

2006

Cook v. Cook : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LISA COOK,)	
)	BRIEF OF THE APPELLANT
Petitioner and Appellee,)	
vs.)	
BRAD COOK,)	Appellate Case No. 20060533-CA
)	Trial Court No. 024901092-DA
Respondent and Appellant.)	

THIS IS AN APPEAL FROM THE THIRD DISTRICT COURT'S
RULING DISMISSING THE APPELLANT'S
VERIFIED PETITION TO MODIFY DECREE OF DIVORCE

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UTAH APPELLATE COURTS
2007-03-05

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dated August 2, 2005.
- B. Verified Petition to Modify Decree of Divorce
dated September 27, 2005.
- C. Minute Entry dismissing Petition to Modify.
dated February 28, 2006.
- D. Objection to Commissioner’s Recommendation
and Request for Hearing.
- E. Order from Hearing Held May 4, 2004,
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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this matter pursuant to Section 78-2a-3(h), Utah Code Annotated (1953, as amended).

STATEMENT OF ISSUES FOR REVIEW

1. **Issue:** Did the trial court, Commissioner Arnett, err in dismissing Mr. Cook's Verified Petition to Modify Decree of Divorce for failure to state a claim for relief? Is it possible that Mr. Cook may be entitled to relief under any set of facts as alleged in his Verified Petition to Modify?

Standard of Review: When determining whether a trial court properly granted a motion to dismiss a complaint, the factual allegations in the complaint are to be accepted as true, and the appellate court is to consider them and all reasonable inferences to be drawn therefrom, in a light most favorable to the plaintiff. *Russell Packard Dev. Inc. v. Carson*, 78 P.3d 616 (Ut. App. 2003). Because the matter is a question of law, there is no deference given to the trial court, and its ruling is reviewed under a correctness standard. *Id.* The dismissal will be affirmed only if it is clear that the claimant is not entitled to relief under any state of facts that could be proven to support the claim. *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990).

Preservation for Review: The dismissal of the Verified Petition to Modify Decree of Divorce was preserved below with the filing of the Verified Petition to Modify (Rec. 1956-1970); the recommendation of dismissal by the Commissioner (Rec. 2284-

2285), the Objection filed to the Commissioner's Recommendation (Rec. 2289-2299) and the Order From Hearing Held May 4, 2006. (Addendum, Exhibit E).

2. **Issue:** Did the trial court, Commissioner Arnett, err in dismissing Mr. Cook's Verified Petition to Modify Decree of Divorce based on a claim that the parties may have contemplated the change in custody prior to the entry of the Divorce Decree, when there is no evidence that such a change was contemplated, and the Divorce Decree contains no provision anticipating such a change, but provides custody to another person.

Standard of Review: See Standard of Review for Issue 1 above.

Preservation for Review: See Preservation for Review on Issue 1 above.

3. **Issue:** Did the trial court, Judge Medley, err in denying Mr. Cook's Objection to the Commissioner's Recommendation based upon an abuse of discretion review of Commissioner Arnett's Recommendation? Is Mr. Cook entitled to a de novo review of the Commissioner's Recommendation by the trial court Judge?

Standard of Review: The procedures employed by the trial court presents a question of law, reviewed under a correction of error standard, giving no particular deference to the trial court's determination. *Ames v. Maas*, 846 P.2d 468, 471 (Ut. App. 1993); *Holm v. Smilowitz*, 840 P.2d 157, 160 (Ut. App. 1992).

Preservation for Review: See Preservation for Review on Issue 1 above and the Order From Hearing Held May 4, 2006, attached in Addendum as Exhibit E.

STATEMENT OF THE CASE

Nature of Proceedings

Prior Appeals:

This case involves a divorce proceeding filed in the Third District Court. An appeal has already been filed involving the divorce proceeding and the trial held, including the imputation of income and the court's ruling regarding the support payments for child support and alimony. This appeal is currently pending. [**Appellate Case No. 20050733-CA**].

A second appeal was filed in this proceeding regarding a subsequent contempt proceeding held before Judge Medley, on March 1, 2006; based on Mr. Cook's failure to obtain health insurance for the children, and to pay the full amount of the support obligations, which were previously imputed. This appeal is also currently pending. [**Appellate Case No. 20060276-CA**].

This Appeal:

This appeal involves the filing of a Verified Petition to Modify Decree of Divorce, that was filed by Mr. Cook, on or about September 27, 2005. (Rec. 1956-1970). Mr. Cook alleged a substantial and material change of circumstances, after entry of the Decree on August 2, 2005; as on August 11, 2005 the physical custody of the parties' minor child, James Gardner Cook, was improperly relinquished to the care, custody and control of the maternal grandparents, Glen and Jody Gardner. (Rec. 1956-1970).

The Petition was served on Ms. Cook on September 29, 2005. No answer was filed to the Petition within the time allowed by law. On October 20, 2005, Mr. Cook filed a Default Certificate. On or near January 6, 2006, Ms. Cook filed a Motion to Quash and Memorandum, claiming that the service of process was defective. On January 6, 2006, a hearing was held before Judge Medley on the matter. Judge Medley indicated that he was inclined to sign the Default Certificate, absent the filing of the Motion to Quash and Memorandum. Judge Medley remanded the matter back to Commissioner Arnett for a hearing to address the Motion to Quash and Memorandum. (Rec. 2137). The matter was set for a hearing on February 28, 2006.

On January 13, 2006, before the hearing on the Motion to Quash was held, Ms. Cook filed a Motion to Dismiss Respondent's Petition to Modify Decree of Divorce based on the grounds that Mr. Cook had failed to allege a material and significant change in circumstances. (Rec. 2144). Mr. Cook objected to the Motion to Dismiss as being untimely, as the deadline to file a responsive pleading expired on October 19, 2005. Further, Mr. Cook argued that Judge Medley had only remanded the matter to the Commissioner for a hearing on the Motion to Quash Service of the Petition, and not for hearing on a Motion to Dismiss the Petition. (Rec. 2224-2230).

In addition to the late filing, Mr. Cook argued that the Petition to Modify could not be dismissed as he adequately alleged a substantial and material change in circumstances to proceed on his Petition to Modify. The relinquishment of custody for the minor child to the maternal grandparents was not contemplated in the Divorce

Decree. The Decree awards custody of the minor child to Ms. Cook, not the maternal grandparents. Mr. Cook argued that there was no provision in the Decree contemplating the relinquishment of the care, custody and control of the minor child to the maternal grandparents, or for the grandparents to serve in any capacity other than grandparents. (Rec. 2224-2230).

Commissioner Arnett never heard argument on the Motion to Quash as referred by Judge Medley, but only on Ms. Cook's Motion to Dismiss. Commissioner Arnett recommended that Ms. Cook's Motion to Dismiss the Verified Petition to Modify be granted and that Mr. Cook's Petition to Modify be dismissed. (Rec. 2284-2285). Mr. Cook filed an Objection to Commissioner's Recommendation (Rec. 2289-2299), and the matter came on for hearing before Judge Medley on May 4, 2006. Mr. Cook argued that the Verified Petition to Modify Decree of Divorce, did state a claim for relief, e.g. a substantial and material change in circumstances; and that if the allegations were proven, Mr. Cook could be entitled to the relief sought in his Petition to Modify. (Rec. 2293-2294).

Judge Medley issued a final ruling on the matter on May 4, 2006, denying Mr. Cook's Objection to the Commissioner's Recommendation, not ruling on the issues raised by Mr. Cook, but rather by stating that there was "no abuse of discretion by Commissioner Arnett" in granting the Motion to Dismiss the Verified Petition. (See Addendum, Ex. E).

Statement of Facts

The following Statement of Facts relate to this appeal:

1. A Divorce Decree was entered in the above matter on or about August 2, 2005; providing that custody, care and control of the parties' minor child, James Gardner Cook, shall be awarded to Ms. Cook. (Divorce Decree, Rec. 1738-1749).

2. A Verified Petition to Modify Decree of Divorce was filed on September 27, 2006, alleging that the parties' minor child, James Gardner Cook, had been abandoned by Ms. Cook; and that after entry of the Decree on August 2, 2005, the physical care, custody and control of James Gardner Cook, was improperly relinquished to the maternal grandparents, Glen and Jody Garner on August 11, 2005. (Rec. 1956-1970). This change of custody was contrary to the Divorce Decree, which awards custody, care and control of the minor child to Ms. Cook and not the maternal grandparents. (Divorce Decree, Rec.1739-1749).

3. An answer was not timely filed to the Petition to Modify and a Default Certificate was filed by Mr. Cook. Ms. Cook filed a Motion to Dismiss the Default Certificate, claiming that service of process was defective. (Rec. 2095). Ms. Cook subsequently filed a Motion to Quash and Memorandum, again claiming a defective service of process. (Rec. 2132-2133).

4. Judge Medley did not sign the Default Certificate, because of the Motion to Quash and Memorandum. Judge Medley remanded the matter to the Commissioner to specifically address the Motion to Quash and service of process issues. (Rec. 2137).

5. The hearing was set for hearing before the Commissioner on February 28, 2006; however, before the hearing on the Motion to Quash could be held, Ms. Cook on or about January 13, 2006, untimely filed a Motion to Dismiss the Petition to Modify. (Rec. 2144). This Motion to Dismiss was based on the grounds that Mr. Cook had failed to allege a material and significant change in circumstances. (Rec. 2144).

6. At the hearing, the Commissioner did not hear argument or rule on the Motion to Quash and service of process, as remanded by Judge Medley; but rather ruled on the Motion to Dismiss. The Commissioner recommended that the Motion to Dismiss be granted (Rec. 2284), and that the Petition to Modify Divorce Decree be dismissed. (Rec. 2285).

7. Mr. Cook filed an Objection to the Commissioner's Recommendation arguing that the Motion to Dismiss was untimely filed, i.e., nearly 3 months after the Default Certificate had been filed; that only the Motion to Quash was properly before the Commissioner; and most importantly that the Petition to Modify adequately stated a substantial and material change of circumstances, that if proven could support the relief requested. (Rec. 2293-2298).

8. On May 4, 2006, Judge Medley heard from both parties as to the Commissioner's recommendation and issued a final ruling on the matter. Judge Medley did not rule on the issues raised by Mr. Cook, but rather stated that there was "no abuse of discretion by Commissioner Arnett" in granting the Motion to Dismiss the Verified Petition. (See Addendum, Ex. E).

SUMMARY OF ARGUMENT

A motion to dismiss a complaint is to be granted and affirmed only if it is clear that the claimant is not entitled to any relief under any state of facts that could be proven to support the relief sought. *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990). When determining whether a trial court properly granted a motion to dismiss, the factual allegations in the complaint are to be accepted as true and the appellate court is to consider them, and all reasonable inferences to be drawn from them, in a light most favorable to the claimant. *Russell Packard Dev. Inc. v. Carson*, 78 P.3d 616 (Ut. App. 2003).

To succeed on a petition to modify, the moving party must show a substantial and material change of circumstances has occurred and that the change was not contemplated in the previously entered decree. *Boyce v. Goble*, 8 P.3d 1042 (Ut. App. 2000). Mr. Cook's Petition to Modify in this case alleges a substantial and material change of circumstances by asserting that after entry of the Decree; the care, custody and control of the parties' minor child, James Gardner Cook, was improperly relinquished to the care, custody, and control of the maternal grandparents, Glen and Jody Gardner.

The relinquishment of custody to Glen and Jody Gardner is not provided for in the Decree, nor contemplated in the Decree. The Decree specifically awards the care, custody and control of the minor child to Ms. Cook, and not to the maternal grandparents. The maternal grandparents have no specific rights under the Decree.

The Petition to Modify does allege sufficient allegations, which if proven true and taken in a light most favorable to Mr. Cook, may entitle him to the relief sought. The trial court failed to apply the proper standard for a motion to dismiss. The trial court failed to accept the facts alleged as true, and failed to view the facts in a light most favorable to Mr. Cook. The Motion to Dismiss should not have been granted by the Commissioner.

After Commissioner Arnett issued his decision Mr. Cook filed an Objection to the Recommendation. A district court's review of a commissioner's recommendation is a de novo review, which may require a evidentiary hearing if the recommendation is not supported by evidence in the record. *Liska v. Liska*, 902 P.2d 644 (Ut. App. 1995). Judge Medley did not make any findings or cite to any support in the record in hearing the objection. Judge Medley simply stated in cursory form that the Commissioner's ruling was not an abuse of discretion.

Judge Medley should have conducted a de novo review, and should have examined the Petition to Modify to determine if it adequately stated a claim for the relief sought, taking the allegations as true and applying all reasonable inferences in favor of Mr. Cook. Judge Medley also should have made findings of sufficient detail and include enough subsidiary facts to disclose the steps taken to reach his ultimate decision to dismiss the Petition to Modify. *Williamson v. Williamson*, 983 P.2d 1103 (Ut. App. 1999). Judge Medley failed to apply the proper standard in reviewing the Commissioner's recommendation and failed to make sufficient findings to support his

ultimate decision to dismiss the Petition. The Petition to Modify does state a claim for which modification may be granted. The Order of Dismissal should be reversed.

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING MR. COOK'S VERIFIED PETITION TO MODIFY THE DIVORCE DECREE AS IT PROPERLY STATES A CLAIM FOR RELIEF

A motion to dismiss a complaint is to be granted and affirmed only if it is clear that the claimant is not entitled to any relief under any state of facts that could be proven to support the relief sought. *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990). When determining whether a trial court properly granted a motion to dismiss, the factual allegations in the complaint are to be accepted as true and the appellate court is to consider them and all reasonable inferences to be drawn from them, in a light most favorable to the claimant. *Russell Packard Dev. Inc. v. Carson*, 78 P.3d 616 (Ut. App. 2003).

To succeed on a petition to modify, the moving party must show a substantial and material change of circumstances has occurred and that the change was not contemplated in the previously entered decree. *Boyce v. Goble*, 8 P.3d 1042 (Ut. App. 2000). Mr. Cook's Petition to Modify in this case alleges a substantial and material change of circumstances, by asserting that on or about August 11, 2005, after entry of the Decree; the care, custody and control of the parties' minor child, James Gardner Cook, was improperly relinquished to the care, custody, and control of the maternal grandparents, Glen and Jody Gardner.

Mr. Cook alleges that such a change of circumstances, i.e. the relinquishment of the care, custody, and control over James Gardner Cook, was never contemplated by the parties in the previously entered Decree. Mr. Cook reasonably contemplated that the care, custody, and control of the minor child would remain with Ms. Cook, which is specifically provided for in the Decree. Again the allegations in the Petition are to be taken as true and considered in a light most favorable to Mr. Cook. Under this standard, it was improper for the Commissioner to grant the Motion to Dismiss the Petition to Modify, in this case.

Furthermore, the Commissioner failed to make any specific findings on the record regarding the allegations in the Petition to Modify, particularly as to those allegations occurring after entry of the Divorce Decree. *Williamson v. Williamson*, 983 P.2d 1103 (Ut. App. 1999) (the court should make findings of sufficient detail and include enough subsidiary facts to disclose the steps by which the court reaches its ultimate decision). A relinquishment of custody to another person, reflects on the custodial parent's parenting ability and the functioning of the custodial parent, sufficient to show a substantial and material change of circumstances to modify a divorce decree. *Hogge v. Hogge*, 649 P.2d 51 (Utah 1982).

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II. THE TRIAL COURT ERRED IN DISMISSING MR. COOK'S VERIFIED PETITION TO MODIFY STATING THAT THE PARTIES CONTEMPLATED THE CHANGE IN CUSTODY WHEN NO EVIDENCE OF THIS WAS PRESENTED AND WHEN THE DECREE ITSELF CONTAINS NO PROVISION ANTICIPATING SUCH A CHANGE

Without making any specific findings or holding any type of evidentiary hearing, the Commissioner (when he was only to consider the Motion to Quash), simply granted the Motion to Dismiss, stating that the parties contemplated such a change in custody in the prior Divorce Decree. However, in order for the court to find that a material change of circumstances was contemplated in a divorce decree, there must be some evidence of this presented. Preferably in the form of a provision within the decree itself, that the trial court anticipated the specific change. *Durfee v. Durfee*, 796 P.2d 713, 176 (Ut. App. 1990).

Such a change of custody was not anticipated by the parties; and there is no evidence that the parties agreed or anticipated that there would be a change of custody to the maternal grandparents. Furthermore, the relinquishment of custody to the maternal grandparents is not provided for in the Decree, nor is it at all contemplated in the Decree. The maternal grandparents have no specific rights under the Decree. In fact, the Decree specifically awards the care, custody and control of the minor child to Ms. Cook; not to the maternal grandparents.

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III. THE TRIAL JUDGE ERRED IN REVIEWING THE COMMISSIONER'S RECOMMENDATION UNDER AN ABUSE OF DISCRETION STANDARD

After Commissioner Arnett issued his decision Mr. Cook filed an Objection to the Recommendation. A district court's review of a commissioner's recommendation is a de novo review, which may require a evidentiary hearing if the recommendation is not supported by evidence in the record. *Liska v. Liska*, 902 P.2d 644 (Ut. App. 1995). Judge Medley did not make any findings or cite to any support in the record in hearing the objection. Judge Medley simply stated that the Commissioner's ruling was not an abuse of discretion.

Judge Medley should have conducted a de novo review, and should have examined the Petition to Modify to determine if it adequately stated a claim for the relief sought, taking the allegations as true and applying all reasonable inferences in favor of Mr. Cook. Judge Medley failed to apply the proper standard in reviewing the Commissioner's recommendation.

Furthermore, Judge Medley should have made findings of sufficient detail and should have included enough subsidiary facts to disclose the steps taken in reaching his ultimate decision to dismiss the Petition to Modify. *Williamson v. Williamson*, 983 P.2d 1103 (Ut. App. 1999).

The Petition to Modify does allege sufficient allegations, which if proven true and taken in a light most favorable to Mr. Cook, may entitle him to the relief sought. The trial court failed to apply the proper standard for a motion to dismiss. The trial court

failed to accept the facts alleged as true, and failed to view the facts in a light most favorable to Mr. Cook. The Petition to Modify does state a claim for relief and the Order of Dismissal should be reversed.

CONCLUSION

The Petition to Modify Divorce Decree, when taking the allegations alleged as true and applying all inferences in favor of Mr. Cook; does state a claim for relief, sufficient to withstand a Motion to Dismiss. It was error for the trial court to grant the Motion to Dismiss under this standard.

The Petition to Modify adequately states a substantial and material change of circumstances after entry of the Decree, which was not anticipated by the parties, or provided for in the Decree itself. These allegations are sufficient to state a claim for the relief sought. Therefore, the Motion to Dismiss should have been denied.

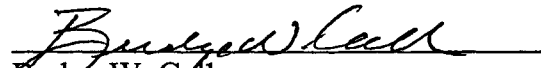
The Court Commissioner erred in granting the Motion to Dismiss by simply stating (without any evidence, evidentiary hearing, or specific findings) that the relinquishment of custody was contemplated by the parties in the Divorce Decree, when the Decree contains no provision anticipating such a change.

The Judge erred in affirming the Commissioner's recommendation based on an abuse of discretion standard, when the Commissioner's recommendation was without any evidence, evidentiary hearing, or specific findings. The Judge should have conducted a de novo review, particularly when there was no record, evidence, or findings, to support the Commissioner's Recommendation.

Based on the foregoing, the trial court's ruling granting the Motion to Dismiss the Verified Petition to Modify should be reversed.

DATED this 16 day of October, 2006.

BOND & CALL, L.C.

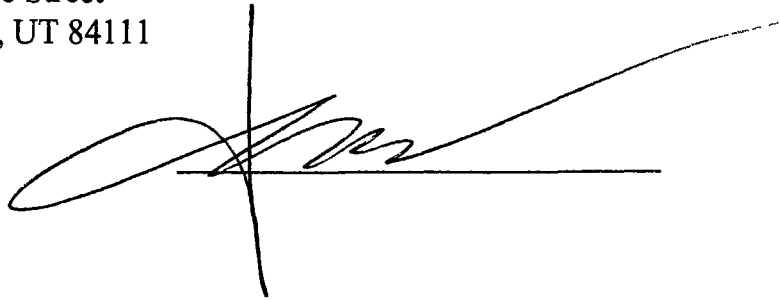

Budge W. Call

MAILING CERTIFICATE

I hereby declare that I caused to be mailed, postage prepaid, first class,
TWO true and correct copies of the foregoing **APPELLANT'S BRIEF** this 17 day
of October, 2006, to:

Richard S. Nemelka
MEMELKA & NEMELKA
6806 South 1300 East
Salt Lake City, UT 84121

Sharon Kishner
Office of the Guardian *ad Litem*
450 South State Street
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to be 'Sharon Kishner', written over a horizontal line. The signature is stylized and includes a vertical line that crosses the horizontal line.

ADDENDUM

- A. Decree of Divorce,
dated August 2, 2005.
- B. Verified Petition to Modify Decree of Divorce
dated September 27, 2005.
- C. Minute Entry dismissing Petition to Modify.
dated February 28, 2006.
- D. Objection to Commissioner's Recommendation
and Request for Hearing, dated March 7, 2006
- E. Order from Hearing Held May 4, 2004,
dated July 20, 2006.

ADDENDUM

EXHIBIT “A”

ENTERED IN REGISTRY
OF JUDGMENTS

DATE 8-3-05

IMAGED

FILED DISTRICT COURT
Third Judicial District

AUG - 2 2005

SALT LAKE COUNTY

By [Signature] Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

<p>LISA COOK, Plaintiff, vs. J. BRAD COOK, Defendant.</p>	<p>DECREE OF DIVORCE Case No.: 024901092DA Judge: Tyrone Medley Comm.: Susan Bradford</p>
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The above-entitled matter came on for Trial on the 14th and 15th of December, 2004, and the 30th and 31st of March, 2005. The Petitioner was present and represented by counsel, Richard S. Nemelka. The Respondent was present and represented by counsel, F. Kevin Bond. The Guardian ad Litem was present during the entire Trial with the exception of March 30, 2005. The Court having heard the testimony as presented by both parties, and having reviewed all documents admitted into evidence, and having otherwise reviewed the file, and having taken the

decree of divorce @J



JD17307395

024901092

COOK, LISA

ENTERED IN REGISTRY
OF JUDGMENTS

DATE 8-3-05

matter under advisement and having entered its Findings of Fact and Conclusions of Law, and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

1. The Petitioner, Lisa Cook, and the Respondent, J. Brad Cook, are hereby awarded a Decree of Divorce in the above-entitled matter severing the bonds of matrimony between the parties herein, the same to be absolute and final upon the signing of the Decree of Divorce and filing of the same with the above-entitled Court.

2. The Petitioner, Lisa Cook, is hereby awarded the primary care, custody and control of the four (4) minor children: Madisen Mae Cook, Kennedy Lauren Cook, James Gardner Cook, and Lacey Mikell Cook. The Respondent, J. Brad Cook, shall be entitled to parent-time that shall increase to unrestricted statutory parent-time pursuant to Utah Code 30-3-35, 35.5 conditioned upon compliance with the plan, outlined below and a determination by the children's therapist that unrestricted parent-time is in the best interest of the minor children.

3. The parties shall abide by the terms of the following plan:

a. The children shall continue to participate in therapy to assist them in addressing the issues that have arisen during the high conflict of this matter, and to ensure that the reported sexualized behavior of the children is appropriately addressed. Neither party shall change the chosen therapist without a court order. Although the Court is concerned about changing the children's therapist, it is important that both Petitioner and Respondent work

together with the therapist. Therefore, Dr. Johanna McManemin is selected by the Court to provide the children's therapy to commence immediately.

b. That it is in the best interests of the minor children that Respondent immediately fully and thoroughly complete a psycho-sexual evaluation at his cost to assist in determining risks to the minor children presented by Respondent's admitted past addictions to pornography, his sex history and interests. At this time, Respondent is not required to participate in a plethysmograph test as part of the evaluation, this component of the evaluation is reserved. The evaluator must be approved by the Court.

c. It is in the best interests of the minor children that both parties participate in individual therapy to address their individual responsibility for the high conflict, anger and anxiety they have created in their family unit to the detriment of their minor children, to address their respective inability to place the needs of their minor children ahead of their own needs, and to learn to co-parent their minor children.

d. A special master/parent coordinator shall be appointed to assist Mr. Cook and the children in the transition to unrestricted, statutory parent-time. The special master/parent coordinator shall be allowed contact with all parties, the Guardian ad Litem, and all professionals/therapists in the matter to assist in this transition. The cost of the special master/parent coordinator is to be shared equally by the parties.

e. Both parties shall be entitled to speak with all care professionals regarding the children and be involved in the children's care at the professional's discretion.

f. Both parties shall be restrained and enjoined from any degrading or disparaging comments about the other parent in the presence of the children and shall remove the children from any situation wherein any third party is doing so. Both parties shall be ordered to encourage the children to have a positive, loving relationship with the other parent.

g. Ms. Cook shall allow Mr. Cook full information regarding the schooling issues of the children, and keep Mr. Cook apprised of any drops in grades or absences of the children. The parties shall be restrained and enjoined from allowing the children to miss school absent a requirement to do so for a medical or therapeutic reason or appointment.

4. Based upon the Court's finding of abuse by both parents, the presumptions regarding parent-time outlined in Utah Code 30-3-32 to 30-3-34 have been rebutted and the Court shall look directly to the best interest of the children if any new issue is brought back before this Court regarding these matters.

5. Based upon the Court's finding that the Petitioner is in contempt for denying parenting-time, the Petitioner is hereby sentenced to thirty (30) days in the Salt Lake County Jail, all of which is stayed, conditioned upon Petitioner not violating the parent-time orders entered in this case and state because in part, Petitioner acted out of a perceived need to protect her minor children.

6. The Petitioner and Respondent shall pay equally the Guardian ad Litem's reasonable attorneys fees for time spent in Trial preparation and Trial in the above-mattered. The Guardian ad Litem's attorneys fees shall be supported by Affidavit filed with the Court.

7. The Respondent, J. Brad Cook, shall pay to the Petitioner, Lisa Cook, child support in the sum of \$1,511.00 per month as stated in the Child Support Worksheet attached hereto as Exhibit "A" and incorporated herein by reference, with said child support commencing on the 1st day of April, 2005. Said child support shall continue until a minor child turns 18 or as has graduated from high school during the child's normal expected year of graduation, whichever occurs later, at which time the base child support amount shall automatically be adjusted to reflect the base combined child support obligation shown in Utah Code 78-45-7.14 for the remaining number of children due child support.

The base child support award shall be reduced by fifty percent (50%) for each child for time periods during which the child is with a non-custodial parent by order of the Court or by written agreement of the parties for at least 25-30 consecutive days of extended parenting-time or twenty-five percent (25%) for each child for time periods during which the child is with a non-custodial parent by order of the Court, or by written agreement of the parties for at least twelve (12) of any thirty (30) consecutive days of extended parent-time.

Said child support obligation shall be due and owing on the first day of each month and shall be paid one-half ($\frac{1}{2}$) by the 5th and one-half ($\frac{1}{2}$) by the 20th of each month.

Income withholding relief consistent with Utah Code 62A-11-502 is hereby ordered to be put into effect immediately as of the 1st day of April, 2005, regardless of whether a delinquency occurs.

The parties advised consistent with Utah Code 78-45-7.2(8) that if this child support order has not been modified within the previously three (3) years, a parent, legal guardian or the Office of Recovery Services may petition the Court to adjust the child support order. The Court shall adjust the support amount if it receives evidence of a non-temporary change of ten percent (10%) or more as then calculated under the guidelines. Further a parent, legal guardian or Office of Recovery Services may petition the Court to adjust the amount of support order at any time if there has been a substantial change of circumstances since the last child support order.

Also, as an additional form of support, each party shall pay one-half (½) work related child care expenses incurred for the benefit of the parties minor children. The parties shall pay their share on a monthly basis, immediately upon presentation of proof of the child care expenses from the other party, but may suspend paying the monthly expense while it is not being incurred. The parent who incurs child care expenses shall provide written verification of the costs and identity of the child care provider to the other parent on engagement of a provider, and thereafter upon the request of the other parent

1743

8. The minor children are in need of health and dental insurance and Respondent is capable of providing the same, therefore, pursuant to Utah Code 78-45-7.15 (1953 as amended) it is hereby ordered to maintain insurance for medical expenses and dental expenses for the benefit of the minor children as soon as such is available.

a. Both parties should equally share the out-of-pocket costs of the premium actually paid by a parent for the children's portion of the insurance.

b. Both parties should equally share all reasonable and necessary uninsured medical expenses, including deductibles and co-payments, incurred for the minor children and actually paid by the parties.

c. The parent ordered to maintain insurance shall provide verification of the coverage to the other parent, or to the Office of Recovery Services under Title IV of the Social Security Act, upon initial enrollment of the dependent child, and thereafter on or before January 2 of each calendar year. The parent shall notify the other parent, or the Office of Recovery Services, of any change of insurance carrier, premium, or benefits within thirty (30) calendar days of the date that parent first knew, or should have known, of the change.

d.. The parent who incurs medical expenses shall provide written verification of the costs and payment of medical expenses to the other parent within thirty (30) days of payment.

e. A parent incurring medical expenses may be denied the right to receive credit for the expenses, or to recover the other parent's share of the expenses, if that parent fails to comply with the subparagraphs "d" and "e" above.

9. The Respondent, J. Brad Cook, shall pay to the Petitioner, Lisa Cook, alimony in the sum of \$100.00 per month commencing April 1, 2005. Said alimony shall terminate upon the remarriage or cohabitation of the Petitioner, or death of either party, or the length of the marriage, whichever occurs first.

10. Based upon the Court's finding of Respondent's contempt for failing to pay child support and alimony, to maintain the private school for minor children or to make Petitioner's automobile payment or pay for orthodontic treatment for the children, the Court hereby sentences the Respondent, J. Brad Cook, to thirty (30) days incarceration in the Salt Lake County Jail to commence September 1, 2005, forthwith.

11. Petitioner, Lisa Cook, is hereby awarded a judgment against the Respondent, J. Brad Cook, for the sum of \$21,111.00 for child support arrearages and the sum of \$90,396.00 for alimony arrearages which is a total judgment of \$111,507.00 with interest accruing therein at the statutory rate.

12. Both parties are awarded the personal property presently in their possession.

13. The Respondent is hereby ordered to maintain life insurance on his life in the sum of \$500,000.00 naming the Petitioner and the minor children as beneficiaries thereon until such time that child support and alimony terminate.

14. Each party shall be allowed to claim two (2) of the minor children as dependents for tax purposes; however, the Respondent shall only be allowed to claim the two (2) minor children as dependents for tax purposes if he is current in all of his child support and alimony obligations including any exemption and all arrearages. Petitioner is entitled to claim Kennedy and James for tax credit purposes. Respondent is entitled to claim Lacey and Madisen for tax exemption and credit purposes.

15. Each party is hereby ordered to assume and pay all debts and obligations incurred by that party subsequent to the separation of the parties, except Respondent is hereby ordered to pay the remaining Will-Win debt and the parties shall equally pay the fees to date from Dr. Matthew Davies.

16. The Respondent shall pay two-thirds (2/3) of Petitioner's reasonable attorneys fees

and costs that have been incurred in this matter, supported by Affidavit and reduced to Judgment.

DATED this ____ day of June, 2005.

BY THE COURT:

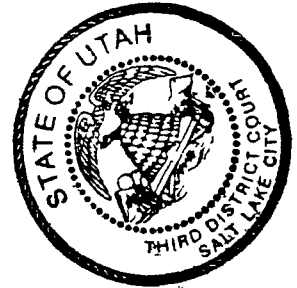
Tyrone E. Medley 8/2/05

JUDGE TYRONE E. MEDLEY
DISTRICT COURT JUDGE

APPROVED AS TO FORM:

F. Kevin Bond

F. Kevin Bond
Attorney for Respondent



Michelle R. Blomquist
Guardian ad Litem

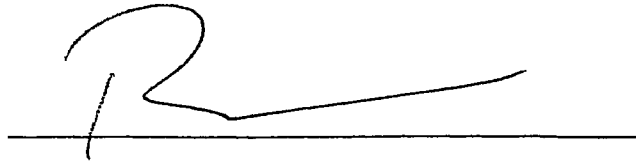
CERTIFICATE OF SERVICE

10 I hereby certify that I mailed a true copy of the foregoing **DECREE OF DIVORCE**, this day of June, 2005, postage prepaid and addressed as follows:

F. Kevin Bond
Attorney at Law
8 E. Broadway, Suite 720
Salt Lake City, Utah 84111

1747

Michele R Blomquist
Office of the Guardian ad litem
450 South State Street, W22
Salt Lake City, Utah 84114

A handwritten signature in black ink, consisting of a stylized capital letter 'R' followed by a horizontal line extending to the right.

IN THE THIRD DISTRICT COURT
S. L. COUNTY, STATE OF UTAH

LISA COOK

vs.

J. BRAD COOK

CHILD SUPPORT OBLIGATION WORKSHEET
 (SOLE CUSTODY AND PATERNITY)

Civil No. 024901092

	MOTHER	FATHER	COMBINED
1. Enter the # of natural and adopted children of this mother and father for whom support is to be awarded.			4
2a. Enter the father's and mother's gross monthly income. Refer to Instructions for definition of income.	\$ 1280	\$ 6000	
2b. Enter previously ordered alimony that is actually paid. (Do not enter alimony ordered for this case).	-	-	
2c. Enter previously ordered child support. (Do not enter obligations ordered for the children in Line 1).	-	-	
2d. OPTIONAL: Enter the amount from Line 12 of the Children in Present Home Worksheet for either parent.	-	-	
3. Subtract Lines 2b, 2c, and 2d from 2a. This is the Adjusted Gross Income for child support purposes.	\$ 1280	\$ 6000	\$ 7280
4. Take the COMBINED figure in Line 3 and the number of children in Line 1 to the Support Table. Find the Base Combined Support Obligation. Enter it here.			\$ 1834
5. Divide each parent's adjusted monthly gross in Line 3 by the COMBINED adjusted monthly gross in Line 3.	17.6 %	82.4 %	
6. Multiply Line 4 by Line 5 for each parent to obtain each parent's share of the Base Support Obligation.	\$ 323	\$ 1511	
7. BASE CHILD SUPPORT AWARD: Bring down the amount(s) from Line 6 or enter the amount(s) from the Low Income Table per U.C.A. 78-45-7.7. The parent(s) without physical custody of the child(ren) pay(s) the amount(s) all 12 months of the year.	\$ 323	\$ 1511	

8. Which parent(s) is the obligor? _____ Mother _____ Father _____ Both

9. Is the support award the same as the guideline amount(s) in line 7? () Yes () No
 If NO, enter the amount(s) ordered: \$ _____ (Father) \$ _____ (Mother) and answer number 10.

10. What were the reasons stated by the Court for the deviation?
 () property settlement
 () excessive debts of the marriage
 () absence of need of the custodial parent
 () other: _____

6749

EXHIBIT “B”

FILED
THIRD DISTRICT COURT
2005 SEP 27 PM 3:67
SALT LAKE COUNTY
BY *[Signature]*
DEPUTY CLERK

F. Kevin Bond (5039)
Budge W. Call (5047)
BOND & CALL, L.C.
8 East Broadway, Suite 720
Salt Lake City, UT 84111
Telephone: (801) 521-8900
Facsimile: (801) 521-9700

Attorneys for Respondent

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

LISA COOK,

Petitioner,

vs.

J. BRAD COOK,

Respondent.

**VERIFIED PETITION TO
MODIFY DECREE OF DIVORCE**

Civil No. 024901092DA

Judge: Tyrone E. Medley

Comm: Thomas N. Arnett, Jr.

COMES NOW the Respondent, J. Brad Cook, by and through his counsel of record, F. Kevin Bond of Bond & Call, L.C., and hereby submits this *Verified Petition to Modify Divorce of Decree* entered on August 2, 2005.

WHEREFORE, Respondent alleges as follows:

BACKGROUND

1. The parties were divorced due to irreconcilable differences and said divorce became final on August 2, 2005.
2. There are four (4) minor children at issue, to wit: Madisen Mae Cook, Kennedy Lauren

Cook, James Gardner Cook. Lacey Mikell Cook was not born as issue of the marriage. She is the biological child of the Petitioner, but was subsequently adopted by the Respondent.

3. The Petitioner was granted custody of the four minor children in the parties' *Decree of Divorce*.

4. Since the entry of the *Decree of Divorce* there have been substantial, material and unforeseeable changes in the circumstances of the parties and one of the minor children, James Gardner Cook ("Gardner"), justifying the Court in modifying the *Decree of Divorce* in this matter as further set forth below.

5. It has come to the attention of the Respondent that Gardner has been living with the maternal grandparents continuously for nearly two (2) years.

6. Respondent suspected that Gardner had no day-to-day interaction with his siblings, or with the Petitioner, but until September 9, 2005, the Respondent did not have substantial or compelling evidence to support his suspicions.

7. With the advent of a new school year, the Respondent had particular concern about whether the Petitioner had registered the parties' children in school. During a conversation with a representative of the Park Lane Elementary school, the Respondent confirmed that Kennedy Cook had been properly registered. However, when the Respondent questioned whether or not his son, Gardner, was registered for Kindergarten, the representative indicated that Gardner was not a registered student at Park Lane.

8. The Respondent contacted the Jordan School District and learned that his son was

registered at Granite Elementary.¹ This change was made by the Petitioner without notice to the Respondent, as required by the *Decree of Divorce*.²

9. The Respondent prepared and served a *Subpoena* and *Notice of Records Deposition* on the Compliance and Special Programs Director, Marilyn Richards, and upon the Principal of Granite Elementary, Dana Easton.

10. In response, the Respondent was provided with various documents. These documents demonstrate that the Petitioner has relinquished physical custody of the minor child, Gardner, to the day-to-day care and control of Gardner's maternal grandparents. They have been (for a period of two years) and continue to be, Gardner's primary caretakers.

11. There are four (4) individual documents that support the

- Durable Power of Attorney, attached hereto as Exhibit "A"
- Authorization to Enroll, attached hereto as Exhibit "B"
- Utah School Immunization Record, attached hereto as Exhibit "C"
- Kindergarten Information Document, attached hereto as Exhibit "D"

12. Exhibit "A" is a Durable Power of Attorney that transfers the protection or furtherance of the health and welfare of Gardner from the Petitioner, as Grantor, to Jody Gardner (a.k.a. Laura Jo Gardner), the Petitioner's mother. **It establishes that Jody Gardner has become the minor child's custodial parent.** Specifically, it states that

¹ Petitioner's home at the time the enrollment took place, located at 2591 East 10000 South, was outside of the Granite Elementary School boundaries. Participation in Granite Elementary required an *Authorization to Enroll* issued by the Jordan School District, Department of Compliance and Special Programs.

² See *Decree of Divorce*, ¶ 3(g)

Grantor(s) hereby designate Jody Gardner as the Custodian(s) of said minor child and grant to said Custodian(s) a Durable Power of Attorney **with full authority to take any action which said Custodian(s) may deem necessary to protect or further said child's health and welfare, including authorization for educational or medical services. Such action shall have the same force and effect, and shall bind the undersigned Grantor(s), their heirs and assigns, to the same degree, as would have been the case had the action been taken by the Grantor(s).**

Exhibit "A" at lines 7-10 (emphasis added). Respondent does not deem it to be in the best interest of the minor child to grant Jody Gardner, a non-parent, non-guardian, to determine the education or medical services that Gardner should receive, nor to be granted any authority to "take any action" that she "may deem necessary." The Respondent has received no notice of this transfer of rights, nor has the Respondent consented to said transfer.

13. Exhibit "B" is an Authorization to Enroll. It establishes the following:
 - A. That Gardner is living with his grandparents.³
 - B. That, although the relationship of the assigned custodian/guardian to the student is "grandmother",⁴ the consent states the following:

"I, hereby give my consent for my son/daughter, Gardner Cook, to attend Granite Elementary school and make his/her home with the assigned custodian/guardian."⁵
 - C. That the **authority to exercise judgment** concerning the education of Gardner is expressly left to the discretion of the custodian.⁶

³ See Exhibit "B" at line 20

⁴ See Exhibit "B" at line 23

⁵ Exhibit "B" at lines 25-26 (emphasis added)

⁶ See Exhibit "B" at lines 28-29

- D. That **in cases of emergency** or with respect to the minor child's safety and welfare, Jody Gardner has been given the **authority to make decisions that are necessary for the best interest of the minor child.** ⁷
 - E. That the Petitioner failed to sign the document – because **she has subrogated her authority and responsibility for the minor child to Jody Gardner.** In so many words, **Jody Gardner authorized herself to assume the responsibilities outlined** in paragraph 13(B) - (D) above. ⁸
 - F. That the enrollment is provisional, **requiring Gardner to remain with the assigned guardian to maintain residency.** ⁹
14. Exhibit "C" is a copy of the Utah School Immunization Record. It reveals the following:
- A. Jody Gardner signed the document under the heading **Signature of Parent/Guardian.** Jody Gardner is neither the parent, nor the guardian.
 - B. Jody Gardner crossed off the name of the Respondent, under the heading **Name of Parent/Guardian.** The Respondent is one of the parent's of the minor child, despite Ms. Gardner's attempts to mask this fact at every turn.
 - C. Jody Gardner crossed off the address of the parties' previous residence, under the heading **Mailing Address,** and replaced it with her own address, 9710 S. Mt. Jordan Rd.

15. Finally, Exhibit "D" is an a Kindergarten Information Document. While the document should recognize the Respondent as the child's father, and the Petitioner as the child's mother, instead, the document recognizes Glen Gardner and Jody Gardner in the spaces designated as **Father's Name** and **Mother's Name.** Exhibit "D" at line 5. Respondent would assert that Glen and Jody Gardner, for all intents and purposes, have not only taken physical custody of Gardner, but in every respect treat him

⁷ See Exhibit "B" at lines 29-30

⁸ See Exhibit "B" at line 35

⁹ See Exhibit "B" at lines 38-40

as their own child and exercise a degree of control over him, his actions, and the direction of his life that is troubling to the Respondent and contrary to the Respondent's wishes.

ANALYSIS

Abandonment

U.C.A. § 78-3a-408 outlines, amongst other things, the definition of abandonment. It states, in pertinent part, the following

(1) In determining whether a parent or parents have abandoned a child, it is prima facie evidence of abandonment that the parent or parents:
(a) although having legal custody of the child, have surrendered physical custody of the child, and for a period of six months following the surrender have not manifested to the child or to the person having the physical custody of the child a firm intention to resume physical custody or to make arrangements for the care of the child

U.C.A. § 78-3a-408(1) - (1)(a) (emphasis added). The Petitioner not only surrendered physical custody of the child, but she failed, within six months following that surrender, to demonstrate any intention to resume physical custody. She relinquished Gardner's physical custody over to Glen and Jody Gardner nearly two (2) years ago. Based upon the documentation provided by virtue of Exhibits "A" through "D" above, it is clear that she has also relinquished the care and control of Gardner over to Glen and Jody Gardner.

Unbeknownst to the Respondent, approximately two to three weeks ago the Petitioner moved from her residence on the east side of the Salt Lake Valley, 2951 East in Sandy, to the west side of the Salt Lake Valley, off Redwood Rd. The children were moved from the schools in which they were originally registered to unknown schools on the west side. Aside from Petitioner's failure to notify the Respondent that she had moved, and to where she had moved, the Petitioner has failed to provide any

notice to the Respondent as to where his children are now registered in school. This is in direct violation to the provisions outlined in the *Decree of Divorce*.¹⁰

The Petitioner would have this court believe that she moved because she could not afford to make the rental payment. In fact, that was the testimony proffered by Petitioner's counsel during the most recent *Order to Show Cause* hearing held before Commissioner Arnett. Based on information and belief, Respondent would contend that the Petitioner, as well as the other residents of the home Petitioner was living in, were asked to leave because the landlord had plans to sell the property or consolidate the ownership of the home to one paying tenant, rather than two.

Regardless of the reason for moving, the Respondent took three of her children with her, but left Gardner to live with Glen and Jody Gardner on the east side of the valley, nearly 60 blocks away. What little control or input she may have exercised regarding Gardner's care, which was minimal at best, has now been further diminished by the distance between them.

Fundamental Liberty Interest of Respondent

Under both the United States Constitution and the constitution of this state, a parent possesses a fundamental liberty interest in the care, custody, and management of the parent's children. Glen and Jody Gardner do not, and should not, possess the right to exercise care, custody, and management of the Respondent's children. U.C.A. § 62A-4a-201 supports the liberties that the Respondent, as the father, should enjoy

(c) It is in the best interest and welfare of a child to be raised under the care and supervision of the child's natural parents. A child's need for a normal family life in a permanent home, and for positive, nurturing family relationships will usually best be met by the child's natural parents. Additionally, the integrity of the family unit, and the right of parents to conceive and raise their children have found protection in the due process clause of the Fourteenth Amendment to the United States Constitution. The right of a fit, competent parent to raise the

¹⁰ See *Decree of Divorce*, ¶ 3(g)

parent's child without undue government interference is a fundamental liberty interest that has long been protected by the laws and Constitution of this state and of the United States.

U.C.A. § 62A-4a-201(1)(c) (emphasis added).

Respondent's fundamental liberty interest is impinged by virtue of Petitioner's abandonment of the minor child, and the subrogation of the Petitioner's parental and custodial rights to Glen and Jody Gardner. Even during the drafting of this document, the minor child is currently visiting with extended family in Michigan with his maternal grandparents – their unilateral decision made without the consent of the Respondent and resulting in the denial of the Respondent's right to exercise his parenting-time rights until their return.

CONCLUSION

The following facts are undisputed:

1. The Petitioner has failed to maintain physical custody of the minor child for nearly two (2) years, and failed to demonstrate any intent to resume physical custody within the six month window, as required by the statute;
2. The Petitioner has relinquished the care and control of Gardner to a third-party.
3. Glen and Jody Gardner were never awarded any custody, guardianship, or parental rights with respect to the minor child; and,
4. As the natural father, the Respondent has a fundamental liberty interest in raising his child.

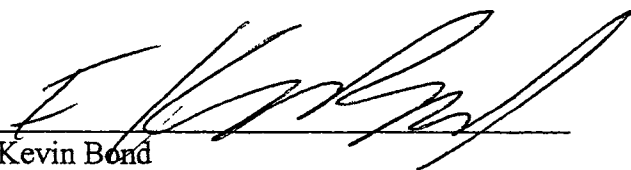
Based on these facts, the Respondent should be immediately awarded the sole custody, care, and control of Gardner Cook. The Petitioner should be awarded supervised parenting-time pursuant to statute.

WHEREFORE, Respondent requests the following:

1. That Respondent be awarded physical and legal custody of the parties' minor child, Gardner Cook, and the Petitioner be awarded supervised parenting-time pursuant to U.C.A. § 35-3-35.5.
2. That child support be ordered in this matter according to the split-custody guidelines.
3. That the Respondent be awarded his attorney's fees and costs incurred in this action for having to bring this matter to Court.
4. For such other and further relief as this Court deems fair and just in the premises.

DATED this 27 day of September, 2004.

BOND & CALL

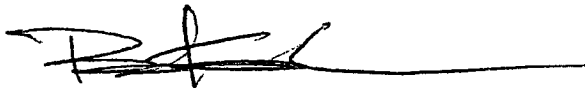


F. Kevin Bond
Budge W. Call
Attorneys for Respondent

VERIFICATION

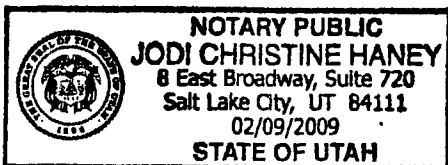
STATE OF UTAH)
 §
COUNTY OF SALT LAKE)

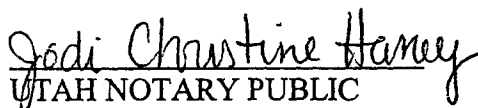
J. Brad Cook, being duly sworn upon oath, deposes and states that he has read the foregoing *Verified Petition to Modify Decree of Divorce*, knows the contents therein and states that the same is true to the best of his knowledge, except those matters stated on belief and as to those matters, he believes them to be true.



J. Brad Cook
Respondent

SUBSCRIBED AND SWORN to before me this 27th day of September, 2005.





Jodi Christine Haney
UTAH NOTARY PUBLIC

CERTIFICATE OF SERVICE

This certifies that on this 27 day of September, 2005, a true and correct copy of the foregoing **VERIFIED PETITION TO MODIFY DECREE OF DIVORCE** was sent to the following using the method indicated:

Richard S. Nemelka
NEMELKA & NEMELKA
6806 South 1300 East
Salt Lake City, Utah 84121

- via first class mail, postage pre-paid
- via facsimile transmission
- via hand delivery
- via attachment to e-mail transmission

Sharon Kishner
Office of the Guardian *ad Litem*
450 South State Street, 2nd Floor
Salt Lake City, Utah 84114

- via first class mail, postage pre-paid
- via facsimile transmission
- via hand delivery
- via attachment to e-mail transmission

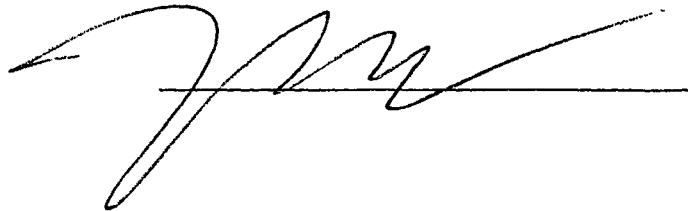
A large, stylized handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to be the name of the person certifying the service.

EXHIBIT “C”

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

LISA COOK, : MINUTES
Petitioner, : ORDER TO SHOW CAUSE
: :
vs. : Case No: 024901092 DA
: :
J BRAD COOK, :
: Commissioner: THOMAS N ARNETT
: JR
Respondent. : Date: February 28, 2006

Clerk: heatherc

PRESENT

Petitioner's Attorney: RICHARD S NEMELKA
Other Parties: SHARON KISHNER
Attorney for the Respondent: F. KEVIN BOND
Respondent(s): J BRAD COOK
Audio
Tape Number: CD 2-06 Tape Count: 9:09-9:31:18

HEARING

TAPE: CD 2-06 COUNT: 9:09-9:31:18

On Record

TIME: 9:09:44 This matter is before the court regarding
Petitioner's Motion to Dismiss Respondent's Petition to Modify
(and) Respondent's Order to Show Cause (and) Respondent's Motion to
Approve Psycho-Sexual Evaluation (and) Respondent's Motion to
Reclassify.

The parties have entered into a Partial Stipulation as follows:

1. Respondent's Motion to Reclassify to be granted
2. Respondent's Motion to Approve Psycho-Sexual Evaluation to be granted

Commissioner approves Partial Stipulation.

TIME: 9:19:04 After argument regarding Petitioner's Motion to
Dismiss Respondent's Petition to Modify, Commissioner recommends:

1. Petitioner's Motion to Dismiss GRANTED

Case No: 024901092
Date: Feb 28, 2006

2. Respondent's Petition to Modify DISMISSED

TIME: 9:29:54 After argument regarding Respondent's Order to Show Cause, Commissioner recommends:

1. Issues of Contempt CERTIFIED for evidentiary hearing
2. Issue of Requests for Attorney's Fees CERTIFIED for evidentiary hearing

Attorney Richard S. Nemelka to prepare Order regarding dismissal of Petition to Modify.

Attorney Kevin F. Bond to prepare Order regarding partial stipulation and Order to Show Cause.

TIME: 9:31:18 end record

EXHIBIT “D”

MAR - 7 2006

SALT LAKE COUNTY

By _____ Deputy Clerk

F. Kevin Bond (5039)
Budge W. Call (5047)
BOND & CALL, L.C.
8 East Broadway, Suite 720
Salt Lake City, UT 84111
Telephone: (801) 521-8900
Facsimile: (801) 521-9700

Attorneys for Respondent

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

LISA COOK,

Petitioner,

vs.

J. BRAD COOK,

Respondent.

**OBJECTION TO COMMISSIONER'S
RECOMMENDATION AND
REQUEST FOR HEARING**

Civil No. 024901092DA

Judge: Tyrone E. Medley

Comm: Thomas N. Arnett, Jr.

COMES NOW the Respondent, J. Brad Cook, by and through his counsel of record, F. Kevin Bond of Bond & Call, L.C., and respectfully objects to Commissioner Arnett's recommendation granting Petitioner's *Motion to Dismiss Respondent's Petition to Modify ("Motion to Dismiss")*. The Respondent requests that a hearing before the Honorable Tyrone E. Medley be granted and set as soon as counsel may be heard.

This matter came on for hearing before the Honorable Thomas N. Arnett, Jr. on February

28, 2006.

IN SUPPORT, Respondent directs the attention of the Court to the following:

BACKGROUND

1. Respondent caused a *Summons* and *Verified Petition to Modify Decree of Divorce* (“*Verified Petition*”) to be served upon the Petitioner on September 29, 2005. Service was effected by the Salt Lake County Constable’s Office.
2. Further, Respondent caused a copy of the *Summons* and *Verified Petition* to be served upon Petitioner’s counsel on September 27, 2005.
3. During the hearing held before Judge Tyrone Medley on January 6, 2006, Petitioner’s counsel stated that neither he, nor his client, had received a copy of the Respondent’s *Summons* and *Verified Petition*.
4. Later that same day, Petitioner’s counsel filed a *Motion to Quash and Memorandum*. This memorandum called into question the service of process and sought to show that said service was defective.
5. During the hearing, Judge Medley indicated that he would consider Respondent’s *Verified Petition* and the corresponding *Default Certificate* once Commissioner Arnett had heard and issued a recommendation on Petitioner’s *Motion to Quash and Memorandum*.
5. Petitioner then presented the court an alternative motion asking the court to dismiss Respondent’s *Verified Petition*.

6. The court never heard, nor did the respective parties argue, Petitioner's *Motion to Quash and Memorandum*.

8. Commissioner Arnett stated that Respondent's "unclean hands" precluded him from seeking relief from the court and, primarily for this reason, he granted Petitioner's *Motion to Dismiss*.

9. Commissioner Arnett further stated that Respondent's *Verified Petition to Modify* identified changes in circumstance previous to entry of the *Decree of Divorce* ("Decree") in August of 2005, but failed to establish any material and substantial change since entry of the *Decree*.

ARGUMENT

I. FILING OF THE MOTION TO DISMISS WAS UNTIMELY

The only issue that was properly before the court was Petitioner's *Motion to Quash and Memorandum*.

Respondent's *Verified Petition* was served upon the Petitioner on September 29, 2005. The time allotted to file an answer or other responsive pleading to the *Verified Petition* had long since expired by the time Petitioner's filed their *Motion to Dismiss*. Rule 12 of the Utah Rules of Civil Procedure states, in pertinent part:

Unless otherwise provided by statute or order of the court, a defendant **shall serve an answer within twenty days after the service of the summons and complaint . . .**

U.R.C.P. Rule 12(a)

The answer was due on October 19, 2005. Any responsive pleading, including Petitioner's *Motion to Dismiss*, was also due by October 19, 2005. Inasmuch as the deadline for filing had passed, nearly three months previous, it was evident that the filing of Petitioner's *Motion to Dismiss* was untimely. Any relief sought therein should have been denied.

Commissioner Arnett allowed the Petitioner to argue her *Motion to Dismiss*, despite the untimely nature of the filing.

II. UNCLEAN HANDS

A. Unclean Hands Doctrine Does Not Preclude Responsive Pleadings To Be Heard and Considered By The Court

The hearing was originally scheduled to hear Petitioner's *Motion to Quash and Memorandum* and, subsequently, Petitioner's *Motion to Dismiss*. Responsive pleadings by the Respondent did not constitute an attempt to seek relief from the court, nor do the alleged "unclean hands" of the Respondent preclude such responsive pleadings, and equitable consideration of the same.

B. The Court Selectively Applied The Unclean Hands Doctrine

The court applied the "unclean hands" doctrine arbitrarily. When considering Petitioner's *Motion to Dismiss*, the court cited "unclean hands" as one of the primary reasons that Petitioner's *Motion to Dismiss* was granted. Conversely, when considering Respondent's *Motion for Order to Show Cause*, the court made no mention of "unclean hands" and certified Petitioner's

contempt to Judge Medley for further hearing.

This capricious and random application of legal doctrine underscores Respondent's objections.

III. IF CIRCUMSTANCES, UPON WHICH A CUSTODY DECISION WAS BASED, HAVE CHANGED, THEN MODIFICATION IS PROPER

A. Verified Petition Was Previously Considered and Favorably Reviewed By Judge Medley

Commissioner Arnett also stated that the Respondent's *Verified Petition* cited changes that occurred prior to entry of the *Decree*, and that Respondent's *Verified Petition* failed to demonstrate any substantial and material change in circumstance after entry of the *Decree*.

This is contrary to Judge Medley's previous, stated position with respect to the *Verified Petition* and his readiness, when after thorough review and consideration of the same, Judge Medley indicated that he had reviewed the *Verified Petition* and was prepared to sign the associated *Default Certificate*. His only stated concern was that the Petitioner had filed a *Motion to Quash and Memorandum* and that prior to signing the *Default Certificate* the *Motion to Quash and Memorandum* needed to be heard and a decision rendered with respect to the same.

B. Petitioner's Stated Position Supports Basis of Respondent's Objections

The Petitioner directed the attention of the court to Hoag v. Hoag 649 P.2d 51 (Utah

1982)¹, to contend that a party seeking a modification of custody **must show that there has been a change of circumstance on which the custody award was based**, and pursuant to Becker v. Becker, 694 P.2d 608 (Utah 1984) that the **change of circumstance must be significant** in relation to the modification sought. That was, in fact, Respondent's position as well.

Justice Durham (dissenting) in the matter of Moody v. Moody, 715 P.2d 507 (Utah 1985), (emphasis added) made the following remarks:

The trial court in this case misconstrued the purpose and intent of our holding in *Hogge*. We have recently had an opportunity to clarify and amplify the significance of that ruling in *Becker v. Becker*, Utah, 694 P.2d 608 (1984). In *Becker*, 694 P.2d at 610, we referred to the threshold requirement from *Hogge* that the party seeking modification demonstrate that there have been "changes [since the time of the previous decree] in the circumstances upon which the previous award was based" and that the changes are "sufficiently substantial and material to justify reopening the question of custody." *Hogge*, 649 P.2d at 54.

There is no clearer case of a "substantial" and "material" change in the circumstances upon which custody was awarded than the change in the custody, care and control of the parties' minor child, Gardner, and the parties' oldest daughter, Lacey.

C. The Decree Awards The Petitioner The Care, Custody and Control Of The Minor Children, Not The Maternal Grandparents

The *Decree* specifically awards the Petitioner with the care, custody and control of the parties' minor children, not Glen and Jody Gardner. If either the trial court, or the Respondent, had known of a pre-trial change, it would have been addressed.

¹ The case is actually Hogge v. Hogge, not Hoag v. Hoag.

The Petitioner claimed that Respondent knew, or should have known, that Gardner was residing at the home of Glen and Jody Gardner at the time of trial. The Court certainly didn't know. The Guardian ad Litem, who represents the interests of the minor children, didn't know. No where in the Court's *Findings of Fact and Conclusions of Law* or the *Decree of Divorce* is there a mention of Glen and Jody Gardner serving in any capacity. How could the Court, the Guardian ad Litem or the Respondent have known? The fact that Gardner was living full-time with Glen and Jody Gardner was, for all intents and purposes, information specifically and willfully withheld.

D. The Guardian ad Litem Expresses Concern Regarding the Change In Circumstances Since Trial

During the hearing before Commissioner Arnett, the Guardian *ad Litem*, Sharon Kishner, expressed her concern regarding the fact that Gardner was living with his grandparents, and that Lacey Cook, the parties' 17 year-old child, was apparently living in Michigan. Was this the set of circumstances contemplated at the time of trial, or at the time the *Decree* was entered? It was not!

E. Testimony Regarding Gardner's Residence Was Withheld From The Trial Court

Contrary to the assertions of the Petitioner, neither the Petitioner, nor Petitioner's mother, Jody Gardner, offered any testimony during trial that (1) Petitioner had relinquished physical control of Gardner to her parents; (2) that Petitioner had signed, or intended to sign, a Durable Power of Attorney granting Jody Gardner determinative powers with respect to Gardner; (3) that Gardner would be attending an elementary school based upon the residence of Glen and Jody Gardner; nor (4) that Gardner would be singled out to live with his grandparents, thus denying him the opportunity to associate with his other siblings on a daily basis, or to be cared for by his

mother. These facts were not presented to the Court.

F. The Durable Power of Attorney Grants Rights to The Maternal Grandparents That Should Be Held And Exercised Only By A Parent

The Petitioner goes on to claim that “the mere fact that the Petitioner and her mother have signed the necessary documents to allow the minor child to continue in the same school is not a change that is significant . . .”² First, the documents would not have been necessary had the minor child been enrolled in school based upon the Petitioner’s residence, instead of the residence of the maternal grandmother. Second, it is very significant that the minor child lives with his grandparents, when he should be living with the Petitioner and his other siblings. Third, and most troublesome, the Durable Power of Attorney grants rights to Jody Gardner that extend far beyond “mere” facts and “necessary documents to allow the minor child to continue in the same school.” This document grants custodianship upon Jody Gardner, and provides her with the rights that should only be held and exercised by a parent.

G. Stability Was Not The Basis For Signing The Durable Power Of Attorney

Finally, the Petitioner would have this court believe that somehow a level of stability in the minor child’s school was effected by signing these documents. They state that the execution of these documents allowed Gardner to “continue in the same school.” There is no doubt that the Authorization to Enroll paved the way for Gardner to enroll in school. It was not, however, a document designed to allow Gardner to “continue in the same school” when the child had never attended any school – Gardner was just starting Kindergarten!

² *Memorandum in Support of Motion to Dismiss*, page 2, ¶ 2

H. Petitioner's Actions Fall Under U.C.A. § 78-3a-408 Which Defines Abandonment

As outlined in Respondent's *Verified Petition*, according to the clear reading of U.C.A. § 78-3a-408, the Petitioner has abandoned the minor child. The statute states that it is prima facie evidence that abandonment has occurred, when the Petitioner surrenders physical custody of the minor child for a period of six months or more. The reasons, excuses, and rationale are immaterial.

I. The Respondent Possesses A Fundamental Liberty Interest In The Care, Custody and Management Of His Children

Respondent's *Verified Petition* goes on remind the court that the Respondent possesses, under both the United States Constitution and the constitution of this state, a fundamental liberty interest in the care, custody and management of his children. U.C.A. § 62A-4a-201 supports the liberties that the Respondent, as the father, should enjoy. The maternal grandparents are not entitled to this interest or the rights associated thereto.

CONCLUSION

Petitioner's *Motion to Dismiss* is untimely. The only real question for this Court to answer is did any defect exist in the service of process, as outlined in Petitioner's *Motion to Quash*. If not, then the *Default Certificate* filed by Respondent, and presently held by Judge Medley pending a decision on the *Motion to Quash*, should be executed -- the relief sought by Respondent will flow therefrom.

Apart from the untimeliness of the *Motion to Dismiss*, the *Motion* itself fails on the merits. As Respondent has shown, the circumstances upon which the custody award was based have changed. The custody decision rendered by the trial court did not contemplate these changes. These changes are "significant" and materially impact the rights of the Respondent to

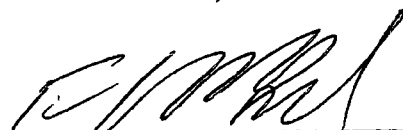
parent his child unfettered by the unilateral decisions made by Glen and Jody Gardner.

WHEREFORE, Respondent prays for the following relief:

1. That Respondent's objection to Commissioner Arnett's recommendation be granted, or in the alternative, that a hearing be set before Judge Medley as soon as counsel may be heard.
2. That the relief granted by way of Petitioner's *Motion to Dismiss* be overturned.
3. That Respondent be awarded his attorney's fees for having to file this objection.
4. For other such and further relief as the Court deems proper.

DATED this 5 day of March, 2006.

BOND & CALL, L.C.



F. Kevin Bond
Budge W. Call
Attorneys for Respondent

CERTIFICATE OF SERVICE

This certifies that on this 7 day of March, 2006, a true and correct copy of the foregoing **OBJECTION TO COMMISSIONER'S RECOMMENDATION AND REQUEST FOR HEARING** was sent to the following using the method indicated:

Richard S. Nemelka
NEMELKA & NEMELKA
6806 South 1300 East
Salt Lake City, Utah 84121

- via first class mail, postage pre-paid
- via facsimile transmission
- via hand delivery
- via attachment to e-mail transmission

Sharon Kishner
Office of the Guardian *ad Litem*
450 South State Street, 2nd Floor
Salt Lake City, Utah 84114

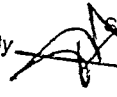
- via first class mail, postage pre-paid
- via facsimile transmission
- via hand delivery
- via attachment to e-mail transmission



A handwritten signature in black ink is written over a horizontal line. The signature is stylized and appears to be the name of the person certifying the service.

EXHIBIT “E”

RICHARD S. NEMELKA #2396
STEPHEN NEMELKA #9239
NEMELKA & NEMELKA
6806 South 1300 East
Salt Lake City, Utah 84121
Telephone: (801) 568-9191
Fax: (801) 568-9196

FILED DISTRICT COURT
Third Judicial District
JUL 20 2006
By  SALT LAKE COUNTY
Deputy Clerk

Attorneys for Petitioner

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

LISA COOK,
Petitioner,

vs.

J. BRAD COOK,
Respondent.

ORDER FROM HEARING HELD
MAY 4, 2006

Civil No: 024901092DA

Judge: Tyrone E. Medley
Comm: Thomas N. Amett, Jr.

Respondent's Objection to the Commissioner's Recommendation and the issue of setting a bond pursuant to the Court of Appeals Ruling both came on for hearing before the Honorable Tyrone E. Medley of the above entitled Court on the 4th day of May, 2006, Petitioner represented by her attorney, Richard S. Nemelka, and Respondent being present and being represented by his attorney, F. Kevin Bond, and Sharon Kishner, Guardian Ad Litem representing the children and

argument having been made to the Court and the Court having reviewed the file, and good cause appearing therefore,

IT IS HEREBY ORDERED, DECREED, AND ADJUDGED AS FOLLOWS:

1. Respondent's objection to the Commissioner's Recommendation from the hearing held February 28, 2006 be and the same is hereby denied for the reason that the Respondent has presented no evidence to the Court that Commissioner Arnett abused his discretion or committed any error at law..

2. The Court finds that pursuant to the Order of the Utah Court of Appeals dated the 24th of April, 2006, that the amount of the bond shall be calculated for the period of time from April 1, 2005 through the date of the contempt hearing on approximately the 1st of March, 2006, as the time period to determine the amount of arrearage in child support and alimony due and owing by the Respondent for said period of time.

3. Based upon the evidence presented by the Respondent the Court finds that the total amount of child support due and owing for said period of time was \$16,621.00 and that the Respondent made payments of \$6,253.48 leaving a balance due and owing of \$10,367.52 for child support during said period of time. The Court further finds that for said eleven (11) month period the Respondent was obligated to pay \$1,000.00 alimony and failed to pay any amount whatsoever and, therefore, the arrearage is \$11,000.00. Based thereon the total amount of arrearages during said period of time is \$21,367.52 . (Although the Court indicated that the

amount was only \$20,367.52 it appears that a slight mathematical error was made and that the correct amount is \$21,367.52.

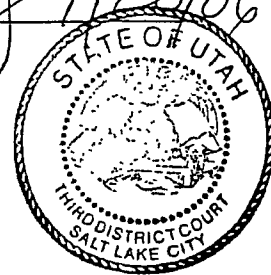
4. Based upon the foregoing the Respondent, J. Brad Cook, shall post a bond in the amount of \$21,367.52 on or before 9:00 a.m. on the 24th of May, 2006.

5. A review hearing shall be held at 9:00 a.m. on the 24th of May, 2006 before the Honorable Tyrone Medley of the above-entitled Court to determine whether or not said bond has been posted and, if it has not, then the Respondent J. Brad Cook should be present so that he can be placed in the custody of the Ballif of the Court to incarcerated for the thirty (30) day jail sentence previously ordered by the Court. Petitioner's request for attorney's fees is hereby reserved.

DATED this _____ day of May, 2006.

BY THE COURT:

Tyrone Medley 7/20/06
JUDGE TYRONE MEDLEY
DISTRICT COURT JUDGE



APPROVED AS TO FORM:

F. Kevin Bond
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true copy of the foregoing ORDER OF HEARING HELD

MAY 4, 2006, this 4 day of May, 2006, postage prepaid, to:

F. Kevin Bond
BOND & CALL, L.C.
8 East Broadway, Suite 720
Salt Lake City, Utah 84111

Sharon Kishner
Guardian Ad Litem's Office
450 South State Street, Second Floor
Salt Lake City, Utah 84114

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by a long, horizontal, slightly wavy line that extends across the width of the signature area.