

1997

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LINDA KAY CLARK,

Petitioner/Appellant,

vs.

CECIL E. CLARK,

Respondent/Appellee.

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CASE NO. 971635 - CA

PRIORITY NO. 15

BRIEF OF APPELLEE

APPEAL FROM THE JUDGMENT AND ORDER OF THE
THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE J. DENNIS FREDERICK, PRESIDING

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IN THE UTAH COURT OF APPEALS

LINDA KAY CLARK,	:	BRIEF OF APPELLEE
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Petitioner/Appellant,	:	CASE NO. 971635 - CA
	:	
vs.	:	
	:	
CECIL E. CLARK,	:	
	:	
Respondent/Appellee.	:	
	:	

Appellee, CECIL CLARK, hereinafter "Mr. Clark" or "Respondent", submits the following Brief:

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant Rules 3 and 4 of the UTAH RULES OF APPELLATE PROCEDURE and §78-2a-3(2)(h) UTAH CODE ANN. (1998).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

1. Did the trial court correctly determine that it lacked subject matter jurisdiction to consider Appellant's (hereinafter "Petitioner" or "Ms. Clark") motions for a *nunc pro tunc* order, to supplement the findings and decree, and her objections to the order vacating the decree?

A trial court's determination that it lacked subject

matter jurisdiction is reviewed on appeal for correction of error. Schwenke v. Smith, 942 P.2d 335, 336 (Utah 1997) (citing Barnard v. Utah State Bar, 857 P.2d 917, 919 (Utah 1993)).

2. If the trial court erred by determining that it lacked subject matter jurisdiction, was the trial court within its discretion in denying Petitioner's motion for *nunc pro tunc* order?

Trial courts enjoy "broad discretion" in deciding whether or not to enter an order *nunc pro tunc*. Horne v. Horne, 737 P.2d 244, 248 (Utah App. 1987).

3. If the trial court erred by determining that it lacked subject matter jurisdiction, was the trial court within its discretion in denying Petitioner's motion to supplement the findings of fact and conclusions of law and decree of divorce and objection to the order vacating the decree and order of dismissal?

Generally, trial courts may exercise broad discretion in divorce matters. Crockett v. Crockett, 836 P.2d 818 (Utah App. 1992)

4. Is the one year requirement of §30-1-4.5 of the Utah Code Ann. constitutional?

"The challenge to the constitutionality of a statute presents a question of law, which we review for correctness." Salt Lake City v. Lopez, 935 P.2d 1259, 1262 (Utah App. 1997) (citations omitted).

DETERMINATIVE STATUTORY PROVISIONS

Respondent submits that there are no statutory nor constitutional provisions completely determinative of the issues presented herein. However §30-1-4.5 and §30-4a-1 UTAH CODE ANN. and Art. VIII, §5, Art. I, §24, and Art. I, §11 of the UTAH CONSTITUTION are relevant to this appeal. §30-1-4.5, §30-4a-1, and Art. I, §§11 and 24 are included in Appellant's Addendum, and Art. VIII, §5 is attached hereto as Addendum A.

STATEMENT OF THE CASE

A. NATURE OF THE CASE AND COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW

This is an appeal from a final order of the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick presiding.

The trial court entered a Declaration of Marriage and Decree of Divorce on September 29, 1997. (R. 278-282). The Respondent appealed this order, case # 970635-CA. After this Declaration and Decree, Respondent moved to dismiss the

action in the trial court for lack of subject matter jurisdiction. The trial court granted Respondent's motion On September 3, 1998. (R. 504-507). Petitioner moved for a stay, to supplement the findings, and objected to the trial court's order of dismissal. (R. 508-539). The trial court granted Petitioner's motion for stay and denied Petitioner's remaining motion and objection on December 24, 1998. (R. 566-68). Petitioner filed her Notice of Appeal of this order on January 19, 1999. (R. 569).

B. STATEMENT OF THE FACTS

Respondent submits the following factual summary and hereby incorporates his Statement of the Facts as set forth in his Appellate Brief filed in the companion appeal to this case, case # 970635-CA.

The parties were previously married. This marriage ended in divorce on August 27, 1985. After this divorce, the parties resumed living together. This subsequent relationship was found by the court below to have ended on August 28, 1996. (R. 267, Aplt. Add. 1). Petitioner filed her Complaint for Divorce on October 1, 1996. (R. 1, Aplt. Add. 2).

As the parties and the trial court were very aware of

the one year time requirement under § 30-1-4.5,¹ trial was expedited in this matter, and held on August 13, 1997. (R. 267, Aplt. Add. 1). Judge Frederick entered specific findings from the bench on the same day as trial. (Aplt. Brf. p. 6, Aplt. Add. 3). The trial court also entered a lengthy minute entry on August 13, 1997, the same day as trial. (R. 238). All of this happened fifteen days prior to the one year limit of August 28, 1997.

Petitioner failed even to submit her Findings of Fact and Conclusions of Law and Declaration of Marriage until September 26, 1997. (Aplt. Brf. p. 6). The trial court promptly signed these documents on September 29, 1997. (Aplt. Brf. p. 6).

Respondent filed an appeal in this Court on October 28, 1997, which is currently pending in case # 970635-CA. This appeal was consolidated into the present appeal as case # 971635-CA, by order of this Court on February 24, 1999.

Respondent filed his Motion and Memorandum to Dismiss for Lack of Subject Matter Jurisdiction on May 4, 1998. (R.

¹ On July 1, 1997, Commissioner Jones entered a minute entry stating that "the statutory limit on establishment of a marriage is looming." (R. 223). On July 16, 1997, the trial court set the matter for trial scheduled for August 13, 1997. (R. 224).

419). Petitioner filed her response to the motion to dismiss and her motion to enter order *nunc pro tunc* on June 3, 1998. (R. 445-449, 453-54). Both motions came on for hearing before the trial court on August 31, 1998. (R. 581, Aplt. Add. 6). The trial court granted Respondent's motion to dismiss based on a lack of subject matter jurisdiction. The trial court denied Petitioner's motion for a *nunc pro tunc* order. (R. 540-506). The trial court specifically acknowledged:

It is my recollection that all [parties] recognized [the] severity, the potential severity, of the imposed deadlines in this statutory scheme, and we did, indeed, move the matter along expeditiously to have the matter tried within the one-year time frame. And it was accomplished. (Transcript from hearing on motion to dismiss, R. 581, Aplt. Add. 6, p. 13).

On September 10, 1998, Petitioner filed her motion for stay and to supplement findings of fact and conclusions of law and decree of divorce. (R. 508). On December 24, 1998, the trial court entered an order granting Petitioner's motion for stay and denying the motion to supplement the findings. (R. 566-68). Petitioner filed her notice of appeal on January 19, 1999. (R. 569-575).

SUMMARY OF THE ARGUMENT

§30-1-4.5 clearly and unambiguously requires that a

common law marriage be established by order of the court within one year after the termination of the relationship. Here, it is undisputed that an order establishing a common law marriage between the parties was not entered within one year of the termination of the relationship, and that it could easily have been entered. Therefore, under the clear and unambiguous language of §30-1-4.5, the trial court correctly dismissed the action for lack of subject matter jurisdiction upon Respondent's motion.

Because the trial court lacked subject matter jurisdiction in this matter, after August 27, 1997, the trial court did not abuse its discretion by denying Petitioner's motions to supplement the findings and decree, for *nunc pro tunc* order, and objection to motion to dismiss. In fact the trial court had no jurisdiction even to entertain Petitioner's motions.

Assuming that this Court finds that the trial court did have subject matter jurisdiction over this action after one year beyond the termination of the relationship, the trial court did not abuse its broad discretion in denying the Petitioner's motions. The parties and the trial court acted as expeditiously as possible to ensure that the trial would

be held prior to the deadline. The trial court ruled from the bench and entered a lengthy minute entry on the same day as trial to assist the Petitioner in timely drafting the final documents. Petitioner had fifteen days from the date of trial to submit the documents to the court. The documents were not submitted until nearly six weeks after trial. Therefore, the trial court did not abuse its discretion in denying Petitioner's motion for *nunc pro tunc* order.

Assuming that the trial court had subject matter jurisdiction to entertain Petitioner's motion to supplement the findings and decree, the trial court did not abuse its broad discretion in denying this motion. The Petitioner failed adequately to plead any of the alternate theories which may have originally been available to her. None of the elements of any alternate theories were even alleged in the pleadings, or at the full and complete trial in this matter. Therefore, the trial court was within its discretion in denying Petitioner's motion to supplement the findings and decree and objection to motion to dismiss.

Finally, Petitioner's claims that §30-1-4.5 is unconstitutional are without merit. First, Petitioner

failed to adequately raise any constitutional issues at the trial level. Second, Petitioner was not denied access to the judicial system. She received a full trial on all the issues she raised. She won at trial. Petitioner was neither denied due process nor her right to equal protection. She was treated just as every other party to a common law action. Neither the Respondent, nor the trial court, nor the statute had any control over the Petitioner's failure timely to submit the requisite documents. The Petitioner received every protection that all common law litigants receive. Petitioner's own failure to take the reasonable steps to secure her remedy required the trial court to dismiss the action.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DISMISSED THE ACTION FOR LACK OF SUBJECT MATTER JURISDICTION.

"The jurisdiction of all other courts, both original and appellate, shall be provided by statute." Art. VIII, §5 UTAH CONSTITUTION. The statute in question in this case is §30-1-4.5 of the Utah Code Ann., which requires that "[t]he 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." (emphasis added). This is clear mandatory language. There is no room for the trial court to abuse its discretion as Petitioner has argued. "'When interpreting statutes, this court is guided by the long-standing rule that a statute should be construed according to its plain language.'" Bunch v. Englehorn, 906 P.2d 918, 920 (Utah App. 1995) (quoting Utah Sign, Inc. v. Utah Dep't of Transp., 896 P.2d 632, 633 (Utah 1995)). "Thus, when the statutory language is plain and unambiguous, we will not look beyond it to surmise the legislature's intent." Id. (citing Brinkerhoff v. Forsyth, 779 P.2d 685, 686 (Utah 1989)). Therefore, the trial court has subject matter jurisdiction, pursuant to §30-1-4.5, to enter an order establishing a common law marriage during the relationship, or within one year following the termination of said relationship, after this one-year period, the trial court loses subject matter jurisdiction.

The trial court found that the parties' relationship terminated on August 28, 1996. (R. 551). Mr. Clark disputes this in his related appeal, but for purposes of Ms. Clark's appeal, this is irrelevant. It is undisputed that the trial court specifically expedited this case to ensure

compliance with the one-year time limit in §30-1-4.5. Trial was held on August 13, 1997, well within the one-year requirement. The trial court ruled from the bench and entered a lengthy minute entry on August 13, 1997. (R. 238-39). Petitioner had ample opportunity to generate and submit findings of fact and conclusions of law and a final order between August 13 and August 28, 1997.

It is undisputed that Petitioner failed to submit the requisite findings or final order to the trial court until approximately September 26, 1997. (Aplt. Brf. p. 6). This was approximately six weeks after the trial, and nearly four weeks after the one year time limit imposed by §30-1-4.5. These documents were promptly signed by the trial court three days later on September 29, 1997.

The Bunch case cited above, while not directly on point, does provide guidance in this case. In Bunch, Ms. Bunch sought to establish a common law marriage to Mr. Englehorn. Id. at 919. Mr. Englehorn moved to dismiss the action because there had been no court order entered establishing a common law marriage within one year after the relationship had ended. Id. The same as the Petitioner here, Bunch admittedly failed to obtain an order from the

court establishing a common law marriage within one year of the termination of the relationship. Id. at 920. The trial court concluded that, based on the requirements of §30-1-4.5, it lacked subject matter jurisdiction over the action and dismissed the case. Id. at 919.

On appeal, Bunch argued that, because she filed her complaint within one year of termination of the relationship, she complied with §30-1-4.5. Id. at 920-21. This Court determined that this interpretation was contrary to the plain meaning of §30-1-4.5. Id. at 921. "Under the plain meaning of the statute, Bunch did not obtain a timely determination of her relationship with Englehorn." Id. This Court affirmed the trial court's dismissal of the case based upon a lack of subject matter jurisdiction. Id. at 921.

This holding directly applies to the facts of the present case. Petitioner admittedly failed to obtain an order from the court establishing a common law marriage within one year of the termination of the relationship. Under the plain meaning of §30-1-4.5, Petitioner did not obtain a timely order establishing a common law marriage with Respondent, and therefore the trial court correctly

dismissed the action for lack of subject matter jurisdiction.

II. THE TRIAL COURT CORRECTLY DENIED PETITIONER'S MOTION FOR NUNC PRO TUNC ORDER, MOTION TO SUPPLEMENT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECREE OF DIVORCE, AND OBJECTION TO THE ORDER VACATING THE DECREE AND ORDER OF DISMISSAL.

As the trial court correctly determined that it lacked subject matter jurisdiction over this case under the clear and unambiguous language of §30-1-4.5, the trial court correctly denied Petitioner's motions filed subsequent to losing said jurisdiction. See Bunch, 906 P.2d at 921. Petitioner's arguments alleging that the trial court erred by denying Petitioner's motions after the dismissal are without merit.

Once the action was dismissed for lack of subject matter jurisdiction, Petitioner's only recourse lay with the appellate courts. Without subject matter jurisdiction, the trial court's only available course of action was to dismiss the case. See Schwenke v. Smith, 942 P.2d 335 (Utah 1997) (affirming the trial court's dismissal of action for lack of subject matter jurisdiction); Bailey v. Utah State Bar, 846 P.2d 1278, 1280 (Utah 1993) (stating that a judge, acting in his/her judicial capacity, loses immunity from suit if the

judge acts without subject matter jurisdiction); Bankler v. Bankler, 963 P.2d 797 (Utah App. 1998) (affirming the trial court's dismissal of action for lack of subject matter jurisdiction).

Petitioner argues that the trial court "erred in not granting [her] *nunc pro tunc* motion" because the statute "requires only a finding of *good cause*" (Aplt. Brf. P. 11). However, this argument neglects the trial court's lack of subject matter jurisdiction. Petitioner's argument, if accepted, would allow a trial court lacking subject matter jurisdiction to enter an order *nunc pro tunc* **to establish subject matter jurisdiction** over an action. This would be improper: A court must first have subject matter jurisdiction to enter an order. It can not enter an order to create subject matter jurisdiction.

For example, in the Bankler case cited above, the parties were divorced in California. 963 P.2d at 798. The husband sought to modify the decree in the Fifth District Court of Utah since he had moved to Utah and the wife had domesticated the decree in the Fifth District Court of Utah. Id. The court dismissed the action for lack of subject matter jurisdiction, as the California court had

specifically retained jurisdiction over the matter. Id.
This Court affirmed the trial court. Id. at 801.

Under Petitioner's argument, the Fifth District Court could have entered an order *nunc pro tunc* establishing subject matter jurisdiction over the matter prior to the California order, upon a showing of good cause. However, such would contradict the plain and unambiguous language of the *Nunc Pro Tunc* Statute which states:

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. UTAH CODE ANN. §30-4a-1 (1998) (emphasis added).

Therefore, Petitioner has erred in arguing that the "statute requires only a finding of *good cause*." Jurisdiction is a clear prerequisite even to considering a motion for a *nunc pro tunc* order. As the trial court clearly lacked subject matter jurisdiction, the trial court did not abuse its discretion in denying Petitioner's motion for entry of a *nunc pro tunc* order to establish jurisdiction.

III. IF THE TRIAL COURT ERRED IN DETERMINING THAT IT LACKED SUBJECT MATTER JURISDICTION, THE TRIAL COURT WAS STILL WITHIN ITS BROAD DISCRETION IN DENYING PETITIONER'S MOTION FOR NUNC PRO TUNC ORDER, MOTION TO SUPPLEMENT

FINDINGS AND DECREE AND OBJECTION TO DISMISSAL.

Trial courts enjoy "broad discretion" in deciding whether or not to enter an order *nunc pro tunc*. Horne v. Horne, 737 P.2d 244, 248 (Utah App. 1987). In addition, generally, trial courts may exercise broad discretion in divorce matters. Crockett v. Crockett, 836 P.2d 818 (Utah App. 1992). Assuming that the trial court had the subject matter jurisdiction required to entertain Petitioner's motion for *nunc pro tunc* order and other motions, the trial court did not abuse its discretion in denying said motions.

Petitioner argues that the trial court erred by not granting this motion for *nunc pro tunc* order because the statute only requires a showing of good cause. However, the language of the statute is not mandatory. The statute does not require that a trial court enter an order *nunc pro tunc* under any circumstances. The statute states that "[a] court having jurisdiction **may**, upon its finding of good cause" enter a order *nunc pro tunc*. UTAH CODE ANN. §30-4a-1 (1998). The language of the statute clearly and unambiguously leaves the decision to enter the order in the sound discretion of the court.

In the present action, where the trial court and the

Respondent acted expeditiously to assure compliance with the one-year time requirement of §30-1-4.5, the Petitioner has failed to establish any good cause for why she failed to submit the requisite documents to the court until six weeks after the trial.² The trial court conducted the trial leaving ample time for the Petitioner to do so, ruled promptly from the bench at the end of trial, and entered a lengthy minute entry on the same day as trial to further facilitate the Petitioner's ability to submit the requisite documents. As the power to submit the documents timely was solely with the Petitioner, even if the trial court did have subject matter jurisdiction over this matter, the trial court was within its broad discretion in denying Petitioner's motion for a *nunc pro tunc* order.

Petitioner also argues that the trial court erred in denying the Petitioner's motion to supplement the findings and decree. (Aplt. Brf. p. 13). Petitioner argues that the trial court should have supplemented the findings "to

² "It is my recollection that all [parties] recognized severity, the potential severity, of the imposed deadlines in this statutory scheme, and we did, indeed, move the matter along expeditiously to have the matter tried within the one-year time frame. And it was accomplished." (Judge Frederick, Transcript from hearing on motion to dismiss, R. 581, Aplt. Add. 6, p. 13)

consider and rule on the alternate theories" of the case. (Aplt. Brf. p. 13). This motion was filed after the trial court had already determined that it lacked subject matter jurisdiction.

Petitioner included the following sentence in her complaint: "These assets should be divided pursuant to common law principles and alternatively under the theory of partnership, contract for services or trust." (Aplt. Add. 2). However, none of the elements of these alternative theories were pled in the complaint. In addition, none of these alternative theories were argued to the trial court, prior to, or during the trial of this matter. Petitioner had ample opportunity to amend her complaint to specifically plead the requisite elements of any alternate theories from the filing of her complaint in October of 1996, until the trial in August of 1997. She had ample opportunity to submit evidence at trial to support these alternate theories. No elements of contract, trust or partnership were alleged in the complaint or testified to at trial.

Petitioner cites Mattes v. Olearain, 759 P.2d 1177 (Utah App. 1988), for the holding that "equitable theories of constructive trust or resulting trust doctrines would

apply." (Aplt. Brf. p. 16). However, actually, this Court in Mattes found that there was no common law marriage and no constructive trust. Id. at 1181. This Court stated that "[a] constructive trust may be imposed if the grantee was in a confidential relationship with the grantor." Id. at 1179 (citing Parks v. Zions First Nat'l Bank, 673 P.2d 590 (Utah 1983)). Petitioner never alleged any confidential relationship in her pleadings or at trial.

Without any cite to the record to show where the trial court refused to allow her to submit any evidence at trial, Petitioner argues that she "has been denied an opportunity to present evidence and briefing on that theory." (Aplt. Brf. p. 16). Petitioner had ample time to brief any issue for trial and to submit any evidence at trial. Petitioner was never denied an opportunity to produce any evidence concerning any of her alternative theories. If she failed to do so, it must have been a conscious trial decision, which she only now regrets in hindsight.

Petitioner also relies on Layton v. Layton, 777 P.2d 504 (Utah App. 1989), to support her argument that the trial court abused its discretion in denying her motion to supplement the findings and decree under alternate theories.

In Layton, this Court acknowledged that "an equitable division of property accumulated by unmarried cohabitants has been sustained upon finding a partnership, contract for services, and/or a trust." Id. at 505-506. However, this Court denied Ms. Layton's suggestion of these alternative theories as they were not adequately pled or sufficiently pursued at the trial level. Id. at 506. In addition, "[t]here are no findings or conclusions concerning any grounds for the property award other than a marriage-equivalent under Utah Code Ann. § 30-1-4.5" Id.

This is analogous to the present case. Petitioner's pleadings were insufficient to maintain an action under any alternate theories. None of the elements of partnership, contract or trust were even alleged in Petitioner's complaint. Further, Petitioner did not submit any evidence or testimony at trial to support any findings or conclusions with regard to the elements of these alternate theories. While it is clear that a trial court may consider these alternate theories under Utah Law, Petitioner is not relieved from her obligation to plead allegations sufficient to support the elements of these alternate theories, nor is she relieved of her obligation to submit evidence or

testimony to support a finding of these elements.

Petitioner received a full trial on her complaint. Neither the trial court nor the Respondent kept Petitioner from admitting any evidence concerning the elements of trust, contract or partnership. In addition, Petitioner drafted the findings of fact and conclusions of law accepted by the trial court in this matter.

In viewing the circumstances of this case, assuming that the trial court had jurisdiction to consider Petitioner's motions, the trial court was within its discretion to deny Petitioner's motion to supplement the findings and decree and objection to dismissal, as Petitioner failed to plead any alternate theories, and failed to submit any evidence or testimony as to the elements of any alternate theory.

IV. PETITIONER'S ARGUMENT CONCERNING MR. CLARK'S ALLEGED BAD FAITH IS WITHOUT MERIT AND IRRELEVANT.

Petitioner argues that some alleged bad faith on the part of Mr. Clark should somehow entitle Petitioner to the relief requested in Petitioner's motions under equitable principles. Petitioner alleges that Mr. Clark caused delays during the litigation which caused the Petitioner's failure to file the findings and decree timely. This argument is

not based in fact or reason.

The parties and the trial court were all very aware of the one-year time requirement of § 30-1-4.5, as noted above. Any alleged delay which occurred prior to the trial date is utterly irrelevant. Trial was actually held leaving ample time for Petitioner to submit the requisite findings and order. Petitioner carried the day at trial. The trial court ruled from the bench in her favor.³

The only delay which caused this matter to be dismissed was Petitioner's delay. Petitioner was in sole control over when the documents would be prepared and submitted to the court. Trial was held on August 13, 1997. Both parties and the court knew that the documents had to be entered by August 27, 1997. The documents are not particularly complex nor difficult to prepare, and could easily have been done by the next day. In spite of this, Petitioner did not submit the documents to the court until September 26, 1997, nearly an entire month after the deadline. Neither the trial court nor Mr. Clark were responsible for Petitioner's failure to submit the documents timely.

³ This ruling is disputed by Mr. Clark in his related appeal.

Petitioner argues that, despite the trial court's alleged knowledge of Mr. Clark's bad faith, "the trial court refused to apply equitable principles and allow Plaintiff the opportunity to obtain a fair distribution of jointly acquired property." (Aplt. Brf. p. 20). In fact, the trial court did everything **in its power** to assure that the Petitioner would have her day in court and be able to present her case. That the Petitioner failed to file the documents timely was solely **in her power**. The trial court lost subject matter jurisdiction and was forced to dismiss the action. Any prejudice to Petitioner in this matter was self-inflicted. The argument that the end result just "isn't fair" carries no weight.

V. PETITIONER FAILED TO ADEQUATELY RAISE ANY CONSTITUTIONAL ISSUES AT THE TRIAL LEVEL.

"To assert constitutional claims on appeal, parties must generally assert them first in the trial court." Bunch, 906 P.2d at 921. Petitioner did allude to certain constitutional concerns in her Memorandum filed on June 3, 1998. (R. 455). In addition, Petitioner also mentioned the possibility of constitutional issues at the hearing on the

motion to dismiss.⁴ Neither in her memorandum in the lower court nor at the hearing did Petitioner supply the trial court with sufficient legal analysis to permit consideration of weighty constitutional issues.

In Bunch, this Court refused to consider the constitutional issues raised on appeal because:

"The closest Bunch came to making a constitutional argument to the trial court occurred when the trial court asked counsel whether the facts of the case reflected any order that had timely established a marital relationship. Counsel responded that there was no order, but 'I guess I would have some concerns about the constitutionality of such a statute when it would make it - when a person files a Complaint to have that determination made, and simply because of the delays and court time and that sort of thing, it can't get it to court.'" Id. at 921.

Here, as in Bunch, Petitioner only alluded to certain constitutional concerns regarding possible equal protection or "open courts" issues. "There is no thoughtful or probing analysis of a state constitutional question" Id.

Petitioner failed to raise any constitutional claims at the trial level to allow consideration in this Court.

"Nominally alluding to constitutional questions 'without any

⁴ "One other area that I did brief, I'll just touch on briefly, and that is the Constitutional issues."
(Transcript from hearing, Applt. Add. 6, p. 8).

analysis before the trial court does not sufficiently raise the issue to permit consideration by this court on appeal.'" Id. (quoting State v. Johnson, 771 P.2d 326, 328 (Utah App. 1989), *rev'd on other grounds*, 805 P.2d 761 (Utah 1991)).

In addition, if Petitioner did attempt to contest the validity of §30-1-4.5 at the trial level, Petitioner's attempt must fail as she neglected to notify the Attorney General of the action. §78-33-11 states, in relevant part, that "if a statute or state franchise or permit is alleged to be invalid the attorney general **shall be** served with a copy of the proceeding and be entitled to be heard." (emphasis added). This is mandatory language. The Petitioner failed to give any notice of any alleged constitutional challenge to the Attorney General.

In Parker v. Rampton, the Utah Supreme Court discussed the "propriety and essentiality" of including the Attorney General as a party to an action contesting portions of Title 64 of the Utah Code. 497 P.2d 848, 853 (Utah 1972).

It is a general rule that where legislation is assailed, the attorney general must be a party or given notice thereof by the way of service of pleadings upon him and where the proceeding is lacking in this respect, a declaratory judgment cannot be granted. Id. (quoting Anderson, Action for Declaratory Judgment, Vol. 1, Section 179).

This is the general consensus among other jurisdictions and authorities. See Torbin v. Pursel, 539 P.2d 361, 363 (Wy. 1975) (holding that the failure to notify the attorney general about a challenge to the validity of a state statute was "fatal to this appeal"); Lakewood Pawnbrokers, Inc. v. City of Lakewood, 512 P.2d 1241 (Colo. 1973) (vacating a lower court judgment finding a city ordinance in conflict with a state statute on the basis that the attorney general had not received notice of the proceeding); see also Borchard, Declaratory Judgments, 275 (2nd ed., 1941) (stating that "[i]n several cases in which the validity of a state statute was either directly or indirectly involved, the failure to make the state or Attorney General a party was deemed fatal." (citations omitted)).

Therefore, because Petitioner failed to raise any constitutional issues at the lower level adequately, Petitioner is barred from raising said issues on appeal. In the alternative, Petitioner's failure to notify the Attorney General at the trial level of a challenge to the validity of §30-1-4.5 is fatal to any alleged challenge.

VI. §30-1-4.5 IS CONSTITUTIONAL.

Petitioner argues that §30-1-4.5 of the Utah Code is

unconstitutional.⁵ "The challenge to the constitutionality of a statute presents a question of law, which we review for correctness." Salt Lake City v. Lopez, 935 P.2d 1259, 1262 (Utah App. 1997) (citing Ross v. Schackel, 920 P.2d 1159, 1162 (Utah 1996); Ryan v. Gold Cross Servs., Inc., 903 P.2d 423, 424 (Utah 1995)). "[W]hen reviewing statutes for constitutionality, a statute is presumed constitutional, and 'we resolve any reasonable doubts in favor of constitutionality.'" Id. (quoting Ryan, 903 P.2d at 424 (quoting Society of Separationists, Inc. v. Whitehead, 870 P.2d 916, 920 (Utah 1993))).

"Moreover, we will not hold a statute to be unconstitutional unless it clearly contravenes a constitutional provision." Campbell v. Campbell, 896 P.2d 635, 641 (Utah App. 1995) (citing Baker v. Matheson, 607 P.2d 233, 237 n. 2 (Utah 1979)). "We strive to construe statutes so as to uphold them as consistent with both our state constitution and the federal constitution." Id.

⁵ Assuming that Petitioner is successful in her claim that §30-1-4.5 is unconstitutional, her appeal is moot, since she relied exclusively on this provision to establish a common law marriage at trial in this matter. If Petitioner wins this argument, then her case must be dismissed.

(citing Whitehead, 870 P.2d at 934 n. 40). Petitioner has failed to establish that §30-1-4.5 clearly contravenes any constitutional provision.

A. §30-1-4.5 DOES NOT VIOLATE THE OPEN COURTS PROVISION OF THE UTAH CONSTITUTION.

Article I, Section 11 of the Utah Constitution declares that an individual shall have a right to a "remedy by due course of law" for injury to "person, property, or reputation." §30-1-4.5 did not deprive the Petitioner any access to legal redress in this case. Petitioner filed her complaint, performed discovery and other pre-trial matters, and was afforded a timely and complete trial.

Petitioner cites the Berry case as analogous to the present case. In Berry v. Beech Aircraft, 717 P.2d 670 (Utah 1985), the Supreme Court of Utah determined that §78-15-3 of the Utah Code Ann. violated the "open courts" provision of the Utah Constitution because it operated to bar actions without regard to when an injury occurred.

In contrast, §30-1-4.5 does not bar any action. This provision merely limits the trial court's subject matter jurisdiction to actions where an order establishing a common law marriage has been entered within one year after the termination of the relationship. Therefore, no actions,

under §30-1-4.5, are barred on the basis of when an injury occurred.

Petitioner argues that "[t]he 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." (Appt. Brf. p. 22). However, Petitioner was actually afforded her right to apply to the appropriate court in this matter for redress of any alleged wrong. She was duly afforded her rights of due process and access to the courts. Petitioner had the opportunity to bring her complaint to trial and submit any evidence and testimony to support her action. §30-1-4.5 did not serve to deny Petitioner her right, under the Utah Constitution, to access to judicial redress. Petitioner's own actions and omissions caused the dismissal of her action.

B. §30-1-4.5 DOES NOT VIOLATE THE EQUAL PROTECTION GUARANTEES OF THE UTAH CONSTITUTION.

Article 1, Section 24 of the Utah Constitution states that "[a]ll laws of a general nature shall have uniform operation." The basic principle embodied in this language is that "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, 669 (Utah 1984) (citations
omitted).

“‘In scrutinizing a legislative measure under article
I, §24, we must determine whether the classification is
reasonable, whether the objectives of the legislation are
legitimate, and whether there is a reasonable relationship
between the classification and the legislative purposes.’”
Whitmer v. City of Lindon, 943 P.2d 226, 230 (Utah 1997)
(quoting Blue Cross & Blue Shield v. Utah, 779 P.2d 634, 637
(Utah 1989)). “The burden upon a plaintiff to demonstrate
unconstitutionality is a heavy one.” Id. (citing Blue
Cross, 779 P.2d at 637). Therefore, Petitioner must first
establish that §30-1-4.5 creates a classification scheme,
and then establish that the legislative intent behind the
classification is not reasonably related to a legitimate
legislative purpose. Petitioner has failed to establish
that the provision even creates any classifications.

Petitioner argues that §30-1-4.5 creates “unreasonable
classifications” because “[o]ne group can obtain judicial
determination of their common law marriage within one year
and another year (sic) cannot obtain this determination.”

(Aplt. Brf. p. 23). However this is not an accurate statement. §30-1-4.5 allows **all** petitioners to bring a cause of action to establish a common law marriage. No classes are created by this provision on the basis of race, property ownership, sex, legitimacy, age, duration of the relationship, presence of children, or any other criteria.

Petitioner seems to argue that the provision creates two classes: one class who has their common law marriage established within the one-year time frame, and one class which fails to meet the time requirement. This theory would allow any party who failed to comply with any statute of limitation or repose, or any time requirement established by the rules of civil, appellate or criminal procedure, to claim that the statute or rule in question created unreasonable classifications. §30-1-4.5 does not create this classification, and clearly does not when viewed in light of the facts of this case.⁶ The statute simply puts a time limit on the establishment of a common law marriage.

⁶ Perhaps in a theoretical case where a trial court refuses to allow a litigant the opportunity to establish a common law marriage within the one-year time frame, the litigant may have an open courts or equal protection claim, however, in the present case the trial court bent over backwards to accommodate the requirements of the provision.

All petitioners are treated exactly alike under this provision.

The type of time requirement in §30-1-4.5 is analogous to a statute of limitation or repose requirement. In Lee v. Gaufin, the plaintiff argued that the statute of limitations provisions of §78-14-4(2) were unconstitutional under Article 1, §24 of the Utah Constitution. 867 P.2d 572, 575 (Utah 1993). The Utah Supreme Court stated that "[s]tatutes of limitation are essentially procedural in nature and establish a prescribed time within which an action must be filed after it accrues." Id. Further, statutes of limitation "do not abolish a substantive right to sue, but simply provide that if an action is not filed within the specified time, the remedy is deemed to have been waived unless the plaintiff did not know of the facts giving rise to the cause of action." Id. (citations omitted). "Thus, the barring of the remedy is caused by plaintiff's failure to take reasonable steps to assert the cause of action within the time afforded by the statute." Id.

This is exactly the case at bar. While the case before the Court does not concern a statute of limitations, *per se*, it does concern a similar time limitation. Just as statutes

of limitation do not abolish any substantive right to sue, neither does §30-1-4.5. Petitioner was able to file her complaint **and** have her day in court. The dismissal of Petitioner's action pursuant to the provision was caused solely by Petitioner's "failure to take reasonable steps" to comply with §30-1-4.5.

In Bunch v. Englehorn, this Court declined to consider any constitutional issues regarding the one-year limitation of §30-1-4.5 because the issues were not adequately brought up at the trial level. 906 P.2d at 921. This Court mentioned in Bunch that "the statute might present a constitutional question in a different context [I]f a trial court were to enter a judgment denying a common-law marriage within one year of separation, and that judgment were reversed on appeal and the matter remanded, the parties might be denied a reasonable opportunity to comply with the plain meaning of the statute." Id. n. 3. While this specific fact situation may give rise to a constitutional challenge, these facts, or any facts similar, are absent from the present case.

Petitioner has failed to meet her burden to establish that §30-1-4.5 is unconstitutional in any way under the

facts of this case. Petitioner was afforded her right to judicial redress for her claims. Petitioner received her day in court. The provision did not unreasonably classify the Petitioner. She was treated just as all other litigants bringing an action under §30-1-4.5 ought to be treated. Petitioner won at trial. Petitioner's action was dismissed, not due to any unconstitutional operation of §30-1-4.5, but only because of her own failure to submit the requisite documents to the trial court in a timely fashion.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court affirm the trial court's dismissal of this action for lack subject matter jurisdiction. In addition, because the trial court lacked subject matter jurisdiction, this Court should affirm the trial court's denial of Petitioner's motions filed subsequent to the lack of jurisdiction. In the alternative, Respondent requests that this Court affirm the trial court's denial of the Petitioner's motions and objection because the trial court was within its discretion in so ordering.

Respondent also requests that this Court determine that the constitutional issues briefed in this appeal must fail

because Petitioner failed to adequately raise any constitutional issues at the trial level or failed to notify the Attorney General of any legislative challenge. In the alternative, Respondent requests that this Court find that §30-1-4.5 is constitutional as applied to the facts of this case.

Respondent requests his costs incurred in this appeal pursuant to Rule 34 UTAH RULES OF APPELLATE PROCEDURE.

RESPECTFULLY SUBMITTED this 5th day of AUGUST, 1999.

CORPORON & WILLIAMS, PC



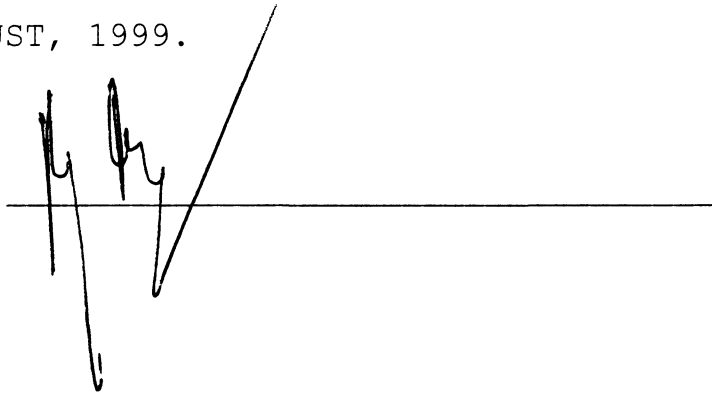
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CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLEE were mailed, first class, postage prepaid, to:

SUZANNE MARELIUS
Attorney for Appellant
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426 South 500 East
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(801) 531-0435

on this 5th day of AUGUST, 1999.

A handwritten signature in black ink, appearing to read 'Suzanne Marelius', is written over a horizontal line. The signature is stylized with a large, sweeping 'S' and a long, vertical stroke extending downwards.

ADDENDUM A

Sec. 5. [Jurisdiction of district court and other courts — Right of appeal.]

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

History: Const. 1896; L. 1943, S.J.R. 2; 1984 (2nd S.S.), S.J.R. 1.

Cross-References. — Original and appellate jurisdiction, § 78-3-4.

Compiler's Notes. — Provisions similar to those in this section were formerly found in Art VIII, Secs. 7, 8 and 9

NOTES TO DECISIONS

ANALYSIS

In general
Appeal by the state in criminal cases.
Appeal where case originated in circuit court.
Appeals.
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—Appellate.
—Original.
Divorce decree
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Juvenile court supervision.
Legislative enlargement or abridgement of powers
Review in cases at law.
Review of evidence in equity cases.
Right to appeal
Summary appellate disposition.
Temporary restraining orders
Cited.

In general.

Although district courts of this state are courts of original jurisdiction, having jurisdiction in all matters both civil and criminal which are not excepted by law or the Constitution, one district court has no power to exercise control over another *Nielson v Schiller*, 92 Utah 137, 66 P 2d 365 (1937)

Appeal by the state in criminal cases.

This section does not grant the state a general right of appeal in criminal cases. *State v Kelbach*, 569 P 2d 1100 (Utah 1977).

Appeal where case originated in circuit court.

Supreme Court had jurisdiction to entertain appeals from district court decisions where the case originated in a circuit court and involved a constitutional issue, Supreme Court's jurisdiction was not limited, as is its jurisdiction over appeals from a district court decision where the case originated in a justice court, to cases involving the constitutionality or validity of a statute. *State v Taylor*, 664 P 2d 439 (Utah 1983).

Appeals.

The district courts of this state had appellate jurisdiction insofar as entertaining appeals of decisions rendered by board of registration of trades and professions revoking license of physicians. *Baker v Department of Registration*, 78 Utah 424, 3 P 2d 1082 (1931)

District judge who was called to another district to try a case did not have jurisdiction to settle bill of exceptions in his home district. *Jenkins v Forsey*, 83 Utah 527, 30 P 2d 220 (1934)

Right to appeal is valuable and constitutional right and should not be denied except where it is clear that right has been lost or abandoned *Adamson v Brockbank*, 112 Utah 52, 185 P 2d 264 (1947)

City court supervision.

District court had subject matter jurisdiction over misdemeanor assault and battery prosecution; jurisdiction over the person was conferred by accused's stipulation that case might be transferred from city court to district court and his appearance in latter court, fact that prosecution was initiated by complaint rather than indictment or information did not preclude district court jurisdiction. *Jardine v Harris*, 63 Utah 560, 227 P 1029 (1924)