

1995

# Idrees Khan v. Annette Khan (Albertsen) : Reply Brief

Utah Court of Appeals

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Kathryn Schuler Denholm; Attorney for Defendant.

Tineke Van Dijk; Family Law Practice; Attorney for Plaintiff/Appellant.

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**COURT OF APPEALS**

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## IDREES KHAN

**vs.**

Defendant/Appellee.

DC No: 874900563

CP No: 940290

Priority No: 15

AN APPEAL FROM THE THIRD DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE TYRONE E. MEDLEY, PRESIDING

Tineke Van Dijk (#6049)  
FAMILY LAW PRACTICE  
243 East 400 South, Suite 301  
Salt Lake City, UT 84111  
Telephone: (801) 575-6610  
Attorneys for Plaintiff/Appellant

Kathryn Schuler Denholm  
Attorney for Defendant  
1343 South State, Suite 210  
Salt Lake City, UT 84115

## **I. ARGUMENTS**

### **A. WHETHER THE PLAINTIFF PRESERVED THE ISSUE OF JURISDICTION AND WHETHER THE TRIAL COURT LACKED JURISDICTION TO HEAR THE ISSUE OF CONTEMPT**

#### **1. Jurisdiction Raised on Appeal**

The Defendant argues that she "submits that Plaintiff failed to preserve the issue of the trial court's jurisdiction in the matter of contempt, and cannot raise this issue for the first time on appeal." Appellee's Brief at 8. In support thereof, the Defendant cites to Oquirrh Assocs v. First National Leasing Co., 888 P.2d 659, 665 (Utah App. 1994) and Salt Lake County v. Carlston, 776 P.2d 653, 665 (Utah App. 1989) for the proposition that "[i]t is axiomatic that the appeal court will not consider a matter for the first time on appeal." Appellee's Brief at 8.

While it is true that an issue raised for the first time on appeal will not be considered by an appellate court, that rule does not apply to jurisdiction. The issue of jurisdiction can be raised at any stage of the proceedings.

#### **2. Jurisdiction in the Trial Court**

The general rule in Utah is that an affidavit stating the facts constituting the contempt is required to give a court jurisdiction. See Young v. Cannon, 2 Utah 560 (1880); Aplt.'s Opening Brief at 12. Although the general rule does not state, it would be common reasoning that before a court can obtain

jurisdiction over a party, the affidavit stating the facts constituting the contempt must have come to a court's attention, then a judges signature must be placed on the document, supported by an affidavit, in order to validate the affidavit before a court can obtain jurisdiction over a party.

As will be demonstrated in the following Argument, the second and third affidavits submitted by the Defendant failed to satisfy the general rule set forth in Young and, therefore, both affidavits cannot be used to form the basis for the trial court's jurisdiction over the Plaintiff.

With respect to the second affidavit, no Order to Show Cause was ever signed by a court, nor was it ever issued and served upon the Plaintiff, see Appellee's Brief at 4, and, therefore, this second affidavit cannot be used to provide the trial court with jurisdiction over the Plaintiff.

Regarding the third affidavit, it appears that it failed to satisfy the general rule inasmuch as it did not state the necessary facts constituting the contempt. Anyway, the resulting Order to Show Cause and the resulting Order on the Order to Show Cause clearly do not state those facts. See Aplt's Opening Brief, Add. F.

With respect to the first affidavit, that affidavit is the only affidavit which could arguable provide the trial court with

jurisdiction of the Plaintiff. However, the first affidavit resulted in an unsigned minute entry, dated January 30, 1993. See Appt.'s Opening Brief, Add. E. And, "[a]n unsigned minute entry is not susceptible of enforcement and does not constitute a final judgment for purpose of appeal[.]" South Salt Lake v. Burton, 718 P.2d 405 (Utah 1986) (citing Wisden v. City of Salina, 696 P.2d 1205 (1985), Wilson v. Manning, 645 P.2d 655 (1982) and State Tax Commission v. Erekson, 714 P.2d 1151 (1986)). Because of the unenforceable nature of the minute entry, Plaintiff asserts that it follows that the unsigned minute entry cannot be used to grant the trial court jurisdiction over the Plaintiff to enforce the issue of contempt against him, which is what happened in the instant case. Accordingly, because none of the affidavits provide the trial court with jurisdiction over the Plaintiff, then the issue of jurisdiction may be raised in the appellate court.

**B.                   WHETHER PLAINTIFF WAS DENIED HIS PROCEDURAL  
DUE PROCESS PROTECTIONS GUARANTEED BY THE FOURTEENTH  
AMENDMENT TO THE FEDERAL CONSTITUTION**

The Defendant argues that "[t]he due process provisions discussed in Von Hake v. Thomas, 759 P.2d 1162, [1170] (Utah 1162) were met in that Plaintiff had notice of the basis of the claims against him[.]" Appellee's Brief at 14. Defendant also argues that "pl's contempt was supported by 4 separate affidavits



of the Def[.]" Id. at 12.

With respect to Defendant's first argument, the Defendant's own Statement of Facts refutes this argument. Regarding, Plaintiff's second argument, the Plaintiff's Statement of Facts refute her claim that there were four affidavits. This is because there were only three affidavits filed by the Defendant, see Appellee's Brief at 4-5, and as the following discussion will show, none of these three affidavits were sufficient enough to place the Plaintiff on notice.

The second affidavit filed by the Defendant was in March, 1993. Appellee's Brief at 4. However, the Defendant admits that the affidavit filed by her, raising the issue of the father's contempt for failure to permit visitation, never produced the issuance of an Order to Show Cause. Id. at 4.

There need not be a lot of discussion spent on this claim. If no Order to Show Cause was issued, then how could it have been served upon the Plaintiff. And, if it was never served on the Plaintiff, then how could any notice be said to have been provided to the Plaintiff. An affidavit in the Record which the Plaintiff does not receive clearly does not provide the requisite notice requirements guaranteed by the Fourteenth Amendment. See Von Hake, 759 P.2d at 1170 ("[T]he person charged be advised of the nature of the action against him[.]").

In addition, the Defendant failed to comply with the requirements of Utah Code Ann. § 78-32-3 (Supp. 1994) ("When the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judges of the facts constituting the contempt[.]"). Clearly, if no Order to Show Cause was ever issued with respect to the second affidavit, then it was never presented to the court or judge at chambers and, therefore, the Defendant failed to satisfy § 78-32-3. Accordingly, the second affidavit that the Defendant argues placed the Plaintiff on notice is of no value to Defendant's argument. In fact, it supports the Plaintiff's position that he was not advised of the nature of the action against him. For the Defendant to argue that this is one of the affidavits that Plaintiff had notice of the basis of the claims against him is clearly a misstatement of the facts and a misstatement of the legal requirements required of an affidavit dealing with contempt.

The third affidavit filed by the Defendant, dated July 2, 1993, was in support of her Writ of Assistance. Appellee's Brief at 4. However, Defendant does not state what was contained in this particular affidavit. The issued Temporary Restraining Order and Order to Show cause made no mention of any contempt allegation, which would arguably place the Plaintiff on notice of

any pending contempt action against him. See Aplt.'s Opening Brief, Add F. The Order on Order to Show Cause similarly made no mention of any contempt allegation, which would arguably place the Plaintiff on notice of any pending contempt action against him. Id., Add. H. Because the third affidavit stated no facts constituting contempt, then this affidavit, too, failed to satisfy the requirements set forth pursuant to § 78-32-3. Accordingly, this affidavit fails to satisfy the due process requirements of the Fourteenth Amendment.

The foregoing clearly shows that the Plaintiff was not put on notice. The only affidavit the Defendant can arguably rely on is the affidavit which accompanied the unsigned minute entry, that is, the first affidavit. However, again, Commissioner Evans found no wilful and intentional violation. Moreover, Commissioner Evans never certified the issue of contempt for trial. Aplt.'s Opening Brief, Add. I. This lack of finding of contempt would support the conclusion that the Plaintiff was still not advised of the nature of the action against him. Plaintiff herein asserts that he needed to once again be placed on notice of any pending contempt charge, either through the second or third affidavit.

In sum, the Defendant has simply attempted to enlarge the number of times she filed affidavits in order to make it appear

as though the Plaintiff was placed on notice. However, as the foregoing shows, because the Plaintiff was not placed on notice of the pending action against him, the Plaintiff's Fourteenth Amendment rights were violated.

**B. Evidentiary Hearing**

The Defendant alleges, that the issue of contempt was brought before Commissioner Evans, who certified the matter for [an] evidentiary hearing, see Appellee's Brief at 12, and "[t]he issue of his contempt had been certified at a hearing he personally attended. Id. The Defendant similarly argues that "[t]he record shows that the Plaintiff was present at the hearing which produced the minute entry, with counsel. (R267) Plaintiff therefore had notice of the alleged contempt and its certification." See id. The Record does not support the Defendant's allegations.

First, if the Defendant is referring to the Minute Entry, dated January 30, 1992, there is no reference made with respect to setting any matter, let alone any alleged contempt issue, for an evidentiary hearing. See Aplt.'s Opening Brief, Add. E. In fact, the Commissioner stated that the Court cannot find any wilful and intentional violation with the visn." Aplt.'s Add. E at ¶ 3 (emphasis provided). And, if there was no wilful and intentional violation, then why would Commissioner Evan's have

set the matter for an evidentiary hearing.

The only time there could have been a matter certified for an evidentiary hearing was at the April 21, 1994 Pre-trial Conference, which Defendant and Defendant's counsel attended. However, the only matter Commissioner Evans certified for trial was the issue of visitation. Accordingly, there was never any evidentiary hearing scheduled on any alleged contempt issue as the Defendant argues. See Appellee's Brief at 12.

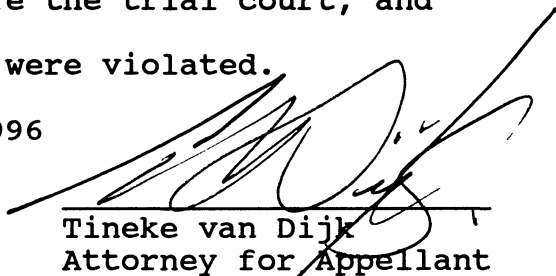
In addition, the Commissioner's Pre-trial conference held between the parties only certified the issue of visitation for trial. This action placed the Plaintiff on notice that this was the only issue to be tried. However, when the Plaintiff appeared for the trial on the issue of visitation, this issue was changed into the primary issue of a contempt proceeding. This was prejudicial to the Plaintiff because no contempt issue was certified by Commissioner Evan's. See Appt.'s Opening Brief, Add. I. See Boggs v. Boggs, 824 P.2d 478 (Utah App. 1991).

#### CONCLUSION

As the foregoing shows, Plaintiff may raise the issue of jurisdiction on appeal, as it relates to the issue of contempt. This is because there was no jurisdiction in the trial court to hear the issue of contempt. Additionally, as demonstrated, the Plaintiff's Due Process guaranteed by the Fourteenth Amendment

was violated. Finally, it is clear that there was never an evidentiary hearing, or even a certification relating to the issue of contempt. Accordingly, this Court should find that the issue of contempt was not properly before the trial court, and that the Plaintiff's Due Process rights were violated.

DATED this 8 day of January, 1996

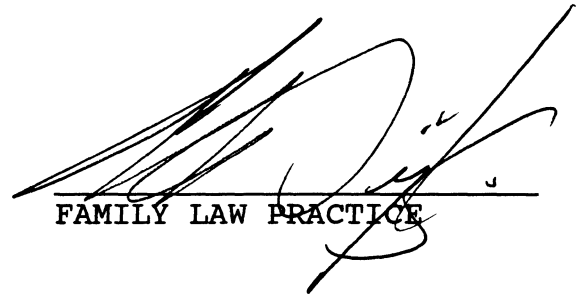


Tineke van Dijk  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF OF THE APPELLANT** was **MAILED**, postage prepaid, on this 8 day of January, 1996 to:

Kathryn Schuler Denholm  
1343 South State, Suite 210  
Salt Lake City, UT 84115



FAMILY LAW PRACTICE