

1993

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

Utah Court of Appeals

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Daniel Darger; Attorney for Appellant.

Mitchell R. Barker; Attorney for Appellee.

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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. :

Case No: 930359-CA

KAREN LARIE THOMPSON :
JOSEPH BLAINE THOMPSON :

Defendant and Appellant :

Priority No: 4

REPLY BRIEF OF APPELLANT

ON APPEAL FROM AN ORDER OF THE THIRD DISTRICT COURT

STATE OF UTAH

JUDGE TIMOTHY R. HANSON

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FILED

Utah Court of Appeals

MAR 31 1994

Mary T. Noonan
Mary T. Noonan

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REPLY TO APPELLEE'S "STATEMENT OF ISSUES"

As noted in the case of *Webster v. Reproductive Health Services*, 492 U.S. 490, 512 (1989), it is the province of the Appellant to frame the issues on appeal, for "the party who brings a suit [or appeal] is master to decide what law he will rely upon. . . ." Appellant's "Statement of Issues" bears little resemblance to the issues raised by Appellant and appears to be an attempt at cross-appeal. The statement should be ignored.

REPLY TO APPELLEE'S "STATEMENT OF THE CASE" AND "COURSE OF PROCEEDINGS"

Appellee is correct at Br. 1 in stating that this is an appeal from the denial of a motion by Appellant seeking to set a custody decree aside. However, the remainder is little more than argument, based upon misstatements of fact and fabrication, and should be disregarded.

ARGUMENT

Appellee raises 25 points of argument in his response brief, many of them redundant. Points 2., 3., 4., 10., 20., and 21. all involve Appellee's claim that this appeal was not timely filed. These are the same issues that were raised and briefed in Appellee's Motion to Dismiss for Want of Jurisdiction and require no further reply except to point out that Appellee continues to make arguments in his brief that were not warranted by law and were frivolous when made in his motion to dismiss. However, he now has the benefit of Appellant's reply to his motion, and if he didn't know the law then, he sure did when he prepared his response brief.

Point 9. also appears to be an attack on the timeliness of appeal not raised in Appellee's Motion to Dismiss. Appellee seems to be arguing that Mr. Kimball's affidavit and testimony is not newly discovered evidence and therefore the Rule 59 Motion to Alter or Amend was not effective in tolling the time for appeal.

He cites no law for this proposition and totally ignores the case law readily available in the annotations to this rule. All hold that a timely motion under Rule 59 U.R.C.P. terminates the running of the time for appeal, and time does not begin to run again until the order granting or denying such order is entered. (e.g. *Hume v. Small Claims Court*, 590 P.2d 309 [Utah 1979]; *Interstate Land Corp. v. Patterson*, 797 P.2d 1101 [Utah Ct. App, 1990])

Not a single Utah case holds that the time for appeal is tolled *only* if the trial court finds that the Rule 59 motion is well taken, as Appellee suggests (Appellee Br. pp. 26, 27). Such an interpretation would place counsel at risk of malpractice every time a Rule 59 motion was filed unless notice of appeal was filed within 30 days of the original judgment regardless of the outcome of the motion. This argument is frivolous.

At Point 6. (Appellee Br. p. 22), Appellee argues that Appellant is barred by the "law of the case" from the relief sought herein. No cases are cited or evidence marshalled as to how the law of the case applies. Instead, Appellee cites cases holding that a party must show a "substantial change of material circumstances" before a decree can be modified. Appellee ignores the fact that this is not an attempt to modify the decree and the cases cited by Appellee are totally irrelevant.

Appellee argues at Point 7. (Appellee Br. p. 22) that Appellant had a chance to protect herself (presumably from Mr. Kimball's conduct) during the trial of this case and that

she failed to do so by failing to call Mr. Kimball as a witness. Further, he argues at Point 23 (Appellee Br. 43) that deference should be accorded the trial judge on this issue (of awarding custody).

Ignored is the fact that the "trial" was actually an evidentiary hearing solely on the issue of modifying visitation from supervised to unsupervised. Other issues were not before the trial court and not relevant. Further, as pointed out below, the findings of fact and conclusions of law are so insufficient that one is unable to determine *why* the trial court awarded custody to Appellee. So how can this unknown determination be given deference? This argument is without merit.

At Paragraph 8. (Appellee Br. p.25) the *laches* argument is made. Appellee argues that Appellant's "delay" in pursuing an order setting the decree aside was unreasonable. However, the record shows no delay. For upon retaining new counsel on May 4, 1992, (Attachment A of Appellant's Brief), a motion to set the decree aside was prepared and filed on May 26, 1992.(Rec. 658-704, 707-708) Further, as set out below, she did not learn that a default decree had been entered until the end of January, 1992, at which time she was again relying upon Mr. Kimball.

Appellee's claim that the delay between filing the motion to set aside and the courts eventual ruling should be attributed to Appellant, is like the pot calling the kettle black.. (Appellee Br. p. 26) Appellant has no control over the trial court's schedule. She filed a timely notice to submit her motion for decision on June 16, 1992 (Rec. 745) *And on June 17, 1992, Appellee filed an objection to the notice to submit*, arguing that the court had

previously determined that Appellant's motion to modify the visitation provisions should be resolved before the court acted upon the motion to set it aside. (Rec. 747-748)

And, several days later, Appellee got around to filing a response to the motion to set aside (Rec. 749-759); followed by Appellant's motion to strike the objection and responsive brief (Rec. 761-768); followed by Appellee's Amended Response to Motion to Set Aside (Rec. 814-824); followed by Appellant's motion to strike the amended response. (Rec. 825-826) (The memo in support of this motion does not appear in the record for some reason and is attached hereto as Attachment A)

A cursory examination of the above documents will reveal that *it was Appellee who was trying to delay the trial court's ruling on the motion to set aside, not Appellant*. Further, this examination will reveal a pattern followed by Appellee throughout this entire litigation of ignoring the Utah Rules of Civil Procedure and twisting facts to meet his purposes. (Not to mention the impropriety of Attachment C of Appellee's Brief) And, Appellee is clearly trying to mislead this court as well.

Points 1., 5., 15., 16., and 17. of Appellee's brief are all based upon a claim that Appellant's answer was withdrawn and the default decree entered against her as a result of her stipulation that it be done. Appellee's proof of a stipulation consists of Appellant's infamous letter of November 4, 1991 (Rec. 410-413; Appendix A of Appellee's Brief) and Mr. Kimball's signature approving the findings of fact, conclusions of law and decree.

However, a review of the November 4th letter indicates absolutely no basis for the misdeeds perpetrated upon Appellant on November 12th and 13th of 1991. And when reviewed together with the affidavit of Mr. Kimball (Rec. 1380-1383) as well as the

testimony of the parties set out below, it is clear that there was no meeting of the minds, no knowing waiver of rights, and no authority for Mr. Kimball to do what he did. Finally, the trial court's minute entry of November 12, 1991 (Rec. 414) indicates on its face that the custody arrangement discussed in the telephonic scheduling conference was a temporary arrangement indicating that it was "until such time the Defendant has resolved her problem." (Rec. 414)

Attempts by Appellee, and the trial court, to justify what occurred the following day on the basis of the November 4th letter is horribly misplaced. For this letter was intended as a personal communication to Appellee, the father of Appellant's only child, *not for the benefit of the attorney's or the court!* (Rec. 2175) Appellant's expressions of frustration and resignation made in a personal letter to Appellee hardly rise to the level of a stipulation or a settlement agreement. Instead, this letter reflects Appellant's repeated refusal to sign off on Appellee's settlement demands and states "I am not giving up and neither is my family." (Rec. 411) Yet, seven days later, Appellee managed to twist this personal letter into a stipulation for withdrawing Appellant's answer and counterclaim, and entering a default decree against her while Mr. Kimball stood lamely by. (Appellee Br. p.35: "This letter constitutes a default") This is hardly justice.

Appellee argues at Points 11. and 12. that the Findings supporting the award of custody were adequate because (1) custody was not at issue (Appellee Br. p. 28, 29) and, (2) adequate findings were incorporated by reference in the form of the so-called custody evaluation of Patricia Smith, Phd. (Appellee Br. p. 29-34) However, regardless of the number of facts Appellee incorporated into the findings and conclusions by reference, they

have a fatal flaw in that they never explain *why* the trial court felt one parent better than the other. They simply fail to articulate a rational factual basis for the ultimate decision by reference to pertinent factors that relate to the best interests of the child. *Sanderson v. Tryon*, 739 P.2d 623 (Utah 1987)

Appellee cites the case of *Ebbert v. Ebbert*, 744 P.2d 1019 (Utah App. 1987) [Specific findings are not required where custody is not an issue.] in support of his contention that the findings were adequate in the instant case. He argues that custody was not an issue in the instant case because it had been resolved by the supposed "stipulation" (the November 4th letter and Mr. Kimball's agreement to the findings),

However, the *Ebbert* case is not applicable because *custody was, and is, the only issue*, and hotly contested in the instant case. Appellant filed an answer and counterclaim seeking custody (Rec. 299-302) And just prior to the entry of the default decree, she was resisting attempts by Appellee and Mr. Kimball to get her to sign stipulations giving Appellee custody. (Rec. 2169) As Appellee's attorney, Mr. Barker stated:

...it's been broached the fact that there's been several attempts at stipulation, and none of them included supervised visitation. Lest the court be misled into thinking it's (supervised visitation) some kind of a punishment later, we need to establish through these documents that she refused to even sign the very most basic two paragraph stipulation. She wouldn't put her signature on anything. (Rec. 2066-2068)

And Appellee testified:

[Exhibit] thirteen is the settlement stipulation, a final settlement stipulation with my signature on it, *dated the 5th day of November, 1991*, (8 days before the default decree was entered) which was the product of five successive weeks of weekly meetings between myself, yourself, Chase Kimball, attorney for Karen Thompson, Karen Thompson, and Deborah's guardian ad litem, Arnold Gardner; and also countersigned by the custody evaluator, Patricia Smith. (Emphasis added)

Q. And the shorter one, the second one, which would be thirteen, I guess?

A. Yes. It's a two paragraph stipulation, merely saying that John Putvin shall receive sole permanent custody; Karen shall receive minimum standard visitation. (Rec. 2067-2068)

* * *

Q. (By Mr. Barker) Mr. Putvin, those stipulations and the unwillingness to sign them on Karen's part, why does that have anything to do with your concern that there's a flight risk, and there should be supervised visitation?

A. Well, first, in her deposition as has been entered in this record, she refused to hypothetically agree to some stipulation that if one party moved, the other would get custody. There was a great deal of ovation on that. Secondly, in this document it stipulates that either party, a physical move by either party would be considered a material change of circumstance, which would warrant a review of the custody arrangement. *And she refused to sign that.* [No kidding!] (Emphasis and editorial added)

* * *

Q. With regard to those stipulations, what should make Judge Hanson believe if anything that that concern is still real, there's still a concern that her refusal to sign those stipulations, or other activities in relation to the court indicate there's still a risk?

A. She sent me, personally addressed to me, her *November 4th letter*, and in that she says I'm not giving up the fight, but I'm not going to fight the devil, ie, you. (Rec. 2069-2070) (Emphasis added)

Appellee has also testified as to the *vehemence* with which Appellant contested custody, stating "...she's contested my name on the birth certificate, and Deborah's middle name, and has opposed vehemently any effort on my part to have that corrected." (Rec. 2064)

Appellant's uncontroverted testimony is: "Because Chase [Kimball] was insisting that I sign those other documents. As a matter of fact, he threatened me over the phone. And I could not accept the way he was going on it." (Rec. 2175)

In response to Mr. Barker's question:

Now you have made some pretty serious accusations against Chase Kimball. Can you tell us what threat he made to you to get you to sign? He threatened you to try to get you to sign a stipulation, is that what you said?

she testified:

He was yelling at me in a very loud, and screaming voice over the phone, and he says, you had better sign that. He says you better call me back within five minutes with the answer to sign this, or you will loose your daughter, and you will be very, very, very sorry. And he kept saying that over and over, and was very, very threatening in his demeanor. (Rec. 2179)

Approximately one week later, Mr. Kimball made good his threat.

Thus, it is obvious that immediately prior to the supposed settlement which Appellee claims made custody a non-issue, Appellant was adamantly refusing to settle or stipulate away her claim to custody *in spite of the threats of her own attorney!* Thereafter, Appellee used the November 4th letter and the complicity of Appellant's counsel to not only obtain permanent custody, but an onerous visitation arrangement which effectively cut Appellant off from any meaningful relationship with her daughter. (The quote of Judge Hanson at Appellee Brf. p.23 is enlightening on how this was accomplished.) And, shortly thereafter, Appellee and the child moved to New Zealand.

The above testimony is also enlightening as to the argument made by Appellee at Point 18. and 24. For, as Appellee admits at Brief 40-41, in January, 1992, when Mr. Kimball attempted to act on Appellant's behalf in this action, Appellee filed a Motion to Require Proof of Authority (Rec. 506-507) The obvious inference is that Appellee had reason to believe Mr. Kimball had been discharged from the case.

Mr. Kimball's affidavit in response to this motion (Rec. 499-500) does imply that his representation of Appellant had been continuous and unbroken up to that date and to this extent, is inconsistent with his later affidavit in support of the motion to amend. (Rec. 1380-1383) However, this later affidavit is clearly against Mr. Kimball's interest in that it exposes him to civil suit for malpractice as well as professional disciplinary action.

More importantly it corroborates the inference that Appellee knew of his lack of authority and provides a timeframe wherein Appellee obtained this knowledge (Before Kimball approved the findings and decree). He had absolutely nothing to gain and everything to lose in giving this affidavit and its credibility should be given great weight.

Appellee's argument, that Mr. Kimball did represent Appellant at the time the decree was entered, misses the point. Whether he did or didn't, it is uncontroverted that he was not authorized by his client to withdraw her answer and counterclaim, enter into a stipulation on her behalf, approve findings of fact, conclusions of law or the entry of a default decree. In fact, he was specifically directed otherwise by his client.

The uncontroverted testimony of Appellant is as follows:

Q. When was the first time you saw that custody decree?

A. If I've seen it, I think I have, if I've seen it, it was I went with you to the courthouse.

Q. When was the first time you ever became aware of the custody decree?

A. I believe it was toward the end of January, and I don't even remember how I found out, but I was very upset, and I called Chase, and raked him over the coals for it.

Q. Did you ever authorize Mr. Kimball to withdraw your answer?

A. Did I ever authorize?

Q. To withdraw your answer to this lawsuit, and let it go by default?

A. No, I did not.

Q. Did you ever authorize him to approve, or sign the Findings of Fact or that default decree?

A. Absolutely not. In the first place, I didn't know there was a default decree going on. In the second place, he wanted me to sign one of these other things, and when I refused, he said, well then let me sign it. I said, absolutely not. If anybody signs it, it will be me, and you're not. (Rec.2170-2171)

In any event, it is manifestly unjust to sanction Appellant for Mr. Kimball's duplicity and abandonment, or for bringing it to the trial court's attention.

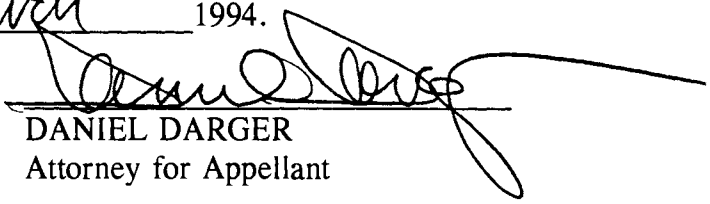
CONCLUSION

It is obvious from the record that Appellant was unjustly denied a fair hearing on her claim to custody of her child. Instead, the misdeeds of Appellee and Appellant's attorney, Mr. Kimball, resulted in a default decree of custody which allowed Appellee and his other wife, to whisk the child away to New Zealand. Since that time, Appellant has had to swim up the stream of Appellee's numerous and meritless, motions, petitions, personal injury actions and all else that a bottomless pocket and a willing attorney can devise to vex her.

This court should reverse the trial court's denial of Appellant's Rule 60(b) motion and remand this matter for a hearing on the issue of custody. Further, Appellant should be awarded attorney's fees for proceedings in the trial court and on appeal, pursuant to Rule 33,

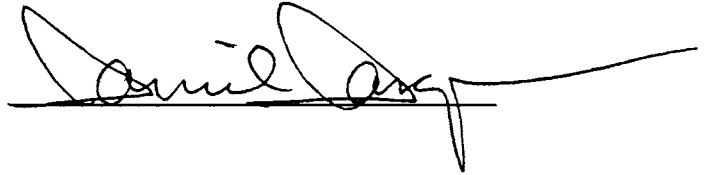
U.R.A.P. and Rule 11, U.R.C.P. for the numerous frivolous pleadings filed by Appellant since May, 1992.

DATED this 30th, day of March, 1994.


DANIEL DARGER
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant has been hand delivered to Mitchell R. Barker, 349 South 200 East, Suite 170, Salt Lake City, UT 84111, this 30th day of March, 1994.



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	:	
	:	MEMORANDUM IN SUPPORT
Plaintiff,	:	OF MOTION TO STRIKE
	:	
vs.	:	
	:	
	:	Civil No: 910903188 CS
KAREN LARIE THOMPSON, ET AL	:	
	:	
Defendant.	:	Judge: Hanson
	:	

COMES NOW, Plaintiff by and through her attorney Daniel Darger, Esq., and hereby submits the above-entitled Memorandum.

UNDISPUTED FACTS

1. On May 26, 1992, Defendant served upon Plaintiff's counsel a motion and memorandum to set aside the default custody decree entered in this matter. (Exhibit A)
2. On June 2, 1992, Defendant served upon Plaintiff's counsel an addendum to Defendant's memorandum in support of said motion. (Exhibit B)

3. On June 16, Plaintiff had failed to file a responsive memorandum and on said date, Plaintiff filed a notice to submit. (Exhibit C)

4. On June 17, 1992, Plaintiff filed an objection to the notice to submit. (Exhibit D)

5. On June 18, 1992, Plaintiff mailed to Defendant a response memorandum to Plaintiff's motion to set aside. (Exhibit E)

6. This Court has entered no order extending Plaintiff's time to respond nor has it entered an order staying the determination of Defendant's motion or otherwise delaying the decision on Plaintiff's motion.

7. On June 26, Defendant received Plaintiff's Amended Response (Exhibit F)

ARGUMENT

I. PLAINTIFF'S AMENDED RESPONSIVE MEMORANDUM IS UNTIMELY AND SHOULD BE STRICKEN

Rule 4-501 is clear in its requirement that a responsive pleading shall be filed and served within ten days after service. The use of the mandatory word "shall" indicates that strict compliance is required. Moore v. Schwendiman, 750 P.2d 204 (Utah App. 1988) (Mandatory requirements must be complied with precisely)

The appellate courts of Utah have consistently held that the procedural time requirements must be strictly complied with, unless a motion to extend the time is timely made, or upon motion and a showing of excusable neglect, as provided by Rule 6(b) U.R.C.P. The cites to these decisions are too numerous to include herewith considering the number of

different rules to which they relate; e.g. Rule 12 (answer), rule 52 and 59 (motion for new trial), appellate Rule 4, etc.

While the appellate courts in Utah have yet to rule on directly on this issue, the Court of Appeals has indicated in dicta that a responsive memorandum must be timely for it to be considered in ruling on a motion. In the case of Gillmore v. Cummings, 806 P.2d 1205 (Utah App 1991), the court reversed an order of summary judgment because it was entered prior to the expiration of the ten day period for filing a responsive memorandum. The court stated: "...the trial court should have considered such a response, if timely received, before ruling on the motion to strike and the summary judgment motion." (emphasis added, at page 1208)

Plaintiff was served with Defendant's motion on May 26, 1992 and the response would have been due on June 8th, with the three day mailing period included. Defendant served her addendum on Plaintiff on June 2, 1992 and Plaintiff waited an additional thirteen days after this date to file the notice to submit. Thus, Plaintiff had at least twenty one days in which to prepare a response, which he failed to do. Thus, the filing of an amended responsive memorandum thereafter, is untimely and this court should strike this pleading as not complying with Rule 4-501.

The alleged basis for Plaintiff's objection and the late filing of his memorandum and amendment should be of substantial concern to this court. As the Court will recall, it noted Defendant's motion to set aside while in chambers prior to the beginning of the evidentiary hearing on Defendant's motion to modify visitation. he Court commented that a decision of the motion to set aside may make the evidentiary hearing moot. However, Plaintiff states in

his objection that this Court "stated that Defendant's earlier motion, to modify the visitation provisions of the decree, should be determined before the instant motion is considered."

(Exhibit D) And in his memorandum, Plaintiff argues that his responsive memorandum is not yet due because the courts comment referred to above somehow had the effect of staying Defendant's motion to set aside, or tolling or extending the time within which Plaintiff is required to answer. As this court is aware, Plaintiff's position has absolutely no basis in fact or law.

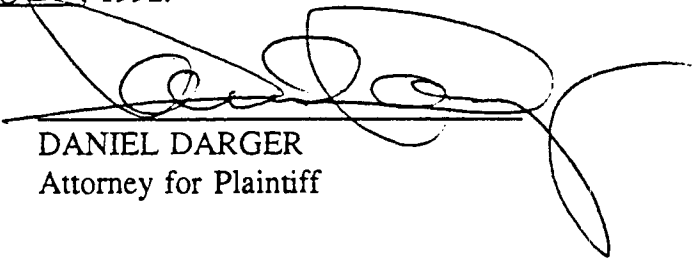
To begin with, it defies logic and reason as to why this court would stay the decision on a motion that may make a prior motion moot until the prior motion can be decided. If anything, reason would dictate that it be the other way around. More importantly, this Court entered no such order and no motion for such an order has been filed. Assuming the fact that Plaintiff's counsel is a licensed member of the Bar, he is presumed to know that the alteration of time requirements set by procedural rules can only be done upon stipulation or motion properly brought before the court, and not by the courts spontaneous comment in chambers. If he is not so aware, Rule 11 would require that he make inquiry. Instead of filing a Rule 6(b) motion, and providing a showing of excusable neglect, Plaintiff simply ignores the law and files his memorandum.

Of equal concern is Plaintiff's outright misrepresentation of the facts. The comment in chambers as recalled by this counsel was not as Plaintiff represents. However, Defendant will leave it to the court to construe its own comments. Suffice it to say that this does not amount to excusable neglect where, subsequent to the comment in chambers, Plaintiff was served with

Defendant's addendum to the memorandum, clearly indicating that Defendant had no illusions that her motion to set aside was not proceeding forward.

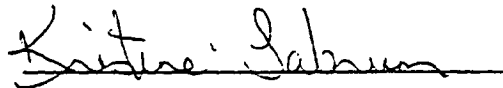
For the reasons above stated, Plaintiff respectfully request that this Court disregard Plaintiff's amended memorandum in ruling upon Plaintiff's motion to set aside the default decree. Further, this court should strike said pleadings from the record as untimely.

Dated this 26th day of June, 1992.


DANIEL DARGER
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum in Support of Motion to Strike has been mailed, postage prepaid to Mitchell R. Barker, 2870 South State Street, Salt Lake City, UT 84115-3692, this 26 day of June, 1992.



G10mot.pri

Daniel Darger (0815)
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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

Plaintiff,

vs.

KAREN LARIE THOMPSON, ET AL

Defendant

:
:
MOTION TO SET ASIDE
DEFAULT JUDGMENT

:
:
Civil No: 910903188 CS

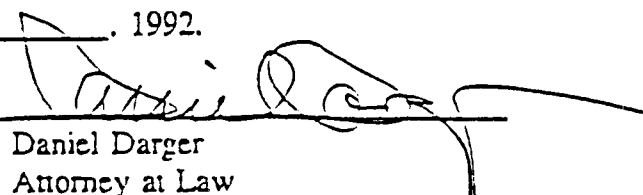
:
:
Judge: Hanson
:

Motion is hereby made for an order setting aside the default custody decree entered in the above matter by this Court on November 13, 1991. This motion is made pursuant to Rule 60 (b) (5) in that said judgment is void to the extent that it provides relief different in kind from or exceeding that specifically prayed for in plaintiff's complaint or to the extent that said decree goes beyond the actual decision of this Court.

Further, this motion is made pursuant to Rule 60 (b) (7) in that said decree is "improper, or illegal, and voidable." (P & B Land, Inc. v. Klungervik, 751 P.2nd 274 [Ut. Ct. App. 1988] at page 277)

Basis for this motion is more particularly set out in defendant's memorandum in support hereof, attached hereto and incorporated herein by reference.

Dated this 26th day of May, 1992.


Daniel Darger
Attorney at Law

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that a true and correct copy of the foregoing Motion has been mailed, postage prepaid to Mitchell R. Barker, 2870 South State Street, Salt Lake City, UT 84115-3692, this 26 day of May, 1992.

Glmot.pri



For the reasons above stated, defendant respectfully requests that this Court set aside the Findings of Fact, Conclusions of Law and Custody Decree previously entered.

Dated this 26th day of May, 1992.


DANIEL DARGER
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum has been mailed, postage prepaid to Mitchell R. Barker, 2870 South State Street, Salt Lake City, UT 84115-3692, this 26 day of May, 1992.



G10mot.pri

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

JOHN CARL PUTVIN	:	
Plaintiff,	:	ADDENDUM TO DEFENDANT'S
	:	MEMORANDUM IN SUPPORT
	:	OF MOTION TO SET ASIDE
	:	DEFAULT JUDGMENT
vs.	:	
	:	
KAREN LARIE THOMPSON, ET AL	:	
Defendant	:	Civil No: 910903188 CS
	:	
	:	Judge: Hanson

COMES NOW, Defendant by and through her attorney Daniel Darger, Esq., and hereby submits the above-entitled Memorandum.

UNDISPUTED FACTS

1. Defendant realleges and incorporates herein the facts set forth in her Memorandum in Support of Motion to Set Aside Default Judgment on file herein.

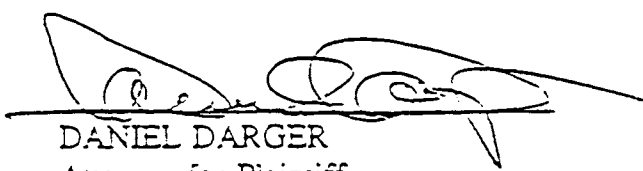
In other words:

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.2d 994 [Utah 1986] at page 994.)

This exactly the instant case. The findings merely recite that Plaintiff 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 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.

For the additional reasons above stated, Defendant respectfully request that this Court set aside the findings of fact, conclusions of law and custody decree heretofore entered.

Dated this 2nd day of June, 1992.


DANIEL DARGER
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum has been mailed, postage prepaid to Mitchell R. Barker, 2870 South State Street, Salt Lake City, UT 84115-3692, this 2 day of June, 1992.



Daniel Darger (0815)
Attorney for Defendant
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

Plaintiff,

vs.

KAREN LARJE THOMPSON

Defendant.

:

:

:

:

:

:

:

NOTICE TO SUBMIT

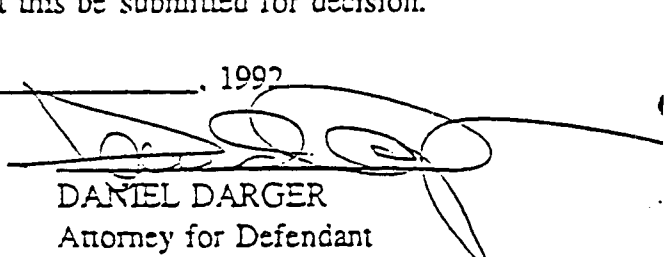
Civil No: 910903188 CS

Judge: Timothy R. Hanson

TO THE CLERK OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH:

PLEASE TAKE NOTICE, pursuant to Rule 4-501(1)(d) of the Utah Rules of Judicial
Administration, that all papers to be filed in support of Defendant's Motion to Set Aside Default
Judgment have been filed, and Defendant requests that this be submitted for decision.

DATED this 16th day of June, 1997


DANIEL DARGER
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice to Submit has been mailed, postage prepaid to Mitchell R. Barker, 2870 South State Street, Salt Lake City, Utah 84115, this 16 day of June, 1992.

Kristine Johnson

Mitchell R. Barker, #4530
Attorney for Defendant
2870 South State Street
Salt Lake City, Utah 84115-3692
Telephone (801) 486-9638

THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH

JOHN CARL PUTVIN, Plaintiffs, vs. KAREN LARIE THOMPSON, et al., Defendants.	OBJECTION TO DEFENDANT'S NOTICE TO SUBMIT Civil No. 910903188CS Judge Hanson
---	---

Plaintiff John Carl Putvin ("John") comes now and respectfully objects to the "Notice to Submit" filed by defendant Karen Thompson ("Karen") on or about June 16, 1992. The Notice is premature and contrary to the direction given by the Court.

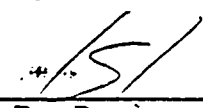
Defendant herself has filed a Petition to Change Custody in the action, which is still pending. An evidentiary hearing was held on that motion on May 27 and 28, 1992. The third day of the hearing on her motion is scheduled for July 7, 1992.

At the two day hearing, the Court acknowledged defendant's motion attacking the original decree, and stated that defendant's earlier motion, to modify the visitation provisions of the decree,

should be determined before the instant motion is considered.

For some reason Plaintiff's counsel has no copy of defendant's memorandum in its files. On this date the undersigned has obtained a copy of the memorandum from the office of defense counsel. In the event the Court desires briefing of the matter now, the plaintiff should be permitted an opportunity to brief this very serious matter prior to submission for decision.

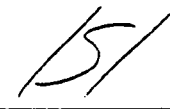
Respectfully submitted this 17th day of June, 1992.



Mitchell R. Barker
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing to be mailed to Daniel Darger, Esq., on this 17th day of June, 1992, at 100 Commercial Club Building, 32 Exchange Place, Salt Lake City, Utah 84111.



Mitchell R. Barker

EXHIBIT E

Mitchell R. Barker, #4530
Attorney for Defendant
2870 South State Street
Salt Lake City, Utah 84115-3692
Telephone (801) 486-9638

THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH

JOHN CARL PUTVIN, Plaintiffs, vs. KAREN LARIE THOMPSON, et al., Defendants.	RESPONSE TO DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT Civil No. 910903188CS Judge Hanson
---	---

Plaintiff John Carl Putvin ("Putvin") comes now and responds as follows to the "Motion to Set Aside Default Judgment" filed by defendant Karen Thompson ("Thompson").

INTRODUCTION

Findings of Fact, Conclusions of Law and a Decree were entered by the Court only after defense counsel agreed to them, and then approved them by his signature. Even if her ninety day period within which to ask 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.

Decree. What she really seeks is a modification of the decree, without following Rule 6-404, Utah Code of Jud. Admin., without showing changed circumstances and without following the clear procedural requirements and pre-conditions contained in the Decree. Par. 5. Since Thompson failed to appeal, she must move against the Decree by way of a petition to modify, showing changed circumstances. *Anderson v. Anderson*, 12 Utah 2d. 36, 368 P.2d 264 (1962).

Respectfully submitted this 18th day of June, 1992.



Mitchell R. Barker
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on or about this eighteenth day of June, 1992, I mailed a copy of the foregoing to Daniel Darger, Esq., 100 Commercial Club Building, 32 Exchange Place, Salt Lake City, Utah 84111.



Mitchell R. Barker

Mitchell R. Barker, #4530
Attorney for Defendant
2870 South State Street
Salt Lake City, Utah 84115-3692
Telephone (801) 486-9638

THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH

JOHN CARL PUTVIN, Plaintiffs, vs. KAREN LARIE THOMPSON, et al., Defendants.	AMENDED RESPONSE TO MOTION TO SET ASIDE DEFAULT JUDGMENT Civil No. 910903188CS Judge Hanson
---	---

Plaintiff John Carl Putvin ("Putvin") comes now and responds as follows to the "Motion to Set Aside Default Judgment" filed by defendant Karen Thompson ("Thompson").

INTRODUCTION

Findings of Fact, Conclusions of Law and a Decree were entered by the Court only after defense counsel agreed to them, and then approved them by his signature. Even if her ninety day period within which to ask 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.

This response memorandum is actually not yet due. During the

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).

CONCLUSION

Thompson has no basis for relief from her voluntarily entered Decree. What she really seeks is a modification, without following Rule 6-404, Utah Code of Jud. Admin., without showing changed circumstances and without following the clear procedure and pre-conditions in the Decree. Par. 5. Since Thompson failed to appeal, she must move against the Decree by way of 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.

Respectfully submitted this 18th day of June, 1992.



Mitchell R. Barker
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on or about this eighteenth day of June, 1992, I mailed a copy of the foregoing to Daniel Darger, Esq., 100 Commercial Club Building, 32 Exchange Place, Salt Lake City, Utah 84111.



Mitchell R. Barker

he had purchased the panties worn by E. in the picture. Mrs. Workman corroborated, testifying that she did not remember the picture being taken and that she had never seen the picture or the panties before. Mr. Workman testified that he could not remember the picture being taken. Even though defendants knew that Kelly had behaved inappropriately with E., much of the inappropriate behavior that they knew about occurred in 1987 and 1988 and the photograph was taken in 1986. Moreover, any knowledge of inappropriate behavior does not go to whether they knew the photo was being taken, nor at what angle and focus. Further, while Kelly did testify to sexually abusing E., he never testified to being sexually aroused by the photo in question nor of taking or possessing it for the purpose of being aroused, nor of telling defendants that the photo aroused him.

In short, no evidence supports a conclusion that defendants knew that E.'s buttocks were only partially covered moments before the photo was taken, that they knowingly allowed Kelly to take or possess the photo, or that they knew the photo was taken or possessed by Kelly for the purpose of sexually arousing him. The State therefore failed to present any evidence on the intent element of the offense charged. Thus, the judge was justified in arresting the judgment on the basis that the facts proved did not constitute an offense.

OBSTRUCTION OF JUSTICE

[5] The State charged Mrs. Workman with obstruction of justice in violation of Utah Code Ann. § 76-8-306.⁴ The requisite criminal intent is "with intent to hinder, prevent, or delay the discovery, apprehension, prosecution, conviction, or punishment of another for the commission of a crime...."

4. The information charging Mrs. Workman with violation of Utah Code Ann. § 76-8-306 charges as follows:

That on or about September, 1985 to August, 1989, at the place aforesaid [Layton], the defendants, as parties, with intent to hinder, prevent, or delay the discovery, apprehension, prosecution, conviction or punishment of an-

Again, where either a trial or an appellate court, substitutes its judgment for that of the jury, the verdict must be based on evidence "so inherently improbable that no reasonable mind could believe it." *State v. Myers*, 606 P.2d 260, 253 (Utah 1980) (Wilkins, J. concurring) (citations omitted). Under such circumstances, an arrest of judgment is appropriate.

The State claims that Mrs. Workman obstructed justice because she knew that Kelly was sexually abusing and exploiting E. and she deliberately withheld this information from the police until after they contacted her. The specific evidence relied on by the State is Mrs. Workman's knowledge that Kelly sent bras to E. in late 1987 or early 1988, her receipt of the telephone call about the pool incident in the summer of 1988, Kelly's statement that he wanted to marry E. made in 1987, and the period of daily long distance telephone calls for which there is no date. The State further claims that Mrs. Workman was motivated to obstruct justice because she shared with Kelly a joint account into which he deposited hundreds of dollars.

Mrs. Workman testified, and Kelly corroborated that she handled each incident as it came up. Each time, she reprimanded Kelly, informed him of the rules of her household and warned him not to do it again. Kelly testified that he concealed his abuse from the Workmans. In April 1988, when the police informed Mrs. Workman that Kelly was under investigation, she readily provided the police with whatever evidence and information they requested. In fact, it was Mrs. Workman who, at the request of the police, searched her daughters' bedrooms, found the lingerie and the photographs and turned them over to the police. Both Kelly and Mrs. Workman testified that the funds in the account were to pay for skating lessons for E., that Mrs. Workman never knew how much money

either for the commission of a crime did provide the offender a means for avoiding discovery or apprehension, obstruct by deception anyone from performing an act that might lead to discovery, apprehension, prosecution or conviction of a person, or conceal, alter or destroy physical evidence.

was in the account, and that she made only one withdrawal of eighty-five dollars. Finally, these incidents occurred over a two and a half year period, during which time Mrs. Workman was involved with the myriad tasks of running a household of thirteen to fourteen people plus guests.

We agree with the trial court that the evidence is inherently improbable such that a reasonable mind could not conclude that in 1986 and 1987 Mrs. Workman was aware that Kelly was sexually exploiting E. and that thereafter she helped him conceal the crime until April 1988. Further, it is inherently improbable that, even if she were aware of the abuse, the joint bank account would have motivated Mrs. Workman to conceal Kelly's abuse of her daughter. We therefore find that the trial court was justified in arresting judgment against Mrs. Workman because the facts proved did not support the offense charged.

Affirmed.

BENCH and GREENWOOD, JJ., concur.



Charles F. GILLMOR, Jr., Plaintiff and Appellant,

v.

Velgh CUMMINGS, Jeffrey K. Garlick, Janet E. Garlick, Peter Swauer, W. Allan Pelton, Timber Lakes Corporation, a Utah corporation, Valley Bank and Trust Company as trustee for the W. Allan Pelton Trust and for John Does 1 through 48, Defendants and Appellees.

No. 890562-CA.

Court of Appeals of Utah.

Feb. 22, 1991.

Boundary dispute was brought, alleging, inter alia, unlawful detainer, trespass
Utah App. 802 809 P.2d - 11

and conversion. The Third District Court Summit County, J. Dennis Frederick, J. granted summary judgment for defendants, and appeal was taken. The Court of Appeals, Greenwood, J., held that trial court improperly granted summary judgment prior to time in which plaintiff was entitled to file response to defendants' motion to strike portions of his affidavit opposing summary judgment.

Reversed and remanded.

Judgment 6-186

Trial court improperly granted summary judgment prior to time in which nonmovant was entitled to file response to movants' motion to strike portions of his affidavit opposing summary judgment. Judicial Administration Rule 4-601(1)(b).

D. Gilbert Athay (argued), Salt Lake City, for plaintiff and appellant.

Bruce A. Maak, Michael M. Later (argued), Salt Lake City, for defendants and respondents Garlick, Pelton & Valley Bank.

Lowell V. Summerhays, Murray, for defendants and respondents Timberlake.

Dennis M. Antill, Salt Lake City, for defendant and respondent Valley Bank.

Before BENCH, BILLINGS and GREENWOOD, JJ.

OPINION

GREENWOOD, Judge:

Appellant Charles F. Gillmor, Jr. (Gillmor) appeals the grant of summary judgment in favor of appellees Jeffrey K. and Janet E. Garlick (the Garlicks), and W. Allan Pelton and Valley Bank and Trust Company as trustee for the W. Allan Pelton Trust (Pelton). We conclude that the summary judgment was granted prematurely because Gillmor was not given adequate time to respond to appellees' motion to strike portions of his affidavit opposing summary judgment. Therefore, we reverse.

This dispute involves neighboring parcels of land in Summit County. Old Ranch Road separates the land occupied by Appellees Garlicks and Pelton, to the west, from that occupied by Gilmor, to the east. In October 1987, Gilmor filed a complaint alleging, in effect, that the record boundary of his property actually extends across Old Ranch Road, overlapping much of the property occupied by appellees. He sought relief under theories of unlawful detainer, trespass, and conversion, among others.

Appellees denied Gilmor's allegation, asserting that under the property descriptions in the relevant warranty deeds to all three parcels, Old Ranch Road forms the record boundary between their land and Gilmor's. Appellees also asserted that even if Gilmor's allegation about the property overlap is correct, they had become the owners of the disputed land through adverse possession. In November 1989, appellees moved for partial summary judgment on their adverse possession claim.

The summary judgment motion was accompanied by affidavits of the Garlicks and Pelton, as well as that of the Garlicks' grantor, establishing the elements of adverse possession; namely, continuous occupation of the land, with payment of all taxes thereon, for seven years. Utah Code Ann. §§ 78-12-12 and -12.1 (1987). Copies of property tax receipts for the land occupied by appellees, going back the requisite seven years from October 1987, were attached to the affidavits. Certified copies of Summit County tax plats were also submitted. The plats identify the land occupied by appellees by the same identification numbers shown on their tax receipts. The plats also show Old Ranch Road as the boundary between land taxed to appellees and that taxed to Gilmor.

Responding to the summary judgment motion, Gilmor alleged that in 1986, he had paid the taxes on the Pelton parcel before Garlicks' grantor, thereby interrupting the necessary continuity of tax payments needed to establish adverse possession. See *Parsons v. Anderson*, 600 P.2d 535, 538

(Utah 1981). Gilmor submitted a copy of his 1986 property tax receipt, confirming the timing of his 1986 tax payment. However, Gilmor's tax receipt is not for taxes paid under appellees' tax identification numbers. Instead, it bears the identification number assigned to Gilmor on the tax plats, indicating that he is taxed only on land east of Old Ranch Road.

Gilmor also contested the continuous occupation element of the Garlicks' claim. He did this by stating in his affidavit that he had been unaware, prior to 1980, of fence rebuilding that the Garlicks' grantor had completed in November 1980. According to the affidavit of the Garlicks' grantor, no buildings appeared on the Garlick property until a barn was completed in November 1980; a home was completed and occupied in December 1981. Pelton, in his affidavit, stated that he had built a home on the land he occupies in 1976. Gilmor did not contest the continuous occupation element of Pelton's adverse possession claim.

The Garlicks and Pelton then filed a reply memorandum and a motion to strike five paragraphs of Gilmor's affidavit opposing summary judgment. Appellees argued that those paragraphs were not based on Gilmor's personal knowledge, and did not contain admissible evidence, as required by Rule 6(e), Utah Rules of Civil Procedure. The paragraphs included Gilmor's claim that he had paid taxes on the Garlick and Pelton property, and his claim that he had been unaware of fencing changes on the Garlick property before 1980. Appellees' reply memorandum and motion to strike were filed on January 12, 1989. On January 19, 1989, by minute entry, the trial court granted the motion to strike and granted summary judgment in appellees' favor. There was no hearing on either the motion for summary judgment or the motion to strike.

On January 25, 1989, Gilmor filed a "motion to reconsider" the summary judgment. The primary ground for the motion was Gilmor's assertion that "there is a genuine issue of fact as to where the Garlick and Pelton homes are located." However, Gil-

more also noted that the court had not given him ten days to respond to appellees' motion to strike, as provided by Utah Code Jud. Admin. 4-501(X)(b). Gilmor filed a second affidavit with his motion to reconsider, modifying the stricken paragraphs of his first affidavit to claim personal knowledge of the facts alleged therein. In this affidavit, Gilmor also alleged, for the first time, that Old Ranch Road, identified in its original warranty deed as the boundary between his property and that of appellees, had been moved "at least twice" since the 1978 execution of that deed, most recently in 1987. Gilmor also filed an affidavit of his surveyor, James West. West stated that he had surveyed Gilmor's land in August 1987, and had determined that Gilmor's property overlapped with that occupied by appellees. A map of the Gilmor property, drawn from West's survey, was attached to West's affidavit.

The Garlicks and Pelton responded to Gilmor's motion to reconsider on February 7, 1989. In their response memorandum, appellees contested Gilmor's and West's assertions that Gilmor's property extended across Old Ranch Road, arguing that West's survey improperly relied on a metes and bounds description of Gilmor's property, instead of the warranty deed description in Gilmor's chain of title, describing the road as the boundary.

Under Utah Code Jud. Admin. 4-501(X)(c), Gilmor had five days, as the moving party, to file a reply to appellees' memorandum. The trial court did not wait five days, however, but denied Gilmor's motion to reconsider.

Gilmor correctly claims that there is a disputed issue of fact concerning the location of the record boundary between his property and that of appellees, as it reflected in his affidavit and those of the surveyor. This issue, however, is not material with respect to the question of whether appellees have satisfied the requisite ground for adverse possession, which was the issue. Indeed, the summary judgment motion starts with the assumption that the Garlicks and Pelton do in fact occupy property to which Gilmor holds record title. The true location of adverse possession has no bearing on the adverse possession claim. However, in the facts, they must address Gilmor's boundary line claim.

more also noted that the court had not given him ten days to respond to appellees' motion to strike, as provided by Utah Code Jud. Admin. 4-501(X)(b). Gilmor filed a second affidavit with his motion to reconsider, modifying the stricken paragraphs of his first affidavit to claim personal knowledge of the facts alleged therein. In this affidavit, Gilmor also alleged, for the first time, that Old Ranch Road, identified in its original warranty deed as the boundary between his property and that of appellees, had been moved "at least twice" since the 1978 execution of that deed, most recently in 1987. Gilmor also filed an affidavit of his surveyor, James West. West stated that he had surveyed Gilmor's land in August 1987, and had determined that Gilmor's property overlapped with that occupied by appellees. A map of the Gilmor property, drawn from West's survey, was attached to West's affidavit.

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ISSUES

Gilmor raises two issues on appeal. First, he contends that there is a genuine dispute as to the true location of the boundary between Gilmor's property and that of appellees.¹ His second contention is that there is a material dispute as to whether appellees satisfied the tax payment element for adverse possession of the property they now occupy.²

1. Utah Code Ann. § 78-12-12 (1987) requires continuous occupation and payment of taxes on land adversely claimed:

In no case shall adverse possession be claimed established under the provisions of any section of this code, unless it shall be shown that the land had been occupied and claimed for the period of seven years continuously, and that the party, his predecessor and his heirs and assigns upon such land according to law.

Gilmor's memoranda and affidavits apparently dispute both the seven year continuous occupation and tax payment for the Garlicks and/or Pelton.

We reverse because of procedural error, and not on either issue Gillmor argues on appeal.³ Therefore, we do not address the substantive issues Gillmor presents.

ANALYSIS

Procedural Error

Appellees' motion to strike parts of Gillmor's first affidavit was based on Utah R Civ.P. 56(e). That rule provides that in a summary judgment motion, "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The motion to strike was filed simultaneously with, but separately from, appellees' reply memorandum supporting their underlying summary judgment motion.

Because appellees' Rule 56(e) objection to Gillmor's first affidavit was framed as a separate, written motion to strike, Gillmor should have been given ten days to respond, as prescribed by Utah Code Jud Admin. 4-501(1)(b). Additionally, because the motion was served on Gillmor by mail, Utah R Civ.P. 6(e) entitled him to an additional three days. Therefore, because the motion to strike was served on January 12, 1989, Gillmor should have been given until January 25 to respond.

Gillmor could have responded to the motion to strike by supplementing his affidavit to meet Rule 56(e) standards. Utah R Civ.P. 56(e) (court may permit party to summary judgment motion to supplement affidavits with depositions, answers to interrogatories, or further affidavits). Because summary judgment is appropriate only when it is clear that no disputed issues of material fact exist, we believe that Gillmor should have been allowed to respond to the motion in this fashion, and that the trial court should have considered such a

3. Although Gillmor did not include procedural error as a basis for appeal in his brief, he did argue the issue before the trial court. We consider the procedural issue on appeal for practical reasons: we are unable to determine from the record before us what the court actually considered in granting the summary judgment

response, if timely received, before ruling on the motion to strike and the summary judgment motion. It was error, however, to rule on the motions on January 19, six days before Gillmor's time to respond to the motion to strike had expired.

Gillmor's motion to reconsider, and the affidavits filed with that motion, were filed on January 25, 1989. Under the combined operation of Utah Code Jud Admin. 4-501(1)(b) and Utah R Civ.P. 6(e), these materials would have been timely if they had been submitted as a response to appellees' motion to strike. Gillmor's motion to reconsider also directed the trial court's attention to the prematurity of the summary judgment under Rule 4-501(1)(b). At that point, the trial court should have corrected the procedural problem with its summary judgment ruling by reconsidering that ruling in light of Gillmor's January 25 affidavits. However, the record does not reveal whether the trial court denied the motion to reconsider upon study of Gillmor's January 25 affidavits or, in denying the motion to reconsider, disregarded those affidavits altogether.

Because the trial court granted summary judgment prematurely under the applicable procedural rules, and because nothing in the record indicates that the court corrected its procedural error when that error was called to its attention, the summary judgment is set aside. See *Graco Fishing & Rental Tools, Inc. v. Ironwood Exploration, Inc.*, 735 P.2d 62, 62-63 (Utah 1987); *K.O. v. Denison*, 748 P.2d 688, 691 (Utah Ct.App.1988). We reverse and remand to the trial court for proceedings consistent with this opinion. Each party shall pay his or its own costs.

BENCH and BILLINGS, JJ., concur.



and denying the motion for reconsideration. This is similar to those cases where we remand for findings because we are unable to discern from the record how the court resolved material issues. See *Acton v. Delian*, 737 P.2d 996, 999 (Utah 1987); *State v. Lovgren*, 798 P.2d 767, 770-71 (Utah Ct.App.1990).

Walter James HOWELL, Plaintiff
and Appellee,

v.

Barbara Joyce HOWELL, Defendant
and Appellant.

No. 890596-CA.

Court of Appeals of Utah.

Feb. 28, 1991.

Divorce was sought. The Third District Court, Salt Lake County, Frank G. Noel, J., granted divorce, awarded alimony, and divided property. Former wife appealed. The Court of Appeals, Greenwood, J., held that: (1) trial court erroneously looked to pre-separation standard of living in setting alimony and should have considered standard of living during marriage up to time of trial approximately two years after separation; (2) monthly alimony award was inadequate to equalize parties' standard of living at time of divorce; and (3) trial court could refuse to speculate about hypothetical future tax consequences of property division pursuant to divorce.

Affirmed in part, reversed in part, and remanded.

Bench, J., concurred in part, dissented in part, and filed opinion.

1. Divorce ¶-237

Alimony was erroneously based on pre-separation standard of living and should have been based on standard of living during the marriage up to time of divorce trial about two years after separation; during that two-year period, husband's income doubled because another airline purchased husband's employer, and husband's ability to take advantage of that change in part resulted from perseverance during lean times.

2. Divorce ¶-253(3)

Value of marital property is determined as of time of divorce decree or at trial, but courts can, in exercise of their equitable powers, use different date, such

as date of separation, if one party has acted obstructively.

3. Divorce ¶-237

Determining standard of living in order to set alimony after divorce is fact sensitive, subjective task and is not determined by actual expenses alone.

4. Divorce ¶-235

Trial courts have discretion to determine standard of living which existed during marriage after consideration of relevant facts and equitable principles.

5. Divorce ¶-237

Trial courts must consider the following factors in setting alimony after divorce: financial conditions and needs of recipient spouse, recipient's ability to produce income, and ability of payor spouse to provide support.

6. Divorce ¶-210(2)

Trial court setting alimony after divorce should first determine financial needs and resources of both parties and should set alimony as permitted by those parameters to approximate parties' standard of living during marriage as closely as possible.

7. Divorce ¶-210(2)

If payor spouse's resources are adequate, alimony following divorce need not be limited to provide for only basic needs, but should also consider recipient spouse's station in life.

8. Divorce ¶-239

Trial court setting alimony after divorce must make findings on all material issues.

9. Divorce ¶-239, 286(9)

Trial court's failure to make findings on all issues material to setting alimony after divorce constitutes reversible error, unless pertinent facts in record are clear, uncontroverted, and capable of supporting only finding in favor of judgment.

10. Divorce ¶-210(1)

Monthly alimony award of \$1,800 was inadequate to equalize abilities of former wife and former husband to go forward