

1993

Michael R. Barker (In His Proper Person) v. Laura
Beth (Barker) McGillivray and the State of Utah,
Department of Human Services : Reply Brief

Utah Court of Appeals

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Michael R. Barker; In His Proper Person.

Paul Graf; Assistant Attorney General.

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IN THE UTAH COURT OF APPEALS

MICHAEL R. BARKER)	RESPONSE TO
(In His Proper Person))	APPELLEE'S BRIEF
Defendant/Appellant,)	
vs.)	
Laura Beth (Barker) McGillivray)	
and the State of Utah,)	Civil No. 930587-CA
Department of Human Services)	(Civil No. 9085)
Plaintiff/Appellee)	Priority No. 4

RESPONSE TO APPELLEE'S BRIEF

ON APPEAL FROM THE ENTIRE JUDGEMENT OF THE
6TH DISTRICT COURT FOR SANPETE COUNTY
STATE OF UTAH
HON. JUDGE LOUIS TERVORT

**UTAH COURT OF APPEALS
BRIEF**

UTAH
F

Michael R. Barker
In His Proper Person
C/O P.O. Box 142
Santa Clara, Utah

.A.J.
DOCKET NO. 930587

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IN BEHALF OF
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AND THE STATE OF UTAH,
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FILED

SEP 27 1994

COURT OF APPEALS

TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
<u>JURISDICTION OF THE COURT.</u>	ii
<u>STATEMENT OF ISSUES AND STANDARD OF REVIEW</u>	ii
<u>STATEMENT OF THE CASE</u>	1
<u>STATEMENT OF FACTS</u>	1
<u>SUMMARY OF THE ARGUMENT</u>	1
ARGUMENTS OF CASE	3
POINT I	
APPELLEE'S DO NOT HAVE JURISDICTION OVER THE PERSON OF MR. BARKER AND ARE NOT AUTHORIZED TO COLLECT MONEY WHEN APPELLANT IS UNABLE TO PAY	3
POINT II	
THE TRIAL COURT DID NOT MAKE SPECIFIC FINDINGS AND DID NOT PROPERLY REVIEW THE FACTS IN REFUSING TO MODIFY APPELLANT'S PETITION.	6
POINT III	
THE TRIAL COURT HAS NOT YET ACTED UPON A RELIEF FROM JUDGMENT AND ORDER	13
POINT IV	
TRIAL COURT'S ORDER FOR CONTEMPT IS DURING THE SAME TIME PERIOD OF A PRIOR COURT ORDER WHEREIN THE CONTEMPT WAS PURGED.	13
POINT V	
APPELLEE'S NEW ACTION THROUGH THE SOCIAL SECURITY ACT GIVES THEM NO JURISDICTION OVER APPELLANT	14
POINT VI	
APPELLANT WAS ENTITLED TO THE SAME RIGHT TO COUNSEL PROVIDED BY THE DISTRICT COURT IN A PRIOR ACTION FOR THE SAME ALLEGED OFFENSE	15
POINT VII	
APPELLANT ALLEGES VIOLATION OF RULE 11 AND FALSIFICATION OF RECORD	22
<u>CONCLUSION AND PRAYER FOR RELIEF</u>	23

TABLE OF AUTHORITIES

CASES CITED

Carter v. Utah Power and Light, 800 P.2d 1095 (Utah 1990)	2
Clark v. Booth, 821 P.2d 1146 (1991)	23
Grover v. Grover, 839 P.2d 871	4, 10
Hill v. Hill, 869 P.2d (Utah App. 1994)	10
Howell v. War Finance Corporation, C.C.A. Ariz., 71 F.2d 237, 243. . . .	17
McWhirter v. Donaldson et al, 104 P. 731.	16

..... v.	(1980, Tenn App) 600 SW2d 242 10 Alr 4th 1260.	17
Openshaw v. Openshaw,	105 Utah 574, 578, 133 P.2d 528, 530.	24
Thomas v. Thomas,	569 P.2d 1119.	19
TransAmerica Cash Reserve, Inc., v. Dixie Power & Water, Inc.,	789 P.2d 24 (Utah 1990)	3
Von Hake v. Thomas,	759 P.2d 1162 (Utah 1988)	18, 19, 21, 22
White v. Boucher (1982, Minn)	322 NW2d 560, 34 Alr 4th 179.	17

CONSTITUTION REFERENCES

U.S. Constitution, 1st Amendment	7
U.S. Constitution, 14th Amendment	4, 5, 7, 12, 13, 15, 16, 18
Utah Constitution, Article 12, Section 18	9
Utah Constitution, Article 1, Section 24.	15
Utah Constitution, Article 1, Section 1	7

RULES CITED

Judicial Administration Rule 6-40	4
Utah Rules of Civil Proc., Rule 56 (c)	3
Utah Rules of Civil Proc., Rule 11.	22
Utah Rules of Civil Proc., Rule 60 (b) (6)	13

STATUTES CITED

J.C.A., 62a-1-101	1
J.C.A., 62A-9-104 (2) (b)	5
J.C.A., 63-1a-1	5
J.C.A., 63-1a-2,	5
J.C.C., 70A-1-207	15
J.C.A., 77-32-1	15
J.C.A., 77-32-2	15
J.C.A., 78-21-3	4
J.C.A., 78-32-3	18
J.C.A., 78-45-1	1
J.C.A., 78-45-7 (1)	4
J.C.A., 78-45-7.5 (d) iii.	8
J.C.A., 78-45-7.5 (4) (a)	13
J.C.A., 78-45-7.7 (5)	12
J.C.A., 78-45-9 (a)	16
J.C.A., 78-45-9 (1) (a) and (b)	16

OTHER AUTHORITIES

Black's Law Dictionary.	17
Title IV-A of the Social Security Act	14

JURISDICTION OF THE COURT

The Utah Supreme Courts has jurisdiction since this case was originally filed therein. Under the purview of the Utah Constitution, Article 1, Section 11 and U.C.A., 78-2-2 (3) (b) the Supreme Court has jurisdiction.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Appellee's attempt to reduced Appellant's brief to three categories issues to be ruled upon by the Appeals Courts based upon law

(statutes) only ignoring the facts both of the Appellant's brief. This case is a question of FACT and law. That fact and law is a mixture of State Statutes, Utah State Constitution, Federal Statutes, and the United States Constitution.

Appellee relies upon Carter v. Utah Power and Light and Von Hake v. Thomas as the "standard of review" for addressing the law only. The application of these citings in this case is misplaced and erroneous. The analysis of these cases are contained herein. Appellant's standard of review is (among others) U.C.A., 78-21-3, Court to decide questions of law.

" All questions, of law, including the admissability of evidence, the facts preliminary to such admission, the construction of statutes and other writings, and the application of the rules of evidence are to be decided by the court and all discussion of law addressed to it. Moreover, facts are in controversy as well as violation of Mr. Barker's constitutional rights along with conflicting statutes and must be addressed.

STATEMENT OF THE CASE

This is an appeal from a contempt of court and judgement of Appellant being an absconding debtor to avoid child support payments.

STATEMENT OF FACTS

Same as Appellant's Brief.

SUMMARY OF THE ARGUMENT

Mr. Barker was erroneously found to be an absconding debtor and incarcerated. After explaining to the court his legal duty to his current (second) family and children Mr. Barker was informed by the court that the first and primary obligation was to pay for the welfare debt of the first (welfare) family and that the others were secondary and that his new family did not constitute a material change of circumstances.

This action was brought about through the efforts of the State of Utah, Department of Human Services utilizing primarily the statutes, or sections thereof, of the "Utah Human Services Code", U.C.A., 62a-1-101 and the "Unified Civil Liability for Support Act", U.C.A., 78-45-1.

The second family is clearly being relegated to "second or third class" citizens with the first "welfare" family having first call on the financial resources of Mr. Barker. In Fact, once a pay order is initially set for the "welfare" family the second or subsequent "nonwelfare" family cannot request its rights for equal protection and support of their father; i.e., the payments to the "welfare" family can never be adjusted downward to meet the growing needs and requirements of the second family. Any additional children will forever be relegated to a second rate subservient position to the first "welfare" family.

Through these statutes Mr. Barker and his children have and are being deprived of many rights and constitutional guarantees. These statutes must

be addressed and declared unconstitutional and the rights of Mr. Barker and all of his family restored.

Mr. Barker, in fact and law, understands very well the Utah State child support enforcement laws and procedures. How these child support laws (1) conflict with and contradict other Utah State Statutes and "administrative procedures"; (2) conflict with and attempt to contradict the Utah State Constitution; (3) conflict with and contradict superior federal statutes and citings; and (4) conflict the United States Constitution.

Appellee's argue that Mr. Barker's arguments are within 3 categories and they attempt to limit the standard of review for two of the categories to only questions of law. That is not so. All of the categories have facts that are in controversy so the standard of review should include questions of facts and the law as well as Constitutional rights violations. The case, cited by Appellee, Carter v. Utah Power and Light, 800 P.2d 1095 (Utah 1990) does not apply to the instant matter since there was no claim to a constitutional rights deprivation in that case. The instant matter does, in fact, claim a gross constitutional deprivation of rights in many areas along with facts in controversy and instances of conflicts between the Utah statutes and the Utah Constitution.. For good cause shown in Appellant's court record a motion and demand is hereby made for a review of the facts and the law and there is no reason why a protective order should be issued or said facts should be withheld from either the public or the Appellate review courts.

The Utah Court of Appeals has, on the record, denied it's own Motion for Summary Judgment and Appellee's arguments for the same have been overcome by Appellant; thereby indicating that the facts as well as the law

will be reviewed. Therefore, the appellee's argument that the arguments are merely three categories to be adjudicated on the standard of law review alone is frivolous, in bad faith, and moot. "Summary Judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." TransAmerica Cash Reserve, Inc., v. Dixie Power & Water, Inc., 789 P.2d 24 (Utah 1990). Utah Rules of Civil Proc., Rule 56 (c).

Further sanctions, moreover, should ensue, since attorneys of record by their signature on their brief have shown a disregard to the rights of Mr. Barker while they continue to increase the cost of litigation, to confuse the real issue, to hide the facts, to take up more court time needlessly, and further cause Mr. Barker more time in defending which results in loss of income, increased litigation cost, time away from his children, his business, and increased stress causing a loss of health.

ARGUMENTS OF CASE

POINT 1

APPELLEE'S DO NOT HAVE JURISDICTION OVER THE PERSON OF MR. BARKER AND ARE NOT AUTHORIZED TO COLLECT MONEY WHEN APPELLANT IS UNABLE TO PAY

Mr. Barker does not participate in the Federal or State Social Security program therefore no benefits are available to him. Since Mr. Barker does not, in fact, use a State or Federal social security number (see Record page 71 line 2 through line 5.) the state cannot force him into a contract under State or Federal Title IV-A of the Social Security Act or Aid to Families with Dependant Children "AFDC" since they have no jurisdiction over his person. Ms. McGillivray was receiving an "AFDC" grant as the custodial parent of the children. (see Record page 13 line 12 through line 19. The lower court has indicated this is an appealable

issue. (See Record page 74 line 20 through 23).

The State of Utah has no jurisdiction over Mr. Barker's person with reference to the divorce since the state constructively frauded Mr. Barker when "They didn't tell him that a marriage license would give them jurisdiction over his children, as if he were a U.S. Constitution, 14th Amendment citizen..." (See Record page 81 line 9 through page 82 line 7).

The Sixth Judicial District Human Relations court does not have jurisdiction over the subject matter or person of Mr. Barker since Judge Tervort is a Juvenile Court Judge. No specific questions relating to support have been certified to the Human Relations Court. The children are not neglected or otherwise within the jurisdiction of the Juvenile Court under U.C.A., 78-3a-16.

The Appellee's argument that they can intervene on behalf of Laura McGillivray to collect six hundred dollars per month for the support of 4 children is not sound. The original divorce decree in the findings of fact and conclusions of law determined that the monthly amount of child support for 5 children would be 100 dollars per child or a total of 500 dollars but would automatically increase to 600 dollars per month when the oldest child reach age 18. See Record page 11 line 24 through page 12 line 8. Mr. Barker cannot be penalized by a provision of a divorce decree, for an automatic increase support money when his children leave the custodial parent's home, nor is it enforceable, unless there is a material change of circumstances pursuant to U.C.A., 78-45-7 (1) and Judicial Administration Rule 6-404. Grover v. Grover, 839 P.2d 871. Is the district court required to adhere to the statutes or is it above the law?

The facts are clear from the history of this case that Mr. Barker was unable to pay child support due to involuntary loss of employment on at

least three occasions. Furthermore the contract between Mr. Barker and McGillivray for support was acted upon for 5 years and included payment "in kind", ie., a house, car, food, clothing, etc. Said payment "in kind" was not allowed by the Office of Recovery services.

U.C.A., 62A-9-104 (2) (b) however, allows the State to provide in kind assistance to Ms. McGillivray. Even today Mr. Barker is denied the right to provide "in kind" assistance, he therefore invokes his right to equal protection under the law pursuant to U.S. Constitution, 14th Amendment which applies to the common law as well as statutory law.

If Appellee's can provide support "in kind" then Appellant should be equally protected in his right to do the same. Appellee attorneys know from the record, or should know, that Mr. Barker did not fail to provide payment "in kind" and financial support for 5 years until he was unable to do so due to involuntary circumstances. See Record page 100 line 8 through line 16.

There was no notification by the Utah Department of Human Services that the Barker children were on welfare. See Record page 109 line 17 through page 105 line 5. Pursuant to U.C.A., 63-1a-1 and more specifically U.C.A. 63-1a-2, which says: "...Upon default in payment of any account receivable, the entity responsible for collecting the account shall send a notice, by certified mail, to the debtor at the debtor's last known address....", notification is required. It is common knowledge that notification is required but the lower court Judge would not allow Mr. Barker to enter onto the record admission of fact that the Office of Recovery Services did not notify him. See Record page 15 line 25 through page 16 line 18. The lower court abused it's discretion and abused process. Appellee's have not overcome by argument or evidence, on the record or off

that they did not notice Mr. Barker.

Appellant was noticed by Appellee Ms. McGillivray's Affidavit that the children were, in fact, not on welfare from a time period prior to 1988. See Page 4, lines 15 through line 18. Affidavit of Laura (Barker) McGillivray in Support of Her Objection to Defendant's Motion for Restraining Order dated 19 October 1988.

POINT 2

THE TRIAL COURT DID NOT MAKE SPECIFIC FINDINGS AND DID NOT PROPERLY REVIEW THE FACTS IN REFUSING TO MODIFY APPELLANT'S PETITION

Appellee's argue on page 12 of their brief, or make it appear by distortion of the actual facts, that Mr. Barker voluntarily quit employment. That is not supported by the facts. Appellee's, on the same page, make it appear that Mr. Barker has no basis for his constitutional rights violation claims since he voluntarily accepted employment with lesser pay when there was no other employment available. The lower court arbitrarily and with abuse of process determined without any specific findings that Mr. Barker's employment at the Hecla mine was to be used as a standard for measuring historical earnings when, in fact, the specific employment was an overemployment situation and which was pointed out to the Judge. See Record page 120 line 3 through line 19.

Appellee's, in their excessive zeal to collect money for the State fail to exercise the common sense, inasmuch as they admit that the reason Mr. Barker was unemployed was due to cutbacks or layoffs. See Record page 116 line 5 through line 10. The facts are as pointed out on Record page 40, line 6 through line 11 and page 41 line 17 through line 21, that Mr. Barker was involuntarily laid off, due to a corporate bankruptcy on one occasion and on another occasion involuntarily lost his work contract due

to a plant shutdown. Immediately prior to that Appellee - Barker to loose a business placing him in considerable debt. See Record page 49 line 15 through page 50 line 2.

Due to a decline of economic conditions for mining and other work in the area Mr. Barker was preparing to change occupations at the time. See Record page 41 line 14 through line 16.

Appellee's argue that Mr. Barker's claim of medical injuries is contradictory. See Record page 116 line 5 through line 10. Mr. Barker has a back problem which he testified hiding from his employers, and which is aggravated by an old injury and therefore chose, at the time, an occupational change that allowed him to work around the injury, with the assistance of his new wife and family. See Record page 46 line 18 through page 47 line 21, Record page 50 line 21 through 25, Record page 58 line 8 through page 59 line 10, and Record page 103, line 1 through 17. Also see Exhibit- Chiropractors statement as mentioned on Record page 56 line 12 through page 57 line 19. There is no contradiction.

Since the State of Utah has, in the past paid all expenses for Ms. McGillivray to go to college for her occupational change; it is certainly reasonable that Mr. Barker can change his occupation when necessity requires, ie., no other work of a like nature was available in the area at the time. Mr. Barker certainly has Utah Constitution, Article 1, Section 1 right to life, which includes the right to work along with other rights stated in his Brief. Also a U.S. Constitutional, 1st Amendment right and a U.S. Constitution, 14th Amendment right to equal protection under the law is guaranteed. The facts are Mr. Barker bore the expense of his occupational change out of his own pocket while the taxpayers paid for Ms. McGillivray's. Mr. Barker had at the time, and has now, a Utah

Constitutional right to obtain employment, when there is no intent to intentionally avoid child support. The historical facts show that for 5 years Mr. Barker supported his family until he was unable to do so, in part due to legal actions of appellee's, ie., incarceration resulting in a loss of a business. Mr. Barker did not intend to avoid child support, nor is there any evidence or specific detailed findings on the record in arriving at that conclusion. See Findings of Facts and Conclusions of Law dated 16 July 1993, item number 14 in Findings and item number 7 in Conclusions, which simply say "Defendant is intentionally underemployed." See also item 16 which says " Defendant is underemployed of the purpose of avoiding his child support payments." His career change was simply, at the time, not making the money the state demanded. See Also Findings of Facts and Conclusions of Law dated 19 August 1993 and mailed 30 August 1993 item number 5 which says " The court finds that, in the trial on June 30, 1993, the Defendant, Mr. Michael Robert Barker, failed to support his minor children as per the order of this court and was, therefore, held in contempt of court and sentenced to 30 days in the Sanpete County Jail." Contempt is "criminal" in nature as explained in Point 6 below.

Why did the state of Utah impute income to Mr. Barker when he was making his career change in violation of the U.C.A., 78-45-7.5 (d) iii, since there is has not been established beyond a reasonable doubt that Mr. Barker's alleged intentional underemployment was for the purpose of avoiding child support? The lower court did not follow said statute and has abused it's discretion, and with abuse of process has denied Mr. Barker statutory and constitutional rights protection. Considering that Mr. Barker had a new growing family responsibility of a wife and 5 children to support it is not reasonable to suppose that he would work

for his own demise.

Mr. Barker had begun his farming career change prior to this action before the court and even prior to a prior court action in Judge Tibb's court in 1991. There are no arguments that rebut the facts that Mr. Barker was involuntarily unemployed through no fault of his own, or that Mr. Barker sought employment at the only other mine in the area but was unable to obtain employment, or that his last mining contract was an overemployment situation. The facts do not even point to the possibility that Mr. Barker was intentionally voluntarily unemployed. See Affidavit of Mr. Barker dated 9 July 1993, item number 5. Will Mr. Barker be denied his statutory and constitutional rights to change his career when no other work of a like nature was in the area? Appellee's argue that several other mining operations were and are available in the area. See Record page 118 line 7 through line 10 and Record page 119 line 5 through line 6. That is false. At the time there was only one gold mine which had merely initiated a limited start up operation. As was stated in Mr. Barker's Affidavit of Mr. Barker dated 9 July 1993, item number 5, at the post Judgment trial, there were 1500 applications for one job. Declining economic conditions at the time prevented Mr. Barker from obtaining employment and rather than go on the welfare dole Mr. Barker made a career change in an attempt to establish a well paying business in the St. George area.. In this particular occupational change one does not simply quit one day for higher paying employment. Farming to be successful requires a commitment to the long term not the 9am to 5pm that Appellee's enjoy at taxpayers expense. Utah Constitution, Article 12, Section 18, which was law at the time, says:

"Every person in Utah is free to obtain and enjoy employment whenever possible, and a person or corporation, or their agent, servant, or employee thereof, maliciously interfering or hindering in any way, with any person

from obtaining employment or from enjoying employment already obtained from any other corporation or person, shall be deemed guilty of a crime. The Legislature shall provide by law for the enforcement of this section."

Appellee's have interfered with Appellant's enjoying employment since as a direct result of contempt incarceration Appellant's wife who was unable to properly handle all the activities of the operation during that time has divorced, leaving Appellant without transportation, with two children of tender age, making it impossible to conduct the operation in the same way.

Appellee's Argument that Mr. Barker's financial situation had improved is simply not factual in light of the above. Appellee's go back five years, before Mr. Barker's change of circumstances, in disregard of his present career change, to determine his earning capacity. Appellee's cite Hill v. Hill, 869 P.2d (Utah App. 1994) in evaluating income. The trial court in "Hill" however, took into account husband's last three years of employment and his current employment. In the instant matter the last three years and Mr. Barker's current employment are for the time period during which he was continuously engaged in his farming career change. Moreover, unlike "Hill" who voluntarily quit a job, Mr. Barker was involuntarily terminated due to shutdowns due to corporate failure. "Hill" further accepted imputation of income as proper: Mr. Barker did not. In Grover v. Grover, 839 P.2d 871, 873 (Utah Ct. App. 1990) the court makes a determination of a financial situation of the obligor at the time. Appellee's argue however, that Mr. Barker's earning capacity should be based on a period 6 years earlier, at the time of his divorce, along with a recent past mining employment which was an overemployment situation. See Record page 117 line 2 through page 118 line 6. Mr. Barker had been farming for about 3 1/2 years prior to this instant matter, but Appellee attorney attempts to go back 6 years

beyond Mr. Barker's present situation simply because he had more money when his circumstances were different.

Appellee's attorney, Graf indicated on the record that a material change of circumstances for income had, in fact, taken place. See Record page 117 line 5 through 12 and page 118 line 3 through line 6. The lower court should not have imputed income to Mr. Barker and it has abused it's discretion. As stated elsewhere, income cannot be imputed when there is a career change. Furthermore, additional factors that go beyond the critical question of whether the drop in earnings was voluntary must be addressed. It will be found that during times of local or national business recession or depression people have, if they were fortunate, accepted work of a lesser pay. The issue is not simply whether or not said voluntary acceptance of work of lesser pay was by choice, but whether or not other work of a like nature was available. Mr. Barker prudently accepted work of a lower pay due to the unavailability of mining work at the time. At the time Mr. Barker was heavily in debt, in part caused by action of Appellee's having put him in jail. In the decision to do so he contemplated the providing for his new family while at the same time planing for the long term of doing the same for all his children by developing a business. Absolutely no evidence exists on the record that Mr. Barker had intent to avoid child support payments. See Record page 100 line 5 through 16. The finding of the lower court is clearly erroneous.

The facts are that a material change of circumstances did take place. Mr. Barker had remarried and was supporting a wife and 5 children prior to the beginning of the most recent 1991 and 1993 Orders to Appear and Show cause. See Record page 94 line 16 through page 95 line 15. The lower court

recognized the primary obligation of support for the change of circumstances for a new wife and two natural children on the record but then ruled to the contrary thereby abusing it's process. See Record page 97 line 3 through 5. Specific findings are not sufficiently detailed which justify the lower court arriving at it's conclusion. See Finding of Facts and Conclusions of Law dated 16 July 1993, item number 13 in Findings and item number 6 in Conclusions which simply say there has been no significant or material change of circumstances since the divorce. The findings of the lower court are clearly erroneous and with abuse of discretion. Appellee's attorney Graf indicated on the record that the law on the books required Mr. Barker to provide primary support for his stepchildren. See Record page 95 line 7 through 21.

Mr. Barker had also been farming for some time prior to the 1991 and most recent 1993 action. See Record page 39 line 7 through page 40 line 3. The lower court erred when it did not allow for the change of circumstances for Mr. Barker's new family including the stepchildren. Said change of circumstances were first plead in Judge Tibb's court in 1991. See Record page 21 line 8 through line 18. The change in circumstances should be allowed from the date it was first plead. See Record page 105 line 1 through page 106 line 4.

Appellee's are trying to force Mr. Barker into violating the equal protection clause of the U.S. Constitution, 14th Amendment when they try to invoke U.C.A., 78-45-7.7 (5) which in essence requires that Mr. Barker's children of his former marriage be supported with a greater money amount than his is able to provide for his children of a subsequent marriage; since the statute will not allow Mr. Barker's change of circumstances to decrease a child support award so that he can support his

children equally. The statutes, if they allow such a thing, conflict with the U.S. Constitution, 14th Amendment. Mr. Barker cannot be compelled to unequally support his children and violate the equal protection clause of the Constitution as well as other constitutional safeguards as stated in Appellant's Brief.

POINT 3

THE TRIAL COURT HAS NOT YET ACTED UPON A RELIEF FROM JUDGMENT AND ORDER

Appellee's ignore the fact that pursuant to Ut. R. or Civil Proc., Rule 60 (b) (6) Appellant filed a second Motion for Relief of Judgment and Order which was mailed to the court from jail on 24 July 1993 which was not acted upon. In paragraph 4 Mr Barker clarifies that his net income from self employment was difference by much less than the erroneous gross income appellee's allege. Appellee's attorney argued that Appellant's gross from his farming operation be calculated on not what U.C.A., 78-45-7.5 (4) (a) requires, namely gross income from a business shall be calculated by subtracting necessary expenses from gross receipts. The court never considered said motion or subsequent argument by both parties.

POINT 4

TRIAL COURT'S ORDER FOR CONTEMPT IS DURING THE SAME TIME PERIOD OF A PRIOR COURT ORDER WHEREIN THE CONTEMPT WAS PURGED

The previous judgment entered on 29 April 1991 required Mr. Barker to provide an accounting of his farming operation for six months. The six month accounting was provided to Judge Tibb's court which accounting was about six months within the time period from March 1991 to January 1993. It is obvious that the time periods overlap by six months during which time period Mr. Barker was purged of his contempt. Mr. Barker was found in contempt during the same time period for which he had purged the earlier

contempt. An adversary should not twice be vexed for the same cause of action". Felt v. Felt, 27 Utah 2d 103, 493 P.2d 620 (1972).

If the lower court in 1991 allowed a purging of the contempt charge which reflected a career change and an obvious change of circumstances and found no intent to avoid child support payments is it not, under the doctrine of res judicata, eligible for estoppel when the state of Utah brings up another contempt charge again two years later for the same thing involving only a different time but overlapping period?

POINT 5

APPELLEE'S NEW ACTION THROUGH THE SOCIAL SECURITY ACT GIVES THEM NO JURISDICTION OVER APPELLANT

Appellee's go to great length to ascertain that the instant matter is separate, since it is now the Department of Human Services bringing action, from all other actions. The Department of Human Services has paid funds authorized under Title IV-A of the Social Security Act. Mr. Barker does not participate in the Social Security scheme which has not been properly ratified by the 50 states comprising the United States of America and therefore, is not under the said jurisdiction. See Record page 71, line 2 through line 19.

The other issues of fact which Appellee's try to dismiss have to do with no jurisdiction over the person of Mr. Barker due to no contractual nexus existing as explained in Appellant's Brief. Also, the matter is res judicata since no action was taken by the lower court for about two years since the 1991 action wherein the contempt charge was allowed to be purged.

The fact is that Ms. McGillivray broke her original contract for support with Mr. Barker, ie., sold a nearly paid for home which the court

had specifically awarded so that the children would have a place --
thereby becoming voluntarily more welfare dependant, along with other
written contract provisions from the beginning of the couples original
Mexican divorce, and then entered into another contract with the Utah
State Department of Human Services. Mr. Barker has not entered the
jurisdiction of the Department of Human Services by contract under U.C.C.,
70A-1-207 or other applicable law and explicitly reserves all his rights.

The Utah State of Utah constructively frauded Mr. Barker when it did
not inform him that his children could be taken away from him and given to
another person having mere custody and therefore has no jurisdiction over
his person.

POINT 6

APPELLANT WAS ENTITLED TO THE SAME RIGHT TO COUNSEL PROVIDED BY THE DISTRICT COURT IN A PRIOR ACTION FOR THE SAME ALLEGED OFFENSE

First, Mr. Barker was not able to afford counsel nor was it appointed,
and he was further denied counsel in his first appeal by right pursuant
to U.C.A., 77-32-1 and U.C.A. 77-32-2 since his contempt was alleged to be
"civil" in nature. Appellee McGillivray however, was provided counsel for
to litigate not only what the Utah Department of Human Services claimed was
owed to that agency but also to litigate what she claimed was owed from a
prior court order. Mr. Barker's United States Constitution, 14th
Amendment right to equal protection under the law, in addition to Utah
Constitution, Article 1, Section 24 rights have been violated.

The lower court held repeatedly stated on the record that Appellee
attorney Graf was only trying to collect the money that the taxpayers had
paid through the Utah Department of Human Services to Ms. McGillivray. See

Record page 11 line 8 through line 16. Attorney Graf repeatedly argued that he and the Office of Recovery Services were trying to collect a prior court order of 600 hundred dollars per month. See Record page 13 line 8 through page 15 line 4. Also see the original Order to Appear and Show Cause. Mr. Barker was prevented by the lower court judge from finding out how much money the Utah State Department of Human Services actually paid Ms. McGillivray. See Record page 19 through page 20 line 16 and Record page 64 line 20 through page 65 line 10. The Utah State Department of Human Services, as seen from the above, is lumping the prior \$600 Dollar child support award into its original order and is even including the \$600 dollar amount into its internal accounting practices and attempting to obtain the entire amount irrespective of what that agency actually paid out; and further; they give no accounting as to what they actually paid out. In short that agency and attorney Graf are trying to collect for Ms. McGillivray a prior court ordered amount pursuant to U.C.A., 78-45-9 (1) (a) and (b) which say the attorney general or the county attorney represent the Office of Recovery Services to "... on behalf of the obligee, to enforce the obligee's right of support against the obligor."

U.C.A., 78-45-9 (a) is not legal and should be repealed. Mr. Barker is poor, and cannot afford an attorney, in part due to actions of Appellee's as shown on the record earlier, but he is denied equal protection under the law pursuant to the U.S. Constitution, 14th Amendment since he does not have the same right to counsel as Appellee Ms. McGillivray.

In McWhirter v. Donaldson et al, 104 P. 731 says:

"Under Comp. Laws 1907, Subsection 133, providing that no practicing attorney shall become (sic) surety in a suit in which he is engaged as attorney, attorneys at law cannot act in the dual capacity of surety and

attorney in the same action.

The Utah State Department of Human Services has attempted to act as a surety for Mr. Barker notwithstanding that the contract for support that Ms. McGillivray entered into with that agency is a different contract than she entered into with Mr. Barker for child support. Surety is defined, in part, in Black's Law Dictionary as "Everyone who incurs a liability in person or estate, for the benefit of another, without sharing in the consideration, stands in the position of a "surety," whatever may be the form of his obligation. Howell v. War Finance Corporation, C.C.A. Ariz., 71 F.2d 237, 243."

Notwithstanding that Mr. Barker maintains the fact that he has not entered into any contract with the Human Service agency and that he as a principal " has no right to control the conduct of the agent with respect to matters entrusted to the agent. This right of control is the primary or essential test of an agency relationship without which no agency exists and the same standard applies when the agency relationship is implied. " Nidiffer v. Clinchfield R. Co. (1980, Tenn App) 600 SW2d 242 10 Alr 4th 1260. "The principal-agent relationship results from the manifestation of consent by one person to another that the other shall act on the first person's behalf and subject to his control, and the other must consent so to act: whether the relationship exists is a question of fact and the party alleging the existence of the agency has the burden of proof." White v. Boucher (1982, Minn) 322 NW2d 560, 34 Alr 4th 179. This lack of contract is more fully explained in Appellant's Brief and relates to the Uniform Commercial Code and other applicable law.

Mr. Barker hereby motions the court for his rights Sua Sponte since the lower court actively sought to deny him his rights instead of holding them

Second, the court did not make specific findings of fact which meets the general rule of proving contempt. There is no clear and convincing evidence of intent to avoid child support in this civil matter which led to Appellants' contempt incarceration. Also Mr. Barker has been unable to obtain that portion of the record which is on the 10:00am tape number DR-76 and after 1360 on the tape, which relates to Judge Tervort making the comment "well that takes care of that." , thereby indicating that the contempt charge was purged. As is evidenced on the record the lower court and the Appellate Court did not follow the rules of appellate procedure so that the transcript, which was repeatedly requested, was not available to Mr. Barker pursuant to those rules. This portion was repeatedly requested verbally and by letters to Mr. Lidell, the court reporter.

The Appellee's attorney argued but did not present any evidence or witnesses testifying that Mr. Barker could confront as to alleged intentional underemployment for the purpose of avoiding child support. Nor did the lower court allow the right to assistance of counsel. Therefore Mr. Barker's due process rights were not provided by the lower court. U. S. Constitution, 14th Amendment, U.C.A., 78-32-3, as cited in Von Hake v. Thomas, 759 P.2d 1162 (Utah 1988).

In the prior same 1991 civil matter before Judge Tibb's District Court, counsel was provided to Mr. Barker because there was the threat of "body execution" or incarceration. The contempt order that Mr. Barker purged was civil in nature since there was a conditional provision whereby relief was obtained from the accounting given to the court by him. Von Hake v. Thomas, 759 P.2d 1162 (Utah 1988). Nevertheless, Judge Tibb's did properly appoint an attorney named Mr. Berry as counsel to Mr. Barker. See

Record page 106 line 23 through page 108 line 4. The reason for being -- should be obvious since at the beginning of adjudication by the court it could not determine, prior to its findings, whether or not the contempt would be classified "criminal" or "civil" in nature. Judge Tervort on the other hand gambled that Mr. Barker would not be held in "criminal" contempt in this civil matter, but lost, since the determinants for the supposed "criminal" contempt were present resulting in a denial of Mr. Barker's substantive right to counsel.

The primary determinant of whether an order for contempt is labeled civil or criminal is the trial court's purpose in entering the order. "A contempt order is criminal if its purpose is to vindicate the court's authority, as by punishing an individual for disobeying an order, even if the order arises from civil proceedings." Von Hake v. Thomas 759 P.2d 1162 (Utah 1988).

The 1993 instant matter, relating to contempt, is "criminal" in nature since the purpose of incarceration was to punish Mr. Barker for not having paid child support and it is fixed and unconditional. Von Hake v. Thomas, 759 P.2d 1162 (Utah 1988). See Findings of Facts and Conclusions of Law dated 16 July 1993 the Conclusion 11 and 12 which say: "11. Defendant should be held in contempt of court for failure to make the child support payments as ordered for the period from March 1, 1991, through January 31, 1993. 12. Defendant should serve 30 days in the Sanpete County jail as penalty for his judgment of contempt, said 30 days to begin immediately...." Judge Tervort has erred with abuse of discretion and abuse of process in denying Mr. Barker his right to counsel. See Record page 127 line 3 through line 5.

Looking at Thomas v. Thomas, 569 P.2d 1119 as cited in Von Hake v.

THOMAS 155 F.2d 1102 (Utah 1988), it is clear that all of the general elements justifying a civil non-support contempt order were not met in reference to Mr. Barker. Namely : (1) The person cited for contempt knew what was required, (2) that he had the ability to comply; and (3) that he willfully and intentionally failed to do so.

In reference to (1) above, Mr. Barker knew there was a support obligation from a prior court order he was unable to pay ,but he did not know, since he had not been noticed by the Utah Department of Human Services, that the state of Utah had paid "AFDC" money to Appellee McGillivray and that they were trying to collect it.

In reference to (2) above, the career change that Mr. Barker entered into prior to the instant matter by its very nature is not a career change that cannot be terminated in a short time. In otherwords, once an egg producer has his operation on a constant basis as Mr. Barker has done he cannot simply quit and loose several years effort in attempting to make in a profitable concern. Mr. Barker could not comply with the court order once he became committed, locked in, as it were, to the long term operation which was subsequent to his involuntary loss of work, as cited to the record above, and subsequent to his aggravated health condition. A new business usually does not show a profit for several years after it is established. See Record page 102 line 21 through 25, and Record 49 line 5 through page 50 line 2.

Mr. Barker's new career change, as is usual with new endeavors, was not making a profit at the time and he was unable to make payments. See Record page 33, line 10 through page 34 line 4. The court knew that he was involved in a career change and was unable to pay and there is no indication anywhere on the record that said career change was intentional

for the purpose of avoiding child support payments, which is a belief unsupported by any facts, without any investigation on the part of appellee's attorney.

In reference to (3) above, Mr. Barker did not refuse to pay. Mr. Barker did try to stipulate in Judge Tibb's court in 1991 that he would pay a small amount as he was able to but attorneys for the State refused. Mr. Barker also asked for more time to pay in 1993. See Record page 110 line 16 through 22, and Record page 112 line 3 through line 4.

Moreover, in the 1991 court's order Mr. Barker was allowed to purge the contempt order for the same alleged offense with no findings of intentional child support avoidance. Two years later the Utah State Department of Human Services brought up the same matter only for a different time period. The matter is res judicata.

There is no "clear and convincing" evidence on the record which is necessary in proving civil contempt nor are there any elements evidenced on the record which show "beyond a reasonable doubt" that Mr. Barker is underemployed for the purpose of avoiding child support. Von Hake v. Thomas, 759 P.2d 1162 (Utah 1988).

There certainly are no specific written findings of fact and conclusions of law for each substantive element in proving (1) knowing what was required, (2) having the ability to comply, (3) intentional failure or refusal to do so, (especially intent). The court has erred and abused it's discretion. Von Hake v. Thomas, 759 P.2d 1162 (unable to pay but incarcerated him any way and would not provide him with counsel.)

Based on the fact that there are: (1) facts in controversy which affect Mr. Barker's constitutional rights and, statutes which conflict with each other as well as with the Utah and United States Constitutions,

12, procedural protections were not provided and (3) the facts and findings do not satisfy substantive requirements the order of contempt is appealable. Von Hake v. Thomas 759 P.2d 1162 (Utah 1988).

Mr. Barker has suffered great nonrepairable harm as a result of his incarceration. His wife left him in part because of having to do all the work of the farming operation as well as the fear of having to do it again. Mr. Barker was left with no transportation with which to deliver his eggs or haul feed for his flock. He was left with two children of tender years, a one year old baby in diapers and a three year old to tend by himself. During the time of his incarceration the farming business deteriorated in that chickens were mismanaged and a significant egg production loss resulted due to his being absent. The mental and physical strain has resulted in a need to depend on neighbors in time of physical incapacity, and a subsequent reduction of laying hens has been necessary in order to physically do the work. For this Mr. Barker is asking an additional 100,000 thousand dollars in pecuniary and punitive damages. Appellee's attorney arguments are frivolous, and in bad faith.

The lower court denied Mr. Barker's right to stay his jail sentence due to its "strong feelings". See Record page 125 line 9 through page 125 line 14. The court has with abuse of discretion abused its process.

POINT 7

APPELLANT ALLEGES VIOLATION OF RULE 11 AND FALSIFICATION OF RECORD

Mr. Barker raised the issue of falsification of the record at the very beginning of the proceedings. See Record page 109 line 3 through line 16.

Sanctions under Utah Rules of Civil Proc., Rule 11 and award for damages should be imposed against Appellees since Appellant has been harmed and deprived of his constitutional rights to equal protection under the

law. In addition to the issues relating to sanctions being imposed in Appellant's Brief and Addendum to Brief other matters relating to sanctions are argued above.

As pertaining to Rule 11 in reference to Appellee Ms. McGillivray having an attorney to litigate her alleged arrears of child support by a prior divorce decree and monies allegedly owed the Department of Human Services: "This rule emphasizes an attorney's public duty as an officer of the court, as opposed to the attorney's private duty to represent a client's interest zealously. Clark v. Booth, 821 P.2d 1146 (1991). See Affidavit of Appellant dated 17 September 1994. Mr. Barker did not have the same right to counsel and without cost as Ms. McGillivray.

Attorneys for the Appellee's have with full knowledge, information and intent attempted to deprive Mr. Barker of his Utah and U.S. Constitutional rights as well as depriving him of his statutory rights and privileges. Evidence of the same, in addition to the arguments above, is found in the Conclusion to Appellee's Brief wherein they state: "The lower court also properly specifically outlined its findings of fact and conclusions of law based upon the record and the law." The obvious missing elements that were not properly and specifically ruled upon were the facts. The facts.

The lower court did not properly address the facts on the record and has abused its discretion and has also abused its' process.

CONCLUSION AND PRAYER FOR RELIEF

Mr. Barker Prays for the following relief:

1. That Mr. Barker's arguments should not be summarily rejected since Mr. Barker has continually demanded all of his rights which have been violated. The Appellate Court should adjudicate on the facts in controversy as well as issues of law and issues at law.

that Mr. Barker be awarded relief of a judgment which has allowed a vindictive or avaricious ex-wife, who refuses to work or cooperate, to place a burdensome accumulating debt for the purpose of harassing him so that he cannot engage in a career change or live a respectable existence. Careful review of the facts will prove that this case is, in the words of Utah Supreme Court Chief Justice Crockett, "subject to exceptions under particular circumstances." Openshaw v. Openshaw, 105 Utah 574, 578, 133 P.2d 528, 530.

3. For sanctions against Appellee's attorneys attempt to hide the facts which appear in the Record Transcript since it has resulted in harm to Appellant, ie., alienation of affection from his wife at the time, loss of health, income, etc.

4. To find that the Utah Department of Human Services has no jurisdiction over the person of Mr. Barker.

5. To award sanctions or pecuniary and punitive damages because Appellee's attorneys have litigated in violation of the law since they are attempting to act as a surety for a party to the action.

6. Reverse findings of fact and conclusions of law to show that Mr. Barker is not intentionally underemployed for the purpose of avoiding child support.

7. That there is in fact a material change of circumstances which included a wife, natural children and stepchildren.

8. That there is a material change of circumstances based on a reduction of income of Mr. Barker.

9. To hold Utah Department of Human Services guilty of maliciously interfering with employment that Mr. Barker had already obtained.

10. Find that the lower court has abused it's discretion and abused it's

process as alleged above.

11. Award Mr. Barker an additional 100 thousand dollars for sanctions and pecuniary and punitive damages based on the above.

12. To provide any other relief as the court deems proper.

mb

Dated 19 September 1994

Michael R. Barker

Signed

VERIFICATION

I, Michael R. Barker, do affirm, and say and verify that the foregoing is true and correct to the best of my knowledge, information and belief and is not for the purpose of delay and it is done in good faith.

mb

Dated 19 September 1994

Signed

Michael R. Barker

mb

Dated 19 September 1994

Witness

James A. Paul

mb

Dated 19 September 1994

Witness

Charlotte

CERTIFICATION OF MAILING

I, MICHAEL R. BARKER, certify that a true and correct copy of the foregoing Response to Appellee's Brief was mailed, postage prepaid, or hand delivered to the following:

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27 mb

on 19 September 1994.

Signed

Michael R. Barker