

2008

Johnson v. Johnson : Reply Brief

Utah Court of Appeals

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IN AND FOR THE FOURTH DISTRICT COURT
UTAH COUNTY, STATE OF UTAH - PROVO DEPARTMENT

INA MARIE JOHNSON,

Petitioner,

vs.

NELDON PAUL JOHNSON,

Respondent.

REPLY MEMORANDUM IN SUPPORT OF
MOTION TO VACATE DECREE OF
DIVORCE AND AMENDED DECREE OF
DIVORCE AND MOTION TO DISMISS
FOR WANT OF SUBJECT MATTER
JURISDICTION PURSUANT TO Utah
R.Civ.P. 12(b)(1), 12(h) and 60(b)(4)

District Court Case No.:004401468

Judge: Steven Hansen

Neldon Paul Johnson, Respondent in the above captioned matter, respectfully submits his reply memorandum of points and authorities in support of his *Motion to Vacate Decree of Divorce and Amended Decree of Divorce and Motion to Dismiss for Want of Subject Matter Jurisdiction*.

A. RESPONDENT'S PRIOR STATEMENT OF FACTS

Petitioner has not controverted any of the facts contained in the Statement of Facts presented by Respondent in support of his Motion to Vacate and Dismiss. Therefore, each of the facts stated in paragraphs 1 through 11 of Respondent's Statement of Fact must be deemed to be true for purposes of this motion.

B. RESPONSE RE: PETITIONER'S STATEMENT OF FACTS

Initially it should be noted that each of the paragraphs of Petitioner's "Statement of Facts", are comprised of rambling statements of fact mingled with argument, most of the facts having no

citation to the record. This makes it difficult for Respondent to reply to Petitioner's Statement of Facts. Respondent objects to Petitioner's recitation of the procedural history of this case and moves that they be stricken. They are irrelevant and serve no purpose except to attempt to vilify Respondent.

It appears that since Petitioner has no substantive defense to the present motion, Petitioner has resorted, once again, to disparaging Respondent in an attempt to divert the attention away from the relevant and dispositive facts asserted by Respondent, which have not been contested by Petitioner. Despite the lack of relevance of the facts asserted by Petitioner, Respondent is compelled to respond to the Statement of Facts presented by Petitioner. Further since Petitioner has imbedded argument with her statement of facts, Respondent is compelled to reply to the argument in his response.

PETITIONER'S FACT No. 1:

DECREE AND AMENDED DECREE

June 27, 2001

1. A review of the pleadings in the divorce proceedings reveals that both parties alleged, verified, certified and represented, in their multiple pleadings, that the parties were married on May, 3, 1964 and lived together as husband and wife thereafter. No one disputes that between May 3, 1964 and the date the original Decree of Divorce was entered, the parties lived together as husband and wife. During that time, they held themselves out as husband and wife to the community, held property as husband and wife, operated joint bank accounts, encouraged a general reputation in the community of being husband and wife; and significantly, filed joint federal and state tax returns avowing that they were legally married and thereby reaping the benefits of the "married" filing status. In the proceedings, neither party denied that, at the time of the divorce, the parties had been married thirty-seven (37) years.

RESPONDENT'S RESPONSE Re: Paragraph [1]: Respondent acknowledges that the relationship between Petitioner and Respondent may have met the requirements of UCA § 30-1-4.5

(1) (a) - (e), with the possible exception of the consent¹ requirement. However, neither party applied for a determination or establishment of marriage during the time of their relationship or within the requisite one year after their relationship ended. Furthermore, despite at least two requests by Respondent to Petitioner to solemnize the marriage, the marriage was never solemnized. *See paragraph 10 of Respondent's Statement of Facts.* At the time the Petitioner filed this divorce proceeding and at all stages in the proceedings that followed, Petitioner knew that she and Respondent had not been married. That knowledge was reinforced by Respondent's requests in recent years for them to solemnize their marriage. *See paragraph 10 of Respondent's Statement of Facts.*

Respondent acknowledges that he is equally at fault with Petitioner in failing to bring to the attention of the Court the fact that the purported marriage of Petitioner and Respondent had never been solemnized. However, it should be noted that Petitioner made the misrepresentation to the Court. Respondent merely failed to deny the misrepresentation, not recognizing the significance of the issue. *See paragraph 11 of Respondent's Statement of Facts.*

PETITIONER'S FACT No. 2:

2. The divorce proceeding, as reflected by the court file and docket reflects that the matter was bifurcated to allow the parties to be divorced on **March 5, 2001**, before the substantive issues in their case were decided. An Amended Decree of Divorce was ultimately entered with appropriate Findings, on **June 27, 2001, which was to be effective on May 29, 2001**. Both parties were represented by counsel during the proceeding and the Amended Decree was the product of a **Stipulation** drafted, accepted and acknowledged by both parties and their attorneys. For the

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Consent is required to validate a marriage under UCA §30-1-4.5. The Supreme Court in *Whyte v. Blair*, 885 P.2d 791 (Utah 1994) looked at factors that show evidence of consent to be married. One of the things the Court looked at was a case out of Hawaii, *Maria v. Freitas*, 73 Haw. 266, 832 P.2d 259, 262 (1992). In *Maria* the wife refused several proposals of marriage after cohabiting. The court reasoned: In contrast, strong evidence of consent, such as (1) living together for 19 years, (2) having a child, (3) having a general reputation as married, and (4) having the mother of one of the partners living with them, was held insufficient to establish consent where the woman refused the man's marriage proposals on several occasions and some of their financial affairs were handled separately. *Maria* @ 262.

Court's convenience, a copy of the Amended Decree is attached hereto as Exhibit "A."

In summary, the Amended Decree ordered as follows:

Property Division Under the Amended Decree

A. Family Home

The Petitioner was awarded the family home in American Fork, subject to the debt and the real property surrounding the family home (Paragraph 3, Amended Decree).

B. Smith Barney Funds

The Court awarded the Petitioner the funds from the Smith Barney funds, **after** the cumulative legal fees of Frederick Jackman, Rosemond Blakelock and Don Petersen, were paid (Paragraph 4, Amended Decree).

C. International Automated Systems

This asset represented the **bulk of the parties estate**. The parties owned eight million shares of stock in International Automated Systems, IAS, also known as "U-Check." Because the parties had concluded that an actual stock split would not be practical, the Petitioner [Sic] was awarded, as her share of this asset, **\$2,800,000, the funds in the Smith Barney account, as well as the award of the real property was to be, as stated in the Amended Decree, "Petitioner's one-half share of the property settlement."** (Emphasis added) (Paragraph 5, Amended Decree).

The Respondent was to pay the Plaintiff her share of the property settlement, in monthly payments, commencing, July 1, 2001, in the sum of \$8,333.33, payable on or before, the 15th of each month. Any amount still due and owing on July 1, 2006, was due on that day, with no prepayment penalty. The Petitioner's interest was to be secured by a trust deed and trust deed note in the "U-Check real and personal property and inventory, behind, in priority, **only to Zion's Bank**, in the approximate sum of \$600,000 (Paragraph 5, Amended Decree)

D. Patents.

The Respondent was awarded all his patents, all patents pending and all his creative ideas (Paragraph 6 Amended Decree).

Alimony Under the Amended Decree

Based upon the amount of property accumulated by the parties and particularly, the size of the monthly payments the Respondent was to pay to the Petitioner, **no** alimony was awarded to the Petitioner (Paragraph 11, Amended Decree).

RESPONDENT'S RESPONSE Re: Paragraph [2]: Respondent controverts the stated fact that

the “Amended Decree was a product of a stipulation drafted, accepted and acknowledged by both parties and attorneys”. Although the parties and their counsel did approve the form of the Amended Decree, there was no written stipulation. Respondent also asks the Court to remember that the Respondent has since repeatedly asserted the position that there was no meeting of the minds with regard to the purported agreement which led to the entry of the Amended Decree of Divorce. The lack of meeting of the minds asserted by Respondent has been manifest in the disputes over which parcels of real property were to be conveyed to Petitioner, over the form of the Trust Deed and Trust Deed Note for the Salem property, and over the application of the one action rule mandated by Utah trust deed statute.

Respondent has consistently asserted the position from the time that the issue first arose, that as the Amended Divorce Decree states that Petitioner was entitled to receive two parcels of property and only two parcels of property, those being the parcels identified as Parcel ID No. 13-076-008 and Parcel ID No. 13-059-0019 in the records of the Utah County Recorder. This included the family home and the surrounding acreage of that parcel and another parcel of property with a home located on it.

The monthly payment set forth in the Amended Decree of Divorce was to be secured by Trust Deed on the Salem property. *See paragraph No. 5 of the Amended Decree of Divorce.* Respondent prepared a Trust Deed and a Trust Deed Note, executed the Trust Deed and Trust Deed Note, and delivered them to a title company, which then recorded the Trust Deed and delivered the Trust Deed and Trust Deed Note to counsel for the Petitioner. Petitioner accepted the Trust Deed and the Trust Deed Note and raised no objections whatsoever to the form or content of the Trust Deed or the Trust Deed Note. The Trust Deed was executed on August 28, 2002, and recorded on September 4, 2002. *See Recorded Trust Deed attached as Exhibit “A” to this Reply.* The Trust Deed and Trust Deed Note were delivered to counsel for Petitioner at that time. Thereafter on the March 7, 2003,

Commissioner Patton, on his own motion, with no objection or motion having been presented by Petitioner regarding the form or content of the Trust Deed or Trust Deed Note, ruled that the Trust Deed and Trust Deed Note were unacceptable. That decision was ultimately upheld by Judge Laycock. Respondent thereafter appealed. Under those circumstances, such an appeal was clearly in good faith. Further, because Respondent was of the strong conviction at that point that he could not longer receive a fair hearing regarding any issue in front of Judge Laycock, he moved for Judge Laycock to be disqualified. Respondent was particularly disconcerted by his conclusion that Judge Laycock appeared to act as attorney for Petitioner with regard to the Trust Deed issue. Again, this action by Respondent was a good faith attempt to regain his confidence that he would be treated fairly by the Court.

Subsequent to the entry of the Amended Decree of Divorce, Petitioner has asserted that she is entitled, in addition to receiving essentially all of the cash of the parties, that she is further entitled to receive all of the real property of the parties (four parcels, not two parcels), except for the Salem property which had a \$600,000.00 loan on it. Respondent was to receive the stock of IAS which merely entitled him to work long hours for very little pay and yet have an obligation to pay \$2,800,000.00 to Petitioner. She has further asserted that she has a choice as to whether to seek a personal judgment against Respondent for failure to pay or to proceed under the Trust Deed or both, contrary to the Utah trust deed statute, namely Utah Code Annotated §78-37-1 (1965). The dispute over what real property Petitioner was entitled to receive, the terms of the trust deed and the trust deed note, and Petitioner's obligation to adhere to the Utah trust deed statute led Respondent to conclude that there had been no meeting of the minds and therefore that the Amended Decree of Divorce should be set aside.

Respondent also disputes that International Automated Systems represented the bulk of the parties estate. As stated above, the stock Respondent was to receive merely entitled him to work

long hours for very little pay. Future value of the stock was, and is, based on future efforts of Respondent.

Also, Respondent controverts the assertions that Petitioner and Respondent were the co-owners of the Smith Barney Account and the IAS Stock. Neldon Johnson was the sole owner of the Smith Barney Account as well as the sole owner of the IAS Stock.

Respondent further controverts Petitioner's assertion that Respondent's attorney fees owed to Don Petersen were paid from the Smith Barney Account. Only a portion of those fees were paid from the Smith Barney Account.

PETITIONER'S FACT No. 3:

3. There is no question that after the Amended Decree of Divorce was entered in this matter on **June 27, 2001, which was to be effective on May 29, 2001, no Rule 50, 59 or 60 motions were made from the Amended Decree or the Findings and Conclusions supporting the same. Further, no appeal was taken from either side from the final judgement represented by the Amended Decree. The divorce was finalized and completed with the entry of the Amended Decree on June 27, 2001, to be effective May 29, 2001.**

RESPONDENT'S RESPONSE Re: Paragraph [3]: As stated above, it was not until the parties began to perform their respective obligations under the Amended Divorce Decree that it became apparent to Respondent that there had been no meeting of the minds with regard to the Amended Decree of Divorce. The first dispute was with regard to the parcels of real property that were to be conveyed to Petitioner. The Amended Decree of Divorce identifies two parcels, which Respondent understood to mean parcels identified as Parcel ID No. 13-076-008 (1.81 acres) and Parcel ID No. 13-059-0019 (5.55 acres) in the records of the Utah County Recorder. Petitioner, however, took the position that there were four parcels that were to be conveyed, namely Parcel ID No. 13-076-008 (1.81 acres), Parcel ID No. 13-059-0019 (5.55 acres), Parcel ID No. 13-078-001 (6.65 acres) and Parcel ID No. 13-076-0015 (1.84 acres).

The second major dispute was over the form of the Trust Deed for the Salem property.

Respondent, in fact, thought that there was no dispute over the form of the Trust Deed and when he prepared the Trust Deed and Trust Deed Note in accordance with his understanding of the agreement, the Trust Deed was recorded by the title company, the Trust Deed and Trust Deed Note were transmitted to Petitioner, and Petitioner accepted the Trust Deed and Trust Deed Note without complaint. It was only after the Court, on its own motion, rejected the Trust Deed and Trust Deed Note, that Petitioner jumped on that band wagon. It was at that point that Respondent had no choice but to take the position that there was no meeting of the minds with regard to that issue as well. The issue of the Trust Deed and the issue of the parcels of real property to be conveyed, have been the subject of several motions and current appeals. Respondent continues to maintain, in good faith, that there was no meeting of the minds with regard to the purported agreement that led to the entry of the Amended Decree of Divorce and therefore that it is invalid and unenforceable. That position clearly has been asserted in good faith.

PETITIONER'S FACT No. 4:

4. At no time during the divorce proceedings or within the one year after its entry, did the Respondent ever disavow his representations to this Court, to the community, to state and federal tax agencies, that he and the Petitioner were "married" as carefully established in the Complaint and response thereto.

RESPONDENT'S RESPONSE Re: Paragraph [4]: As stated previously, Respondent admits that he is equally at fault with Petitioner in regard to the misrepresentations to the Court regarding the marriage of Petitioner and Respondent. However, Petitioner is the party that made the original misrepresentation. Respondent merely failed to deny it, not recognizing the significance of the issue.

See Respondent's Statement of Facts, paragraph 11.

PETITIONER'S FACT No. 5:

5. As this Court knows, although a decree may be finalized, parties are allowed in domestic cases to file **new** matters relating to the on-going relationship between the parties, operating under the terms of the decree, in the same action. However, each such new proceeding constitutes a new action or proceeding.

RESPONDENT'S RESPONSE Re: Paragraph [5]: This paragraph seems to be a statement of legal opinion but, to the extent, that this paragraph asserts that the present motion should be considered to be a new matter, Respondent controverts such an assertion. The present motion asserts a lack of subject matter jurisdiction for the Court over the present case and it does not constitute a new matter.

PETITIONER'S FACT No. 6:

6. This present motion, made by the Respondent who is an intelligent, well-educated business man, is another, in a long continuous line, attempt to thwart the terms of the Amended Decree of Divorce, to which he stipulated. The Respondent has been derelict in his duties under the Amended Decree from the time of its entry to the present day. A snap-shot of the Respondent's conduct is detailed from the court record and docket as follows.

RESPONDENT'S RESPONSE Re: Paragraph [6]: Petitioner is correct that Respondent has continuously and repeatedly asserted that there was no meeting of the minds with regard to the Amended Decree of Divorce, if, as Petitioner has asserted, she understands the Amended Decree of Divorce to entitle her to receive four parcels of property and not two, if she understands the Amended Decree of Divorce to entitle her to a Trust Deed which is not subject to the statutory obligations and limitations imposed by the Utah trust statute on all other trust deeds, and if she understands that the provisions of the Trust Deed and Trust Deed Note prepared by Respondent and accepted by Petitioner are not the Trust Deed and Trust Deed Note provisions agreed upon by the parties. It is when those contrary interpretations of the Amended Decree of Divorce came to light, that all of the ensuing disputes relating to the Amended Decree of Divorce arose.

PETITIONER'S FACT Nos. 7 & 8:

ORDER ON ORDER TO SHOW CAUSE

August 15, 2001

7. With an Amended Decree entered only on June 27, 2001, effective as of May, 29, 2001, the matter was already back in front of Judge Taylor on August 15, 2001. The matter was before the Court on the Petitioner's claims regarding property, the Respondent's failure to pay, deliver the deeds and otherwise comply with the Court's orders as set out in the Amended Decree.

8. In the Court's Amended Minutes, dated August 15, 2001, attached hereto as Exhibit "B," Commissioner Patton ordered the requested deeds to be delivered to counsel for Respondent's office within five (5) days and then for counsel for Respondent to have them signed and delivered to counsel for Petitioner's office within five (5) business days thereafter. In addition, the Court appointed a Forensic Accountant, to be paid for equally by both parties to resolve the accounting and payment issues; and, finally, the Court ordered a police officer to be present for a final exchange of personal property.

RESPONDENT'S RESPONSE Re: Paragraph [7 & 8]: Respondent has explained in his response Re: Paragraphs 2-4 and 6 above the ongoing dispute regarding the real property that was to be conveyed. Those responses are hereby incorporated by reference.

PETITIONER'S FACT Nos. 9-12:

ORDER ON OBJECTION TO ORDER FROM ORDER TO SHOW CAUSE
September 18, 2002

9. In a theme that has become the Respondent's *modus operandi*, the Ruling of Commissioner Patton was objected to by the Respondent and then prolonged by him. It was from August 15, 2001, until August 19, 2002, **a year and four days**, before the matter came on for hearing before Judge Claudia Laycock for determination. The Findings of Fact and Order from those proceedings was signed on September 18, 2002. There is attached hereto and incorporated herein as Exhibit "C," a copy of the Findings of Fact, Conclusions of Law, In Re: Order to Show Cause.

10. In the Court's Finding's, the Court characterized the testimony of the Respondent. In paragraphs 1-3 of the Findings, it recites:

1. The Court heard the testimony of both parties and find that the testimony of the Respondent is not credible.
2. The Court finds that it is absurd..
3. The Court finds that the Respondent's testimony regarding his admission to signing the three checks is nonsensical.

11. In Paragraph 8, the Court found that **"the Respondent converted \$22,500.00 of funds, that were intended by the Court to be paid to Petitioner, for his own use."** (Emphasis added). The Court found in Paragraph 9 of the Findings that **"the Respondent willfully disobeyed the previous orders of the Court."** Paragraph 10 states **"[t]hat the Court finds the Respondent had the ability to obey the previous orders of the Court but failed to do so."** (Emphasis added). In Paragraph 11, the Court found the **"Respondent in contempt of Court, for his willful refusal to follow the orders of the Court."** (Emphasis added).

12. In Paragraph 13, the Court made this insightful observation that would characterize the Respondent's conduct throughout:

The Court finds that Respondent believes that he has the ability to determine

which Court orders he will follow.

RESPONDENT'S RESPONSE Re: Paragraph [9 - 12]: This relative minor dispute over the proceeds from a \$22,500.00 sale of IAS stock merely has to do with whether the proceeds of that sale were subject to the Amended Divorce Decree or were subject to the pre-decree orders of the Court. It has nothing to do with the question before the Court on this motion and is merely an attempt by the Petitioner to divert attention away from the irrefutable facts which are dispositive of this motion.

PETITIONER'S FACT No. 13-23:

13. Important to the Petitioner, the Court made the following order with regard to the trust deed that he was required to sign pursuant to Paragraph 5 of the Amended Decree of Divorce, as found on Page 5 of that document under the subsection (d):

Petitioner shall be granted a secured interest in the "U-Check real and personal real property, to include all inventory, and shall be a lien holder in the second position behind the existing loan at Zion's bank in the approximate balance of \$600,000.00. Security to be a trust deed and trust deed note.

14. As noted in Paragraph 5 of the same page of the Amended Decree, that property was the only security that the Petitioner had to rely upon to enforce the Respondent's obligation to make the \$8,333.33 monthly payments comprising the \$2,800,000.00 property settlement that included the property division as well as a substitute for alimony from the **37 year marriage**.

15. In paragraph 15 of the Order entered by the Court on September 18, 2002, (Exhibit "C"), the Court ordered:

The Court finds that the Amended Decree at paragraph 5E requires as Trust Deed Note to be issued and that the Respondent shall see that the orders are followed as set out in the Amended Decree.

As demonstrated hereinafter, as with the required monthly payments, the Respondent, to this day, has failed to comply with this provision of the Amended Decree, again placing the Petitioner's right to the property settlement and the monthly payments upon which she relies to live upon, in jeopardy.

16. In Paragraph 19, the Court found that the Respondent had failed to "take care of his obligations."

In Paragraphs 20 and 21, the Court found:

20. The Court finds that the Respondent has failed to make the monthly payments due to the Petitioner in the amount of \$8,333.33 as set forth in paragraph 5a of the Amended Decree of Divorce.

21. The Court finds that the Respondent **admitted that he chose not**

to make the monthly payments to Petitioner as required in the Amended Decree of Divorce (Emphasis added).

17. In Paragraph 22, the Court granted Judgment in the amount of \$25,999.99 for the monthly payments due Petitioner for the months of May, June, July and August, 2002.

18. In Paragraph 23, the Court found the Respondent in contempt:

The Court finds that the Respondent shall be held in contempt for his willful failure to make the monthly payment to Petitioner as ordered in the parties Amended Decree of Divorce and his willful failure to sign the Trust Deed or Trust Deed Note. (Emphasis added)

19. It is the Petitioner's contention that outside the rancor that sometimes characterizes a divorce proceeding, the Respondent will do anything and everything to thwart the legal process and deprive the Petitioner of the Court's award as set out in the Amended Decree of Divorce. The Court's characterization of the Respondent's testimony and the resulting action of the Court in holding the Respondent in contempt emphasizes that point. Importantly, it was the claim of the Petitioner, that the Respondent, besides being in contempt of Court, considered the divorce action, a game. Further, that he thought he was smarter than the Petitioner, smarter than her lawyers, smarter than the Court and that no one could extract the money ordered under the Amended Decree from him. To date, the Respondent has been successful. However, In Judge Laycock's Finding's about this precise issue, she stated, starting at Finding number 28:

28. The Court finds that at this point, it is speculation that the Respondent Is destroying the business assets upon which the award to Petitioner was based.

29. The Court finds that, at this point, it lacks sufficient evidence before the Court to appoint a forensic accountant. The Court does find that the Petitioner is actually requesting a special master be appointed.

30. The Court finds that if Mr. Johnson quits making the \$8,333.33 monthly payment to Petitioner and does not keep current on his monthly financial obligations to Petitioner that the Court would probably grant the Petitioner's request, for a forensic accountant, the next time the request is made and determine what is occurring with Respondent's financial dealings. (Emphasis added).

20. As demonstrated hereinafter, the Respondent has failed to satisfy the judgment for the monthly accrued payments of \$25,999.99, representing the missed monthly payments for the months of May through August, 2002. Since that date, he has **failed to make any payments. Through December, 2004, there have been 28 months elapse since August 2002 and, without prejudgment interest, 28 multiplied by \$8,333.33 equals \$233,333.24. In addition, the Respondent owes \$13,380.55 in property taxes on the property supposedly securing the Petitioner's property award. Further, Petitioner has been required to pay taxes owed by the Respondent's company that the IRS was going to lien on the subject property. If any set of circumstances ever cried out for a citation for contempt, an appointment of a special master, a forensic accountant, a freezing of the Respondent's assets and an immediate imposition of a jail term, Petitioner submits that it is this case.**

ORDER TO SHOW CAUSE
September 27, 2002

21. This matter came on before the Court again on September 27, 2002, **a little over one month after the last order**, based again upon the Respondent's continued failure to abide by the Court's order. At the last minute, before the order to show cause, the Respondent paid the Petitioner the \$25,000.00 awarded in the Court's prior order. **However, the Court found that the Respondent was again, over a month late in delivering the deeds and held him in contempt and ordered him to do 100 hours of community service through the United Way at the rate of 20 hours a month.** The Court applied the \$25,000 payments to the monthly payments of \$8,333.33 for the months of July, August and September, 2002. Only July and August were covered by the previous judgment for back due payments granted in the 9/18/02 Order, leaving the judgment for May and June, 2002, totaling \$16,666.66 unpaid.

22. Judgment was awarded to Petitioner for attorney fees in the amount of \$1,000.00. **Importantly, the Court again states on page two of the Ruling:**

The Court is not persuaded that a Forensic Accountant is necessary at this time. If respondent does not become current within a few months the Court will question as to whether one should be appointed. (Emphasis added).

23. It is the Petitioner's view that by spreading the proceedings out, hiring new counsel and getting having the proceedings in front of different judges, the Respondent has succeeded in his campaign not to have the Court freeze his assets, appoint a Forensic Accountant and take the steps necessary to assure that the Petitioner gets the benefit of a 37 year marriage. A copy of the Court's Minutes from the Order to Show Cause held on September 27, 2002 are attached as Exhibit "D." A review of the file will indicate that the Respondent even attempted to manipulate the company through which he provided community service so that he would not have to do any work. Petitioner submits that there is simply no tactic that the Respondent will not employ to frustrate the orders of this Court. Petitioner has documented the community excursion material because it shows the effort the Respondent will go to in this matter to disobey the simplest of orders. The documents are included with Exhibit "D."

RESPONDENT'S RESPONSE Re: Paragraph [13 -23]: All of the proceedings alluded to by Petitioner are the result of the dispute over the form of the Trust Deed and Trust Deed Note, the security to be provided by the Trust Deed for the payments, and the application of the limitations and obligations of the Utah Trust Deed statute with regard to this Trust Deed. There is nothing in the Amended Divorce Decree that excepts the Trust Deed contemplated by the Amended Divorce Decree from application of the Utah trust deed statute. Further, as indicated previously, neither Petitioner nor counsel objected to the form of the Trust Deed or Trust Deed delivered until much later. The Court on its own motion rejected those documents, without having received any prior objection by the Petitioner. Petitioner has, on the other hand, sought to obtain personal judgment

against the Respondent, contrary to the trust deed statute, thereby violating the one action rule. That matter is currently on appeal.

Again, however, it must be noted that none of these proceedings over the interpretation of the Amended Decree of Divorce and whether there was a meeting of the minds between the parties and therefore a valid decree, have anything to do with the question of whether there was and is subject matter jurisdiction in this case.

PETITIONER'S FACT No. 23:

DISQUALIFICATION PROCEEDINGS

23. It is the Petitioner's view that by spreading the proceedings out, hiring new counsel and getting having the proceedings in front of different judges, the Respondent has succeeded in his campaign not to have the Court freeze his assets, appoint a Forensic Accountant and take the steps necessary to assure that the Petitioner gets the benefit of a 37 year marriage. A copy of the Court's Minutes from the Order to Show Cause held on September 27, 2002 are attached as Exhibit "D." A review of the file will indicate that the Respondent even attempted to manipulate the company through which he provided community service so that he would not have to do any work. Petitioner submits that there is simply no tactic that the Respondent will not employ to frustrate the orders of this Court. Petitioner has documented the community excursion material because it shows the effort the Respondent will go to in this matter to disobey the simplest of orders. The documents are included with Exhibit "D."

RESPONDENT'S RESPONSE Re: Paragraph [23]: Again, this is merely an obvious attempt by Petitioner to disparage the Respondent and to do so with the hope of diverting attention away from the law and facts that are dispositive of this motion. However, Respondent made no attempt "to manipulate the company through which he provided community service so that he would not have to do any work." The Respondent actually performed the community service documented by the recipient of that service. A subsequent decision by Judge Laycock that the service did not qualify, because Respondent might receive an indirect benefit from the service, i.e. good will with a potential client of IAS, did not change the fact that Respondent had actually performed the service. Again, however, it has nothing to do with the present motion.

PETITIONER'S FACT No. 24 - 27:

September 18, 2002

24. With the posture of the case finally in a position where the Respondent had been

cited in contempt, the record replete with his failure to make payments, the Court's admonitions regarding a Forensic Accountant and other sanctions, the Respondent obviously has at least two choices. The Respondent can start complying with the Court's order and find another diversionary tactic. Of course, the Respondent opts for the latter and freezes the proceedings by filing a motion to disqualify Judge Laycock. During all the time it takes to resolve this issue, the Respondent fails to make **one single payment** under the Amended Decree.

25. The Respondent's Motion and Affidavit to disqualify were filed on July 8, 2003. Judge Stott denied the same by Ruling dated July 22, 2003, attached hereto as Exhibit "E." New counsel for Respondent files a motion to set aside and amend the prior orders of the court which are all denied by Ruling dated December 5, 2003, a copy of which is attached hereto as Exhibit "F." Further Rulings on the issue were entered on November 21, 2003 and December 5, 2003, included together as Exhibit "G." All orders denied the Respondent's substantive motions and the motions to disqualify Judge Laycock.

APPEAL
August 20, 2003

26. The Respondent filed a Notice of Appeal on August 20, 2003. Respondent first tried to appeal the Rulings denying his attempts to have Judge Laycock disqualified. The Court of Appeals denied the appeal on jurisdictional grounds by order dated January 29, 2004. In an unpublished decision, a copy of which is attached hereto as Exhibit "H," the actions and orders of the trial court were upheld.

27. The same strategy has continued to be employed by the Respondent to the present day as reflected by the court docket and file. Unable to conceive any more arguments to avoid the obligations to which he stipulated, Respondent has resorted to claiming that he did not know what he was doing when he represented to this Court that he was married on a specific day in 1964. There is no question that if the Respondent had been able to get away from his obligations under the Decree, he would never make the claim he is making in the pending motion.

RESPONDENT'S RESPONSE Re: Paragraph [24 - 27]: Respondent acknowledges that he lost confidence in his ability to obtain a fair hearing under Judge Laycock. That was precipitated by Commissioner Patton's sua sponte decision to reject Respondent's Trust Deed and Trust Deed Note for the Salem property, without there having been any objection voiced by Petitioner, which was ultimately upheld by Judge Laycock. It then appeared to Respondent that Judge Laycock was biased against him and he filed a motion to have her disqualified. He remains adamant that the motion to disqualify her was filed in good faith and was not in any way calculated to delay the proceedings.

Again, however, reference to these proceedings by Petitioner is merely an attempt to divert the Court away from the dispositive facts and law that govern the question of subject matter jurisdiction. The dispositive facts are that the parties were never married and the purported marriage

of Petitioner and Respondent was not solemnized during the period of time that they resided together or within one year thereafter which is unequivocally required by Utah Code Annotated 30-1-4.5. Respondent is certainly no more at fault for the misrepresentation to the Court regarding the marriage than is the Petitioner. As stated above, it is the Petitioner who filed the complaint and made the misrepresentation regarding the marriage to the Court. The Respondent simply failed to deny that misrepresentation. His failure to do so was based upon his failure to recognize the significance and his belief that the passage of time alone created a marriage. *See paragraph 11 of Respondent's Statement of Facts.*

RESPONDENT'S REBUTTAL ARGUMENT

Petitioner raises two issues: 1) Respondent is estopped from asserting lack of subject matter jurisdiction. 2) there is subject matter jurisdiction per the cases of *Caffall* and *Vander Strappen*.

I. PETITIONER CANNOT MEET THE ELEMENTS OF JUDICIAL ESTOPPEL, GENERAL ESTOPPEL &/OR STATUTORY ESTOPPEL (See UCA § 30-1-17.2)

To read Petitioner's version of this case the Respondent was solely responsible for the misrepresentations made to the court. However, if either is more at fault it is Petitioner. Petitioner filed for divorce and plead the marriage and the marriage date, even though she knew it was a false statement. She alleged they were husband and wife in order to freeze Respondent's Smith Barney account. With that act she took control of assets that were not hers and in the process crippled IAS. She also signed the parties tax returns. She also participated in the LDS Temple ceremony. She initiated or participated in all of the things she now wants to lay at Respondent's feet as though she was an innocent bystander, which she clearly is not. As to the issue of subject matter jurisdiction, none of facts raised in Petitioner's Memorandum in Opposition are relevant or material to the issue of whether there was a marriage. There was no marriage and there is no subject matter jurisdiction.

Petitioner alleges that estoppel bars Respondent from now raising subject matter jurisdiction. Petitioner cannot meet the elements of estoppel. All applicable forms of estoppel require that Petitioner be innocent; that is, that she be able to say that she reasonably relied on Respondent's

words, actions or inaction. This she cannot do. She has always known that they were never married, in 1964 or at any other time. Under the facts of this case, she could not have been married in May 1964 because she was 15 ½ and did not have the requisite permission and authorization to cure her age deficit. She did not avail herself of the cure provisions of UCA § 30-1-4.5 nor the offers of Respondent, who on at least two occasions in the 1990's asked her to marry him to solemnize their relationship. She refused. These are all uncontroverted facts.

Respondent urges the court to not lose sight of who filed the Petition alleging that a marriage occurred on a specific date. Respondent has at least offered an explanation of his passive role and why he waited until now to raise the issue of subject matter jurisdiction. *See paragraph 11 of Respondent's Statement of Facts.* That explanation remains uncontroverted. Petitioner, on the other hand, has offered the court no explanation of her affirmative misrepresentations. The Court's file will confirm that Rosemond G. Blakelock has been Petitioner's attorney of record since the petition was filed. Respondent, on the other hand, has had at least three law firms of record. The attorneys raising this argument only recently discovered the issue. Respondent has acted in good faith. As soon as he knew that time alone was not enough to confer marital status on the couple (and hence subject matter jurisdiction on the court) he brought that fact to the attention of the court. For that he is vilified and accused of improper motive by Petitioner. This is not some belated argument reserved for end game strategy. Given the amount of posturing and rancor alleged by Petitioner, it is logical that Respondent would have raised the issue of subject matter jurisdiction at the earliest possible opportunity.

Petitioner cannot claim judicial estoppel. Even if, for arguments sake, you grant Petitioner elements 1 - 3 of her judicial estoppel argument, she can never meet the fourth element: "The party seeking judicial estoppel in the subsequent judicial proceeding² must have relied on the former testimony." [Emphasis added.] Petitioner's Memorandum at pg. 23.

² This is not a subsequent judicial proceeding as alleged by Petitioner. This is all one continuous judicial proceeding.

Petitioner knew that she had never married Respondent. Therefore, she cannot now be found to have relied on Respondent's acquiescence in her misrepresentation. She knew what she had written (or caused to be written) was false. The same argument is true of general estoppel, as stated in *Youngblood v. Auto-Owners*, 2007 UT 28, 158 P.3d 1088, 1092 and the same is true in the provisions of statutory estoppel per UCA § 30-1-17.2 and discussed in Respondents initial brief in *Mattes v. Olearain*, 759 P.2d 1177, 1180-81 (Utah App. 1988). Estoppel is a principle of equity requiring Petitioner to meet the standard of reasonable reliance on Respondents words, acts or inactions. Again, this she cannot do.

II. SUBJECT MATTER JURISDICTION

Respondent has found no Utah case stating that subject matter jurisdiction is not necessary in order for a court to adjudicate a divorce matter before it. Petitioners brief notwithstanding, *Caffall* and *Van Der Strappen*, though critical of *Caffall*, stand for the premise that subject matter jurisdiction is necessary to adjudicate a divorce.

Barton v. Barton, 2001 UT App 199, 29 P.3d 13, 16, is another recent divorce case, in a long line of decisions, addressing the issue of subject matter jurisdiction. *Barton* states the following:

. . . "A court's initial inquiry should always be to determine whether it has jurisdiction to determine a controversy." [Citations omitted]

* * * *

¶ 12 We first address application of the PKPA, noting that the application of the PKPA was not brought to the attention of the trial court. However, "lack of subject matter jurisdiction cannot be stipulated around nor cured by a waiver. **A lack of subject matter jurisdiction can be raised at any time and when subject matter [jurisdiction] does not exist, neither the parties nor the court can do anything to fill that void.**" *Crump v. Crump*, 821 P.2d 1172, 1174 (Utah Ct.App. 1991) (quoting *Curtis v. Curtis*, 789 P.2d 717, 726 (Utah Ct.App. 1990)). [Emphasis added.]

Consequently, counsel may raise the defense that the court failed to comply with the requirements of the UCCJA and the PKPA at anytime in the course of an interstate custody proceeding. In addition, subject matter jurisdiction under the UCCJA and the PKPA cannot be vested by agreement of the parties, . . . **and such jurisdiction cannot be conferred on the court by a party's failure to interpose a timely objection to the court's assumption of jurisdiction.** [Emphasis added.]

Petitioner argues *Van Der Strappen* at pages 26-28 of her Memorandum stating:

The Court held that a court faced with a determination that the marriage sued upon is not valid, is not deprived of subject matter jurisdiction; rather, is deprived of granting a specific remedy, a decree of divorce. As noted by the Court, the trial court maintains jurisdiction to enter equitable orders regarding the distribution of property and other matters and therefore, is not denied subject matter jurisdiction. [Emphasis added.]

This is not the holding of *Van Der Strappen*, and what follows in Petitioner's Memorandum at pages 27-28 is nothing more than dicta recited from footnote 8 of *Van Der Strappen* criticizing the decision in *Caffall*. *Van Der Strappen* @ 1340.

III. CAFFALL & VAN DER STRAPPEN

A. *Caffall v. Caffall*, 5 Utah 2d 407, 410 (1956), 303 P.2d 286.

Respondent has found no divorce cases that say the court does not need subject matter jurisdiction to adjudicate a case, including *Caffall*. Furthermore *Caffall* is the only case of which Respondent is aware where the court said, in essence, we do not have subject matter jurisdiction, but we are not going to set the decree aside. *Caffall* was decided on principles of equity and estoppel that do not exist in this case. Respondent has discussed most of the things that distinguish his case from *Caffall* in his initial memorandum. The following are two additional distinctions.

1. The Court in *Caffall* was worried that Mr. Caffall was trying to avoid paying child support. In the present case the Johnson's have no minor children.
2. In *Caffall*, only Mr. Caffall was charged with perpetrating a fraud on the court. In the present case both parties knew they had never married. Respondent stated that his passive concurrence was due to his understanding that the passage of time had established a common law marriage. He stated that he did not know otherwise until just recently.

B. *Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335, 1337-38 (Utah App. 1991), 815 P.2d 1335, 1337.

Petitioner's reliance on the *Van Der Strappen* decision is misplaced. As stated above, Petitioner relied largely on dicta involving the court's criticism of *Caffall* and not the holding of the *Van Der Strappen* court. Mr. Van Der Strappen claimed that his marriage to Mrs. Van Der Strappen was void ab initio and that the trial court lacked subject matter jurisdiction to enter a divorce decree because at the time of the parties' wedding his wife's previous marriage to another man had not yet been legally dissolved. The trial court refused to vacate the decree; the Court of Appeals reversed.

The issue was whether his divorce decree was void for lack of subject matter jurisdiction because there was never a valid marriage between the parties. The court's analysis is as follows:

. . . However, a judgment is void when entered by a court that lacks subject matter jurisdiction over the controversy, and must be set aside under Utah R.Civ.P. 60(b)(5). *Id.* Furthermore, subject matter jurisdiction cannot be conferred upon a court by consent or waiver, and a judgment can be attacked for lack of subject matter jurisdiction at any time. *Thompson v. Jackson*, 743 P.2d 1230, 1232 (Utah App. 1987). . . .

* * * *

Utah Code Ann. § 30-1-2 (Supp. 1991).[fn2] Because appellee's prior divorce was not final and absolute until some time after her wedding to appellant, under section 30-1-2, the marriage of the parties was void at its outset, and no court action was required to establish this. *Sanders v. Industrial Comm'n*, 64 Utah 372, 230 P. 1026, 1027 (1924). Furthermore, the marriage could not be validated by the fact that the parties conducted themselves as husband and wife for several years after appellee's prior divorce became final.[fn3] *Jenkins v. Jenkins*, 107 Utah 239, 153 P.2d 262, 263 (1944) (citing *Sanders*, 230 P. at 1027). Accordingly, there was never a marriage from which a decree of divorce could be obtained. *Jenkins*, 153 P.2d at 263 ("Since the purported marriage was void there was no grounds nor necessity for divorce").

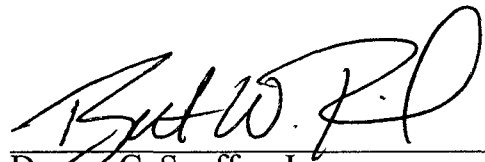
Mr. Van Der Strappen argued that because no marriage ever existed that the trial court lacked subject matter jurisdiction to enter a decree. He argued that *Caffall v. Caffall*, 5 Utah 2d 407, 303 P.2d 286 (1956), supported his position. The *Van Der Strappen* Court quoting *Caffall* said: "The Utah Supreme Court stated that the trial court 'had no jurisdiction of the subject matter since there had been no legal marriage' between the Caffalls." *Id.* 303 P.2d at 288. Though not raised or briefed the *Van Der Strappen* Court commented on harmless error stating: "Additionally, as long

as Caffall stands as precedent, it is questionable whether the entry of judgment where subject matter jurisdiction is lacking can ever be harmless.” Id @ 1340.

CONCLUSION

Contrary to Petitioner’s assertion, Respondent **does** deny that he affirmatively represented and certified to this Court and to the community and governmental agencies that he was married to the Petitioner on the date alleged in the Complaint and he **can and did** explain how or why, when initially confronted with the specific allegation in the Complaint that the parties were married on May 3, 1964, he admitted the allegation. See Respondent’s briefs, including *paragraph 10 of Respondent’s Statement of Facts*. For the reasons cited in this reply brief and those contained in Respondent’s initial brief this Court does not have subject matter jurisdiction to adjudicate a divorce between these parties pursuant to Utah R.Civ.P. 12(b)(1) and Utah R.Civ.P. 12(h). Therefore, the decrees and other judgements and orders previously entered are void pursuant to Utah R.Civ.P. 60(b)(4)³ and the petition must be dismissed.

DATED this 5th day of November, 2007.



Denver C. Snuffer, Jr.
Bret W. Reich
Attorneys for Respondent

³Previously codified as Utah R.Civ.P. 60(b)(5).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing **REPLY MEMORANDUM IN SUPPORT OF MOTION TO VACATE DECREE OF DIVORCE AND AMENDED DECREE OF DIVORCE AND MOTION TO DISMISS PETITION FOR WANT OF SUBJECT MATTER JURISDICTION PURSUANT TO UTAH R.CIV.P. 12(b)(1), 12(h) AND 60(b)(4)** was mailed, postage prepaid, faxed or hand delivered to the following parties:

Rosemond G. Blakelock
75 South 300 West
Provo, Utah 84601
Attorney for Ina Marie Johnson

Sent Via:
☒ Mail (Postage Prepaid)
☐ Hand Delivery
☒ Facsimile 801 576-2661

DATED this 5th day of November, 2007.

