

2008

Shelley L. Gish v. Rodney J. Yanke : Reply Brief

Utah Court of Appeals

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Brent M. Brindley; Brindley Sullivan; Attorneys for Appellee.

Rodney J. Yanke; Appellant, pro se.

Recommended Citation

Reply Brief, *Gish v. Yanke*, No. 20081037 (Utah Court of Appeals, 2008).

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Aug. 19, 2010
CCO

IN THE UTAH COURT OF APPEALS

SHELLEY L. GISH,

Petitioner, Appellee, and Cross-
Appellant,

v.

RODNEY J. YANKE,

Respondent, Appellant, and Cross-
Appellee

Case No. : 20081037-CA

APPELLEE AND CROSS-APPELLANT'S REPLY BRIEF

Brent M. Brindley
BRINDLEY SULLIVAN
382 South Bluff Street, Suite 150
St. George, Utah 84770
Attorneys for Appellee

Rodney J. Yanke
6967 East Bonanza Road
Las Vegas, Nevada 89110
Appellant, *pro se*

**FILED
UTAH APPELLATE COURTS**

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BRINDLEY SULLIVAN
382 South Bluff Street, Suite 150
St. George, Utah 84770
Attorneys for Appellee

Rodney J. Yanke
6967 East Bonanza Road
Las Vegas, Nevada 89110
Appellant, *pro se*

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TABLE OF AUTHORITIES

None.

STATUTES, RULES, CONSTITUTIONAL PROVISIONS

Statutes:

Utah Code Ann. § 30-1-4.5 4

Rules:

Utah Rules of Civil Procedure 15 6

Constitutional Provisions:

None applicable to this appeal

ARGUMENT

I. The Parties' Relationship Was a Common Law Marriage.

Appellant argues that Appellee's claim of common law marriage is time barred by Utah Code Ann. § 30-1-4.5(2), which requires that an action to establish a common law marriage must be commenced within one year following the termination of the relationship. Appellee acknowledges that she did not include a claim for the establishment of a common law marriage in her petition for divorce. At that time she considered (and still considers) the parties' September 28, 2001, marriage in Mexico a legal and valid marriage. However, during the progress of the case, the alternative theory of common law marriage developed in response to Appellant's efforts to undermine the parties' marriage. Although the petition was not formally amended to assert the common law claim, the parties litigated the claim and the trial court considered it in its findings of fact and conclusions of law.

On May 19, 2006, the parties entered into a postnuptial agreement that outlined the terms on which they would enter into a legal separation. Appellee had one year from that date in which to assert a claim to establish a common law marriage. Appellee filed her petition for divorce on September 7, 2006, well within the one year period. Although the common law claim was not asserted at that time, it was litigated by the parties and considered by the trial court in its

findings of fact. Pursuant to Rule 15(b) of the Utah Rules of Civil Procedure, the common law issue should be treated in all respects as if it had been raised in the pleadings.

Rule 15(b) of the Utah Rules of Civil Procedure states:

(b) Amendments to Conform to the Evidence.

When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

Rule 15(b)

The issue of common law marriage was tried without objection. Appellee presented extensive and detailed evidence on that issue. Appellant presented contrary evidence. The trial court considered and ruled on that issue. Even though the pleadings were never formally amended to include the common law issue, “failure to so amend does not affect the result of the trial of these issues.” Rule 12(c) provides that an amended pleading relates back to the date of the original pleading. Therefore, Appellee has asserted the claim to establish a common law marriage within one year of the termination of that relationship.

CONCLUSION

For the reasons stated in her brief, Appellee requests that this court affirm that the parties' property settlement agreement is valid and enforceable. Appellee also requests that this court reverse the trial court's ruling that the parties' September 28, 2001 marriage was not a legal marriage.

DATED this 10th day of August, 2010

BRINDLEY SULLIVAN



Brent M. Brindley

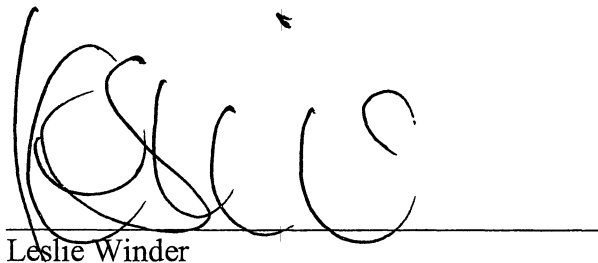
Attorneys for Petitioner and Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 2010, I served a copy of the foregoing **REPLY BRIEF OF APPELLEE** on each of the following by depositing a copy thereof in the U.S. Mail, postage prepaid:

Rodney J. Yanke
6967 East Bonanza Road
Las Vegas, Nevada 89110
Appellant, *pro se*
Two (2) copies

Utah Court of Appeals
450 South State Street, 5th Floor
Post Office Box 140230
Salt Lake City, Utah 84114-0230
Original and 7 copies



Leslie Winder