

1997

Linda Kay Clark v. Cecil E. Clark : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Mary C. Corporon; Attorney for Appellee.

Suzanne Marelius; Attorney for Appellant.

Recommended Citation

Brief of Appellant, *Clark v. Clark*, No. 971635 (Utah Court of Appeals, 1997).

https://digitalcommons.law.byu.edu/byu_ca2/1287

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

**UTAH COURT OF APPEALS
BRIEF**

**UTAH
DOCUMENT
CFU
7**

UTAH COURT OF APPEALS

CKET NO. 971635

LINDA KAY CLARK,

Plaintiff/Appellant,

BRIEF OF APPELLANT

vs.

CECIL E. CLARK,

Defendant/Appellee.

Case No. 971635-CA

Priority No. 15

BRIEF OF APPELLANT

Appealed from the Judgment and Order of the Third District Court,
Salt Lake County, State of Utah.

SUZANNE MARELIUS #2081
Attorney for Plaintiff/Appellant
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
(801) 531-0435

MARY C. CORPORON
Attorney for Defendant/Appellee
CORPORON & WILLIAMS P.C.
808 East South Temple
Salt Lake City, Utah 84102
(801) 328-1162

FILED
Utah Court of Appeals

JUL - 6 1999

Julia D'Alessandro
Clerk of the Court

UTAH COURT OF APPEALS

LINDA KAY CLARK,

Plaintiff/Appellant,

BRIEF OF APPELLANT

vs.

CECIL E. CLARK,

Defendant/Appellee.

Case No. 971635-CA

Priority No. 15

BRIEF OF APPELLANT

Appealed from the Judgment and Order of the Third District Court,
Salt Lake County, State of Utah.

SUZANNE MARELIUS #2081
Attorney for Plaintiff/Appellant
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
(801) 531-0435

MARY C. CORPORON
Attorney for Defendant/Appellee
CORPORON & WILLIAMS P.C.
808 East South Temple
Salt Lake City, Utah 84102
(801) 328-1162

TABLE OF CONTENTS

	Page(s)
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
JURISDICTIONAL AUTHORITIES	1
NATURE OF THE PROCEEDING	2
STATEMENT OF THE ISSUES	2
DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES ..	3
STANDARD OF REVIEW	3
STATEMENT OF FACTS/STATEMENT OF THE CASE	4
A. <u>General Background</u>	4
B. <u>Mr. Clark's Appeal</u>	7
C. <u>Post-Appeal Motions Before the Trial Court</u>	7
SUMMARY OF ARGUMENT	8
MARSHALLING OF EVIDENCE	9
I. ARGUMENT: THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFF'S MOTIONS FOR <i>NUNC PRO TUNC</i> ORDER, TO SUPPLEMENT FINDINGS AND DECREE, AND THE OBJECTIONS TO THE ORDER VACATING DECREE	9
A. <u>The Trial Court Erred in Failing to Grant Plaintiff's Motion to Enter Order <i>Nunc Pro Tunc</i></u>	10
B. <u>The Trial Court Erred in Failing to Grant Plaintiff's Motion to Supplement Findings of Fact and Conclusions of Law and Decree of Divorce</u>	12

C.	<u>The Trial Court Erred in Denying Plaintiff’s Objection to Order Vacating Decree and Order of Dismissal</u>	17
D.	<u>The Bad Faith of Mr. Clark Should be Considered in Review of the Plaintiff’s Motions and Under Equitable Principles</u>	18
II.	THE ONE-YEAR REQUIREMENT IN THE UTAH COMMON LAW MARRIAGE STATUTE IS UNCONSTITUTIONAL	20
A.	<u>The Statute Violates Article I, Section 11 of the Utah Constitution by Depriving Plaintiff of Any Means to Redress Injuries</u>	21
B.	<u>The Statute Violates Article I, Section 24 of the Utah Constitution by Violating Plaintiff’s Rights of Equal Protection and to be Free of Discrimination</u>	22
	CONCLUSION	27
	ADDENDUM	29

TABLE OF AUTHORITIES

	Page(s)
<u>CASES</u>	
<i>Ashton v. Ashton</i> , 733 P.2d 147 (Utah 1987)	16
<i>Barnes v. Barnes</i> , 857 P.2d 257 (Utah App. 1993)	14
<i>Berry v. Beach Aircraft Corp.</i> , 717 P.2d 670 (Utah 1986)	22
<i>Bunch v. Englehorn</i> , 906 P.2d 918 (Utah App. 1995)	20, 21, 24
<i>Burke v. Burke</i> , 733 P.2d 133 (Utah 1987)	15
<i>Crockett v. Crockett</i> , 836 P.2d 818 (Utah Court App. 1992)	4, 13
<i>Edgar v. Wagner</i> , 572 P.2d 405 (Utah 1977)	16
<i>In Re Hock</i> , 655 P.2d 1111 (Utah App. 1982)	16
<i>Layton v. Layton</i> , 777 P.2d 504 (Utah App. 1989)	15
<i>Lee v. Gaufin</i> , 867 P.2d 572, 577 (Utah 1993)	22, 23
<i>Malan v. Lewis</i> , 693 P.2d 661, 669 (Utah 1984)	22
<i>Marvin v. Marvin</i> , 557 P.2d 106 (California 1976)	16
<i>Mattes v. Olearain</i> , 759 P.2d 1177 (Utah 1988)	16
<i>Noble v. Noble</i> , 761 P.2d 1369 (Utah 1988)	15
<i>Painter v. Painter</i> , 752 P.2d 907 (Utah App. 1988)	14
<i>State v. Pena</i> , 869 P.2d 932 (Utah 1994)	3
<i>Walters v. Walters</i> , 812 P.2d 64 (Utah App. 1991), cert denied, 836 P.2d 1983 (Utah 1992)	14, 15
<i>Whyte v. Blair</i> , 885 P.2d 791 (Utah 1994)	26

STATUTES

<i>Utah Code Ann.</i> § 78-2(a)-3(2)(h)	1
<i>Utah Code Ann.</i> § 30-1-4.5	3, 10, 20
<i>Utah Code Ann.</i> § 30-1-4.5(2)	3, 9, 11, 21
<i>Utah Code Ann.</i> § 30-4(a)-1	4, 10

CONSTITUTIONAL PROVISIONS

Constitution of Utah, Article I (Declaration of Rights), Section 11 (Court's Open-Redress of Injuries)	3, 20, 21
Constitution of Utah, Article I (Declaration of Rights), Section 24 (Uniform Operation of Laws)	3, 22

OTHER SOURCES

<i>Utah Law Review</i> , Volume 1988, No. 1, p. 273	25
---	----

SUZANNE MARELIUS (2081)
Attorney for Plaintiff/Appellant
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
(801) 531-0435

UTAH COURT OF APPEALS

LINDA KAY CLARK,

Plaintiff/Appellant,

BRIEF OF APPELLANT

vs.

CECIL E. CLARK,

Defendant/Appellee.

Case No. 971635-CA

Priority No. 15

BRIEF OF APPELLANT

PLAINTIFF/APPELLANT (hereinafter "Plaintiff") submits the following as her opening brief in the above-referenced appeal:

JURISDICTIONAL AUTHORITIES

Jurisdiction to review the final judgment and order of the District Court of Salt Lake County, State of Utah, is vested in the Utah Court of Appeals pursuant to the Rules of Appellate Procedure, Rules 3 and 4, and *U.C.A.* § 78-2(a)-3(2)(h).

NATURE OF THE PROCEEDING

This is an appeal from a final judgment and order of the Third District Court, in and for Salt Lake County, State of Utah, involving a common law marriage and divorce. A Declaration of Marriage and Decree of Divorce was issued by trial court Judge Dennis Frederick September 29, 1997. The Defendant/Appellee Cecil E. Clark appealed that matter, which case is presently pending with this Court as Case No. 970635-CA. Subsequent to that appeal, Mr. Clark filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and Plaintiff filed a Motion for Entry of Order *Nunc Pro Tunc*. On August 31, 1998, the trial court granted the Motion to Dismiss for lack of subject matter jurisdiction. Plaintiff filed a Motion for Stay and to Supplement Findings of Fact and Conclusions of Law and Decree of Divorce and an Objection to Order Vacating Decree and Order of Dismissal. These matters were resolved by Order of the trial court dated December 24, 1998, which is the final judgment and order being appealed to this Court.

STATEMENT OF THE ISSUES

1. Did the trial court abuse its discretion in denying the Plaintiff's Motion for Entry of Order *Nunc Pro Tunc*, which would have validated the Declaration of Marriage and Decree of Divorce which was being challenged by Defendant based on lack of subject matter jurisdiction pursuant to violation of the time provisions in the common law marriage statute?
2. Did the trial court commit error in denying Plaintiff's Motion for Stay and to Supplement Findings of Fact, Conclusions of Law and Decree of Divorce and the

Plaintiff's Objection to Order Vacating Decree and Order of Dismissal which would have allowed a divorce trial on alternate theories set forth in the original Divorce Complaint in this matter, other than the common law marriage theory?

3. Is the one-year time limit in the common law marriage statute set forth at *U.C.A.* § 30-1-4.5 unconstitutional?

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES AND RULES**

Appellant sets forth in the attached Addendum, the complete code and rule provisions referenced as follows:

Utah Code Ann. § 30-1-4.5 (common law marriage statute and one-year filing requirement)

Utah Constitution, Article I, Section 11 (Addendum 12)

Utah Constitution, Article I, Section 24 (Addendum 12)

STANDARD OF REVIEW

This Court must review the trial court's interpretation of *Utah Code Ann.* § 30-1-4.5 (1995 as amended) and Utah Constitution, Article I, under a correction of error standard. As used by Utah's Appellate Courts, "correctness" means that no particular deference is given to the trial court's ruling on questions of law. *State v. Pena*, 869 P.2d 932 (Utah 1994).

This Court must review the trial court's interpretation of *Utah Code Ann.* § 30-4(a)-1, the *nunc pro tunc* statute, and rulings on Plaintiff's motions, under an abuse of discretion standard. Trial courts may exercise broad discretion in divorce matters, absent

manifest injustice or inequity that indicates a clear abuse of discretion. *Crockett v. Crockett*, 836 P.2d 818 (Utah App. 1992).

STATEMENT OF FACTS/STATEMENT OF THE CASE

Plaintiff submits the following as summary of the case and refers to the relevant facts, as needed. A more detailed Statement of Facts is set forth in the Brief of Appellee Linda Kay Clark filed in a companion appeal to this case, Case No. 970635, and those should be incorporated herein by reference.

A. General Background.

1. The parties to this action had an 18-year solemnized marriage, which ended in divorce granted by the Third District Court of Summit County on August 27, 1985.

2. The parties resumed living together in October 1985, returning to their previous marital home in Coalville, Utah. They later moved to a home in Magna, Utah, where they lived together until their separation approximately 11 years later. The trial court found that the separation of the parties on August 28, 1996 represented the formal termination of their common law marriage. (Addendum 1, Findings of Fact).

3. The Plaintiff filed a Complaint for Divorce alleging that the parties had a common law relationship and that the assets and property of the parties should be awarded on an equitable basis. She also requested that the marital estate be divided pursuant to common law principles and, alternatively, under the theories of partnership, contract for services or trust. (Addendum 2, Verified Complaint for Divorce, para. 6).

4. A trial was held on August 13, 1997, before the Honorable J. Dennis Frederick who entered Findings that the parties met the legal requirements for a common law marriage, including: the parties being of legal age and capable of giving consent; the parties' cohabitation from 1985 until 1996; the mutual assumption of marital rights, duties and obligations; and the holding out as husband and wife and having acquired a general reputation as same. Part of the specific evidence on which the Court made these findings include the following:

- (a) The parties filed joint, married income tax returns from 1985 through 1994 (this return was filed 10/1/95);
- (b) After an 18-year solemnized marriage, the parties were divorced and resumed living together only two months after their divorce and cohabited continuously thereafter for a period of approximately 11 years;
- (c) Plaintiff kept the married name of Clark, and Mr. Clark purchased a set of wedding rings for her in 1989;
- (d) The parties established several business together, which they operated jointly, and Mrs. Clark worked on a full-time basis in these businesses doing bookkeeping, payroll, and other office work without being paid a formal salary; and
- (e) The parties established and maintained joint bank accounts, credit, and purchased real property together.

5. On August 13, 1997, at the close of trial, Judge Frederick made lengthy and specific Findings of Fact and a ruling determining a common law marriage existed. (Addendum 3, Text of Bench Ruling). A lengthy Minute Entry reflects the finding and ruling of the Court.

6. The Findings of Fact, Conclusions of Law and Declaration of Marriage and Divorce were prepared by Plaintiff's counsel and sent to opposing counsel on August 26, 1997. Changes were requested by counsel and revised copies were sent September 10, 1997 for approval and were never returned and no objection was filed. A transmittal letter to the Court for review and entry of the documents is dated September 26, 1997. (Addendum 4).

7. The Findings and Declaration of Marriage were entered September 29, 1997 by the Court. (Addendum 1).

8. Earlier in the proceeding, Plaintiff filed a Motion for Entry of Decree and related documents pursuant to the ruling of Commissioner Lisa A. Jones at a hearing held April 17, 1997, arising from Defendant's delay in providing discovery after two motions to compel and the Commissioner's ruling that his pleading should be stricken and default entered. (Addendum 5, Commissioner Jones' Ruling).

9. A hearing was held June 30, 1997, before Commissioner Lisa A. Jones, where she stayed Plaintiff's Motion for Entry of Decree and ruled that discovery be provided the next day. The proposed Declaration of Marriage and Decree of Divorce were filed in the record unsigned.

B. Mr. Clark's Appeal.

10. Defendant Cecil E. Clark filed an appeal with the Utah Court of Appeals on October 28, 1997, on two issues: the first, whether the trial court had jurisdiction to enter the order declaring the marriage of these parties because the order was not entered within one year of the termination of their relationship, as required by the common law marriage statute; and second, whether the trial court abused its discretion in finding a common law marriage based on the evidence at trial.

11. The above-referenced appeal was consolidated into this appeal as Case No. 971635-CA by Order of the Utah Court of Appeals entered February 24, 1999.

C. Post-Appeal Motions Before the Trial Court.

12. Mr. Clark filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and Memorandum, on May 1, 1998.

13. Plaintiff Linda Kay Clark filed a Response and Memorandum of Points and Authorities to the Motion to Dismiss for Lack of Jurisdiction. Plaintiff also filed a Motion to Enter Order *Nunc Pro Tunc* on June 3, 1998. Both Motions were heard before the trial court on August 31, 1998. At the close of argument, the trial court granted the Motion to Dismiss by Order entered September 3, 1998. (Addendum 6, Transcript of August 31, 1998 hearing).

14. On September 10, 1998, Plaintiff filed a Motion for Stay and to Supplement Findings of Fact and Conclusions of Law and Decree of Divorce and Objection to Order Vacating Decree and Order of Dismissal. Mr. Clark filed no response to either of

these Motions and pursuant to a Notice to Submit for Decision, the Court ruled by Minute Entry that Plaintiff's Motion to Stay was granted, and that Plaintiff's Motion to Supplement and to Object to the Order was denied. (Addendum 7, Minute Entry Ruling).

SUMMARY OF ARGUMENTS

1. The trial court abused its discretion in denying the request of Plaintiff to enter the Findings of Fact, Conclusions of Law and Declaration of Marriage *Nunc Pro Tunc* to the date of trial, August 13, 1997, rather than the actual date of entry, September 29, 1997. The *nunc pro tunc* statute states that a court must simply find "good cause" for granting such an order in a matter relating to marriage, divorce, legal separation or annulment. Since granting of the request would have merely corrected a technical violation of the common law statute and would have validated the findings and ruling of the Court, it was error to find that good cause was not shown.

2. The trial court erred in denying Plaintiff's Motion to Supplement the Findings and Declaration of marriage in this case. This pleading acknowledged the Court's ruling that the common law marriage claim was invalid and requested a determination and division of assets based on alternate grounds set forth in the original Complaint, such as common law principles, equity, theory of partnership, contract for services or trust. Similarly, Plaintiff's Objection to the Order Vacating the Decree and Order of Dismissal asserted that the ruling to dismiss the underlying action was overly broad and that the Court should proceed under the alternate theories to make an appropriate evaluation and division of joint assets. The Court denied these requests without comment or findings.

3. This Court should find that the one-year provision of the common law marriage statute is unconstitutional both on its face and as applied to the case before the Court. The application of the time limit creates arbitrary classes without any rational basis for such discrimination. This Court should find the one-year provision of *U.C.A.* § 30-1-4.5(2) unconstitutional and affirm that the facts in this case support a finding of a common law marriage which meets the other elements of the statute.

4. The trial court erred in interpreting the common law statute to bar entry of the Findings and Order in this case beyond one year, based on a reasonable reading of the statute and on the theory of estoppel. Plaintiff's ability to comply with the one-year time limitation in the statute was substantially prevented by the conduct of Mr. Clark, who should not be allowed to gain from this misconduct.

MARSHALLING OF EVIDENCE

In marshalling the evidence herein, Plaintiff submits that there is only one significant fact and ruling to present. That is the fact that Plaintiff did not meet the clear technical requirement of the common law marriage statute by not having the Declaration of Marriage and Divorce Order entered on or before August 26, 1997, which was one year after the termination of the marriage, as found by the trial court.

ARGUMENT

- I. THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFF'S MOTIONS FOR *NUNC PRO TUNC* ORDER, TO SUPPLEMENT FINDINGS AND DECREE, AND THE OBJECTIONS TO THE ORDER VACATING DECREE.

A. The Trial Court Erred in Failing to Grant Plaintiff's Motion to Enter Order *Nunc Pro Tunc*.

This appeal is from a final Order of Trial Judge Dennis Frederick involving a common law marriage and divorce. The parties in this matter had a 29-year relationship. The first 18 years were pursuant to a solemnized marriage which ended by divorce in Summit County in August 1985. A few months later the parties resumed living together, which they did continuously until their separation in August 1996. The Plaintiff filed a Complaint for Divorce requesting that the parties find a common law marriage existed and, alternatively, that the assets of the parties be divided based on alternate theories, including common law principles, the theory of partnership, contract for services or trust. Plaintiff filed her Complaint on September 20, 1996, and the Court held a one-day trial August 13, 1997. At that time, a bench ruling was made finding that the parties met the legal requirements for a common law marriage set forth at *Utah Code Ann.* § 30-1-4.5. (Addendum 8). The trial court made detailed findings referring to a long course of conduct and many categories of evidence which met the required statutory elements. Mr. Clark filed an appeal to this Court challenging the establishment of a common law marriage, and raising the question of the trial court's jurisdiction based on the entry date of the Order and the one-year time deadline in the common law marriage statute for the Court to make a determination of marriage.

After the appeal was filed, Mr. Clark returned to the trial court and filed a Motion to Dismiss for Lack of Jurisdiction based on violation of the one-year time filing provisions in the common law marriage statute. The Plaintiff brought a motion to enter the

Declaration of Marriage and Decree of Divorce as a *Nunc Pro Tunc* Order under the provisions of *Utah Code Ann.* § 30-4(a)-1, which provides as follows:

A court having jurisdiction may, upon its finding of good cause and giving of such notice as may be ordered, enter an order *nunc pro tunc* in a matter relating to marriage, divorce, legal separation or annulment of marriage.

The Court heard both motions on August 31, 1998, and granted the Motion to Dismiss for Lack of Jurisdiction. This appeal followed.

The Court erred in not granting the *nunc pro tunc* motion of Plaintiff. The statute requires only a finding *good cause*, which Plaintiff has unquestionably shown in the circumstances of this case. The Findings and Order of the trial court establishing that a common law marriage existed for at least 12 years prior to August 1997 show that Plaintiff met all substantive requirements of the common law marriage statute. Detailed Findings were made as a bench ruling and subsequently a Minute Entry, on the date of trial, August 13, 1997. In those Findings, the Court made the required statutory finding that the *termination* of the marriage occurred on August 28, 1996, when the parties separated and Mr. Clark changed the locks on the residence and Plaintiff relocated. The final Findings and Declaration of Marriage and Divorce were entered by the trial court September 29, 1997, about four weeks after the trial and thus one month beyond the one-year time limit of the common law marriage statute. The relevant portion of that statute at *U.C.A.* § 30-1-4.5(2) is as follows:

(2) The determination or establishment of a marriage under this section must occur during the relationship described

in subsection (1) or within one year following the termination of that relationship. Evidence of the marriage recognizable under this section may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.

(Addendum 8).

The Utah *nunc pro tunc* statute requires only a showing of *good cause* for the Court to enter an Order concerning marriage or divorce on a *nunc pro tunc* basis. Good cause is certainly present in this case, given the Findings and Ruling of the trial court on the existence of the common law marriage in this case. By failing to grant the *Nunc Pro Tunc* Order, the Court ignores traditional principles of equity and fairness by relying on a technical matter. The existence of the *nunc pro tunc* statute and its specific application in the area of domestic relations law is tailor-made for a situation such as this. These parties have come before the Court after a relationship of 29 years, nearly one-third of which was in a common law status, and Plaintiff seeks assistance in dividing the substantial marital estate. The ruling of the Court leaves Plaintiff without a remedy under the common law statute, which can be easily corrected by the entry of the order in this case, *nunc pro tunc*.

B. The Trial Court Erred in Failing to Grant Plaintiff's Motion to Supplement Findings of Fact and Conclusions of Law and Decree of Divorce.

After the trial court ruled that the Court lacked subject matter jurisdiction to rule on the issue of common law marriage, the Plaintiff filed a Motion for Stay and to Supplement Findings of Fact and Conclusions of Law and Decree of Divorce. This pleading requested that the Court stay enforcement of the dismissal based on failure to meet the common law marriage requirements pending a decision by the Utah Court of Appeals on this

appeal and the previous one filed by Mr. Clark. That Motion to Stay was granted by the Court.

Plaintiff also requested that the Court hold an additional hearing or allow briefing to supplement the Findings of Fact, Conclusions of Law and Decree of Divorce entered in this case September 29, 1997. The Plaintiff had filed a Complaint for Divorce which requested a finding of common law marriage and which also requested a determination and division of assets based on equity, common law principles, the theory of partnership, contract for services or trust. Based on the taking of evidence which occurred August 31, 1998, the Court had sufficient evidence to make rulings under these alternate theories. The findings made by the Court established that the parties had contributed to the purchase of one another's vehicles, real property, personal property and business interests. It was reasonable that the Court supplement the Findings and final Order entered in this matter to consider and rule on the alternate theories which were properly pled in this case. Based on the evidence already of record, it would be likely that Plaintiff would be entitled to a distribution of assets and property currently under the control of Mr. Clark.

Mr. Clark made no response to this Motion and despite the fact that it was unopposed, the Court denied the Motion by Minute Entry on October 16, 1998. Again, the ruling of the trial court effectively deprived Plaintiff of any remedy for the division of jointly acquired assets and was an abuse of discretion. Trial courts are allowed to exercise broad discretion in divorce matters unless there is "a manifest injustice or inequity that indicates a clear abuse of . . . discretion." *Crockett v. Crockett*, 836 P.2d 818, 819 (Utah App. 1992).

It is also well settled in Utah appellate law that to ensure that a trial court acts appropriately in discretionary matters, that the reasons for the Court's decision must be set forth fully in appropriate findings and conclusions. *Barnes v. Barnes*, 857 P.2d 257, 259 (Utah App. 1993) (quoting *Painter v. Painter*, 752 P.2d 907, 909 (Utah App. 1988)). The trial court herein utterly failed to provide any findings for this ruling.

The failure of the Court to allow Plaintiff an opportunity for hearing or briefing on the alternate theories requesting equitable division of assets is clear error. After the trial, the trial court was fully informed of the extensive businesses and properties acquired during this lengthy relationship, and of Plaintiff's financial need. The Court awarded Plaintiff alimony of \$1,000 a month, attorneys' fees, and one-half the marital estate encompassing all property accumulated during the relationship. This property included a paid-for residence, a cabin, two rental properties, cash value in life insurance, businesses and bank accounts. All these assets were in the control of Mr. Clark. Failing to allow Plaintiff a reasonable opportunity to address division of assets under alternate theories was a clear abuse of discretion.

Utah law supports a division of assets under such alternate theories under many varied circumstances. An example is the case of *Walters v. Walters*, 812 P.2d 64 (Utah App. 1991), cert denied, 836 P.2d 1983 (Utah 1992), where the parties resided in a "marriage like relationship" from 1980 to 1984, when they were ceremoniously married and prior to their divorce action in 1989. The trial court made a property distribution of all assets acquired during the relationship and not only during the period of marriage. This was challenged on

appeal and the high court upheld the discretion of a trial court to allocate property acquired by prior to and after the solemnized marriage. The Court stated that to do so, it was important to categorize the property as premarital or marital and that the Court must first "find unique circumstances that warrant disregarding the general rule that premarital property is separate property." Utah trial judges have been given the broad mandate to make equitable divisions of property in domestic relations cases pursuant to statute, *U.C.A. § 30-3-5*, and case law. *Burke v. Burke*, 733 P.2d 133 (Utah 1987). It has been stated that the purpose of property divisions is to allocate property in the manner which "best serves the needs of the parties and best permits them to pursue their separate lives." *Noble v. Noble*, 761 P.2d 1369, 1373 (Utah 1988). The *Burke* case sets forth a detailed list of factors for the Court to consider in making a property division. In *Walters*, the trial court stated the general property division rules and added that "where unique circumstances exist, a trial court may reallocate premarital property as part of a property division incident to divorce."

Another example is the case of *Layton v. Layton*, 777 P.2d 504 (Utah App. 1989). This case involved a couple who held themselves out to be husband and wife for many years and were never legally married. They raised four children, worked full-time in a family business, titled property in cotenancy, although in separate names. The wife sued for divorce in 1983 and later amended her Complaint to add a claim for partition. The trial court found that a common law marriage existed, even though the Complaint was filed four years before the commencement of statute. The Court of Appeals reversed the holding of the trial court and found it had mischaracterized the relationship as a marriage. The decision

cites with approval alternate theories on which to base an equitable division of property accumulated by unmarried cohabitants such as a finding of partnership, contract for services (citing *Edgar v. Wagner*, 572 P.2d 405 (Utah 1977), and *Marvin v. Marvin*, 557 P.2d 106 (California 1976)), and/or a trust (citing *Ashton v. Ashton*, 733 P.2d 147 (Utah 1987), *In Re Hock*, 655 P.2d 1111 (Utah App. 1982)).

Another example is the case of *Mattes v. Olearain*, 759 P.2d 1177 (Utah 1988) involving a common law wife bringing an action against the common law husband's estate for declaration of rights and distribution of property. During their relationship, these parties cohabited and jointly paid the mortgage on real property from funds in a joint account. After her husband's death, the common law wife continued living in the real property and paying the mortgage and filed a legal action alleging the common law marital relationship to secure her interest in the property. The trial court concluded that equitable principles should be applied to the marriage-like relationship and awarded her the residence. On appeal, Plaintiff argued the court should find a constructive trust. Although denying her request, this well-analyzed opinion suggests that the equitable theories of constructive trust or resulting trust doctrines would apply. Plaintiff specifically argued this alternate theory in the current case and, based on the ruling of the Court, has been denied an opportunity to present evidence and briefing on that theory.

C. The Trial Court Erred in Denying Plaintiff's Objection to Order Vacating Decree and Order of Dismissal.

After the ruling of the trial court finding lack of jurisdiction to enter a common law marriage, Plaintiff filed an Objection to Order Vacating Decree and Order of Dismissal. Denial of this Motion was an abuse of discretion by the trial court. At the hearing held August 31, 1998, where the Court granted the Motion to Dismiss, no specific findings were made and only the granting of the Motion to Dismiss was specifically stated. The Order, as prepared by Respondent's counsel, vacated the Declaration of Marriage and Decree of Divorce in an overbroad and inappropriate fashion. The affect of dismissing Plaintiff's claims under the common law marriage statute should not result in a dismissal of the entire case. Rather, it only results in the trial court being able to make findings and a ruling under the common law statute. The other claims pled by Plaintiff in her Complaint concerning alternate theories of property division and principles of common law and equity should be unaffected by that jurisdictional ruling.

The appropriate scope of the Order arising from the August 31, 1998 hearing should be only that the Motion to Dismiss for Lack of Jurisdiction under the common law marriage statute is granted. Plaintiff should have been allowed to proceed with a hearing and briefing on her alternate theories. The denial of this Motion by the Court substantially prejudices Plaintiff and leaves her without a remedy for a division of property and support claims.

D. The Bad Faith of Mr. Clark Should be Considered in Review of the Plaintiff's Motions and Under Equitable Principles.

During the pendency of this litigation, the Court made specific findings on several occasions that Mr. Clark acted in bad faith. Plaintiff submits he should not be allowed to benefit from this misconduct. The fact that the Trial Judge was fully aware of this misconduct and addressed the bad faith in his ruling favors Plaintiff's request to have equitable principles applied in this case. During the litigation, Mr. Clark failed and refused to produce discovery which impeded and delayed the litigation. Plaintiff separated at the end of August 1996 and filed her Complaint the following month on September 20, 1996. She filed an Order to Show Cause requesting temporary support and a finding of common law marriage, which was heard by the Commissioner on November 7, 1996. The Commissioner's Minute Entry notes that an evidentiary hearing is required for a finding of common law marriage and reserves the issue for trial. (Addendum 10). Plaintiff objected to the ruling and requested an evidentiary hearing but the trial court denied a hearing and reserved the common law issue for trial. Plaintiff then served discovery October 16, 1996, and after waiting several months filed a Motion to Compel on January 31, 1997. No discovery was provided and a second Motion to Compel was filed March 20, 1997. The Commissioner held a hearing April 17, 1997, and entered an Order that inadequate discovery was provided and provided 10 days for compliance or Mr. Clark's pleadings would be stricken and his default entered. This Order on second Motion to Compel Discovery Responses was signed and entered by Judge Frederick on April 30, 1997. (Addendum 5). Plaintiff filed a Motion for Entry of Decree

and Findings, an Affidavit of Jurisdiction and Grounds for Divorce and Proposed Findings and Decree on May 15, 1997. Mr. Clark filed a Motion for Relief and to Vacate Judgment May 21, 1997, and a hearing was held June 30 before the Commissioner where she made no recommendation on the request for declaration of marriage, ordered discovery and tax returns to be provided within 10 days, and again suggested that a bifurcated hearing on the issue of common law marriage take place based on the closeness of the statutory one-year requirement. (Addendum 10).

The above history shows that Plaintiff was extremely prompt in filing her Complaint and discovery requests and in requesting enforcement of the discovery sanctions. When the Court finally ordered complete discovery and tax returns to be provided June 30, 1997, discovery had been delayed eight months beyond the time it had initially been requested. This resulted in substantial detriment to Plaintiff in trial preparation and, in fact, denied her the opportunity to present a complete case at the time of trial. This chronology shows clearly that the delays were the result of Mr. Clark's actions and not those of Plaintiff.

A hotly disputed issue at the time of trial was the status of the marital residence on Jefferson Road in Magna, Utah, that both parties resided in that home until separation and which was fully paid for. From the time of purchase in 1988 until June 1996, a few months before separation, the home was titled in the sole name of Plaintiff. A written agreement was made in 1992 to transfer the home to Mr. Clark, based on a series of payments. Minimal payments were made until June 1996, when Mr. Clark made a balloon payment and obtained a Quit-Claim Deed. At trial, Plaintiff asserted that she entered into this agreement under

duress and pressure from Mr. Clark and that it was never intended to be a true agreement. The Court found Plaintiff's claims of duress and intimidation by Mr. Clark credible and found clear and convincing evidence that Plaintiff was pressured and the trial court voided that transfer. This episode shows the knowledge of the trial court of Mr. Clark's bad faith and intimidation in the relationship, as well as in the course of litigation. Despite this knowledge, the trial court refused to apply equitable principles and allow Plaintiff the opportunity to obtain a fair distribution of jointly acquired property.

II. THE ONE-YEAR REQUIREMENT IN THE UTAH COMMON LAW MARRIAGE STATUTE IS UNCONSTITUTIONAL.

The Utah common law marriage statute at *U.C.A. § 30-1-4.5* contains two parts. Section (1) sets forth four factual elements which must be established for the Court to find a common law marriage. The second section (2) states that the *determination or establishment* of a marriage under this section *must occur* during the relationship described in subsection (1), or *within one year following the termination of that relationship*. Appellant challenges this language as violating the "open courts" provision of the Utah Constitution (Article I, Section 11) because on its face it constitutes an arbitrary and unjustified deprivation of the right to adjudication. Appellant also challenges this statute as unconstitutional as applied in this case, since it forecloses Plaintiff's rights to an adjudication of a common law marriage through no fault of her own.

A critical case in reviewing this issue is *Bunch v. Englehorn*, 906 P.2d 918 (Utah Court App. 1995) where this appellate court held that the language requiring a

determination within one year meant just that, rather than meaning a "filing" of the action within one year. In *Bunch*, the Utah Court of Appeals held that the statute's plain meaning required a "determination" or "adjudication" within one year of the termination of the alleged common law relationship. In the *Bunch* case, a divorce was filed even though no marriage had been solemnized and no order under the common law statute had been entered. The trial court dismissed the Complaint after two years because the one-year period of Section 30-1-4.5(2) had expired and the party seeking to establish the marriage had not complied with the statute. In its opinion, the Court of Appeals did note that Section (2) of the statute might present a constitutional problem because it requires that the order be entered within one year, not that a Petition or Complaint be filed within that period. The Court stated a party could timely file a petition for determination and still not comply with the statute if the Order were not entered within the one-year period. *Id.* footnote 3.

A. The Statute Violates Article I, Section 11 of the Utah Constitution by Depriving Plaintiff of Any Means to Redress Injuries.

The time limit provision in the common law marriage statute is unconstitutional under the "open courts" provision of the Utah Constitution, Article I, Section 11, which reads:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, in a civil cause to which he is a party.

Plaintiff filed a Complaint seeking a remedy for rights accruing to her by way of a marriage-like relationship and asked the Court to equitably divide marital property and

address her support needs. The right to apply to courts for redress of wrong is a substantial right and application of the one-year time limit to Plaintiff's case herein violates her rights of due process and access to the Courts. Similarly, this Court has found unconstitutional a limitations provision in the Utah Product Liability Act which barred actions without regard to when an injury occurred and was not designed to provide a reasonable time within which to file a lawsuit. *Berry v. Beach Aircraft Corp.*, 717 P.2d 670 (Utah 1986). The time limitation in the common law marriage statute deprives Plaintiff of a remedy which violates this constitutional provision.

B. The Statute Violates Article I, Section 24 of the Utah Constitution by Violating Plaintiff's Rights of Equal Protection and to be Free of Discrimination

The one-year time limit also violates the Utah Constitution, Article I, Section 24, which states: "All laws of a general nature shall have uniform operation." The Utah Supreme Court has held this provision to be analogous to the Fourteenth Amendment of the U.S. Constitution by stating as follows:

Although their language is dissimilar, these provisions embody the same general principle: persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same.

Malan v. Lewis, 693 P.2d 661 (Utah 1984). See also, *Lee v. Gaufin*, 867 P.2d 572 (Utah 1993). The *Lee* court explained that for a law to be constitutional under Article I, Section 24, it is not enough that it be uniform on its face, "what is critical is that the *operation* of the law be uniform. A law does not operate uniformly if 'persons similarly situated' are not 'treated similarly' or if 'persons in different circumstances' are 'treated as if their circumstances were

the same.' " Under this analysis, we must review the common law marriage law to determine first, if it applies equally to all persons within a class; and second, whether the statutory classification and the different treatment given the classes are based on differences that reasonably further the objectives of the statute. These cases hold that it is unconstitutional to single out one person or group of persons from among the larger class on the basis of unreasonable justification that has little or no merit. The level of review under this Article I, is either a rational basis standard or can be a higher standard of judicial scrutiny if a fundamental right is at issue. Arguably, the right to marry is such a fundamental right.

The *Lee* court set forth the judicial review process to be used under a rational basis approach stating as follows:

Under the rational basis, or least restrictive standard, a statutory classification is constitutional unless it has no rational relationship to a legislatively stated purpose or, if not stated, to any reasonably conceivable legislative purpose. A presumption of constitutionality is extended to statutes . . . and that presumption is sufficient to sustain the constitutionality of a classification created by the statute unless the classification creates an invidious discrimination, or bears no rational relationship to a legitimate state purpose. Moreover, the presumption requires a court to presume that the classification was intended to further the legislative purpose.

Id. at 580. The operation of the common law marriage one-year time limit creates unreasonable classifications. One group can obtain judicial determination of their common law marriage within one year and another year cannot obtain this determination. There is no essential difference between these classes when they begin the process. It is thus reasonable

to ask whether the discriminatory treatment accorded these classes withstands constitutional scrutiny.

As stated by the Court of Appeals in the *Bunch* case, there are many reasons why a common law marriage determination may not be completed within one year. Simply the process of discovery, intervening motions and litigation tactics can easily delay a domestic law case and prevent a final order being entered within one year of filing. A common law situation is even more problematic, as the parties may be disputing the date of termination of the relationship which may not even have a final resolution until the trial and ruling of the court, which could be well beyond the one-year time bar had expired. Additionally, it is unusual for a case to be resolved by summary judgment or other intervening, final order which could establish the marital relationship in a short-term, summary hearing without a complete trial. In the case at bar, Plaintiff sought a determination of the marriage before the Domestic Relations Commissioner on at least two occasions and the ruling was reserved for trial based on the need for an evidentiary hearing, which the trial court refused to grant earlier than trial. In Plaintiff's case, she also suffered from the litigation tactics of Mr. Clark in delaying discovery for eight months from the time it was first requested. She filed two Motions to Compel with the Court and a Motion for Entry of Default and that pleadings be stricken. Moreover, at the end of the case, Plaintiff prepared and filed timely Findings and Proposed Order which were sent to opposing counsel, as required by the rules. Counsel requested revisions, which were made, and ultimately the documents were signed and entered by the Court one month after the one-year time bar. Plaintiff had no choice but to follow the

procedural rules of the Court and given a trial date of August 13 and a one-year time bar that expired August 26, it would have been nearly impossible for Plaintiff to comply with preparing and presenting final documents to opposing counsel and to the Court within the statutory time frame. This element of trial tactics and bad faith by an opposing party was unfairly ignored by the trial court when Plaintiff asked for her *nunc pro tunc* ruling and presented a Motion to Supplement Pleadings. It is also evident that the case load and procedures of the Court in this case and the Domestic Relations Commissioner's process of hearing all preliminary matters before the Trial Judge reviews them, resulted in periods of delay beyond Plaintiff's control.

Plaintiff has attempted to discover the legislative history of the common law marriage statute to determine the legislative objective in this law. A *Utah Law Review* note reviewed the legislative floor debate and concludes that the legislative intent in passing the common law marriage statute was as a cost-saving measure to curtail welfare abuse. Apparently, women and children could qualify for welfare benefits even when they cohabited with an employed domestic partner whose resources were not counted. Passing a common law marriage statute would close this welfare loophole as well as remedy the inequitable situation of Worker's Compensation benefits being denied to spousal equivalents of deceased employees. *Utah Law Review*, Volume 1988, No. 1, p. 273. This *Law Review* commentator also suggests that the one-year time bar is ambiguous and unclear as it does not define what part of "termination" of the marital relationship is referred to. As an example, if a cohabiting couple declares that they are terminating their marital relationship but continue to cohabit and

meet the requirements of the statute for more than a year after that termination, can they still validly establish a common law marriage? Similarly, a strict interpretation of the one-year time bar may result in a termination of the relationship when any one of the five statutory conditions ceases to exist. Even a third scenario, a liberal view, holds that if each of the statutory conditions has existed at some time in the relationship, then the conditions once met are forever satisfied and the court is not precluded from establishing the marriage, regardless of when the order is issued. To adopt this view without making the time limit meaningless, a court would have to focus on one or more of the five conditions, such as cohabitation, as representing the "relationship" whose termination would trigger the one-year period. *Id.* page 277, note 19.

The Utah Supreme Court in the case of *Whyte v. Blair*, 885 P.2d 791 (Utah 1994) stated that the legislative history of the common law marriage statute indicates it is clearly a codification of common law marriage principles. Significant in that legislative history is the interpretation that once a common law marriage has been found to exist by a court or administrative order, "it is treated as any other marriage for all purposes." *Id.* at 793-794. There does not appear to be any specific history on the reasoning behind the one-year time bar other than to venture a guess that it is to be a limitation on stale claims and to allow a certain amount of closure in an important personal area. Against these possible legislative purposes, this Court must measure the disparate treatment of different classifications which inevitably occur as the statute is applied. Plaintiff submits that there is no rational

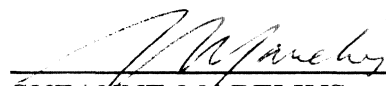
relationship between these conceivable legislative purposes for the statute to the types of classifications which result.

If this Appeals Court cannot find a rational basis for such disparate treatment or discrimination, then the one-year time bar must be deemed arbitrary and unconstitutional. This Plaintiff's view of the application of the one-year time bar is that it is merely fortuitous if a litigant can meet that arbitrary requirement and meeting the requirement is not based on any reasonable legislative purpose. Plaintiff, such as the one at bar, is thus denied reasonable access to legal remedies for reasons entirely beyond her control. This Court should find the time-barring provision invalid as constitutionally defective.

CONCLUSION

For the foregoing reasons, this Court should find the one-year time limit in the common law marriage statute as unconstitutional. Further, this Court should find the trial court's denial of Plaintiff's Motions for *Nunc Pro Tunc* Order, to supplement the pleadings, and Objection to Order Vacating the Decree as abuses of discretion which inequitably deny Plaintiff's access to a legal remedy in this case.

Respectfully submitted this 5 day of July, 1999.



SUZANNE MARELIUS
Attorney for Plaintiff/Appellant
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
(801) 531-0435

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I caused two copies of the foregoing
BRIEF OF APPELLANT to be mailed, postage prepaid, to:

Mary C. Corporon
Attorney for Defendant/Appellee
CORPORON & WILLIAMS P.C.
808 East South Temple
Salt Lake City, Utah 84102



ADDENDUM

1. Findings of Fact and Conclusions of Law, Declaration, Entered 9/29/97
2. Complaint, September 20, 1996
3. Bench Ruling, August 13, 1997
4. Transmittal Letters to Counsel and Court, August and September 1997
5. Order on Second Motion to Compel Discovery Responses, entered April 30, 1997
6. Transcript of Hearing, August 31, 1998
7. Judge Dennis Frederick's Minute Entry, October 16, 1998, and Order, entered December 28, 1998
8. U.C.A. § 30-1-4.5 (common law marriage statute)
9. U.C.A. § 30-4(a)-1 (*nunc pro tunc* statute)
10. Commissioner Jones' Minute Entry, November 7, 1996
11. Commissioner Jones' Minute Entry, July 1, 1997
12. Utah Constitution, Article I, Sections 11 and 24

JUDGEMENT

FILED DISTRICT COURT
Third Judicial District

SUZANNE MARELIUS - 2081
Attorney for Plaintiff
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

SEP 29 1997
By C. Baverley

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

-----00000-----
LINDA KAY CLARK,

Plaintiff,

v.

CECIL E. CLARK,

Defendant

**DECLARATION OF MARRIAGE AND
DECREE OF DIVORCE**

2218072

10-1-97

8:22 am

Case No.: 964904244 DA

Judge: J. Dennis Frederick

-----00000-----
The above-entitled matter came before the Court for trial on August 13, 1997, the Honorable J. Dennis Frederick presiding. Plaintiff was present in person and represented by counsel, Suzanne Marelius. Defendant was present in person and represented by counsel, Dean N. Zabriskie. The Court received and approved the Stipulation of the parties that in the event a Declaration of Marriage is made, that the marital assets would be jointly appraised and the parties would enter binding arbitration to divide marital assets. On the issue of whether a common law marriage existed, the Court heard the testimony of witnesses, received evidence, reviewed the Court file and record herein, and having entered its Findings of Fact and Conclusions of Law and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The above-named parties are hereby declared married effective October 1, 1985, having met all elements to establish a common law marriage pursuant to UCA §30-1-4.5.

2. The Plaintiff has established grounds for divorce from Defendant pursuant to irreconcilable differences and Plaintiff is granted a Decree of Divorce to become final upon entry.

3. The written Agreement entered between the parties dated June 26, 1992 pertaining to a division of equity in the marital residence at 7492 West Jefferson Road, Magna, Utah 84044, is hereby declared null and void. The Quit Claim Deed signed by Plaintiff, pursuant to that Agreement transferring her interest in this residence to Defendant, dated April 10, 1996, is hereby set aside and declared null and void. This residence is a joint marital asset of the parties.

4. The Plaintiff is awarded alimony payable by the Defendant in the amount of \$1,000.00 per month September 1, 1996. Alimony will be paid by the 1st of every month payable to Plaintiff until such time as she remarries, cohabits, until alimony has been paid for a term equaling the length of the marriage of the parties, or until Plaintiff's death, whichever event occurs earlier.

5. Plaintiff is awarded a judgment for alimony accumulated during the pendency of this matter between September 1, 1996 through August 31, 1997, in the amount of \$12,000.00 to bear interest at the legal rate of 7.45% per annum until paid.

6. Plaintiff is awarded all costs and attorney's fees incurred by her in connection with the above-entitled action. Plaintiff's counsel is directed to submit an Affidavit of Costs and Attorney's Fees pursuant to Code of Judicial Administration Rule 4-501 and Defendant may respond or object accordingly. The Court will determine the amount of fees and costs pursuant to that Rule.

7. The parties are ordered to select a mutually agreed upon appraiser to establish the current value of all marital property including the real estate and businesses established during the marriage. The parties are to pay the costs of these appraisals jointly. The parties are to select a mutually agreed upon mediator or arbitrator to oversee the distribution of marital property. The parties are to jointly pay for this arbitration and are to cooperate in good faith in that process.

8. The Court finds that the marital estate is encompassed by all property, of every nature, accumulated either in the sole or joint names of the parties during the term of their cohabitation from October 1, 1985 through the date of entry of the Decree of Divorce. The Court finds that this property includes but is not limited to the following: assets that comprise the heating, cooling and insulation businesses operated by the Defendant, the marital residence on 7492 West Jefferson Road, Magna, Utah; the rental property at 12251 South 500 West, Draper, Utah; the four-plex rental property at 3667 South 3325 West, West Valley City, Utah; the trailer and lot on Skyline Drive in Sanpete County; the life insurance with a cash value on the life of Roberta Clark; the snowmobiles, 4-wheelers, and vehicles consisting of 1988 Lincoln, 1995 Ford pick-up truck, and business equipment and vehicles; the wedding rings purchased by

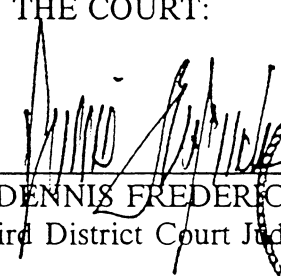
Defendant for Plaintiff; the bank accounts and any and all other assets purchased by both parties during the designated time.

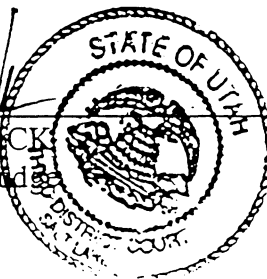
9. The parties are to cooperate as needed to sign titles, transfer property, and to do other things needed to effectuate the terms of this Decree and implement the Court orders herein.

10. Plaintiff is entitled to return to her maiden name of "Hammond."

DATED this 29th, day of Sept, 1997.

BY THE COURT:


J. DENNIS FREDERICK
Third District Court Judge



Approved as to Form:

DEAN N. ZABRISKIE
Attorney for Defendant


CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, a true and correct copy of the foregoing,

DECLARATION OF MARRIAGE AND DECREE OF DIVORCE, this 12 day of _____

Sept, 1997, to:

Mr. Dean N. Zabriskie
Jamestown Square
Hanover Building, Suite 370
3507 North University Avenue
Provo, UT 84604

_____

S8\23417.dmd

SUZANNE MARELIUS - 2081
Attorney for Plaintiff
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

FILED DISTRICT COURT
Third Judicial District

SEP 29 1997

By C. Bauerley
SALT LAKE COUNTY

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

LINDA KAY CLARK,

Plaintiff,

v.

CECIL E. CLARK,

Defendant

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Case No.: 964904244 DA
Judge: J. Dennis Frederick

The above-entitled matter came before the Court for trial on August 13, 1997, the Honorable J. Dennis Frederick presiding. Plaintiff was present in person and represented by counsel, Suzanne Marelius. Defendant was present in person and represented by counsel, Dean N. Zabriskie. The Court received and approved the Stipulation of the parties that in the event a Declaration of Marriage is made, that the marital assets would be jointly appraised and the parties would enter binding arbitration to divide marital assets. On the issue of whether a common law marriage existed, the Court heard the testimony of witnesses, received evidence, reviewed the Court file and record herein and being thus well advised in the premises, with good cause appearing does make and enter the following:

FINDINGS OF FACT

1. The Court has considered evidence on the issue of whether the parties have met the requirements for a common law marriage set forth in the statute at UCA §30-1-4.5. The Court finds that the evidence establishes that the parties have met all legal requirements of that statute and should be declared married.

2. On the common law marriage elements, the Court finds that the evidence establishes the following:

a. Both parties to this action are of legal age and capable of giving consent to a marital relationship;

b. The parties to this action are both legally capable of entering into a solemnized marriage and in fact were previously married and divorce from one another by Decree entered in the Third Judicial Court of Summit County, State of Utah on or about August 27, 1985;

c. The parties to this action have cohabited and the Court finds that cohabitation to have commenced on or about October 1, 1985, and continued until the final separation of the parties on August 28, 1996, when the Defendant changed the locks on the residence and Plaintiff relocated to a separate home;

d. The parties to this action mutually assumed marital rights, duties and obligations in numerous ways which will be set forth elsewhere in these findings;

e. The parties to this action mutually held themselves out as wife and husband, and have acquired a uniform and general reputation as wife and husband. Among the

evidence supporting this factor is the consistent filing of joint, married income tax returns with the federal and state tax authorities from 1985 through 1994 (this return was filed 10-1-95 and was the last tax return filed before the separation).

3. The Court finds that the parties mutually assumed marital rights, duties and obligations and have acquired a general reputation as a married couple and relies on the following specific evidence established at trial:

a. Within a few months of their formal divorce in 1985, the parties commenced cohabitation and consistently lived together until August 28, 1996;

b. The parties built a home together in Coalville, Utah, shortly after resuming cohabitation. They later moved to Magna, Utah with their children and purchased a residence in 1988 on 7492 West Jefferson Road, Magna, Utah. The parties lived in this residence together until the final separation and jointly maintained, improved, paid for and enjoyed the benefits of this home ownership;

c. In late 1985, the parties resumed parenting their children together until they reached the age of majority or were emancipated;

d. The Plaintiff retained the married name of "Clark" and used this throughout the period of cohabitation, with Defendant's knowledge and consent;

e. The Defendant purchased a new set of wedding rings for the Plaintiff in 1989 (Plaintiff's Exhibit 16);

f. The parties established joint credit as a married couple would do with Sears and JC Penney's (Plaintiff's Exhibit 17);

g. The parties established and maintained joint bank accounts for several years during their relationship, in addition to having separate accounts. The Court finds that there was no formal distinction during the relationship of the parties as to whether joint living expenses were paid from separate or joint accounts, and that said funds appear to be entirely commingled (Plaintiff's Exhibit 6, 7, 8 11 and 27);

h. The parties filed joint income tax returns claiming the marital deduction from 1985 through 1994, which was the last return filed prior to separation. These returns reflect that all property whether titled in the separate or joint names of the parties was described as marital property and both parties shared the tax impact of rental income, depreciation, etc., on such properties without distinction (Plaintiff's Exhibit 5);

i. During the relationship the Defendant established several businesses which were operated together by the parties. These included Sonny's Heating and Air Conditioning, Mark and Sonny's Heating and Air Conditioning, K & S Properties. The Plaintiff worked on a full-time basis in these businesses doing bookkeeping, payroll, tax filings, record keeping, scheduling, and other general office work. Plaintiff was not paid a formal salary for these services and testified that she was working towards the betterment of the family finances and to augment the value of joint businesses. It is clear that Defendant relied on Plaintiff's ongoing services in this regard and that these businesses are jointly acquired marital assets;

j. During the relationship the parties acquired personal belongings together and acquired real estate together, including the marital residence, the family businesses, a lot on Skyline Drive, rental property in Draper and a four-plex. At various times during the

relationship these assets were titled either in the separate names of the parties or joint names, as circumstances arose;

k. During the relationship in approximately 1991, the parties each prepared a last will and testament which were reciprocal documents where each party left all interest in their property to the other party (Plaintiff's Exhibit 14, 15);

l. During the relationship the parties routinely introduced one another as "husband" or "wife" and in particular, Defendant would make this introduction with the Plaintiff when he hired new employees for his business. The Court finds the testimony of Mr. Jon Nash, a neighbor and friend of the parties for five years and that he assumed the parties were married and did not know that they were not formally married until the time of their separation in December 1995 as credible and reliable evidence on the reputation of the parties as married. The Court finds the testimony of Lisa Hart, the girlfriend of the parties' son since January 19, 1993, and who also stayed with the parties for about three (3) weeks to care for Kelly Clark, that she believed the Clark's were married, based on their conduct and representations to her until Mr. Clark introduced her to a "girlfriend" at a later time, to be credible and reliable testimony on the conduct and reputation of the parties as married;

m. The parties acquired vehicles together and paid for these vehicles from both joint and separate funds. The evidence establishes that Defendant bought a new 1994 Dodge Ram pickup truck on July 2, 1994, and that Plaintiff paid the \$5,000.00 down payment from her separate bank account (Plaintiff's Exhibit 9) which was later repaid to her by the Defendant);

n. During their relationship, the Plaintiff maintained insurance coverage on the Defendant's 1994 Dodge truck and paid for this from her separate account (Plaintiff's Exhibit 10);

o. Shortly after the parties resumed cohabitation, the Defendant restored Plaintiff as the primary beneficiary on his life insurance policy on April 15, 1986 (Plaintiff's Exhibit 12);

p. During the relationship, the parties paid jointly on life insurance for Defendant's mother, Roberta A. Clark, which premiums were paid from joint funds Plaintiff's Exhibit 13);

q. Even during the separation of the parties which began December 1995, during their period of cohabitation, the Defendant would on occasion stay overnight with the Plaintiff and paid her first and last months rent and separate expenses, such as car repairs from his own funds (Plaintiff's Exhibit 20);

r. Throughout the cohabitation of the parties and as recently as May 1996, on Plaintiff's birthday, the Defendant sent cards expressing his love and affection for the Plaintiff (Plaintiff's Exhibit 21).

4. The parties purchased a marital residence at 7492 West Jefferson Road, Magna, Utah, in 1988. Upon purchase of this residence, it was titled solely in the name of Plaintiff, Linda K. Clark even though the home was purchased with the joint funds of the parties. It is undisputed that this was done to preserve the asset during Defendant's bankruptcy proceedings. Thereafter, the parties entered into a written agreement dated June 26, 1992, wherein they

agreed that Plaintiff would Quit Claim her entire equity and interest in the residence to Defendant for the sum of \$22,500.00 payable in installments of \$300.00 per month. The parties both testified that Defendant came up with this number based on his own opinion that the home was worth approximately \$50,000.00 and that this was a fair value after the deduction of certain joint debts. The Defendant made payments under this agreement and often missed payments for as long as ten (10) months. In approximately June 1996, the Defendant made a balloon payment completing the financial terms of this agreement and Plaintiff executed a Quit Claim Deed transferring the entire property to Defendant. Plaintiff claims that she entered into this agreement under duress and pressure from the Defendant and that it was never intended to be a true agreement.

5. The Court finds the Plaintiff's claims of duress and intimidation by the Defendant relating to the June 1992, agreement are credible and finds that the agreement is of no force and effect and is void. The Court finds Plaintiff's testimony credible that she would receive the \$300.00 payments and would routinely deposit those either in the parties joint account or her separate account or otherwise use those funds directly for the regular joint expenses of the parties such as groceries. The Court finds Plaintiff to be a timid, unassertive individual who could be easily pressured to enter into such an agreement by the Defendant. The Court finds Defendant to be overbearing and capable of intimidation towards the Plaintiff. The Court finds credible the testimony of the parties' son, Kelly Clark that the Defendant is intimidating and would routinely take advantage of individuals for financial gain. The Court finds clear and convincing evidence that Plaintiff felt compelled to sign this deed and did not have a full and

fair opportunity to consult counsel or otherwise reflect on the consequences of her actions. The deed was prepared by Attorney Nolan Olsen, who was the divorce attorney for Defendant and who, for many years, had been the Defendant's friend and business attorney. The Court finds that this was not an arms length, fair transaction and that equity requires that the Agreement and deed be set aside and given no force and effect.

6. Based on the Court finding that the agreement dated June 26, 1992, is null and void, the Court also sets aside the Quit Claim Deed, dated April 10, 1996, by Plaintiff to Defendant, transferring her interest in the marital residence. The Court finds that the marital residence at 7492 West Jefferson Road, Magna, Utah, is a joint marital asset of the parties.

7. The Plaintiff is requesting an award of alimony. The Court finds that Plaintiff is currently employed full-time earning \$10.00 per hour, which is a gross monthly wage of \$1,720.00 and that she has a net monthly income of \$1,309.00. The Court finds Plaintiff's Exhibit 26 to be an accurate statement of Plaintiff's income and expenses and finds that Plaintiff's reasonable monthly expenses are \$2,409.00 per month. Plaintiff has shown a need for alimony.

8. The Defendant has testified that he is unaware of his current income. The Court recognized Mr. Clark's reluctance to testify as to what his current income is for purposes of alimony, which the Court finds to be troubling and not credible. The evidence has shown inconsistencies in Defendant's statements of his income depending on the purpose for which it is being made, such as an application for credit or for purposes of divorce. The Court finds Plaintiff's Exhibit 39, the Uniform Residential Loan Application a verified document completed

by Defendant, June 20, 1996, to be the best evidence of Defendant's current income and finds that income to be at least \$5,376.00 gross per month. It is clear that during the recent cohabitation of the parties, they acquired considerable assets and have had a very comfortable style of living. Plaintiff's Exhibit 30, the loan application completed by Defendant states his net worth to be \$477,118.00. It is clear that the Defendant has the ability to pay alimony.

9. The Plaintiff's request for \$1,000.00 a month for alimony is appropriate and the Court awards her that amount retroactive to September 1, 1996. Plaintiff is thus awarded a judgment against the Defendant for alimony accumulated during the twelve (12) months this matter has been pending, in the amount of \$12,000.00. This judgment should bear interest at the legal rate of 7.45% per annum until paid. Defendant should commence making ongoing payments of alimony to Plaintiff effective September 1, 1997, which should be paid by the 1st of every month thereafter. Alimony will be payable to Plaintiff until such time as she remarries, cohabits, or until alimony has been paid for a term equaling the length of the marriage of the parties, or until Plaintiff's death, whichever event occurs earlier.

10. Plaintiff has requested costs and attorney's fees. The Court finds Plaintiff has established a need for fees based on her income and that Defendant's income is more than twice that of the Plaintiff's and he has an ability to pay Plaintiff her reasonable costs and fees. The Court directs the Plaintiff's counsel to submit an Affidavit of Attorney's fees and costs under Rule of Judicial Administration, 4-501 and that Defendant may file any objection to that request, which the Court will consider under the terms of that Rule.

11. The Court finds that all property acquired during the marital relationship, which extends between October 1, 1985 and the date of the entry of the Divorce to be marital assets. The Court finds those marital assets to comprise at least the heating, cooling and insulation businesses operated by the Defendant, the marital residence on 7492 West Jefferson Road, Magna, Utah, the rental property at 12251 South 500 West, Draper, Utah, the four-plex rental property at 3667 South 3325 West, West Valley City, Utah, the trailer and lot on Skyline Drive in Sanpete County, the life insurance with a cash value on the life of Roberta Clark, the snowmobiles, 4-wheelers, and vehicles consisting of 1988 Lincoln, 1995 Ford pick-up truck, and business equipment and vehicles, the wedding rings purchased by Defendant for Plaintiff, the bank accounts and any and all other assets purchased during the appropriate time by both parties. The Court approves the parties stipulation that all assets will be appraised at the joint cost of the parties, with jointly agreed upon appraisers. Thereafter, the parties will mutually select and pay for a mediator or arbitrator to make a final division of marital assets between the parties. Both parties have agreed to be bound by the decision of that arbitrator.

12. Plaintiff is entitled to return to her maiden name of "Hammond."

13. The Court finds that during the marital relationship of the parties, they encountered irreconcilable differences and that a divorce should be granted to Plaintiff to be final upon entry.

Based on the foregoing Findings of Fact, the Court now makes and enters its Conclusions of Law:

CONCLUSIONS OF LAW

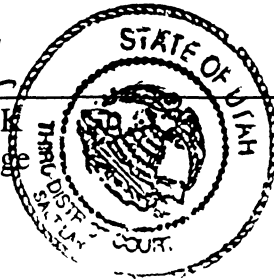
1. The Plaintiff is entitled to a Declaration of Marriage based on the finding that the elements of the Common Law Marriage Statute at UCA §30-1-4.5 have been met;
2. The Plaintiff is entitled to a Decree of Divorce from the Defendant on the grounds of irreconcilable differences, said divorce to become final upon entry.
3. The Court should enter such orders regarding alimony, division of assets and liabilities as are consistent with the Findings of Fact.

DATED this 19th day of Sept, 1997.

BY THE COURT:



J. DENNIS FREDERICK
Third District Court Judge



Approved as to Form:

DEAN N. ZABRISKIE
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, a true and correct copy of the foregoing,
FINDINGS OF FACT AND CONCLUSIONS OF LAW, this 10 day of Sept,
1997, to:

Mr. Dean N. Zabriskie
Jamestown Square
Hanover Building, Suite 370
3507 North University Avenue
Provo, UT 84604



S8\23417 ffc

SUZANNE MARELIUS - 2081
Attorney for Plaintiff
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

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

-----oo0oo-----

LINDA KAY CLARK,	:	
	:	VERIFIED COMPLAINT FOR DIVORCE
Plaintiff,	:	
	:	
v.	:	
	:	
CECIL E. CLARK,	:	
	:	
Defendant.	:	Case No. _____
	:	Judge _____

-----oo0oo-----

Plaintiff complains and alleges against Defendant as follows:

1. Plaintiff is a resident of Salt Lake County, State of Utah, and has been so for more than three months prior to the filing of this Complaint.

2. Plaintiff and Defendant are wife and husband and were married for 18 years prior to divorcing in 1985. A few months after the divorce, the parties commenced living together and have established a common law relationship since that date through their separation in September, 1996.

3. During the course of their common law marriage, the parties have encountered differences of an irreconcilable nature making a continuation of the marital relationship impossible.

4. The parties have had two children together namely Kelly Clark born September 2, 1971 and Lisa Clark born August 1, 1968. Both these children are past the age of majority.

5. During the marriage the parties acquired a residence, real property and other improvements including furniture, fixtures and appliances at 7492 West Jefferson Road, Magna, Utah 84044. It is reasonable that the use and occupancy of this property be awarded to the Plaintiff until further order of the Court.

6. During their marriage and common law relationship, the parties have acquired certain business interests, real property, personal property, vehicles and other assets and Plaintiff alleges that each party should fully disclose to the other the exact nature and extent of such assets and that the same should be awarded on an equitable basis between the parties, subject to any existing debt thereon, as determined by the Court. These assets should be divided pursuant to common law principles and alternatively under the theory of partnership, contract for services or trust.

7. Since their marriage, the parties have incurred certain liabilities and obligations. Plaintiff alleges that each party should fully disclose the exact nature and extent of such debt to the other and that the parties should be ordered to assume, pay and discharge the same as determined by the Court.

8. That during the pendency of the above-entitled action Plaintiff alleges that the parties should be restrained and enjoined from transferring, disposing of or changing the form or nature of assets, and from incurring any additional liabilities other than as may be mutually agreed to by the parties or otherwise ordered by the Court.

9. That each of the parties hereto should be required to execute such deeds, conveyances, bills of sale and other documents and instruments needed to transfer the respective party's interest in and to the property awarded by the Court and title thereto.

10. That the Plaintiff has retained the services of counsel in this action and should be awarded such fees and costs as are charged for services incurred in connection herewith.

11. That the Defendant is currently employed as a business owner of "Sonny's Heating and Air Conditioning", Mark & Sonny's Heating and Air Conditioning", among other activities which generate income, and it is reasonable that Defendant pay to

Plaintiff permanent alimony in such sum and amount as the Court shall determine.

WHEREFORE, Plaintiff prays for judgment as follows:

1. That she be granted a divorce from the Defendant on the grounds of irreconcilable differences, said divorce to become final upon entry.

2. That the Court enter such orders as are reasonable regarding support, and division of assets and liabilities as are alleged herein above.

3. For such other and further relief as the Court deems fair.

DATED this ____ day of _____ 1996.

LITTLEFIELD & PETERSON

SUZANNE MARELIUS
Attorney for Plaintiff

Plaintiff's address:

3542 Candis
Magna, Utah 84044

VERIFICATION

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

LINDA KAY CLARK, being first duly sworn upon oath deposes and says that she has read the foregoing Complaint for Divorce and knows and understands the contents thereof and the same is true as to her own knowledge except to those matters herein stated upon information and belief as to those matters, she believes the same to be true.

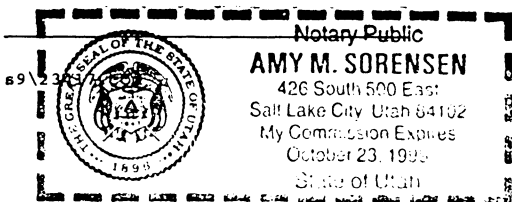
DATED this 20 day of September, 1996.

Linda Kay Clark
LINDA KAY CLARK

September, 1996. SUBSCRIBED AND SWORN to before me this 20 day of

Amy M. Sorensen
NOTARY PUBLIC
Residing at SLC, Utah

My Commission Expires:



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

LINDA KAY CLARK,

Plaintiff,

vs.

CECIL E. CLARK,

Defendant.

Case No. DOM 964904244 DA

REPORTER'S TRANSCRIPT
OF JUDGE'S RULING

DISTRICT COURT
Third Judicial District
AUG 20 1997

By *[Signature]*
Duty Clerk

REPORTER'S TRANSCRIPT OF JUDGE'S RULING

THE HONORABLE J. DENNIS FREDERICK

on Wednesday, August 13, 1997

APPEARANCES:

For the Plaintiff:

SUZANNE MARELIUS
Attorney at Law
426 South 500 East
Salt Lake City, Utah 84102
(801) 531-0435

For the Defendant:

DEAN N. ZABRISKIE
Attorney at Law
3507 North University Avenue #370
Provo, Utah 84604
(801) 375-7680

ANNA M. BENNETT, CSR
License No. 22-106796-7801
240 East 400 South
Salt Lake City, Utah 84111
(801) 535-5203

1 * * *

2 THE COURT: All right. I have done a number of
3 these cases where there's a claim of common law marriage,
4 since the advent of this statute which some may argue is
5 ill-conceived, but nevertheless, our legislature has seen
6 fit to legitimize common law relationships under certain
7 limited circumstances, and since that time, I've had
8 occasion to rule on a number of these, and in this instance
9 I am persuaded that the overwhelming evidence is that there
10 was a marital relationship post divorce of 1985, which,
11 coincidentally, I granted.

12 The persuasive, credible evidence is that within a
13 matter of a few months of the time of that original divorce,
14 which was granted in August of 1985, Exhibit 1, these parties
15 were back living together as early potentially as October
16 of 1985. They built a home together. They moved to a home
17 in Magna together with their two children. They raised
18 their children to the age of majority. They used the common
19 last name of Clark. They drafted wills which while state
20 they are separate individuals and single individuals, the
21 content of the wills is that they leave to each other their
22 entire estate, Exhibits 14 and 15.

23 The defendant bought rings for the plaintiff,
24 Exhibit 16. There was a joint use of credit accounts,
25 Exhibit 17. They maintained joint bank accounts, Exhibit 6.

1 They commingled funds, business rentals, hair salon, et
2 cetera, through August of 1996, Exhibits 27, 13, 11, 10,
3 9, 8 and 7. They filed joint tax returns through 1994, the
4 last date available prior to the separation, Exhibit 5,
5 from 1986 on. They jointly worked for the betterment of the
6 family goals. Plaintiff worked in the business doing the
7 books, records, banking, et cetera, taxes of the business,
8 Exhibit 28.

9 They, I find, introduced each other and/or held
10 themselves out as being married. Their personal belongings
11 were by and large together in the Magna home which they
12 treated as if it were their own home, each of them, and
13 therefore, it is my view that the statutory requirements
14 of 30-1-4.5 have been met.

15 Certainly one may testify and argue that this all
16 was done without specific consent. That is, however, not
17 controlling. Rarely do I have disputes of this nature
18 where the parties come in and say, "Yes, I consented."
19 I must, therefore, glean consent from conduct and actions
20 of the parties.

21 These parties were, in my judgment, capable of
22 consenting. They were both adults, and after 1985 for at
23 least a few months they were single adults. They could have
24 entered into a solemnized marriage relationship during
25 that time. They did clearly cohabit and they mutually

1 assumed the rights and obligations and duties of a marriage
2 relationship, and lastly, held themselves out as husband and
3 wife. At least, it was implicit in their relationship
4 that they indeed were husband and wife.

5 Consequently, I determine that there was a common
6 law marriage up to the date of August of 1996, at which
7 time then the separation, the final separation occurred.

8 I am, moreover, of the view that the claim of
9 intimidation, duress, overbearing conduct on the part of the
10 defendant vis-a-vis the plaintiff here is a believable
11 claim.

12 Now, it may well be in the objective world, Mr.
13 Clark's attitude and conduct is not such that one would
14 find him to be overbearing or intimidating, but my observa-
15 tion of the respective parties here is that Ms. Clark,
16 number one, is a person of considerable timidity, and I
17 am of the view, therefore, that her execution of the deed
18 incident to the Magna property was a situation she felt
19 compelled to do, did not obtain independent counsel;
20 indeed, used Mr. Olson who had been the longtime counsel of
21 Mr. Clark and in fact represented him at the original
22 divorce trial or stipulated divorce, and therefore find
23 by clear and convincing evidence that she would not, but for
24 these circumstances, have executed that deed for the sum of
25 money that she received, that her will was overwrought, that

1 it was not an arm's length transaction.

2 Consequently, I determine that it is of no force
3 and effect with regard to her interest in that property.

4 I have considerable trouble with Mr. Clark's lack
5 of knowledge, or maybe just reluctance to acknowledge what
6 his income for purposes of determining alimony is. There
7 is considerable inconsistent information about what his
8 income is, in all likelihood depending upon the purpose
9 for which he's disclosing his income.

10 In Exhibit 13, his application for credit, he has
11 indicated that his income was something in the range of
12 \$5,376 a month, and that was during the time frame of June
13 of 1996. In fact, it was executed June 20th of '96. I
14 find that document most credible in terms of an assessment
15 as to what his income is and therefore impute that income
16 to him.

17 He has considerable assets which he has acquired
18 over the course of the relationship with this Ms. Clark,
19 Linda Clark, the first, the plaintiff, and I determine that
20 her list of expenses and income is such that she has shown
21 a need for alimony, and that in that regard, her stated
22 income and expenses in Exhibit 26, I believe, I find to be
23 credible and that is her net monthly income is \$1,309 per
24 month and her expenses are \$2,409 per month, leaving her
25 then with a net shortfall per month of approximately \$1,100,

1 and that her claim for alimony in the amount of \$1,000 per
2 month is neither exorbitant, nor is it in appropriate.

3 I believe that she's shown a need for that and
4 consequently award \$1,000 per month in the form of alimony
5 to terminate on the earliest of the typical conditions, and
6 that that shall be retroactive to the month of September
7 of 1996.

8 In addition, I award to the plaintiff reasonable
9 attorney's fees to be determined pursuant to Rule 4-501 of
10 the Code of Judicial Administration.

11 You submit to me an affidavit, and to Mr. Zabriskie
12 likewise, Ms. Marelius, the amount of your fees, and then
13 he will have the opportunity to object, and I will then
14 rule pursuant to 4-501 on the reasonableness of the fees to
15 be awarded here.

16 The properties acquired during the course of this
17 marital term that I have now defined are deemed to be and I
18 consider them to be marital properties and therefore, the
19 parties may and will submit the issue of distribution to
20 binding arbitration as they have stipulated.

21 Now, are there any questions? Ms. Marelius?

22 MS. MARELIUS: My client would like to be awarded
23 her name of Hammond, if we could add that to the Decree so
24 it's clear.

25 THE COURT: Insofar as this proceeding is concerned,

1 now that I have determined that there was a marriage, I will
2 moreover determine that the parties are entitled to a
3 divorce and grant the plaintiff a divorce on the grounds of
4 irreconcilable differences in accord with the terms of the
5 testimony here and give her her previous name back.

6 Do you have any questions, Mr. Zabriskie?

7 MR. ZABRISKIE: Your Honor, I would request of the
8 Court a specific finding as it relates to the December date
9 of 1995 as not constituting a termination of what had
10 heretofore or theretofore been a relationship between the
11 parties and that the Court is in effect discounting the six
12 or seven months that -- wherein the relationship was --

13 THE COURT: Yes, I am specifically, by virtue of my
14 ruling to the contrary, finding that that separation did
15 not terminate the marriage relationship. In my judgment,
16 it was one of more than one some separations between the
17 parties. Maybe at the outset the parties figured that that
18 was the end, but indeed, as was their habit and style, it
19 was not the end. They reconciled, got back together.
20 Consequently, I decide that that was not the termination of
21 the marriage.

22 Ms. Marelius, you prepare the Findings and Conclusions
23 and Decree and submit those to Mr. Zabriskie for approval as
24 to form.

25 We'll be in recess.

(Whereupon, the proceedings were concluded.)

1
2 REPORTER'S CERTIFICATE
3
4

5 STATE OF UTAH)
6) ss
7 COUNTY OF SALT LAKE)
8

9 I, ANNA M. BENNETT, do hereby certify:

10 That I am a Certified Shorthand Reporter, License
11 No. 22-106796-7801, and one of the official court reporters
12 of the state of Utah; that on the 13th day of August, 1997,
13 I attended the within matter and reported in shorthand the
14 proceedings had thereat; that later I caused my said
15 shorthand proceedings to be transcribed into typewriting,
16 and the foregoing pages, numbered from 2 to 7, inclusive,
17 constitute a full, true and correct account of the Judge's
18 Ruling only, to the best of my ability.

19 DATED AT SALT LAKE CITY, UTAH, this 20th day of
20 August, 1997.
21
22

23 

24 ANNA M. BENNETT, CSR
25

LITTLEFIELD & PETERSON

ATTORNEYS AT LAW

426 SOUTH FIFTH EAST

SALT LAKE CITY, UTAH 84102

(801) 531-0435

DAVID E. LITTLEFIELD

E. PAUL WOOD

ANN L. WASSERMANN

SUZANNE MARELIUS

ARNOLD G. GARDNER, JR.

JAMES H. WOODALL

JANICE R. OLSON

FACSIMILE NO.

(801) 575-7834

August 25, 1997

CRAIG M. PETERSON

(1942 - 1994)

Mr. Dean Zabriskie
Hanover Building, Suite 370
Jamestown Square
3507 North University Avenue
Provo, UT 84604

Re: Clark vs. Clark

Dear Dean:

I am enclosing **herewith** the proposed Findings of Fact and Conclusions of Law and a Declaration of Marriage and Decree of Divorce, which I have drafted in the above-matter. Please review these and if they are acceptable, indicate your approval as to form and return them to me for filing in Court.

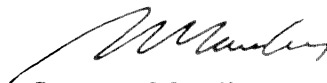
If there is any question or problem with the content of any of these documents, please call me to discuss that.

I would like to propose that we select a real estate and business appraisers as soon as possible. Please call me to discuss who you might have in mind for these tasks. I also would like to be informed whether Mr. Clark will pay the \$12,000.00 arrears and the \$1,000.00 in judgment for attorney's fees incurred in the pendency of this matter. Please have him make these payments through my office and if he will not be paying these as a lump sum, please communicate with me what payment terms he is proposing.

I look forward to hearing from you in this matter.

Sincerely,

LITTLEFIELD & PETERSON



Suzanne Marelius

SM:ngp

Enclosure(s)

cc: Linda Clark

S8\23417-4.ltr

EXHIBIT A

LITTLEFIELD & PETERSON
ATTORNEYS AT LAW
424 SOUTH FIFTH EAST
SALT LAKE CITY, UTAH 84102
(801) 531-0436

DAVID E. LITTLEFIELD
E. PAUL WOOD
ANN L. WASSELMANN
SUZANNE MARELIUS
ARNOLD G. GARDNER, JR.
JAMES H. WOODALL
JANICE R. OLSON

FACSIMILE NO.
(801) 975-7834

CRAIG M. PETERSON
(1942 - 1994)

September 26, 1997

The Honorable J. Dennis Frederick
Third District Court
240 East 400 South, #503
Salt Lake City, UT 84111

Re: Linda Kay Clark vs. Cecil E. Clark
Case No.: 964904244 DA

Dear Judge Frederick:

I am submitting the enclosed proposed Findings and Declaration of Marriage pursuant to Rule 4-504(2), Code of Judicial Administration. I supplied a copy of these documents August 26, 1997, to Attorney Zabriskie and made numerous changes based on his comments. I submitted revised copies September 10, 1997, for his approval as to form and he has not returned them to me approved or filed an objection. I presume the enclosed documents are thus acceptable.

I ask that you review and execute these documents so they can be entered on the Court record. I am sending a copy of this letter to Attorney Zabriskie, notifying him that if he has further objections, he must file those in a formal matter with the Court. Thank you for your consideration.

Respectfully,

LITTLEFIELD & PETERSON



Suzanne Marelius

SM:ngp
Enclosure(s)
cc: Dean Zabriskie
Linda Clark

EXHIBIT B

FILED DISTRICT COURT
Third Judicial District

APR 30 1997

By C. Beverley
Clerk

SUZANNE MARELIUS - 2081
Attorney for Plaintiff
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

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

-----oo0oo-----

LINDA KAY CLARK,
Plaintiff,

v.

CECIL E. CLARK,
Defendant.

:
: ORDER ON SECOND MOTION TO
: COMPEL DISCOVERY RESPONSES
: 2214963
: 5-1-97- 8:03AM
:
:
: Case No. 964904244 DA
: Judge J. Dennis Frederick

-----oo0oo-----

The Plaintiff's Motion for Contempt and Second Motion to Compel Discovery Responses came before the Court for hearing on April 17, 1997, before the Honorable Commissioner Lisa Jones presiding. Plaintiff was present in person and represented by counsel Suzanne Marelius. Defendant was not present nor was any appearance made by counsel on his behalf. Counsel for Plaintiff proffered that there had been a partial response to the discovery consisting of Interrogatories, however, there have been no written responses to the Request for Production of Documents nor were the documents other than some tax returns produced. Based on the

proffer, the Court record and file herein, the Court makes the following Findings and Recommendation for Court Order:

1. The Plaintiff initiated discovery in October 1996, provided a reminder letter that responses were overdue on November 26, 1996 and filed a First Motion to Compel which was scheduled for hearing March 6, 1997. That hearing was resolved by Stipulation and an Order entered April 7, 1997, requiring Defendant to comply with complete discovery responses by March 13, 1997, and pay fees of \$250. There has been no compliance by the Defendant.

2. The Plaintiff filed a second Motion to Compel on March 20, 1997, and by the date of the hearing there had only been a partial, deficient response. The issue of Defendant's contempt for failure to abide by the Court Orders herein concerning discovery is hereby certified for evidentiary hearing.

3. Based on the record of noncompliance herein, and the available sanctions set forth in Utah Rules of Civil Procedure 37(b). The Defendant's pleadings will be stricken and his default entered in the above entitled matter unless full and complete responses to the discovery served by Plaintiff are received by Plaintiff's counsel within ten days of entry of the order.

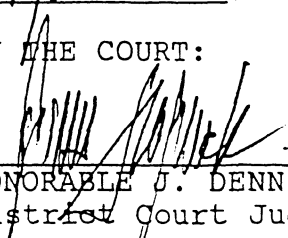
4. The Plaintiff is awarded a judgment in the amount of \$500 payable by Defendant which will bear legal interest at the

rate of 7.45% per annum until paid. This judgment arises from the attorneys fees required for the attorney's Motions to Compel.

5. If Defendant's pleadings are stricken, Plaintiff may submit an Affidavit as to her current expenses and the Court will consider Plaintiff's request for a specific amount of alimony.

DATED this 30th day of Apr., 1997.


BY THE COURT:


HONORABLE J. DENNIS FREDERICK
District Court Judge

RECOMMENDATION OF COMMISSIONER

Commissioner Lisa Jones, having heard the above matter, herewith recommends that the foregoing Order be entered in this matter.

DATED 29th day of April, 1997.

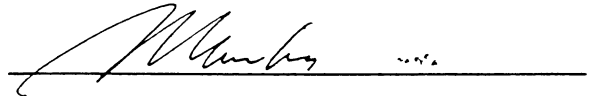

LISA A. JONES
Commissioner

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, a true and correct copy of the foregoing, ORDER ON SECOND MOTION TO COMPEL DISCOVERY RESPONSES, this 18 day of April, 1997, to:

Dean Zabriskie, Esq.
Hanover Building, Suite 370
James Town Square
3507 No. University Ave.
Provo, UT 84604

Attorney for Defendant

A handwritten signature in cursive script, appearing to read "Dean Zabriskie", is written over a horizontal line.

S4\Clark.ORD

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

* * *

LINDA KAY CLARK,

Plaintiff,

-vs-

CECIL E. CLARK,

Defendant.

Case No. 964904244

HEARING, 8-31-98

BE IT REMEMBERED that on the 31st day

of August, 1995, at 9:00 o'clock a.m., this cause

came on for hearing before the HONORABLE J. DENNIS

FREDERICK, District Court, without a jury in the Salt

Lake County Courthouse, Salt Lake City, Utah.

A P P E A R A N C E S :

For the Plaintiff: SUZANNE MARELIUS
Attorney at Law

For the Defendant: MARY C. CORPORON
Attorney at Law

CAT by: BILLIE WAY, CCR

COPY

1 but -- finding that there is a marriage declared by
2 law must be entered, if at all, within one year of
3 the date of the separation of the parties or the last
4 time that they cohabited together.

5 I would point out that this matter came
6 on for trial on August 14th, 1997, and the Court
7 found that the parties separated for the final time
8 on August 28th. The Court issued a ruling from the
9 bench on this matter on August 14th, which gave
10 plenty of time, two weeks, for an issuance of an
11 order in this case, but the order -- I believe the
12 certificate of mailing of the order indicates that it
13 went to Mr. Zabriskie my predecessor Counsel, in
14 September of 1997, and it was not entered by this
15 Court until September of 1990 -- 1997; as
16 specifically it went to Mr. Zabriskie on September
17 10th, and the order was issued on September 29th.

18 It is our position that this Court went
19 to some length to have a trial and to expedite the
20 matter and to have that trial within the one-year
21 statute, that there was ample time of two weeks after
22 the issuance of the Court's ruling from the bench,
23 that there was no order -- proposed order submitted
24 to this Court and, in fact, not until about two weeks
25 after the applicable one year time period had

P R O C E E D I N G S

1 THE COURT: This is the time and place
2 for the hearing on the Defendant's motion to dismiss
3 in the matter of Linda K. Clark versus Cecil E.
4 Clark, Case No. 964904244.

5 Counsel, start your appearances for the
6 record, please.

7 MS. CORPORON: Mary Corporon for the
8 Defendant.

9 MS. MARELIUS: Suzanne Marelius for the
10 Petitioner.

11 MS. CORPORON: And we are the moving
12 party, Your Honor.

13 THE COURT: Very well, Counsel. I've
14 reviewed the respective memoranda both in support and
15 in opposition to the motion.

16 Ms. Corporon, you may proceed.

17 MS. CORPORON: Thank you. This is our
18 motion to dismiss, for lack of subject matter
19 jurisdiction in this Court to issue the order which
20 was issued declaring a common-law marriage as between
21 these parties and then ordering other relief as
22 between the parties, that is for violation of Section
23 30-1-4.5 requiring that any order finding a
24 common-law marriage -- and I use that term, I guess,

1 expired.

2 The case law in this State and
3 specifically in Bunch v. Inglehorn (Phonetic) is very
4 clear that it is not the date of filing, it's not the
5 date of trial, it's not the date of the oral ruling,
6 it is the date of entry of the order; and submission
7 of the Proposed Order on September 10th is simply
8 untimely. We've gone past our time period and within
9 the holding in Bunch v. Inglehorn and the clear
10 language of the statute is this entire action has to
11 be dismissed at this point. The Court lost
12 jurisdiction as of August 27th, 1997, to enter any
13 orders finding or declaring a marriage in this case.

14 I'll submit it.

15 THE COURT: All right. Thank you,
16 Ms. Corporon.

17 Ms. Marelius?

18 MS. MARELIUS: Your Honor, there are a
19 number of legal, practical and equitable reasons that
20 this Court should deny the motion to dismiss. The
21 Court found this relationship by its findings in the
22 disputed order ended August 28th, '96. We had close
23 of evidence, bench ruling, minute entry, all occurred
24 August 14th, within that one-year time period.

25 We also sent, contrary to what Counsel

Page 4

1 indicates, Proposed Findings and Decree to Counsel
2 Zabriskie August 25th, again, within the one-year;
3 and we've attached as Exhibit, I think, A and B to
4 our Memorandum, my cover letter just to the Court of
5 September 26th, saying that I sent the first draft
6 August 25th, and then we also had our mailing
7 certificate on the first draft.

8 After a bench trial the Rules provide 15
9 days for presenting opposing Counsel with the draft
10 pleadings, that was done. There were revisions,
11 changes requested. That was done. An then new
12 pleadings were presented, and Counsel never sent them
13 back. And so my transmit letter of September
14 indicates that was the status. And based on that the
15 Court did enter these documents September 29th, a few
16 weeks beyond the one-year time limit.

17 So, I think it is undisputed that the
18 Court found all the elements of a common-law marriage
19 existed after the 12-year relationship of these
20 parties, which, in fact, came after an 18-year formal
21 marriage. The Court essentially found that there had
22 been no change in their relationship and actions
23 towards one another.

24 I would point out that the Petitioner
25 also pled alternate theories in this case. We pled

Page 5

1 partnership, resultant trust, constructive trust and
2 equitable theories, which the Court did not rule on.
3 We relied, the Court also relied, also primarily on
4 the common-law theory.

5 I think the prime fact of allowing the
6 motion to dismiss would simply result in a new trial
7 on these alternate theories. It would serve no
8 purpose. And that would, I think, be at great cost
9 to these parties. There is an appeal pending. They,
10 of course, vested in that whole litigation process.
11 That would cause another delay. And I think those
12 things are equally prejudicial to both parties.

13 We have filed a motion to enter this
14 order nunc pro tunc, which I think is the practical
15 equitable solution. That statute only does allow a
16 Court, in matters of divorce, annulment and
17 separation, to enter for a showing of good cause an
18 order at a different date, and I would submit that
19 date of trial three weeks earlier is the appropriate
20 date that the Court should use to solve this
21 problem.

22 I think also under just the equitable
23 authority of this Court, in domestic matters and the
24 best interests of justice, that these parties are
25 served by carrying out the ruling and findings of the

Page 6

1 Court that the common-law marriage existed.

2 I think it's also reasonable -- another
3 approach to this is to view Petitioner's filings as
4 having complied with this one-year statute. There's
5 two parts to the statute. The first part talks about
6 entry of an order and the elements to establish a
7 common-law marriage; the second part says that the
8 determination or establishment of a marriage under
9 the section must occur within one year of terminating
10 the relationship. I don't think it is clear that the
11 language "termination" or "establishment" means entry
12 of an order. I think it can certainly mean
13 everything that the Court did here at the close of
14 evidence ruling, minute entry, that kind of a
15 finding. So I think that's an open question under
16 Utah law.

17 The Bunch Case is distinguishable. It
18 does appear to be the only guiding case we have in
19 Utah, and that relates very specifically to the fact
20 that filing a complaint for common law marriage
21 within one year is not enough. That's all that
22 holding really relates to.

23 I think another reason here, very
24 significant, is that to enter a nunc pro tunc order
25 -- to not do that would allow Mr. Clark to benefit

Page 7

1 from this -- the kinds of delays that I think were so
2 frustrating to us at the time of trial. And I think
3 the Court should be mindful of that. This is the
4 case where we had two contempt orders entered. We
5 had discovery served in October, motion for contempt
6 in January that was granted, motion for contempt in
7 April. Never had she responded to that discovery.
8 April, the commissioner struck the pleadings, entered
9 an order of marriage. That was not signed because
10 there was a motion to set aside. But that bought
11 Mr. Clark a six-month delay. We came into this court
12 without complete discovery, and that's where we had
13 this somewhat unusual order of having to do the
14 appraisal and separation of property post-trial.

15 The Petitioner in this case also tried
16 very hard to get a ruling, a summary judgment, as it
17 were, finding of the marriage. That was brought in a
18 motion to the commissioner. The commissioner denied
19 it, said there was an evidentiary hearing needed,
20 that was recommended; the hearing was requested and
21 denied. The Court wanted to do everything at the
22 time of trial. So she certainly tried that.

23 The third area of delay here, the final
24 findings and decree were prepared and proposed before
25 the one-year deadline and were simply held onto by.

Page 8

Page 10

1 Counsel. Whether that was deliberate or not, I don't
2 know. But it certainly caused significant problems
3 in this case.

4 So I think it is fair to say that the
5 Petitioner complied to the best of her ability to be
6 timely and complete and to complete this case in one
7 year, and that would certainly suffice to establish
8 good cause for the application of a nunc pro tunc
9 order.

10 One other area that I did brief, I'll
11 just touch on it briefly, and that is the
12 Constitutional issues. The Court of Appeals in Bunch
13 Footnote 3 addressed this problem themselves, they
14 could see it coming, that there was a potential equal
15 protection violation under Article 24 of the Utah
16 Constitution. The example the Court gave, and this
17 would just be in the normal course of events, that
18 this application of this one year deadline would
19 deprive a party of their rights:

20 "If a finding of common-law
21 marriage was denied at trial, reversed
22 on appeal, remanded, the parties could
23 thus be denied the reasonable
24 opportunity to have that common-law
25 marriage determination within one year

1 tunc to the day of trial.

2 THE COURT: All right. Ms. Marelus,
3 thank you.

4 Do you wish to respond briefly,
5 Ms. Corporon?

6 MS. CORPORON: Yes, Your Honor. After
7 the request to issue a nunc pro tunc in this case, it
8 is our position that once August 27th, 1997, had come
9 and gone, this Court simply lost subject matter
10 jurisdiction to do anything which includes a nunc pro
11 tunc order. And it is our position that that
12 deadline having passed this Court is lacking the
13 jurisdiction and the power to issue the declaring the
14 marriage.

15 All of the constitutional arguments are,
16 I submit, interesting academic arguments, but they
17 don't apply to the facts in this case. It is
18 absolute black letter law that courts do not reach
19 constitutional issues if the issues can be resolved
20 on non-constitutional, statutory grounds.

21 In this particular case -- and I wasn't
22 participating in the original trial in this, but it's
23 very clear to me from looking at the record that the
24 Court and everyone bent over backwards to see that
25 this trial came to trial before August 17. And it's

Page 9

Page 11

1 through no fault of their own."

2 I think the case, as I've just discussed
3 in the brief Mayland v. Lewis applies so well to this
4 situation because it talks about the two types of
5 discrimination that Section 24 guards against, that a
6 law must apply equally to all persons within a class
7 and if the classes are treated differently they must
8 have -- based on differences that further the goals
9 of the statute.

10 In application, this one-year limit
11 creates these two classes: It creates a class of
12 people that can bring their case entirely within one
13 year and those that can't. And I think the Court of
14 Appeals has noted that the failure to meet that one
15 year could be through no fault of the parties, it's
16 simply inherent in the system we have. Discovery
17 delays are common. Motions are common. The domestic
18 relations commissioner system, itself, gives us many,
19 many inherent delays. So I would submit no purpose
20 is served by this arbitrary creation of two classes
21 that can be justified, and there probably are some
22 serious constitutional defects.

23 I would urge the Court at this point to
24 deny the motion to dismiss and enter this -- just
25 solve this problem by entering the order nunc pro

1 really clear in reading the trial transcript that
2 everyone took a very brisk approach to the trial
3 process in order to get this done on August 14th,
4 1997, so that the Court could make a ruling. And so
5 the Petitioner's claims and constitutional rights to
6 get in here and have due process and to be heard by
7 this Court were not denied to her, were not taken
8 away from her, she was not treated differently from
9 other litigants in this particular case. And if
10 there's some potential for mischief in this statute,
11 it didn't happen here because everyone was aware of
12 this deadline and took measures, took appropriate
13 measures to give the Petitioner a hearing. But then
14 having had the hearing and with the Bunch v.
15 Inglehorn Decision in 1995, some two years earlier,
16 so that it's not some surprise sprung on everybody
17 after the fact, the Petitioner waits until August
18 25th to submit proposed documents by mailing and not
19 to submit them to the Court.

20 The presumption under Utah Rules of Civil
21 Procedure is that if those things are mailed on the
22 25th, they don't even get to Mr. Zabriskie, my
23 predecessor Counsel, until August 28th, the three
24 days later that would be presumed or allowed for the
25 mailing process, which is a day later than the

Page 12

1 deadline for entry of this order. The problem is the
2 Petitioner didn't jump on the preparation of those
3 documents, get them to this Court quickly so that
4 Your Honor could enter them in a timely manner. And
5 that's -- that's not the fault of the statute, that's
6 not the fault of this Court. And I would submit,
7 Your Honor, that it is appropriate to dismiss this
8 since the deadlines that are clearly enunciated were
9 violated. Thank you.

10 THE COURT: All right, Ms. Corporon.
11 Thank you.

12 It is particularly troubling to me to
13 enforce specific deadline-type language in equitable
14 matters such as domestic cases that are pending
15 before me. The reason is because we are, by rule, by
16 case law, expected to do equity in equitable matters
17 of this nature. However, the legislature has, for
18 whatever reason, determined that if these types of
19 marital relationships, that is unsolemnized
20 relationships, are going to be established, they must
21 meet certain specific guidelines to be established;
22 recognizing, of course, that prior to the advent of
23 30-1-4.5, common-law marriages of this nature were
24 not legally recognized. So, I suppose that when one
25 is faced with what appears to me to be quite specific

Page 13

1 language about the time frames in which this must be
2 accomplished, then my mandate, of course, is to
3 follow the language of the statute.

4 It is my recollection that all recognized
5 severity, the potential severity, of the imposed
6 deadlines in this statutory scheme, and we did,
7 indeed, move the matter along expeditiously to have
8 the matter tried within the one-year time frame. And
9 it was accomplished. And my rulings were made,
10 albeit not reduced to writing, and executed by myself
11 until the 29th of September, 1997, which is obviously
12 in excess of one year from the date that I determined
13 was the legal separation of these parties on August
14 28th of '96.

15 In the face of language such as, "A
16 marriage that is not solemnized shall be legal and
17 valid if a court order establishes such," and
18 furthermore the language, "The determination or
19 establishment of a marriage under this section must
20 occur during the relationship or within one year
21 following the termination of that relationship," it
22 seems to me that there is little room for this Court
23 to engage in so-called equitable innovation.

24 Therefore, it seems to me that I am
25 compelled by the language of the statute and the time

Page 14

1 frames applicable in this case to grant the motion to
2 dismiss.

3 And, Ms. Corporon, I will ask that you
4 prepare an appropriate order in that regard.

5 The fact that this matter is already
6 pending on appeal may well facilitate an expedited
7 ruling on the very issue that we are here dealing
8 with today. I don't know that, but this is an issue
9 that has not, other than the Bunch Case, which, if
10 anything, seemed to me to establish that the
11 appellate courts are going to look at specific
12 enforcement language and see that it's complied
13 with. But, nevertheless, it may well be that I'm
14 wrong. And if that is the case, then the matter is
15 pending and hopefully it can get the appellate court
16 to tell him so and we'll pick up the pieces
17 thereafter. But in the face of what I'm confronted
18 with now, I think I have no alternative but to grant
19 the motion to dismiss.

20 MS. MARELIUS: Based on that, Your Honor,
21 I would make a motion to stay this ruling pending my
22 being able to file a motion with the appellate court
23 to join this issue in the appeal.

24 THE COURT: I don't know if there's going
25 to be an objection, Ms. Corporon, from you about -- I

Page 15

1 don't really know what's happening in the matter in
2 terms of these parties' relationship, anyway.

3 MS. MARELIUS: I think the stay would
4 relate to no one selling or transferring, disposing
5 of marital assets.

6 THE COURT: Is there objection to that
7 kind of an order?

8 MS. CORPORON: The problem, Your Honor,
9 is that Mr. Clark has been in significant financial
10 difficulties and one possible remedy is for him to be
11 able to encumber some of the real estate in order to
12 borrow money to be able to pay some of the creditors
13 that he has. But right now with being unable to sell
14 the real estate, encumber it to perform repairs on
15 it, do anything really imagined significantly, his
16 hands are tied and he is collapsing financially.

17 THE COURT: I think what I'm hearing at
18 this stage is that I'm not prepared to take any
19 action of that nature, Ms. Marelius. You can present
20 it to me in the proper format in the form of written
21 motion to which Counsel can object, and then I will
22 rule on it.

23 MS. MARELIUS: Your Honor, will you give
24 me ten days to do so --

25 THE COURT: I will grant you ten days in

Page 16

1 which to file your motion, and then I will respond as
2 soon as I get a reply from you, Ms. Corporon. You
3 will prepare the appropriate order?

4 MS. CORPORON: Yes.

5 THE COURT: All right.

6 MS. MARELIUS: There will be no disposal
7 or disbursement of property for ten days?

8 THE COURT: Ten days, the status quo will
9 remain in the effect.

10 MS. CORPORON: Thank, Your Honor.
11 (Hearing adjourned.)
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Page 17

TRANSCRIBER'S CERTIFICATE

2
3 STATE OF UTAH)
) ss.

4 County of SALT LAKE)
5

6 I, BILLIE WAY, CCT, do hereby certify that I
7 am a Certified Court Transcriber in and for the State
8 of Utah;

9 That I reduced the proceedings aforesaid to
10 print from videotape to the best of my ability;

11 I further certify that I have no interest in
12 the event of this action.

13 WITNESS MY HAND this the 17th day of October,
14 1998.

15
16
17 (Signature) BILLIE WAY, CCT
18
19
20
21
22
23
24
25

00901
10/16/98

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LINDA KAY CLARK,	:	MINUTE ENTRY RULING
Plaintiff(s),	:	CASE NO. 964904244 DA
vs.	:	Judge J. Dennis Frederick
CECIL E. CLARK,	:	Date: October 16, 1998
Defendant(s),	:	

After review of the pleadings and upon receipt of the Notice to Submit for Decision filed October 8, 1998 and Notice to Submit for Decision filed October 8, 1998, the Court rules as follows:

1. Petitioner's Motion to Stay is granted, there being no timely opposition.
2. Petitioner's Motion to Supplement, etc. and Objection to Order, etc. are denied.
3. Counsel for movant to prepare the order.

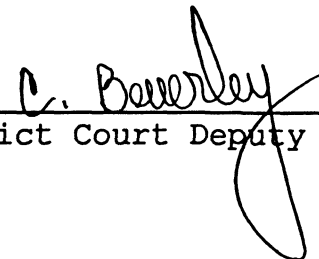
Case No. 964904244 DA

CERTIFICATE OF MAILING

I certify that on the 16th day of October, 1998, I sent by first class mail, a true and correct copy of the attached document to the following:

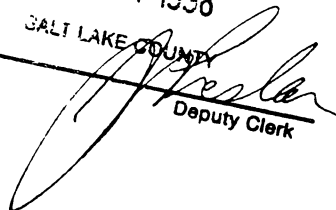
Suzanne Marelius
426 South 500 East
Salt Lake City, UT 84102

Mary C. Corporon
808 East South Temple
Salt Lake City, UT 84102



District Court Deputy Clerk

SUZANNE MARELIUS (2081)
Attorneys for Petitioner
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, UT 84102
Telephone: (801) 531-0435
Facsimile: (801) 575-7834

FILED DISTRICT COURT
Third Judicial District
DEC 24 1998
By 
SALT LAKE COUNTY
Deputy Clerk

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

LINDA KAY CLARK,

Petitioner,

vs.

CECIL E. CLARK,

Respondent.

ORDER

Case No. 964904244 DA
Judge: J. Dennis Frederick

-----ooOoo-----
The Petitioner's Objection to Order Vacating Decree and Order of Dismissal; the Petitioner's Motion for Stay and to Supplement Findings of Fact and Conclusions of Law and Decree of Divorce having come before the Court pursuant to Rule 4-501 Utah Code of Judicial Administration, were reviewed and the Court issued a Minute Entry Ruling thereon. Based on the record and file herein, argument of counsel the Court makes the following ruling:

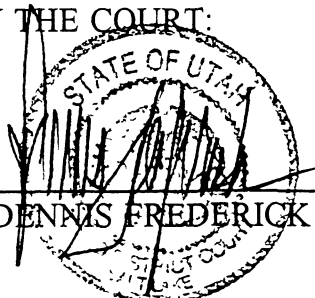
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Petitioner's Motion to Stay the "Order Vacating Decree and Order of Dismissal" issued in the above-referenced matter is granted. Neither party is to thus take any action to sell, transfer, encumber or otherwise alienate or change the form or nature of assets of either party during the pendency of this case and appeal.

2. The Petitioner's Motion to Supplement Findings of Fact and Conclusions of Law and Decree of Divorce and the Petitioner's Objection to Order Vacating Decree and Order of Dismissal are denied.

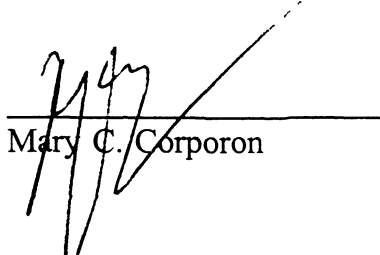
DATED this 24th day of Dec, 1998.

BY THE COURT:


J. DENNIS FREDERICK

The court seal is circular with the text "STATE OF UTAH" at the top and "DISTRICT COURT" at the bottom. A handwritten signature is written over the seal.

Approval As to Form:

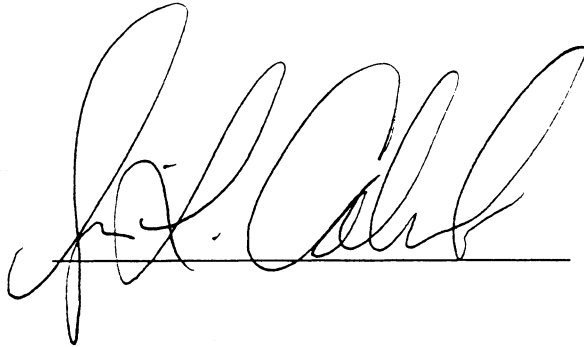

Mary C. Corporon

A handwritten signature is written over a horizontal line.

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be hand-delivered, a true and correct copy of the foregoing, Order, this 15 day of December, 1998, to:

Mary Corporon
CORPORON & WILLIAMS
808 East South Temple
Salt Lake City, Utah
(fax) 363-8243



S12\clark.ord

30-1-4.5. Validity of marriage not solemnized.

(1) A marriage which is not solemnized according to this chapter shall be legal and valid if a court or administrative order establishes that it arises out of a contract between two consenting parties who:

- (a) are capable of giving consent;
- (b) are legally capable of entering a solemnized marriage under the provisions of this chapter;
- (c) have cohabited;
- (d) mutually assume marital rights, duties, and obligations; and
- (e) who hold themselves out as and have acquired a uniform and general reputation as husband and wife.

(2) The determination or establishment of a marriage under this section must occur during the relationship described in Subsection (1), or within one year following the termination of that relationship. Evidence of a marriage recognizable under this section may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.

History: C. 1953, 30-1-4.5, enacted by L. 1987, ch. 246, § 2.

Severability Clauses. — Laws 1987, ch. 246, § 5 provided that if any provision of Chap-

ter 246, or the application of any provision to any person or circumstance, is held invalid, the remainder of the chapter is to be given effect without the invalid provision or application.

CHAPTER 4a

NUNC PRO TUNC ORDERS

Section
30-4a-1. Authority of court.

30-4a-1. Authority of court.

A court having jurisdiction may, upon its finding of good cause and giving of such notice as may be ordered, enter an order nunc pro tunc in a matter relating to marriage, divorce, legal separation or annulment of marriage.

History: C. 1953, 30-4a-1, enacted by L.
1983, ch. 118, § 1.

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

Linda Kay Clark, Plaintiff,	:	UNDER ADVISEMENT
	:	MINUTE ENTRY
	:	
vs.	:	CASE NO: 964904244 DA
	:	
Cecil E. Clark,	:	COMMISSIONER:
Defendant.	:	Lisa A. Jones
	:	

The Commissioner having received proffers of testimony and argument from Counsel on certain contested issues and having taken those contested issues under advisement, the Commissioner now makes the following findings and recommendations:

1. COMMON LAW MARRIAGE:

Plaintiff claims that the parties were married for eighteen years and in the almost twelve years since the divorce have had an identical relationship to that of a married couple. In 1992 plaintiff quit claimed her interest in the home in which defendant now lives for a \$22,000.00 payment in \$300.00 per month monthly increments with a balloon payment in May of 1996. Plaintiff now claims that to be an agreement entered into through duress. The parties filed joint tax returns in 1993 and 1994.

Defendant responds that the parties were divorced in 1985 when there was a property division and admits the parties lived together but after 1992 had no marital relationship

EXHIBIT A

and in fact made a division of their property in 1992 as evidenced by the payout for her share of the marital property. Defendant claims that the parties lived together from July through September of 1992, from January through March 1993, from July 1993 through April 1994, from May 1994 through September 1994, from March through October 1995 and for six weeks starting July 1, 1996. Defendant claims that the statute's requirement that she make a claim for common law marriage within one year has lapsed. Defendant married last August and is living in the marital home.

The issue of the common law marriage is hotly disputed. Without an evidentiary hearing with regard to the factors for a common law marriage and evidence regarding when the parties were together and separated, the Commissioner cannot make a determination that a common law marriage exists. Without such a determination no relief plaintiff requests is possible. The issue of the common law marriage is a trial issue and the parties should move forward to trial. The issue of retroactivity with regard to the request for alimony is reserved as a trial issue. Plaintiff's requests for alimony, possession of the home and suit costs on a temporary basis are denied. The parties agree that the temporary restraining order should remain in effect and the Commissioner approves that stipulation.

2. ORDER.

Attorney for plaintiff should prepare the appropriate order.

Dated this 12th day of November, 1996.


LISA A. JONES
DISTRICT COURT COMMISSIONER

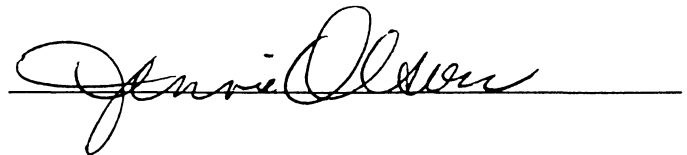


MAILING CERTIFICATE

I hereby certify that I delivered a true and correct copy of the foregoing Minute Entry, postage prepaid, to the following, this 13 day of November, 1996.

Suzanne Marelus
LITTLEFIELD & PETERSON
Attorney for Plaintiff
426 South 500 East
Salt Lake City, UT 84102

Dean Zabriskie
Thomas L. Low
Attorney for Defendant
Jamestown Square, Suite 370
Hanover Building
3507 North University Avenue
Provo, UT 84604

A handwritten signature in cursive script, appearing to read "James L. Low", is written over a horizontal line.

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

CLARK, LINDA KAY	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 964904244 DA
	:	DATE 07/01/97
Vs	:	HONORABLE LISA A. JONES
	:	COURT REPORTER NO TAPE
CLARK, CECIL E	:	COURT CLERK GLN
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY. MARELIUS, SUZANNE
D. ATTY. ZABRISKIE, DEAN N

COMMISSIONER RECOMMENDS: SET FOR TRIAL ON THE FOLLOWING ISSUES.

1. WHETHER COMMON LAW MARRIAGE EXISTS.
2. REAL PROPERTY DISTRIBUTION.
3. DEBT DISTRIBUTION.
4. ALIMONY.
5. ATTORNEY FEES.
6. CONTEMPT. VIOLATION OF RESTRAINT ON ASSETS.

COMMISSIONER'S SUGGESTION FOR SETTLEMENT:

1. THE COMMISSIONER RECOMMENDS A BIFURCATED HEARING ON THE ISSUE OF COMMON LAW MARRIAGE. THAT INITIAL HEARING WOULD TAKE 1/2 DAY AT MOST. FURTHER, THE STATUTORY LIMIT ON ESTABLISHMENT OF A MARRIAGE IS LOOMING. THERE IS A SUBSTANTIAL LIKELIHOOD OF SETTLEMENT ONCE THE ISSUE OF COMMON LAW MARRIAGE IS DECIDED.

Sec. 11. [Courts open — Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

History: Const. 1896.

Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

History: Const. 1896.

Cross-References. — Prohibition on private or special laws, Utah Const., Art. VI, Sec. 26.