

2006

# Kenneth Davis v. Dennis Goldsworthy : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS, STATE OF UTAH**

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KENNETH DAVIS,

Plaintiff/Appellant,

vs.

DENNIS GOLDSWORTHY,

Defendant/Appellee.

**REPLY BRIEF OF APPELLANT  
KENNETH DAVIS**

Appellate Case No. 20060924

---

Appeal from Ruling on Appellee's Motion to Set Aside Default Judgment granted on February 27, 2006 and from Ruling Denying Appellant's Motion for Reconsideration on Ruling Granting Motion to Set Aside Default Judgment entered on March 31, 2006 by the Honorable James R. Taylor of the Fourth Judicial District Court, Utah County, State of Utah.

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### **Rules**

Rule 5 of the Utah Rules of Civil Procedure

Rule 74 of the Utah Rules of Civil Procedure

Rule 60 of the Utah Rules of Civil Procedure

## **ARGUMENT**

The crux of this appeal is the fact that the only stated reason the trial court gave for setting aside Goldsworthy's default judgment was the assertion that Davis failed to properly serve his Notice to Appear or Appoint. The trial court provided no other findings of fact to support setting aside Goldsworthy's default judgment. Of particular note, Goldsworthy provides no legal argument that Davis' Notice to Appear or Appoint should have been personally served on Goldsworthy, or that the Notice to Appear or Appoint was procedurally inadequate. Goldsworthy only repeatedly reasserts that he did not receive the Notice to Appear or Appoint and that the other events in his life show that he "was unable to protect his rights". The trial court provided but one reason for setting aside Goldsworthy's default judgment and, given a plain reading of the service requirements of Rule 74 and supporting case law, the trial court abused its discretion in granting Goldsworthy's motion to set aside default judgment. Alternatively, this Court should remand this action to the trial court for additional findings on excusable neglect. *See e.g., Hunt v. Hunt*, 2004 WL 253571 (Utah App.)(Attached hereto as Addendum "1");

Furthermore, Goldsworthy spends a significant portion of his statement of facts and argument section of his Appellee's brief arguing that the Court's determination to set aside his default judgment was justified because he provided a meritorious defense. As a

threshold matter, Goldsworthy's argument is beyond the scope of the issues Davis has raised on appeal and should be disregarded. In order to justify setting aside a default judgment, Goldsworthy was required to meet all three prongs of excusable neglect set forth in Rule 60(b). However, Davis' appeal is specifically limited to the argument that Goldsworthy has failed as a matter of law to show that he has met the first prong of the Rule 60(b) test for excusable neglect. Goldsworthy's arguments regarding his meritorious defense should also be disregarded because they were not properly before the trial Court at the time of hearing and should have been disregarded in their entirety.

Finally, even if the trial court had provided additional findings of fact, there are insufficient facts to justify a finding of excusable neglect because Goldsworthy's justifications fail to rise to the level of a showing "that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control."

Black's Title Inc. v. Utah State Ins. Dept., 1999 UT App 330, ¶10, 991 P.2d 607.

Goldsworthy argues for the first time on appeal that his actions rise to the level of "any other reason justifying relief from the operation of the judgment" under Rule 60(b)(6).

However, as set forth in further detail below, Goldsworthy's reliance on Interstate Excavating v. Agla Development Corp., 611 P.2d 369, 370-71 (Utah 1981) and Warren v. Dixon Ranch Co., 260 P.2d 741, 744 (Utah 1953) is misplaced and Goldsworthy's justifications fail to show due diligence and circumstances outside his control.

//

**A. The Trial Court Abused its Discretion in Setting Aside Default Judgment Based on the Decision that Service of the Notice to Appear or Appoint was not Adequate.**

Goldsworthy provides no argument that Rule 74 or Rule 5 required Davis to personally serve the Notice to Appear or Appoint on Goldsworthy or that Davis' Notice was otherwise procedurally inadequate. Goldsworthy's only argument is that he did not receive the Notice, that Davis reliance on Hawley v. Union Pacific Railroad, 2005 UT App 368 is "misguided", and that the argument that service of the Notice to Appear or Appoint was inadequate was not raised by the trial court *sua sponte*.

Goldsworthy's assertion that the notice argument was not raised *sua sponte* by the trial court is inaccurate and inapposite to the issue of whether Goldsworthy showed excusable neglect. In particular, while Goldsworthy cites to a statement in his Reply Memorandum in Support of Motion to Set Aside Default Judgment ("Reply Memorandum") regarding the inadequacy of the notice provided to him, this Reply Memorandum was untimely filed and was not received by either the Court or Davis' counsel until the day prior to the hearing on the matter. [R. 217]. At the hearing, Davis' counsel objected to the Reply Memorandum and the argument contained therein and the Court clearly indicated that it had not reviewed the Reply Memorandum. [R. 374:3-9]. Furthermore, at no point in his argument in chief did Goldsworthy's counsel argue that notice was improper. The issue was raised for the first time during Davis' counsel's argument, by Judge Taylor. [R. 375:11].



That being said, the issue of whether the argument was raised first *sua sponte* by the court or by Goldsworthy's attorney does not change the legal analysis or the fact that failure to receive actual notice is not a sufficient basis for setting aside default judgment. Actual receipt of a notice to appear or appoint is not contemplated or required by the Rules of Civil Procedure. Subsection (b) of Rule 74 simply provides that "the opposing party shall serve a Notice to Appear or Appoint Counsel on the unrepresented party." Utah R. Civ. P. 74(b). Of note, Rule 5(b)(1) specifically provides that service upon a party of documents filed with the Court, unless otherwise specified by the Rules, "shall be made by delivering a copy or by mailing a copy to the *last known address*, or if no address is known, by leaving it with the clerk of the court." Utah R. Civ. P. 5(b)(1)(emphasis added).

Goldsworthy further argues that this Court's ruling in Hawley v. Union Pacific Railroad, 2005 UT App 368 is distinguishable from the present case because: (1) Hawley involved the setting aside of a summary judgment and not a default judgment; (2) that the plaintiff in Hawley did not argue that he had not received a notice to appear or appoint, but that he did not receive notice of judgment; and (3) that the Plaintiff provided no other extenuating circumstances.

Notwithstanding Goldsworthy's contention, Hawley is persuasive on the issue for which it was cited, whether a judgment should be set aside pursuant to Rule 60(b) based solely on the argument that the party failed to receive a notice in the pending action. The

Court itself makes no distinction that a showing of excusable neglect is somehow heightened by the fact that the judgment Defendant seeks to be set aside was a summary judgment as opposed to a default judgment. The argument before the Hawley court is the same argument that served as the basis for the trial court's decision in the present case; that non-receipt of notice is a sufficient basis for setting aside a judgment.

Furthermore, while the defendant's arguments in Hawley were based on the non-receipt of the notice of judgment, the Court's reasoning specifically addresses the notice to appear and appoint that was filed and served in the case. In particular, the Court held that:

Hawley is not entitled to relief under Rule 60(b) because he did not fulfill his duty to inform the trial court and opposing counsel of any changes in his address nor did he exercise due diligence in keeping himself informed of ongoing court proceedings. See Volostnykh v. Duncan, 2001 UT App 26 (per curiam)(recognizing the parties' duties to inform the court of any address changes and to "keep themselves apprised of ongoing court proceedings"). Here, Hawley did not inform the trial court or opposing counsel of his new address. Union Pacific received Mueller's notice of withdrawal but the new address was not listed in the notice, rather it was found in the mailing certificate. As a result, Union Pacific attempted to mail Hawley a notice to appear or appoint counsel to the address provided in the Complaint twice, but both attempts were unsuccessful. Id.

Furthermore, the ruling in Hawley is supported by other cases that have dealt with the argument that failure to receive notice of a hearing or action is the basis for setting aside default judgment. See Black's Title, Inc. v. Utah State Insurance Department, 1999 UT App 330, ¶14, 991 P.2d 607 ("Because Black's lack of notice resulted from his own failure, the

Commissioner did not abuse his discretion in concluding that Black had not shown excusable neglect”). *See also* Heath v. Mower, 597 P.2d 855 (Utah 1979). Indeed, Goldsworthy cites no case where the defendant failed to keep the Court and opposing counsel apprised of his address, and consequently did not receive notice of the proceedings, as a justifiable basis for setting aside default judgment. Simply put, Goldsworthy did not fulfill his duty to inform the trial court and opposing counsel of any changes in his address and did not exercise due diligence in keeping himself informed of ongoing court proceedings.

Furthermore, Goldsworthy’s contention that he did not receive notice is suspect given the number of notices that were sent to him, and the fact that the notice that finally prompted a response, in the form of a letter to the Court received on January 20, 2006, was sent to the same addresses as the other notices, including the Notice to Appear or Appoint. Goldsworthy claims that he did not receive notice from his counsel of the Notice of Deposition, Plaintiff’s Motion to Compel, the Notice of Hearing on Plaintiff’s Motion to Compel, and personally did not receive a copy of his counsel’s Motion to Withdraw as Counsel [R. 108:3; 111:3], the Notice of Entry of Order Permitting Withdrawal of Counsel (sent to Goldsworthy’s business address) [R. 127:3], the Notice to Appear or Appoint (sent to both addresses) [R. 130:3], and Notice of the rescheduled hearing on Plaintiff’s Motion to Compel. Of note, the only notice returned to the Court as undeliverable was the Court’s Notice of the hearing on damages, which was sent to Goldsworthy’s business and home addresses and only the

business address was returned as undeliverable. [R.142]. No prior notices of hearings were returned as undeliverable.

**B. Goldsworthy's Justifications do not Amount to Excusable Neglect and are Not an Adequate Basis for Setting Aside Default Judgment.**

Goldsworthy argues that pursuant to Warren v. Dixon Ranch Co., 123 Utah 416, 423, 260 P.2d 741, 744 (1953), this Court should not “substitute its decision for that of the trial court where the trial court acted reasonably based upon the facts of the case, even if another court may have reached a different conclusion.” However, unlike Warren where the trial Court issued a memorandum decision “where all elements were considered” the trial court in this case did not make a careful analysis of the elements of excusable neglect, but instead set aside default judgment based solely on the assertion that notice was not adequate.

Goldsworthy relies exclusively on the case of Interstate Excavating, Inc. v. Agla Development Corp., 611 P.2d 369 (Utah 1980) to support his position that his actions constituted excusable neglect. It should be noted, however, that in his dissenting opinion Justice Hall argued that the trial court had correctly exercised its discretion in denying the defendant's motion to set aside judgment, stating:

This Court has previously stated that neglect, to be excusable, must occur despite the exercise of due diligence. Other jurisdictions have defined excusable neglect as “such as might have been the act of a reasonably prudent person under the same circumstances.” It has also been held that simple carelessness does not rise to the statutory standard, nor do simple business difficulties which allegedly prevent the dedication of adequate attention to the

litigation in question. Moreover, this Court has held that the failure of a party to appear in court, allegedly occasioned by failure of notice due to withdrawal of counsel, does not constitute such “excusable neglect” as to justify relief from judgment where the evidence was that ample notices of the procedures were mailed, and the defaulting party was well aware of the withdrawal of counsel in advance of the proceedings from which he was absent. Id. at 372 (citations omitted).

The Utah Supreme Court subsequently adopted the definition cited by Justice Hall that excusable neglect requires that Goldsworthy exercise “due diligence” as would “a reasonably prudent person under similar circumstances”. Mini Spas, Inc. v. Industrial Comm’n, 733 P.2d 130, 132 (Utah 1987).

In addition, the facts cited in Agla have been read narrowly and distinguished by the Supreme Court. For example in Pittman v. Bonham, 677 P.2d 1126 (Utah 1984), where default was entered after withdrawal of counsel and after defendant had been sent a notice to appear or appoint and notice of hearing to the defendant’s last known address, the Supreme Court specifically distinguished the facts of Pittman from those of Agla in upholding the trial court’s decision to deny the motion to set aside based on the distinction that in Agla, trial was set barely three weeks after the withdrawal of counsel, the defaulting party offered a reason for overlooking the receipt of notices of withdrawal, and the fact that no notice to appear or appoint was provided. Similarly, the facts of the present case indicate that prior counsel’s motion to be removed as counsel was filed on August 28, 2005, but that no further action was taken in the case until October 14, 2005.

In contrast, in Agla, counsel withdrew on April 16, 1979 and trial took place on May 7, 1979, just twenty-one days later.

Also unlike the defendant in Agla, Goldsworthy is not simply arguing that he missed the hearing due to the oversight of withdrawing counsel to inform him of the hearing date, but he is also arguing that he exercised due diligence as would a reasonably prudent person under similar circumstances. Again, Goldsworthy simply argues that his counsel did not inform him of the deposition, and that he was unable to communicate with his attorney. However, Goldsworthy does not provide any reason for his inability to communicate with his attorney. He does not state that his counsel did not return his phone calls, that he was unable to obtain phone service, or even that he made any phone calls to prior counsel to ascertain the status of the action. Indeed, Mr. Jensen's affidavit indicates that it was Goldsworthy and not Mr. Jensen who failed to communicate with his attorney and not the other way around. [R. 108: 1-2; 111: 1-2].

Goldsworthy simply asserts that he did not have a steady home address and that his business address was shut down and that he had no forwarding address. [R. 209 -210]. Again, Goldsworthy provides no justification as to why he did not obtain a forwarding address in Colorado, set up a post office box, or make any other reasonable efforts to make sure that he received important mail.

Goldsworthy, attempts to distinguish the present case from Sierra Wholesale Supply, L.L.C. v. Radiant Technologies, Inc., 2005 WL 3436926 (attached to Appellant's

Brief as Addendum “7”) based on the argument that this case does not involve “sophisticated parties”. Sierra Wholesale is applicable in this case because both the defendant in that case and Goldsworthy in this case have attempted to justify their neglect of the action by providing reasons without providing any justification as to why his divorce, his abrupt move, his lack of communication with his attorney, or the closure of his business “so incapacitated him such that he was unable to act.” The fact that the defendant in Sierra Wholesale was president of a corporation and that there were others within the corporation who would be checking the mail, does not diminish the fact that “no affidavit was submitted to the trial court detailing how this [defendant’s president being out of the office recovering from back surgery] so incapacitated Defendant...that it was unable to take steps to protect its rights.” Id. at 2.

Similarly, in the case of Wells Fargo Bank, N.A. v. Kearns, 2001 WL 327756 (Utah App.)(Attached hereto as Addendum “2”), this Court found that the defendant’s failure to explain how his son’s illness prevented him from responding to the complaint was a sufficient basis for denying defendant’s motion to set aside default judgment. In contrast, in the case of Hunt v. Hunt, 2004 WL 253571 (Utah App.)(Addendum “1”) overturned the trial court’s denial of a motion to set aside where the husband presented evidence that he was unable to respond to the action because his Wife had cut him off from all marital assets, and he thereby was prevented from retaining counsel. Id. at 2. In addition, the Husband provided further evidence, including documentation of an

emergency room visit and the affidavit of a treating physician that Husband had been suffering from anxiety and depression and had literally been unable to function at the time that the answer was due. Id. at 2.

Goldsworthy argues that he had “reasonable justification” for his failure to appear and respond. The standard is clear, however, that a reasonable justification is simply not enough. Goldsworthy must also allege and show that his justifications were “beyond his control”, which he has failed to do.

**C. Goldsworthy Failed to Provide a Timely Meritorious Defense.**

As set forth above, the basis of Davis’ appeal is that Goldsworthy fails to meet the first element of showing excusable neglect. Notwithstanding this fact, Goldsworthy goes to some length to explain his “meritorious defense”. However, at the time of the hearing on Goldsworthy’s Motion to Set Aside, the arguments set forth in his Appellee’s brief were not properly before the Court. In his Motion to Set Aside Default filed on February 2, 2006, Goldsworthy asserted simply that his motion should be granted because “Defendant states that the claims made by the Plaintiff in the case are false.” [R. 156:2]. In his Memorandum in Opposition, Davis argued that Goldsworthy had failed to show a meritorious defense and his allegation that Davis’ claims were “false” fell well below the requirement that Goldsworthy must “present a clear and specific proffer of a defense that, if proven, would preclude total or partial recovery by the claimant.” Hernandez v. Baker, 2004 UT App 462 ¶ 6, 104 P.3d 644. [R. 195:2].



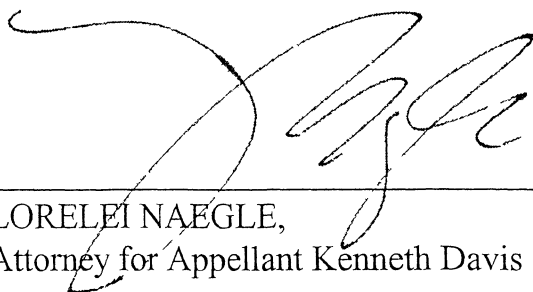
On the day prior to the hearing on the Motion to Set Aside Judgment, Goldsworthy submitted a lengthy Reply Memorandum wherein he argued at length that Davis' claims had no merit. [R. 217]. At the hearing the following day, Davis' counsel objected to the timeliness and content of the Reply Memorandum. The Court did not rule on Davis' objection, but also made no findings at that time regarding whether Goldsworthy had sufficiently shown a meritorious defense. Accordingly, this Court should disregard Goldsworthy's argument regarding his meritorious defense not just because it is an issue outside the scope of this appeal, but also because it was not properly before the Court at the time of hearing and should have been disregarded.

#### **CONCLUSION AND REQUEST FOR RELIEF**

For the foregoing reasons, this Court should reverse the trial court's ruling setting aside default judgment, enter default against Goldsworthy, and remand the matter to the trial court for a hearing on damages.

Respectfully submitted this 31st day of July, 2007.

**ASCIONE, HEIDEMAN & MCKAY, L.L.C.**



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LORELEI NAEGLE,  
Attorney for Appellant Kenneth Davis

### **ADDENDA**

1. Hunt v. Hunt, 2004 WL 253571
2. Wells Fargo Bank, N.A. v. Kearns, 2001 WL 327756 (Utah App.)

# **Addendum 1**

Not Reported in P.3d, 2004 WL 253571 (Utah App.), 2004 UT App 26

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.  
Diane E. Rich HUNT, Petitioner and Appellee,  
v.  
Kelly R. HUNT, Respondent and Appellant.  
No. 20020921-CA.  
Feb. 12, 2004.

Third District, Tooele Department; The Honorable David S. Young.  
Debbie A. Robb, Salt Lake City, for Appellant.  
Randall D. Cox, Salt Lake City, for Appellee.

Before Judges BILLINGS, DAVIS, and ORME.

MEMORANDUM DECISION (Not For Official Publication)

BILLINGS, Presiding Judge:

\*1 Kelly R. Hunt (Husband) appeals the trial court's entry of an order of default against him. Husband asserts that the trial court abused its discretion by refusing to set aside the default under rule 60(b)(1) of the Utah Rules of Civil Procedure.

On September 5, 2001, Kelly R. Hunt (Wife) filed a Verified Petition for Annulment or Divorce. Husband was served on September 7, 2001. On October 4, 2001, Wife filed a Motion for Default Judgment, arguing that default was proper because Husband had failed to file an answer within twenty days after being served as required by rule 12 of the Utah Rules of Civil Procedure. On October 11, 2001, the trial court entered an order of default against Husband. The following day Husband filed an answer.

On October 22, 2001, pursuant to rule 60(b) of the Utah Rules of Civil Procedure, Husband filed a Motion to Set Aside Default Judgment on the grounds that: (1) he has valid defenses to the causes of action in the case; (2) his answer was untimely due to inadvertence, mistake, and excusable neglect; and (3) because no final judgment or decree had been entered, Wife would suffer no prejudice if the case were adjudicated on the merits.

On March 4, 2002, Husband filed a Verified Amended Answer and Counterclaim. On that same date, the trial court held a hearing regarding Wife's motion for entry of default judgment and Husband's motion to set aside the order of default. The trial court granted Wife's motion for entry of default judgment, entered Wife's proposed Findings of Fact and Conclusions of Law and Decree of Annulment, and denied Husband's motion to set aside the order of default. The trial court denied Husband's motion “[d]ue to [Husband's]

failure to answer [Wife's] Verified Petition in a timely manner and failure to present any evidence in support of his Motion to Set Aside.” However, the trial court made no other findings with respect to the denial of Husband's rule 60(b) motion to set aside the order of default.

Husband filed another rule 60 motion on June 6, 2002, captioned as a Verified Motion for Relief from Judgment. Husband asserted for the first time that he should be excused from failing to answer Wife's Verified Petition in a timely manner because he had been suffering from anxiety and depression. In support of this assertion, Husband provided documentation that he had been in the emergency room for anxiety on August 14, 2001, six weeks before his answer was due, and had been prescribed Ativan to treat his anxiety. Husband also provided information from Dr. Alan Heap, dated March 12, 2002, which indicates that “[Husband] was so depressed through September and October of 2001, that he was unable to function and went off his medication (antidepressants) suddenly and [this] made him unable to maintain [a] normal life and activities.” Wife disputed Husband's allegations regarding his inability to function. The trial court denied this motion without taking evidence and entering findings. On January 2, 2003, the court entered the Amended Decree of Annulment. Husband appeals.

\*2 Husband asserts that the trial court erred when it denied his rule 60(b) motion to set aside the order of default. While “judgments by default are disfavored by the law,” Wright v. Wright, 941 P.2d 646, 649 (Utah Ct.App.1997), in general, “a trial court has broad discretion in deciding whether to set aside a default judgment.” Lund v. Brown, 2000 UT 75, ¶ 9, 11 P.3d 277 (per curiam). However, a trial court's discretion is not limitless and “must be ‘based on adequate findings of fact’ and ‘on the law.’” *Id.* (quoting May v. Thompson, 677 P.2d 1109, 1110 (Utah 1984) (per curiam)).

Husband argues that the trial court erred in entering a default against him and in refusing to set it aside. “To be relieved from the default, [Husband] must show that his motion to set aside was timely, that he has a meritorious defense, and that the default occurred for a reason specified in [r]ule 60(b).” Black's Title, Inc. v. Utah State Ins. Dep't, 1999 UT App 330, ¶ 6, 991 P.2d 607. The parties do not dispute that the rule 60(b) motion was timely, as it was filed less than two weeks after the default judgment was entered. See Utah R. Civ. P. 60(b) (“The motion shall be made ... not more than 3 months after the judgment, order, or proceeding was entered or taken.”).

Rule 60(b) provides that a “court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect.” Utah R. Civ. P. 60(b)(1). “To demonstrate that the default was due to excusable neglect, [Husband] ‘must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control.’” Black's Title, Inc., 1999 UT App 330 at ¶ 10 (quoting Airkem Intermountain, Inc. v. Parker, 30 Utah 2d 65, 513 P.2d 429, 431 (1973)).

Husband presented evidence that the default resulted from excusable neglect. Specifically, Husband presented evidence that he was unable to answer Wife's Verified

Petition in a timely manner because Wife had cut him off from all marital assets, and he thereby had been prevented from retaining counsel. Husband further presented evidence that he had been suffering from anxiety and depression and had been unable to function at the time the answer was due. Because the trial court made no findings with respect to excusable neglect and stated only that Husband does not have a meritorious defense, we remand for findings on excusable neglect.

Husband also argues that the trial court erred in denying his rule 60(b) motion on the grounds that his answer lacks a meritorious defense. We agree. In Utah, “[a] defense is sufficiently meritorious to have a default judgment set aside if it is entitled to be tried.” Erickson v. Schenkers Int’l Forwarders, Inc., 882 P.2d 1147, 1149 (Utah 1994). The court stated that “Husband appears to have no meritorious defense, particularly in relation to the ownership of the business, all of which stock is acknowledged to have been in her name.”

\*3 Husband argues that he raised several meritorious defenses in his answer. First, Husband requested custody of the parties' daughter (Child) and claimed an interest regarding the best interests of Child in connection with the care, custody, and control of Child. Second, Husband claimed an equitable interest in The Matchbox Club, a business formed by Wife during the marriage and at which both parties worked.

The trial court addressed only the issue of ownership of The Matchbox Club and found that because Wife held all of the stock in the club, Husband did not have any property interest subject to division upon annulment. However, when a spouse makes a contribution of time and resources to the other spouse's business interests, those business interests may become part of the marital estate and be subject to property division. See Elman v. Elman, 2002 UT App 83, ¶ 24, 45 P.3d 176. The trial court made no findings about whether Husband was entitled to an equitable interest in the club. In addition, the trial court was presented with the issue of who should have custody of Child. As both of these appear to be “defense[s] which [are] entitled to be tried,” Erickson, 882 P.2d at 1148, we hold that the trial court erred in finding no meritorious defenses in Husband's answer.

Thus, we reverse the trial court's conclusion that Husband had no meritorious defenses. We also remand for findings on whether Husband's inaction constituted excusable neglect. If so, the default should be set aside. If not, it will stand.

WE CONCUR: JAMES Z. DAVIS and GREGORY K. ORME, Judges.

Utah App., 2004.

Hunt v. Hunt

Not Reported in P.3d, 2004 WL 253571 (Utah App.), 2004 UT App 26

# **Addendum 2**

Not Reported in P.3d, 2001 WL 327756 (Utah App.), 2001 UT App 96

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.  
WELLS FARGO BANK, N.A., Plaintiff and Appellee,  
v.  
Michael J. KEARNS, Defendant and Appellant.  
No. 20000271-CA.  
March 22, 2001.

Mark S. Swan, Midvale, for appellant.

Mark A. Larsen and Joleen S. Mantas, Salt Lake City, for appellee.

Before JACKSON, ORME, and THORNE, JJ.

#### MEMORANDUM DECISION

##### JACKSON.

\*1 Michael J. Kearns (Kearns) appeals the trial court's denial of his Motion to Set Aside the Default Judgment (Motion), claiming that (1) the Motion was timely filed, (2) his failure to respond to the complaint was due to excusable neglect, and (3) he has a meritorious defense. Wells Fargo Bank, N.A. (Wells Fargo) counters, claiming Kearns's arguments are frivolous, and requests sanctions be awarded. We affirm the trial court's denial of Kearns's Motion and decline to impose sanctions.

“To be relieved from the default [judgment], [Kearns] must show [1] that his motion to set aside was timely, [2] that he has a meritorious defense, and [3] that the default occurred for a reason specified in Rule 60(b).” *Black's Title, Inc. v. Utah State Ins. Dep't*, 1999 UT App 330, ¶ 6, 991 P.2d 607. Even assuming Kearns satisfied factors one and two, we are not persuaded that the trial court abused its discretion by ruling that Kearns failed to satisfy factor three because his circumstances did not rise to the level of excusable neglect. See *Lund v. Brown*, 2000 UT 75, ¶ 11, 11 P.3d 277 (standard of review applied to a trial court's Rule 60(b)(1) decision is “abuse of discretion”).

Kearns was served with the complaint on August 23, 1999, by substitute service on his wife. Kearns argues that his new born son's life threatening condition and his contemporaneous engagement in efforts to terminate a trust of which he was a beneficiary combined to constitute excusable neglect on his part. See *Utah R.Civ.P. 60(b)* (allowing a trial court to “relieve a party or his legal representative from a final judgment, order, or proceeding for ... excusable neglect”). However, Kearns had retained two law firms in separate proceedings at the time of service, and, in spite of his preoccupation with his son's condition, Kearns was aware of this action. Further, he was in contact with counsel regarding another matter within three days after his wife was served and gave



counsel a copy of the complaint in this action. Kearns's early awareness of the complaint and his ongoing legal representation in other matters render his excusable neglect argument unpersuasive.

Moreover, Kearns does not attempt to explain how his son's condition prevented him from responding to the complaint. See Warren v. Dixon Ranch Co., 123 Utah 416, 260 P.2d 741, 743 (1953) (stating the court was “not told the nature of the illness and it [did] not appear that appellant ... was *so incapacitated* that he could not have called an attorney to have his rights and the rights of the corporation protected,” and “[i]llness alone is not sufficient to make neglect in defending one's action excusable” (emphasis added) (citations omitted)); Black's Title, 1999 UT App 330 at ¶ 10 (“[Appellant] neither described the illness, nor explained how it *wholly prevented* him from taking the steps required to maintain contact with counsel.... In the absence of such a showing, [the] assertion does not demonstrate [excusable neglect].” (Emphasis added.)). Accordingly, the trial court did not abuse its discretion.

\*2 Finally, Wells Fargo requests sanctions under Rule 33(a) of the Utah Rules of Appellate Procedure. Kearns's appeal appears to be based on good faith arguments and does not seem “frivolous or for delay.” Utah R.App.P. 33(a).

Accordingly, we affirm the trial court's denial of Kearns's Motion and decline Wells Fargo's request for sanctions.

ORME and THORNE, JJ., concur.

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Not Reported in P.3d, 2001 WL 327756 (Utah App.), 2001 UT App 96

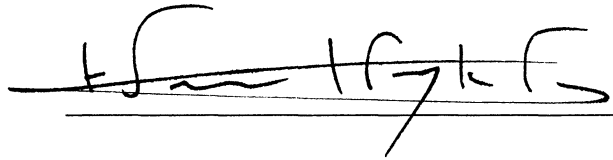
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## CERTIFICATE OF SERVICE

On the 31<sup>st</sup> day of July, 2007 I caused to be delivered via the following method two copies of the foregoing to the following:

Gregory Hansen  
DUVAL HAWS & MOODY PC  
947 S. 500 E. STE 200  
American Fork, Utah 84003

- ☐ U.S. Mail
- ☐ Facsimile
- ☐ Hand-Delivered
- ☒ Federal Express

A handwritten signature in black ink, appearing to read "Gregory Hansen", is written over a horizontal line. The signature is stylized with a large initial "G" and a long horizontal stroke.