

1994

Jenkins v. Jenkins : Brief of Appellant

Utah Court of Appeals

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Rosemond Blakelock; Attorney for Appellant.

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

ROBERTA MARIE JENKINS
Plaintiff and Appellant,

v.

JUSTIN DONALD JENKINS,
Defendant and Appellee.

CASE NO. 940733-CA

PRIORITY 4

BRIEF OF APPELLANT

APPEAL FROM AN ORDER AWARDING CUSTODY TO DEFENDANT
IN THE FOURTH DISTRICT COURT, IN AND FOR UTAH COUNTY,
STATE OF UTAH, THE HONORABLE JUDGE PRO TEMPORE HOWARD
MAETANI, PRESIDING

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FILED
Utah Court of Appeals
MAR - 3 1995
Marilyn M. Branch
Clerk of the Court

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CASE NO. 940733-CA

PRIORITY 4

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from an Order, (case number 934401476) of the Fourth District Court changing custody of the minor children from the Plaintiff to the Defendant, filed October 25, 1994. Utah Code Ann. § 78-2a-3(h)(i) (1994) grants this court jurisdiction over appeals from district court involving domestic relations case, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption and paternity.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did due process, the Utah Rules of Civil Procedure, and the Utah Code of Judicial Administration require the Defendant to provide Plaintiff with notice that a pretrial conference was scheduled in case number 934401476, prior to the hearing in which the court made a determination as to custody.

2. Was the Fourth District Judge Pro Tem, Howard Maetani, able to change custody from Plaintiff to Defendant at a pretrial conference hearing, in case number 934401476, in which the Plaintiff was neither notified, nor present.

STANDARD OF REVIEW

The Court will presume the correctness of the trial court's decision absent "manifest injustice or inequity that indicates a clear abuse of . . . discretion." Turner v. Turner, 649 P.2d 6, 8 (Utah 1982)); see also Whitehead v. Whitehead, No. 910205-CA, slip op. at 3 (Utah App. Aug. 7, 1992).

STATUTES

All relevant statutes are attached in Addendum A.

STATEMENT OF THE CASE

This case is an appeal from an Order signed by Judge Pro Tem Howard Maetani, on October 25, 1994, which changed custody to the Defendant, in case number 9344001476. The change in custody occurred at a pretrial conference held on October 14, 1994. The

Plaintiff was never notified that a pretrial conference was being held, regarding her custody case, was not in attendance at the hearing and was not represented by counsel at the pretrial hearing at which custody was determined.

FACTS

FACTS "1" THROUGH "15" LIST THE CHRONOLOGICAL FACTS REGARDING CASE NUMBER# 934401476, WHICH IS THE CASE ON APPEAL:

1. Plaintiff and Defendant were divorced June 16, 1992, in the Fourth District Court, in and for Juab County, State of Utah, case number 6706.

2. Pursuant to the terms of the Divorce, the Plaintiff and Defendant, by stipulation, entered into a joint parenting agreement.

3. On April 5, 1994, the Defendant, by and through his counsel, Douglas Baxter, filed a Motion For Change Of Venue, requesting the case be transferred to the Fourth District Court, in Utah County.

4. The Plaintiff and Defendant signed a stipulation agreeing to the change of Venue and the stipulations filed with the clerk in the Fourth District Court, Juab County on April 5, 1994.

5. The Order for Change of Venue was signed on May 18, 1994, and the file was transferred to the Fourth District Court, Utah County on July 14, 1994, and assigned case number 934401476.

6. On July 22, 1993, the Defendant filed a Petition to Modify in case number 934401476, requesting relief as follows:

"For a change in the custody arrangement"

7. On August 6, 1993, the Defendant, by and through his attorney, Douglas Baxter, filed a request for pre-trial conference, and sent a notice, via first class mail, to attorney D. John Musselman, 3507 North University Avenue, Suite 370, Provo, Utah 84604.

8. The Fourth District Court Commissioner, Howard Maetani set a date and time for a settlement conference for Friday, September 17, 1993, and gave notice of the date and time, to attorney's Musselman and Baxter.

9. On September 17, 1993, a Pre-Trial conference was held. Mr. Musselman appeared, and was representing the Plaintiff. Douglas Baxter appeared for the Defendant. The court continued the Pre-Trial without date, and stated in the Minute Entry, "If nothing happens in this matter in the next six (6) months, the Court will dismiss this matter."

10. Six Months latter, on March 17, 1994, there had been no activity in the case, but the court did not dismiss the case, as it indicated in the Minute Entry of September 17, 1993.

11. On May 20, 1994, the court, by and through the court Commissioner, Howard Maetani, issued an Order To Show Cause, scheduled for June 17, 1994, and stated it was an order to "show cause why this case should not be dismissed for failure to prosecute under Rule 4-103 of the Code of Judicial Administration"

a. The Order To Show Cause also stated that " The parties' failure to appear will be deemed as consent to the entry

of an order of Dismissal, and that such an order will be entered by the court without further notice to the parties". The Order To Show Cause was sent to attorney's Musselman and Baxter.

12. On June 17, 1994, the court entered a minute entry on the Order To Show Cause, it stated that Attorney Baxter appeared for the Defendant and addressed the court. The minute entry states that "The Court ordered this matter be kept open for six months. If no action is filed in this matter within the six months, the Court will dismiss this it". The minute Entry is on Case Number 934401476, Tape number 94/5/061-771, Clerk:LLP.

13. On October 14, 1994, a Pretrial conference was held on case number 934401476 (and 934400050) wherein the court ordered as follows: "This matter will be heard in case number 934401476" and "The Court found substantial change of circumstances to modify the decree of divorce based upon the testimony presented".

14. The custody of the minor children was granted to the Defendant at the October 14, 1994 hearing, without notice to Plaintiff of the court's intent to take testimony and make a determination as to custody, in Case Number 934401476.

A Default Certificate, filed October 25, 1994 states that the Plaintiff was properly noticed of the pre-trial and failed to appear.

15. There was no notice in file number 934401476 to indicate that the Plaintiff had even been given notice that any issue was being considered by the court in case number 934401476; no notice of the date and time of the hearing or that the court was

going to have the matter heard on it's merits at that time.

FACTS "16" THROUGH "22" LIST CHRONOLOGICAL EVENTS IN CASE NUMBER 934400050

16. On January 25, 1993, an Ex-Parte Protective Order was issued, in case number 934400050, wherein the Defendant was ordered to remain away from the Plaintiff.

17. The Plaintiff also filed a Complaint for a Protective Order, and a hearing date was set in the matter for the 29th day of January, 1993, at 9:00 a.m., case number 934400050.

18. The hearing on the complaint (case number 934400050) was held on January 29, 1993 before Commissioner Howard Maetani, and the court granted relief as prayed for in the complaint and a protective order was signed.

19. An Order To Show Cause, and hearing on a Temporary Restraining Order was filed in case number 934400050, and a hearing date and time was set for March 10, 1993.

20. At the OSC hearing, (March 10, 1993) attorney's Baxter and Musselman attended and addressed the court.

21. At the OSC hearing, (March 10, 1993) the Minute entry states that Mr. Baxter informed the court that the filing was inadvertent and should have been filed in case number 934401476. The parties reached a stipulated agreement. The Minute Entry reflects the hearing, but no order has ever been signed regarding the rearing or the stipulation, or orders of the court. However, the Minute Entry in case number 934400050 indicates that the

parties were ordered by the court that "all documents relating to the OSC and TRO will be transferred to the new case", meaning case number 934401476, which is the Petition To Modify Decree of Divorce. The Court kept the cases distinctly separate.

22. On June 7, 1994, attorney Musselman signed a "Notice Of Withdraw of Counsel" on case Number 934400050.

REMAINING FACT PATTERN DEALS WITH BOTH CASE NUMBER 934400050 AND CASE NUMBER 934401476.

23. Mr. Musselman did not file a Notice of Withdrawal in case Number 934401476, which is the case number of the Divorce and Petition To Modify.

24. The "Notice Of Withdrawal of Counsel" was sent to Plaintiff and to attorney Douglas Baxter, in case number 934400050.

25. Attorney Baxter filed a Notice to Appoint Counsel, on June 30, 1994, informing Plaintiff that she should retain an attorney, in case number 934400050.

26. No Notice To Appoint was ever filed or served to Plaintiff in case number 934401476, because Mr. Musselman never filed a Notice of Withdrawal in case number 934401476.

27. Mr Baxter, counsel for Defendant, filed a Request For Pre-Trial with the court on June 30, 1994, case number 934400050.

28. The court Commissioner, Howard Maetani set a date for a pre-trial on August 11, 1994, in case number 934400050.

29. On August 11, 1994, a minute entry indicates that the

pre-trial was held in case number 934400050, but that the Plaintiff was not present - nor was she represented by counsel. The minute entry indicates that the Plaintiff may not have received notice of any hearing due to Mr. Baxter's not having Plaintiff's current address. Mr. Baxter was ordered to "obtain the Plaintiff's current address".

30. Mr. Baxter, counsel for Defendant, filed a "Request To Reschedule Pre-Trial" in case number 934400050, (which is a Protective Order) on September 1, 1994, along with a Notice Of Address Change, stating that Plaintiff lived at 672 North 1060 West, Orem, Utah.

31. On September 14, 1994, Judge Pro Tem Howard Maetani mailed a notice of "Settlement Conference" to Roberta Jenkins, in case number 934400050. The notice indicated that if "settlement is reached, the divorce and/or other relief may be granted at this hearing".

32. The Notice Of Settlement Conference did not indicate any subject matter that would, be heard on it's merits, only contained a case number, which was 934400050.

33. The Minute Entry, in file Number 934400050, indicates that the Court questioned Mr. Baxter, and Mr. Baxter, and the Court were both aware that the notice the court sent to the Plaintiff was for a pretrial conference regarding the "spouse abuse matter".

34. The court, without notice to Plaintiff, or providing her time to respond, decided to made a determination as to custody in case number 934401476.

SUMMARY OF ARGUMENT

June 22, 1993, the Defendant filed a Petition To Modify Decree of Divorce, in case number 934401476, seeking custody of the parties minor children, which had been granted to Plaintiff in the original decree of divorce.

Plaintiff was notified of a pretrial conference to be held on October 14, 1994, in another case - number 934400050, (which involved a protective order). Plaintiff did not attend the pretrial conference in case number 934400050. Without notice to the Plaintiff, Judge Pro Tem Howard Maetani combined both cases, (#934400050 and 934401476).

Without notice to the Plaintiff, (in case number 934401476) and without the Plaintiff's attendance at the hearing, the court held a pretrial conference, on October 14, 1994, regarding custody, and found that there had been a substantial change of circumstances necessary to modify the decree of divorce, and changed custody from Plaintiff to Defendant.

Such a change of custody, absent notification, is a violation Plaintiff's due process rights, a violation of the Utah Rules of Civil Procedure, and a violation of the Utah Code of Judicial Administration, all of which required the Defendant and/or the Court to provide Plaintiff with notice, prior to the hearing, in order that Plaintiff may attend and proceed with the case. Defendant should not have proceeded without proper notification to Plaintiff. The result (Plaintiff's loss of custody of her minor

children) is a manifest injustice and inequity that indicates a clear abuse of discretion on the part of the honorable Judge Pro Tem Howard Maetani.

ARGUMENT

THE UTAH CODE OF JUDICIAL ADMINISTRATION AS WELL AS THE THE UTAH RULES OF CIVIL PROCEDURE REQUIRE NOTICE

Rule 4-102, Law and Motion Calendar, provides that the purpose of the Law and Motion Calendar is: To establish uniform notice requirements and filing deadlines for law and motion matters".

As has been cited in the facts, the Plaintiff and Defendant had two distinct cases before the Fourth District Court, one was a Protective Order matter (case number 934400050) and one was a Petition to Modify, as for custody (case number 934401476). The Fourth District Court Judge Pro Tem Howard Maetani sent Plaintiff (who was not represented by counsel) a notice that a pretrial conference was scheduled for October 14, 1994, on the Protective Order, in case number 934400050. See Addendum C.

Plaintiff was completely unaware that any action was contemplated in her custody matter. In fact the, last document in the custody case (#934401476) was a Minute Entry dated June 17, 1994 which stated that the court would keep the case open for six months, and further ordered: "If no action is filed in this matter within the six months, the court will dismiss this". Nothing further appears in Case Number 934401476, until the Minute Entry was filed on the October 14, 1994 hearing. See Addendum's D and F.

A pre-trial conference is regularly held on the "law and motion calendar" and is governed by Rule 4-102 (2) (A), which requires notice "no less than five days prior to the date of the hearing". Plaintiff did not receive any notification of a pretrial hearing in her custody case.

Rule 4-905 of the Utah Code of Judicial Administration specifically deals with Domestic pretrial conferences, and assumes that notice was given.

Rule 16 of the Utah Rules of Civil Procedure, also deals with Pretrial conferences, scheduling and management conference. However, Rule 16 of the Utah Rules of Civil Procedure also assumes notice. The application of Rule 16 of the Utah Rules of Civil Procedure, as well as Rule 4-905 of the Utah Code of Judicial Administration, assume that the parties have been notified. In this case - no notice was given to Plaintiff that the issue of custody was even being considered at the pretrial conference scheduled for October 14, 1994. In fact, previously (on May 20, 1994), the court on it's own motion held an Order To Show Cause, citing both Plaintiff and Defendant with failure to prosecute. See Addendum E.

At the pretrial conference in case number 934400050 held October 14, 1994, Judge Pro Tem Howard Maetani arbitrarily transferred notice of a settlement conference in one case (regarding a protective order) to a wholly different proceeding, (regarding custody), in another case, involving the same parties, without notice to the Plaintiff. See Addendum F.

Although Rule 42 (a) of the Utah Rules of Civil Procedure does allow for consolidation of cases, it is in cases where there is a common question of law or fact and then the court "may order a joint hearing or trial". However, even Rule 42 of the Utah Rules of Civil Procedure presupposes notice. Plaintiff never received any notice that the court was even considering the consolidation of her cases, until after the fact, and after she had lost custody of her children.

DUE PROCESS REQUIRES THAT PLAINTIFF BE GIVEN ADEQUATE NOTICE AND THE COURT'S ACTIONS CONSTITUTE AN ABUSE OF DISCRETION

The Plaintiff's due process rights require adequate notice, especially in custody cases. In cases where the notice has not been adequate, the judgment cannot stand. Smart v. Cantor, 117 Ariz. 539, 574 P.2d 27, 30 (Ariz. 1977). (citing Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972)); accord Walden v. Walden, 355 So. 2d 372, 376 (Ala. Civ. App. 1978) (Smart is a case where notice was not provided in a custody matter until the evening preceding the 9:15 a. m. hearing. Because of this abbreviated notice petitioner was unable to prepare a responsive pleading, and the virtual lack of due process caused the court to remand for additional proceedings.)

In this case, due to lack of any notice at all, there was no due process afforded Plaintiff at all. Plaintiff was unable to be heard by the court, could not present her position, or her case. The basic concepts of fairness and procedural rules rely on

adequate notice. In Wiscome v. Wiscome, the court held:

The demands of due process rest on the concept of basic fairness of procedure and demand a procedure appropriate to the case and just to the parties involved. Wiscombe v. Wiscombe, 744 P.2d 1024, 1025 (Utah App. 1987)- (quoting Ruion v. Grantsville City, 610 P.2d 338, 341 (Utah 1980)). "One of the fundamental requisites of due process is the opportunity to be fully heard." Id. (citation omitted).

The fact that the Plaintiff was given notice of a pretrial hearing in a protective order case would not cause Plaintiff to be aware of the possibility that the court would (or could) consolidate a protective order cases with a custody case, and then, without any notice as to the consolidation, proceed to make a determination as to custody, in a wholly unrelated case.

Plaintiff was not represented by an attorney, (Mr. Musselman was no longer representing Plaintiff) and counsel for the Defendant was aware of that fact, because he had sent Plaintiff a Notice To Appoint Counsel on case number 934400050. See Addendum G. Pursuant to Utah Code Ann. § 78-51-36, the Defendant, through his attorney, was required to send Plaintiff a Notice To Appoint Successor, in case number 934401476. No Notice To Appoint Successor was ever sent to Plaintiff in case number 934401476.

STANDARD OF REVIEW

The stand of review in custody case is abuse of discretion or manifest injustice. The trial court's decision regarding custody will not be upset "absent a showing of an abuse of discretion or manifest injustice." Maughan v. Maughan, 770 P.2d 156, 159 (Utah App. 1989).

In this case, there was no notice to the Plaintiff that the issue of custody was being considered by the court. Plaintiff found out that she had lost custody of the minor children only after receiving the final order in the mail. Plaintiff's due process right's have been violated, and such a violation is a substantial abuse of discretion and a manifest injustice to the Plaintiff.

ATTORNEY'S FEES AND COSTS

Plaintiff is entitled to an award of attorney's fees and costs. Pursuant to Rule 34 (a) of the Utah Rules of Appellate Procedure, "if a judgment or order is reversed, costs shall be taxed against the appellee unless otherwise ordered". Therefore, Plaintiff requests that if the Order of the Fourth District Court dated October 25, 1994, and signed by Judge Pro Tem Howard Maetani is reversed, that she be granted attorney's fees and costs.

CONCLUSION

The Order of Judge Pro Tem Howard Maetani, in case number 934401476, signed and dated October 25, 1994 should be dismissed and the matter sent back to the Fourth District Court for further determination on it's merits.

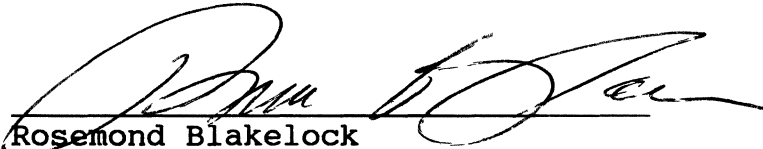
Plaintiff should be granted attorney's fees and costs.

RESPECTFULLY submitted this 2nd day of March, 1995.


Rosemond Blakelock
attorney for Plaintiff/Appellant

CERTIFICATE OF MAILING

THIS IS TO CERTIFY THAT TWO COPIES OF THE FOREGOING BRIEF OF APPELLANT WAS MAILED, VIA FIRST CLASS MAIL, TO:
DOUGLAS BAXTER, 3325 NORTH UNIVERSITY AVENUE, #200, PROVO, UTAH 84604, ON THIS 21st DAY OF MARCH, 1995.


Rosemond Blakelock
attorney at law

ADDENDA

ADDENDUM A

78-51-36. Notice to appoint successor.

When an attorney dies or is removed or suspended, or ceases to act as such, a party to an action or proceeding for whom he was acting as attorney must, before any further proceedings are had against him be required by the adverse party, by written notice, to appoint another attorney or to appear in person. 1953

CODE OF JUDICIAL ADMINISTRATION

Rule 4-102. Law and motion calendar.

Intent:

To establish a uniform procedure of scheduling matters on the law and motion calendar.

To establish uniform notice requirements and filing deadlines for law and motion matters.

Applicability:

This rule shall apply to all civil and criminal proceedings in the District and Circuit Courts.

Statement of the Rule:

(1) Law and motion matters.

(A) In multi-judge districts, law and motion matters arising in connection with a case which has been assigned for all purposes to a particular judge shall be heard by the assigned judge.

(B) If the assigned judge is unavailable, the case shall not be assigned or transferred to any other judge for handling without the approval of the presiding judge.

(2) Notice and filing requirements.

(A) Orders to show cause and other matters requiring written notice shall be heard only after written notice served no less than five days prior to the date of the hearing, unless the court for good cause shown orders the period of time for notice of hearing shortened.

(B) Affidavits in support of law and motion matters must be filed with the motion or memorandum of points and authorities supporting or opposing the motion. Other documents filed in support of or in opposition to law and motion matters, including returns of service on supplemental orders, orders to show cause and bench warrants, must be filed in the clerk's office at least two working days before the hearing on the matter, together with a copy of the signed order showing the date and time of the required appearance.

(C) Proceedings based upon supporting documents which are not filed in accordance with this rule may be dismissed.

(3) Ex-parte matters, stipulated matters and supplemental proceedings.

(A) Ex-parte matters based upon stipulations may be presented at any time to the assigned judge. Proceedings on the law and motion calendar involving the taking of evidence may be heard after those not requiring the taking of evidence. Add-ons may be heard on the day set for hearing, provided proper notice has been given and the convenience of the court permits such hearing.

(B) Motions for supplemental proceedings may be set on the weekly supplemental proceedings calendar or before the judge assigned to the case on the assigned judge's regular law and motion calendar.

(Amended effective January 15, 1990.)

CODE OF JUDICIAL ADMINISTRATION

Rule 4-905. Domestic pretrial conferences and orders.

Intent:

To establish a uniform procedure for conducting pretrial conferences in contested domestic matters.

To provide for uniformity in pretrial orders in contested domestic matters.

Applicability:

This rule shall apply to the district courts which have court commissioners.

Statement of the Rule:

(1) Court commissioners shall conduct pretrial con-

ferences in all contested matters seeking divorce, annulment, paternity or modification of a decree of divorce.

(2) At the pretrial conference, the commissioner shall discuss the issues with counsel and the parties, may receive proffers of evidence, and may receive evidence if authorized to do so by the presiding district judge.

(3) Following the pretrial conference, the commissioner shall issue a pretrial order which shall include:

(A) the issues stipulated to by the parties;

(B) the issues which remain in dispute; and

(C) the commissioner's recommendations as to the disputed issues if the commissioner conducted an evidentiary hearing on those issues.

(4) The commissioner may designate one of the parties' counsel to reduce the pretrial order to writing pursuant to Rule 4-504.

(5) The disputed issues identified in the pretrial order shall remain at issue for purposes of trial.

(Added effective March 31, 1992; amended effective March 31, 1992.)

UTAH RULES OF CIVIL PROCEDURE

Rule 16. Pretrial conferences, scheduling, and management conferences.

(a) **Pretrial conferences.** In any action, the court in its discretion or upon motion of a party, may direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as:

- (1) expediting the disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted for lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation;
- (5) facilitating the settlement of the case; and
- (6) considering other matters as may aid in the orderly disposition of the case.

(b) **Scheduling and management conferences.** In any action, in addition to any pretrial conferences that may be scheduled, the court in its discretion may direct that a scheduling or management conference be held. The court may direct the attorneys or unrepresented parties to appear before the court. Scheduling or management conferences may also be held by way of telephone conferencing between the court and counsel as the particular case may require. Decisions and agreements reached at scheduling and management conferences may be formally made an order of the court. At the conference, the court may consider the following matters:

- (1) the formation and simplification of the issues, including the elimination of frivolous claims or defenses;
- (2) the necessity or advisability of joining additional parties or amendment of pleadings;
- (3) the completion of outstanding discovery;
- (4) the time for filing and hearing of motions;
- (5) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authentic-

ity of documents, and advance rulings from the court on admissibility of evidence;

(6) the identification of witnesses and documents, the need for and schedule for filing and exchanging trial briefs, and the dates for a final pretrial and scheduling conference and for a trial;

(7) the advisability of referring matters to a lower court that has appropriate jurisdiction to hear the case;

(8) the possibility of settlement;

(9) the need for adopting special procedures for managing particularly difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(10) the form and substance of a pretrial order, if it is determined that a formal pretrial order is necessary in the particular case; and

(11) such other matters as may aid in the disposition of the case.

(c) **Final pretrial or settlement conferences.** In any action where a final pretrial conference has been ordered, it shall be held as close to the time of trial as reasonable under the circumstances. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties, and the attorneys attending the pretrial, unless waived by the court, shall have available, either in person or by telephone, the appropriate parties who have authority to make binding decisions regarding settlement.

(d) **Sanctions.** If a party or a party's attorney fails to obey a scheduling or pretrial order, if no appearance is made on behalf of a party at a scheduling or pretrial conference, if a party or a party's attorney is substantially unprepared to participate in the conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, may make such orders with regard thereto as are just, and among others, any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanctions, the court shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney fees, unless the court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

(Amended effective Jan. 1, 1987.)

UTAH RULES OF CIVIL PROCEDURE

Rule 42. Consolidation; separate trials.

(a) **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) **Separate trials.** The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

UTAH RULES OF APPELLATE PROCEDURE

Rule 34. Award of costs.

(a) **To whom allowed.** Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment or order is affirmed, costs shall be taxed against appellant unless otherwise ordered; if a judgment or order is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment or order is affirmed or reversed in part, or is vacated, costs

shall be allowed as ordered by the court. Costs shall not be allowed or taxed in a criminal case.

(b) **Costs for and against the state of Utah.** In cases involving the state of Utah or an agency or officer thereof, an award of costs for or against the state shall be at the discretion of the court unless specifically required or prohibited by law.

(c) **Costs of briefs and attachments, record, bonds and other expenses on appeal.** The following may be taxed as costs in favor of the prevailing party in the appeal: the actual costs of a printed or typewritten brief or memoranda and attachments not to exceed \$3.00 for each page; actual costs incurred in the preparation and transmission of the record, including costs of the reporter's transcript unless otherwise ordered by the court; premiums paid for superseas or cost bonds to preserve rights pending appeal; and the fees for filing and docketing the appeal.

(d) **Bill of costs taxed after remittitur.** When costs are awarded to a party in an appeal, a party claiming costs shall, within 15 days after the remittitur is filed with the clerk of the trial court, serve upon the adverse party and file with the clerk of the trial court an itemized and verified bill of costs. The adverse party may, within 5 days of service of the bill of costs, serve and file a notice of objection, together with a motion to have the costs taxed by the trial court. If there is no objection to the cost bill within the allotted time, the clerk of the trial court shall tax

the costs as filed and enter judgment for the party entitled thereto, which judgment shall be entered in the judgment docket with the same force and effect as in the case of other judgments of record. If the cost bill of the prevailing party is timely opposed, the clerk, upon reasonable notice and hearing, shall tax the costs and enter a final determination and judgment which shall thereupon be entered in the judgment docket with the same force and effect as in the case of other judgments of record. The determination of the clerk shall be reviewable by the trial court upon the request of either party made within 5 days of the entry of the judgment.

(e) **Costs in other proceedings and agency appeals.** In all other matters before the court, including appeals from an agency, costs may be allowed as in cases on appeal from a trial court. Within 15 days after the expiration of the time in which a petition for rehearing may be filed or within 15 days after an order denying such a petition, the party to whom costs have been awarded may file with the clerk of the appellate court and serve upon the adverse party an itemized and verified bill of costs. The adverse party may, within 5 days after the service of the bill of costs file a notice of objection and a motion to have the costs taxed by the clerk. If no objection to the cost bill is filed within the allotted time, the clerk shall thereupon tax the costs and enter judgment against the adverse party. If the adverse party timely objects to the cost bill, the clerk, upon reasonable notice and hearing, shall determine and settle the costs, tax the same, and a judgment shall be entered thereon against the adverse party. The determination by the clerk shall be reviewable by the court upon the request of either party made within 5 days of the entry of judgment; unless otherwise ordered, oral argument shall not be permitted. A judgment under this section may be filed with the clerk of any district court in the state, who shall docket a certified copy of the same in the manner and with the same force and effect as judgments of the district court.

ADDENDUM B

OCT 25 9 39 AM '94

14

This Court held a hearing on the October 14, 1994 at which the Defendant, Justin Donald Jenkins, was present and represented by counsel, Douglas A. Baxter. The Plaintiff, Roberta Marie Jenkins, was not present. The Court having entered Plaintiff's default as a result of her failure to attend the hearing, and having heard the testimony of the Defendant and having entered Findings of Fact and Conclusions of Law hereby enters the following Order:

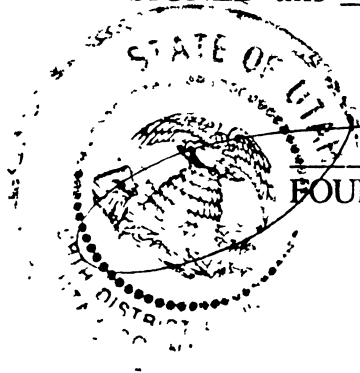
1. The Defendant is awarded custody of the parties two minor children, Justin Colt Jenkins and Donald Cody Jenkins subject to the Plaintiff's rights of reasonable visitation.

2. The Court orders that the Defendant's obligation for child support is hereby terminated retroactively to July 22, 1993 when the Petition for Modification was filed by the Defendant.

3. The Court hereby reserves the issue of child support as it relates to the Plaintiff for the minor children that are now in the custody of the Defendant.

4. The Court hereby orders each party to bear their own costs and attorney's fees in this matter.

DATED AND SIGNED this 28 day of October, 1994.



Edward J. Moulton
FOURTH DISTRICT COURT JUDGE Mr. J. Moulton

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true copy of the foregoing Order, by U. S. first class mail, postage prepaid, this 18th day of October, 1994, to the following:

Roberta Marie Jenkins
672 North 1060 West
Orem, Utah 84057

Malynda Shull
Secretary

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY
OCT 25 9 38 AM '94
NA

CARTER, PHILLIPS & WILKINSON
DOUGLAS A. BAXTER (4795)
Attorney for Defendant
3325 North University Avenue, #200
Provo, Utah 84604
Telephone: 375-9801

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH, PROVO DEPARTMENT

ROBERTA MARIE JENKINS,)	
)	FINDINGS OF FACT AND
Plaintiff,)	CONCLUSIONS OF LAW
)	
- v s -)	
)	
JUSTIN DONALD JENKINS,)	
)	
Defendant.)	Case No. 934401476

The above-entitled matter having come on regularly for hearing before the Court on the 14th day of October, 1994 for Pre-trial Conference. The Defendant, Justin Donald Jenkins, having been present and represented by his attorney, Douglas A. Baxter of Carter, Phillips & Wilkinson. The Plaintiff, Roberta Marie Jenkins, was not present nor represented by counsel; the Court noted that the Plaintiff received Notice of the Pre-trial Conference, however, the Court noted in this matter there are two files. File No. 934400050, which was a protective order case and File No. 934401476, which is

the matter before the Court. The notice of this hearing was inadvertently filed in the protective order case. Therefore, the Court makes reference to that file for notice in this matter. The Court having entered the default of the plaintiff from failing to appear and having heard testimony of the Defendant, Justin Donald Jenkins, hereby enters the following.

FINDINGS OF FACT

1. The Court finds that the couple were divorced in the Fourth Judicial District Court in and for Juab County, State of Utah, on the 16th day of June, 1992, before the Honorable George Ballif.

2. The Court finds that at that time the parties were awarded joint custody of the parties two minor children Justin Colt Jenkins and Donald Cody Jenkins.

3. The Court finds that the parties participated in a joint parenting plan for approximately one year after the divorce of the parties.

4. The Court finds that both parties moved to Utah County, State of Utah, and stipulated to a change of venue so that this matter could be heard before the Fourth Judicial District Court in and for Utah County, State of Utah.

5. The Court finds that on or about July 22, 1993, the Defendant, Justin Donald Jenkins, filed a petition to modify the

Decree of Divorce alleging that the joint custody arrangement was no longer working out.

6. The Court finds that pursuant to Defendant's testimony there has been a substantial change of circumstances since the original Decree of Divorce was entered in this matter in that the original joint parenting plan is not working and is no longer in the best interests of the minor children.

7. The Court finds that the defendant has been the primary care taker of the children for all but approximately 6 weeks since the parties have moved to Utah County.

8. The Court finds that the Defendant has a more stable residence and that he has lived at the same address for more than a year and the children are enrolled in school based on Defendant's residence.

9. The Court finds that the Plaintiff has not fulfilled her obligations under the original joint parenting agreement in the original decree of divorce.

10. The Court find that it is in the best interest of the children for the Defendant to be awarded custody of the children subject to the Plaintiff's reasonable rights of visitation.

11. The Court finds that the Defendant's obligation to the Plaintiff for child support is hereby terminated retroactive to the date of the filing of the Petition for Modification in this action.

12. The Court finds that the issue of ongoing child support from the Plaintiff to the defendant is hereby reserved for future consideration.

13. The Court finds that each party should bear their own attorney's fees and costs in this matter.

CONCLUSIONS OF LAW

The Court having previously entered its Findings of Fact hereby enters the following conclusions of law:

1. The Court concludes that there has been a substantial change of circumstances in this matter since the original decree of divorce was entered.

2. The Court concludes that it is in the best interest of the parties minor children that custody of the minor children be awarded to the defendant subject to the Plaintiff's reasonable rights of visitation.

3. The Court concludes that the Defendant's obligation for child support is terminated retroactive to the date that the petition for modification was filed which is July 22, 1993.

4. The Court concludes that the issue of child support from the Plaintiff to the Defendant for the parties minor children shall be reserved for future consideration.


5. The Court concludes that the parties should bear their own costs and attorney's fees in this matter.

DATED AND SIGNED this 25 day of October, 1994.


FOURTH DISTRICT COURT JUDGE *Tammey Martin*
CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true copy of the foregoing Findings of Fact and Conclusions of Law, by U. S. first class mail, postage prepaid, this 18th day of October, 1994, to the following:

Roberta Marie Jenkins
672 North 1060 West
Orem, Utah 84057


Secretary

ADDENDUM C

1994 SEP 14 11:15

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

ROBERTA MARIE JENKINS Plaintiff,	CASE NO. 934400050
vs.	NOTICE OF SETTLEMENT CONFERENCE
JUSTIN DONALD JENKINS Defendant.	

A settlement conference has been set before the Court Commissioner on this case as follows:

DATE: Friday, October 14, 1994

TIME: 11:20 a.m.

Counsel as well as both clients are to be present so that if settlement is reached, the divorce and/or other relief may be granted at this hearing.

If the clerk has not heard from you within five (5) days from the date of this notice, this hearing date will be considered firm; and upon failure to appear, default will be entered.

Counsel are required to submit to the domestic clerk a written settlement proposal of client's case five (5) days prior to the settlement conference and to opposing counsel.

The Financial Declaration form, if applicable, for both plaintiff and defendant must be filed with the domestic clerk at least five (5) days prior to settlement conference. Failure of counsel to supply the required financial information and the aforementioned documents in a timely manner may result in the matter being stricken. If only one party responds, then that party's proposal and/or financial declaration will be deemed as true, and the commissioner may enter his recommended order

accordingly. It will be discretionary with the court whether to consider any proposal and/or financial declaration which is filed prior to the hearing, but less than (5) days prior to the settlement conference.

In the event a matter is stricken, the commissioner will notify both counsel and their clients as to the reasons therefor.

If settlement is reached prior to hearing, then the Commissioner at the time of the settlement conference may grant the divorce and/or other relief requested on a proper showing as though a default matter.

The Court admonishes counsel to communicate their respective positions to each other prior to the settlement conference and to be prepared to proceed at the time set for pretrial.

Both counsel are required to follow Utah Rules of Civil Procedure in providing the address of their clients to the Commissioner and to each other at the time of the filing of Complaint; and if not done so, on receipt of this document.

Copies of this notice were mailed to the following attorneys and/or parties at the addresses indicated:

DOUGLAS A BAXTER ESQ, 3325 N UNIVERSITY AVENUE #200, PROVO UT 84604
ROBERTA MARIE JENKINS, 672 N 1060 W, OREM UT 84057

DATED this 14th day of September, 1994.

A handwritten signature in cursive script, reading "Howard H. Maetani". The signature is written in dark ink and is positioned above a horizontal line.

Judge Pro Tempore

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this proceeding should call LORI at 429-1112, at least 3 working days prior to the proceeding.

ADDENDUM D

1994 JUN 17 AM 11:57

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

ROBERTA MARIE JENKINS, Plaintiff,	MINUTE ENTRY
vs.	CASE NO: 934401476
JUSTIN DONALD JENKINS, Defendant,	DATE: June 17, 1994
	COMM. HOWARD H MAETANI
	Tape: 94/5/061: 716- 771
	Clerk: LLP

This was the time set for hearing in on the court order to show cause. Douglas A Baxter appeared representing the Defendant.

Mr. Baxter addressed the Court.

The Court ordered that this matter be kept open for six months. If no action is filed in this matter within the six months, the Court will dismiss this it.

ADDENDUM E

1994 MAY 20 PM 1:25

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

ROBERTA MARIE JENKINS,
Plaintiff,

vs.

JUSTIN DONALD JENKINS,
Defendant.

ORDER TO SHOW CAUSE

CASE NUMBER: 934401476

DATE: May 20, 1994

HOWARD H MAETANI, COMMISSIONER

On its own motion, the Court orders the parties in this case to appear before Howard H. Maetani, Court Commissioner, on Friday, the 17th day of June, 1994 at 11:00 a.m., to show cause why this case should not be dismissed for failure to prosecute, under Rule 4-103 of the Code of Judicial Administration.

The parties' failure to appear will be deemed as consent to the entry of an order of dismissal, and such an order will be entered by the court without further notice to the parties.

Dated at Provo, Utah this 20th day of May, 1994.

BY THE COURT:



HOWARD H. MAETANI
Court Commissioner

cc: John Musselman
Douglas A Baxter

ADDENDUM F

FILED
Fourth Judicial District Court
of Utah County, State of Utah
CARMA B. SMITH, Clerk
Deputy
October 14, 1994

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

ROBERTA MARIE JENKINS, vs JUSTIN DONALD JENKINS,	Plaintiff, Defendant,	MINUTE ENTRY CASE NO 934401476 & 934400050 DATE October 14, 1994 COMM HOWARD H MAETANI Tape 94/5/102 2934- 3984 Clerk LLP
--	----------------------------------	--

PRETRIAL CONFERENCE

This was the time set for hearing in the above entitled matter Douglas A Baxter appeared representing the Defendant who was also present The Plaintiff was not present nor was she represented by counsel

Mr Baxter addressed the Court


The Court questioned Mr Baxter regarding the documents filed in the spouse abuse matter

The Court ordered that this matter will be heard in case #934401476

Justin Donald Jenkins was sworn and testified on direct

The Court found a substantial change of circumstances to modify the decree of divorce based upon the testimony presented The Court terminated the Defendant's obligation to pay child support The issue of the Plaintiff's obligation for support is reserved

ADDENDUM G


DOUGLAS A. BAXTER
Attorney for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true copy of the foregoing,
by U. S. first class mail, postage prepaid, this 30th day of
June, 1994, to the following:

Roberta Marie Jenkins
380 South 200 West, #1
Provo, Utah 84604

Malynela Shoell
Secretary

JUN 15 1994

[Handwritten signature]

D JOHN MUSSELMAN, USB #5582
Attorney for Plaintiff
96 East 100 South
Provo, UT 84601
Telephone: (801) 374-1212

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

ROBERTA MARIE JENKINS,

Plaintiff,

NOTICE OF WITHDRAW OF COUNSEL

vs.

Civil No. 93440050

JUSTIN DONALD JENKINS,

Defendant.

COMES NOW, D. John Musselman, attorney for Plaintiff in the above entitled action, and hereby withdraws as counsel of record of Plaintiff in this case.

DATED AND SIGNED this 7 day of June, 1994.

[Handwritten signature: D John Musselman]
D JOHN MUSSELMAN

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing NOTICE OF WITHDRAWAL OF COUNSEL, postage prepaid, addressed as follows:

Roberta Jenkins
380 S 200 W #1
Provo UT 84601

Douglas Baxter
CARTER PHILLIPS & WILKINSON
3325 N University Ave #200
Provo UT 84604

DATED AND SIGNED this 20 day of June, 1994.

Douglas Baxter