors that a trial court should consider in an award of custody. In addition, the Supreme Court made it clear that "[t]he trial court must enter specific findings on the factors relied upon in awarding custody". (cite omitted) (emphasis added, at page 42) The Court also held that these factors must be related to determining what is in the best interest of the child. In the later case of Smith v. Smith, 726 P.2nd 423 [Utah 1986] the Supreme Court reiterated this rule and held as follows:

To ensure that the trial court's custody determination, discretionary as it is, (cite omitted), is rationally based, it is essential that the court set forth in its findings of fact not only that it finds one parent to be the better person to care for the child, but also the basic facts which show why that ultimate conclusion is justified. There must be "a logical and legal basis for the ultimate conclusion." (citing Milne Truck Lines v. Public Service Commission, 720 P.2nd 1373, 1378 [Utah 1986] (at page 426))

In other words:

A mere finding that the parties are or are not "fit and proper persons to be awarded the care, custody and control" of the child cannot pass muster when the custody award is challenged and an abuse of the trial court's discretion is urged on appeal. (Martinez v. Martinez, 728 P.2nd 994 [Utah 1986] at page 994.)

This is exactly the instant case. The findings merely recite that Appellee is a fit and proper person to be awarded custody. There is no finding as to what would be in the best interest of Deborah. And, in fact, this court could not make the required findings based upon the evidentiary record as it is. There has been no evidentiary hearing on the issue of custody to allow the court to hear and weigh evidence or judge the credibility of witnesses, nor is there a stipulation signed by the parties as to what those facts are. Since the custody issue was not tried upon the facts, there is simply no evidence for the court to sift in determining the best interests of Deborah and, thus, the findings should be set aside as clearly erroneous.

**II. THE TRIAL COURT'S REFUSAL TO SET ASIDE THE
DEFAULT JUDGMENT ENTERED AGAINST DEFENDANT/APPELLANT WAS AN
ABUSE OF DISCRETION BECAUSE THE COURT FAILED TO ENTER HER
DEFAULT PRIOR TO ENTRY OF THE DEFAULT JUDGMENT AND IT SHOULD
BE SET ASIDE PURSUANT TO RULE 60(B)(7) U.R.C.P.**

The Utah case squarely on point of this issue is the case of P & H Land, Inc. v. J. A. Klungervik, 751 P.2nd 274 [Ut. Ct. App. 1988]. In the Klungervik case, the trial court had struck the defendant's answer and entered a default judgment without entering the defendant's default. In reversing the trial court's refusal to set the judgment aside, the Court held as follows:

Although the trial court has the inherent power to order the entry of a party's default (cite omitted), this important step was completely skipped over in this case. There was no entry of default prior to the sua sponte entry of the default judgment. No default judgment may be entered under Utah R. Civ. P. 55(b)(2) unless default has previously been entered. (cites omitted) "Thus, the entry of default is an essential predicate to any default judgment." (Id. See Russell v. Martell, 681 P.2d 1193 [Utah 1984] (requiring the trial court compliance with Rules 55 and 54(c)(2) in entering judgments against defaulting parties).

(emphasis added, at pp. 276, 277)

The Court noted on page 277, footnote 4 that "It is not proper for the trial court to pass over this part of the default process, i.e., by striking defendants' answer and implicitly entering their default, and proceed directly to entry of default judgment."

This is precisely what the trial court did in the instant case. The minute entry does not include an order entering defendant's default nor does the record indicate that default was ever entered. (Rec. 414) Instead, the Findings of Fact, Conclusions of Law and Decree merely recite defendant's "stated and written desire to withdraw her answer and proceed by default. The Decree includes no provision whereby Appellant's default is actually entered. (Rec. 415-470) As in the Klungervik case, Appellant's default was implicitly noted at best and this Court should set the Custody Decree aside and allow Appellant to reassert her answer and counterclaim and proceed.

The Klungervik Court did not explicitly indicate the provision of Rule 60 U.R.C.P. under which it set the default aside. However, it did cite the case of Russell v. Martell, supra, as authority for holding that it is an abuse of discretion for the trial court to refuse to set aside a judgment entered without compliance with Rules 55 and 54(c)(2).

The Martell case did explicitly address the Rule issue. Here, the Appellant had moved to set aside a default judgment under Rule 60(b)(7) because of confusion in his previous

attorney's office and the mistaken failure of that attorney to file an answer. The court noted that this is the type of reason provided by Rule 60(b)(1) which requires that the motion be brought within three months of the entry of the judgment. The Court refused to allow Appellant to get around the three month requirement by noting that "We have held that subparagraph 7 may not be resorted to for relief when the ground asserted for relief falls within subparagraph 1." (at page 1195) Nevertheless, the Martell Court did reverse the trial court's refusal to set the judgment aside as an abuse of discretion, reasoning as follows:

....the judgment against Mills must be reversed because of the failure of the trial court to follow Rule 55(b)(2) of the Utah Rules of Civil Procedure. Rule 54(c)(2) and Rule 55 prescribes the procedure to be followed by trial courts in entering judgments against defaulting parties. 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. (at page 1195)

Thus, it is clear that it constitutes an abuse of discretion for a trial court to refuse to set aside a default judgment entered without complying with the procedures set out in Rule 54(c)(2) and Rule 55 such as the Custody Decree in the instant case. It is also clear that Rule 60(b)(7) is the appropriate basis for setting such a judgment aside. (See also, Darrington v. Wade, 812 P.2nd 452 [Ut Ct. App. 1991] holding that the notion that a default judgment can only be vacated in accordance with rules only applies to properly entered default judgments.)

III. THE TRIAL COURT'S REFUSAL TO SET ASIDE THE DEFAULT JUDGMENT ENTERED AGAINST DEFENDANT/APPELLANT WAS AN ABUSE OF DISCRETION BECAUSE THE JUDGMENT DOES NOT ACCURATELY REFLECT THE RESULT OF THE COURT'S JUDGMENT.

As noted above, the minute entry merely awarded custody of Deborah to plaintiff and restricted defendant's visitation to "supervised visitation... until such time the defendant has

resolved her problem." (Rec. 414) The minute entry does not refer to an award of permanent custody but implies that the arrangement is temporary until defendant could regain her resolve to continue the custody battle. There is no reference to psychological counseling, no reference to supervision at plaintiffs discretion and control, no requirement that defendant seek the approval of plaintiff before coming back to this court for relief. Yet the custody decree provides for all of this relief and purports to be a judgment of permanent custody.

Although the trial court's subsequent modification removed the requirement of supervised visitation, (Rec. ???) the decree continues to be different in kind, and goes far beyond the judgment of the court as reflected by the minute entry. As stated by the Utah Court of Appeals in the case of Darrington v. Wade, 812 P.2d 452 [Ut. Ct. App. 1991]:

It is well established that [a] court may vacate, set aside, or modify its orders or judgments entered by mistake or inadvertence which do not accurately reflect the results of its judgment. (cite omitted, at page 456)

Thus is the instant case. The default custody decree should be set aside.

IV. THE TRIAL COURT'S REFUSAL TO SET ASIDE THE DEFAULT JUDGMENT ENTERED AGAINST DEFENDANT/APPELLANT WAS AN ABUSE OF DISCRETION BECAUSE THE JUDGMENT FAILS TO COMPLY WITH THE REQUIREMENTS OF RULE 4-504 C.J.A.

Rule 4-504 C.J.A. provides in pertinent part:

(8) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

In the instant case, there is no such stipulation and the decree was, therefore, improperly signed and entered. There being no stipulation as to the facts set out in the

Findings prepared by Appellee and no evidentiary hearing, the Findings are without any basis whatsoever and should be set aside. The decree likewise. The trial court abused its discretion in refusing to do so.

V. THE TRIAL COURT'S REFUSAL TO SET ASIDE THE DEFAULT JUDGMENT ENTERED AGAINST DEFENDANT/APPELLANT WAS AN ABUSE OF DISCRETION BECAUSE THE JUDGMENT WAS THE RESULT OF THE ACTS OF HER ATTORNEY OR FORMER ATTORNEY WITHOUT AUTHORITY AND/OR AFTER TERMINATION OF THE ATTORNEY/CLIENT RELATIONSHIP.

§78-51-32 U.C.A. provides that "[a]n attorney and counselor has authority: (2) to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise." (emphasis added) It is axiomatic therefore, that before an attorney can bind an individual by his agreement, there must exist an attorney-client relationship between them.

Mr. Kimball's affidavit indicates his opinion that his client had terminated the relationship prior to his approval of the findings and decree. (Rec. 1380-1383) And who should know better than him. Therefore, he had no authority pursuant to the above statute and the findings of fact and decree should have been set aside. (Also see: Schwarze v. May Department Stores, 360 S.W. 2nd 336 (?) (No act of the attorney can bind the client after termination of the attorney-client relationship.)

Further, the case of Linsk v. Linsk, 449 P.2nd 760 (Cal. 1969) states the general rule followed in most jurisdictions that even where the attorney-client relationship exists, "the attorney is authorized by virtue of his employment to bind his client in procedural matters

arising during the course of the action but he may not impair the client's substantial rights or the cause of action itself." (at page 762) (See Generally: 7 Am Jur 2nd, Attorney and Client, §150)

Although the Utah appellate courts have not ruled directly on this issue, the case of Mechan v. Benson, 590 P.2nd 304 (Utah 1979), notes this obvious rule in dicta as follows: "A lawyer cannot stipulate for a judgment against his client unless where it is shown that he is authorized to do so, there is no basis therefore." (at page 309) It is obvious from Mr. Kimball's sworn statement that he had no authority to withdraw his client's answer and counterclaim and stipulate that her default be entered. (Rec. 1380-1383) These acts went far beyond procedural matters and extinguished any substantive claims she had to custody of her daughter permanently!

But for counsel's unprofessional errors there is a reasonable probability that the results of the proceeding would have been different, i.e. Appellant would have had a trial on the merits.

The trial court abused its discretion when it refused to amend its judgment so as to set aside the Default Decree and grant Appellant a trial on the merits.

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

Utah follows the general rule that in civil cases a new trial will not be granted based upon the incompetence or negligence of one's own trial counsel. Jennings v. Stoker, 652 P.2d 912 (Utah 1982) However, Utah law also recognizes that "under exigent or exceptional circumstances which appear to have resulted in an injustice, the court may be justified in granting a new trial" because of the negligence of counsel. Jennings v. Stoker, supra at page 913.

In recognizing this rule, the Jennings Court cited the earlier case of Maltby v. Cox Construction Co., 598 P.2d 336 (Utah 1979) In a concurring opinion which was joined by two other justices, Chief Justice Crocket stated as follows:

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

In so saying, I am aware that it is generally said that mistake, error of judgment or negligence of counsel in presenting or defending a case is not sufficient cause of vacating a judgment and granting a new trial. However, consistent with the principal stated above, it has been held that, under exigent circumstances, incompetence or negligence of counsel which appears to have resulted in an injustice, will justify the granting of a new trial. (at page 341, 342)

Further, while there is no Utah case directly on this point, most jurisdictions follow the rule that negligence or incompetence of counsel will allow setting aside a judgment where negligence prohibited a hearing on merits. (attorney's extreme negligence or misconduct which denies client hearing on the merits will not be imputed to client, Lopez v. Superior Court 223 Cal Rptr 798 [1986 2d Dist]; new trial granted where attorney utterly failed to represent client's interests in controversy, Garrett v. Osborn, 431 P.2d 1012 [Colo. 1967]; extreme misconduct of counsel justifies setting aside judgment Honolulu v. Bennett, 627

P.2nd 1136 [Hawaii 1981]; attorney's abandonment of case without clients knowledge or consent supports setting judgment aside, Day v. Allaire, 31 NJ Eq 303 [1879]; gross negligence of counsel which denied client chance to have issues fairly litigated supports setting judgment aside, Manning Engineering, Inc. v. Hudson County Park Com. 376 A. 2nd 1194 [NJ 1977]; attorney's abandonment of case is exception to general rule that attorney's neglect will be imputed to client, Graham v. Loris, 248 S.E.2nd 594 [SC 1978]; egregious example of incompetent counsel will support setting judgment aside. Big Bend v. Anderson, 308 N.W.2nd 887 [Wos 1981]

In the instant case, Appellant does not request a new trial, she requests a trial on the merits, a day in court. Clearly, where her attorney performed acts intended to bind her resulting in substantial prejudice to her substantive rights after he had been discharged and/or without any authority, the process has gone so awry that injustice has resulted.

A more egregious example of attorney abandonment and incompetence cannot be imagined than that of the instant case. Mr. Kimball not only failed to realize he had been discharged, he allowed the withdrawal of Ms. Thompson's defense and counterclaim, approved the entry of findings of fact, conclusions of law and a default decree which denied her the opportunity to have her claim to custody heard on the merits and placed her in a position of substantial prejudice as to visitation with her child.

For the reasons above stated, Appellant respectfully requests that this Court set aside the Default Judgment and allow her the opportunity of trial on the merits.

**VII. THE TRIAL COURT'S AWARD OF SANCTIONS AGAINST
DEFENDANT APPELLANT FOR ATTEMPTING TO ALTER OR AMEND A PRIOR**

**JUDGMENT IN ORDER TO BRING NEW EVIDENCE TO THE COURT'S
ATTENTION WAS AN ABUSE OF DISCRETION.**

Section 78-27-56 Utah Code Annotated (Supp. 1990) provides that "(1) 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 or asserted in good faith...."

To prove that a claim is "without merit" under the statute, the party asserting an award of attorney fees must first demonstrate that the claim is "frivolous" or "of little weight or importance having no basis in law or fact." Jeschke v. Willis, 811 P.2nd 202, 203 (Utah App. 1991), citing Cady v. Johnson, 671 P.2nd 149,151 (Utah 1983).

Second, it must be shown that the conduct in asserting the claim or defense was lacking in good faith. This lack of good faith turns on subjective intent, and for purposes of the statute, is synonymous with a finding of "bad faith" Jeschke v. Willis, supra, at 204, citing Cady v. Johnson, supra at 151-52. As indicated by the affidavit of Daniel Darger, submitted in support of Appellant's Motion to Alter or Amend Judgment, Mr. Kimball never came forward with evidence of his lack of authority to approve the findings and decree until March 22, 1993 (Rec. 1369-1401). This constituted newly discovered evidence, not available at the time the original motion to set aside was made and was properly brought before the trial court pursuant to Rule 59(e) U.R.C.P.

The cases cited at VI., and VII. supra. clearly indicate that the basis for Appellant's motion was not without merit or having no basis in law. It can hardly be argued that the acts

of Mr. Kimball as set out in his affidavit are "of little weight or importance" for an attorney's fealty to his client is at the very heart of our legal system.

As pointed out by Justice Crockett in Maltby v. Cox Construction Co., supra, "The purpose of all court proceedings is, of course, to do justice." And it was the obligation of Appellant and her counsel to bring her former attorney's conduct, which prevented her from having a trial on the merits, before the trial court so that it could be considered to that end, and hopefully, rectify error before the necessity of appeal..

As to Appellant's present counsel, it appears that the actions of Mr. Kimball raise a substantial question as to his fitness as a lawyer since, in this counsel's opinion, it involved acts that a self-regulating profession must vigorously endeavor to prevent. This counsel had an obligation to bring this matter before an appropriate authority pursuant to Rule 8.3 Rules of Professional Conduct. Certainly, the trial court judge, who has the power to remedy the prejudice caused Appellant by these acts, in an appropriate place to start. The trial court's sanction of Appellant for ~~doing~~ so was an abuse of discretion.

VII. APPELLANT SHOULD BE AWARDED COSTS AND ATTORNEY'S FEES RELATED TO OPPOSING APPELLEE'S MOTION TO DISMISS..

As noted in Appellant's memorandum in opposition to Appellee's motion to dismiss for lack of jurisdiction, none of the theories underlying this motion had any basis in fact or law. All it did was possibly delay these proceedings and require Appellant to incur additional attorney's fees to oppose it. Appellant should be awarded attorney's fees and Appellant otherwise appropriately sanctioned for filing this motion.

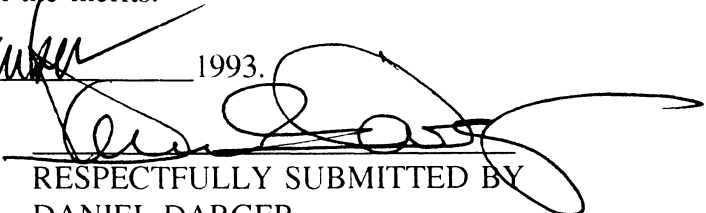
CONCLUSION

The trial court had absolutely no evidence before it upon which it could base an award of permanent custody in this case. The findings of fact and decree which did so are total deficient of the specificity required in Utah in order to protect and insure the best interests of our children in these disputes.

Instead, incompetence of counsel and a distortion of our justice system allowed Appellee to snatch this child out of her mother's arms and to a foreign country thousands of miles away. Begrudgingly, the system has finally allowed Appellant to resume a relationship with her daughter strained loss of work caused by long travel from Appellant's home in Wyoming to her mother house in Utah and twice-weekly interference by Appellee.

These results are a shameful indictment of a system gone so awry that interests of justice and the best interests of the child have been lost. This court should set aside the default decree, direct that Appellee return Debra Thompson to Utah until this matter is fully and fairly decided, and allow Appellant a trial on the merits.

DATED this 15th, day of November, 1993.


RESPECTFULLY SUBMITTED BY
DANIEL DARGER
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLANT has been hand delivered to Mitchell R. Barker, Esq, 349 South 200 East, Suite 170, Salt Lake City, UT 84111, this 15th day of November, 1993.



Attachment A

Daniel Darger (0815)
Attorney at Law
100 Commercial Club Building
32 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 531-6686

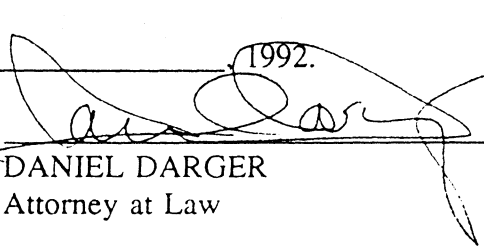
IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

JOHN CARL PUTVIN	:	APPEARANCE OF COUNSEL
Plaintiff,	:	
	:	
vs.	:	Civil No: 920900804CV
	:	
KAREN LARIE THOMPSON. ET AL	:	Judge: Hanson
Defendant.	:	
	:	

COMES NOW, Daniel Darger, Esq. and hereby enters his appearance as counsel for the defendant Karen Larie Thompson above named.

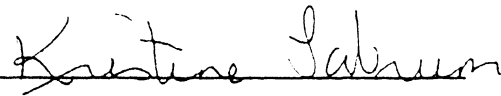
DATED this 9th day of May, 1992.



DANIEL DARGER
Attorney at Law

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appearance of Counsel has been mailed, postage prepaid to: Mitchell R. Barker,
2870 South State Street, Salt Lake City, UT 84115-3692. this 4 day of
May, 1992.



Kristine Johnson