

1998

# Margaret Lucille Lent v. Norman Floyd Lent : Reply Brief of Appellant

Utah Court of Appeals

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G. Michael Westfall; Gallian, Westfall, Wilcox & Wright; Attorney for Plaintiff/Appellant.

LaMar J Winward; Attorney for Defendant/Appellee.

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TICKET NO.

COURT OF APPEALS

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## **SUMMARY OF ARGUMENTS**

Defendant contends that the issue of residency, as it relates to jurisdiction, should not be considered by the Court because that issue was not specifically identified in the docketing statement or notice of appeal. However, both the docketing statement and the notice of appeal address the issue of jurisdiction, which is the issue on appeal. The difference between the docketing statement and the brief is that Plaintiff subdivided the issue of jurisdiction into two parts for purposes of argument in the brief. Both arguments concerning jurisdiction have been raised throughout this litigation. Defendant had ample notice of the issues presented by Plaintiff in her brief.

Even if Plaintiff were required to subdivide the jurisdiction issue in her docketing statement, that would not be fatal error with regard to the residency issue. State and federal case law proscribe that the merits of an appeal be heard and not dismissed because of technical defects. Defendant makes no claim that the alleged defect in the docketing statement unfairly prejudiced him for purposes of responding to the issues on appeal. Therefore, this Court should not deny Plaintiff the opportunity to argue the merits of her appeal.

Finally, with regard to the docketing statement issue, if the Court determines that the docketing statement is defective, Plaintiff requests leave of the Court to amend the docketing statement to subdivide the jurisdictional issue in order to separately identify the issue as it relates to residency and to the location where the cause of action arose.

Defendant's assertion that Utah's long-arm statute does not extend jurisdiction over him is erroneous. Defendant's repeated acts, on record in this case, clearly fall within the scope of the enumerated activities in Utah's long-arm statute. Further, his long history of both business

and marital contacts in the state of Utah make it reasonable and fair for him to foresee being brought into court in this state.

## **REPLY TO APPELLEE’S ARGUMENTS**

**I. WHETHER THE TRIAL COURT HAD IN PERSONAM JURISDICTION BECAUSE THE PARTIES RESIDED IN THE MARITAL RELATIONSHIP, WITHIN THE STATE OF UTAH, IS AN ISSUE PROPERLY BEFORE THIS COURT AND SHOULD BE HEARD ON APPEAL.**

**A. Rule 9 of the Utah Rules of Appellate Procedure.**

Rule 9 of the Utah Rules of Appellate Procedure governs the contents of the docketing statement. Subsection c(5) directs, in part, that the docketing statement include “the issues presented by the appeal, expressed in the terms and circumstances of the case, but without unnecessary detail.” It further directs that “the questions should not be repetitious.” Utah R. App. P. 9c(5). Plaintiff complied with both the letter and the spirit of Rule 9. The rule discourages unnecessary detail or repetition because “the docketing statement is not meant to be a brief or to present arguments.” Utah R. App. P. 9(b). Nor is it intended for use by the Appellee, but by the Court in processing the appeal. Nelson v. Salt Lake City, 919 P.2d 568, 572 (Utah 1996).

The issue of jurisdiction was argued below and subsequently included in Plaintiff’s docketing statement and brief for this appeal. While she subdivided the issue of jurisdiction into two separate questions for purposes of the brief, she did not raise any new issue. In fact, Plaintiff’s arguments in favor of exercising jurisdiction over Defendant have remained the same throughout this litigation. This accounts for the actual reference to the residency issue in the docketing statement itself. (See EXHIBIT R1)

The notice of appeal states that “the appeal is taken from such part of the Judgment that dismisses *all issues* except for the issue of divorcing the parties themselves. (See EXHIBIT R2) This logically includes the issue of residency argued before the trial court. It follows that Defendant had more than adequate notice as to the arguments raised on appeal. Accordingly, Defendant has not been unduly prejudiced, nor has he claimed such.

**B. Any alleged defect in the docketing statement does not warrant this Court dismissing the issue of residency as a basis for jurisdiction.**

Even if Rule 9 required that Plaintiff specifically include the residency argument in the docketing statement, this would not preclude the Court from hearing that issue on appeal. Subsection (b) of Rule 9 directs that the docketing statement is intended for use by the Court in assigning, classifying, prioritizing and calendaring cases. Accordingly, any deficiencies in the docketing statement would be raised by the Court and not by the Defendant.

To deny Plaintiff the opportunity to argue the merits of her appeal based on Defendant’s dissatisfaction with the docketing statement would run contrary to well established policy and case law. Both the Utah Supreme Court and the Tenth Circuit have ruled on this issue. In particular, the Utah Supreme Court resolved that even where an appellant failed to list all of the issues for review in his docketing statement, it did not affect his right to raise the issues on appeal since they were thoroughly discussed in his brief. Nelson v. Salt Lake City, 919 P.2d 568 (Utah 1996).

Similarly, the Tenth Circuit acknowledged the policy regarding defects in procedure and the effect of these defects on an appeal. That court announced that, while practitioners are expected to carefully comply with procedural rules, “case law interpreting those rules is founded upon a policy which favors deciding cases on the merits as opposed to dismissing them because

of minor technical defects.” Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co., 119 F.3d 847 (10<sup>th</sup> Cir. 1997). Plaintiff should be allowed to argue the merits of her appeal despite Defendant’s dissatisfaction with the form of her docketing statement.

Finally, if there is a defect in the docketing statement, Plaintiff requests that this Court exercise its authority under Rule 2 of the Utah Rules of Appellate Procedure to permit Plaintiff to amend the docketing statement to correct that defect.

**II. UNDER THE TWO-PART INQUIRY IN *KAMDAR*, THE TRIAL COURT HAD PERSONAL JURISDICTION OVER THE DEFENDANT.**

Defendant contends that under the two-part inquiry, outlined in Kamdar & Company v. Laray Company, 815 P.2d 245 (Ut. App. 1991), Utah lacks jurisdiction over him. Yet, Defendant has purposefully availed himself of activities and privileges that satisfy the requirements for asserting jurisdiction under Utah’s long-arm statute. Consequently, it is not unreasonable for him to foresee being hailed into court here.

Defendant, in his brief, properly identified the two-step analysis in Kamdar. First, claims against the person must arise from the activities enumerated in UCA §78-27-24, and second, the defendant’s contacts must be sufficient to allow jurisdiction to be exercised without violation of due process. Kamdar & Company, 815 P.2d at 248. However, Defendant failed to mention that, as recently as 1998, the Legislature amended §78-27-24, and replaced the language “arising from” with “arising out of or related to,” effectively expanding the basis for exercising the State’s jurisdictional powers. Accordingly, Defendant’s repeated activities within Utah, including work, (R. at 27-28), membership in a Utah union, (R. at 29-30), hospitalization, (R. at 29), use of alcohol, (R. at 106 pages 13-17), and temporary residence for extended periods of time in the marital relationship, (R. at 28-29), fit squarely within the enumerated acts giving rise



to personal jurisdiction under §78-27-24. The clear trend, as evidenced by the Legislature's recent amendment, is to favor the exercise of jurisdiction over nonresidents in cases such as this one.

Utah's exercise of jurisdiction over Defendant will not violate the due process clause of the U.S. Constitution. Defendant is not deprived of due process by being hailed into court in a state in which he purposefully and repeatedly worked, stayed, and visited over a number of years. His work activities alone, coupled with his membership in the local union, make it foreseeable that he might be hailed into court within the State of Utah. Similarly, maintaining an action in the same state will not place an undue hardship on the Defendant. Contrary to Defendant's argument, it makes no difference, for purposes of §78-27-24, that his assets and actual domicile are in the state of Idaho. Utah's long-arm statute was intended to apply in precisely this situation. Finally, Defendant urges this Court to adopt a definition of "reside within the marital relationship" under §78-27-24 that mirrors the definition of residency under §30-3-1(2). However, §30-3-1(2) requires actual and bona fide residency for purposes of exercising subject matter jurisdiction, whereas, §78-27-24 requires only that the a person "resided within the marital relationship, within this state" for purposes of establishing the minimum contacts necessary for in personam jurisdiction over non-residents. Subject matter jurisdiction and in personam jurisdiction are two distinct forms of jurisdiction, requiring different standards. They are set forth in two different sections of the Code. The definition of residency, in one section, can not be adopted for purposes of the other, without effectively changing the law as originally drafted. Had the Legislature intended that a non-resident, in a divorce proceeding, be an actual and bona fide resident, it could have drafted or subsequently amended the language to that effect.

Since it has not, Defendant's request that this Court adopt the same definition of residency for both sections should be denied.

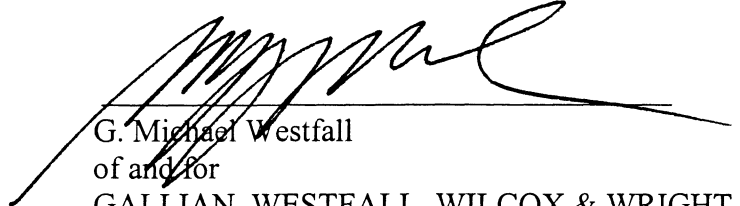
### **CONCLUSION**

Plaintiff complied with Rule 9. Defendant had adequate notice of the issues on appeal; the issues have not changed from those mentioned to the court below. Defendant is attempting to dispose of Plaintiff's ability to argue the merits of her appeal based on a technicality. Nowhere in his response does Defendant claim that the alleged deficiency in the docketing statement unfairly prejudices his ability to respond to the issues. Defendant does not cite to any case law on point that indicates that an issue is deemed to have been waived based on an appellee's dissatisfaction with the docketing statement. Therefore, the issue of residency, as it pertains to jurisdiction, should be heard and decided by this Court.

Defendant's analysis of Utah law regarding long-arm jurisdiction is erroneous because Defendant's activities fall well within the scope of enumerated acts justifying the exercise of personal jurisdiction over non-residents. Likewise, Defendant's numerous contacts with the State make it reasonable for him to expect to be hailed into a Utah court. Accordingly, the trial court would not violate Defendant's due process rights by exercising personal jurisdiction over him. This case fits squarely within the activities contemplated to give rise to long-arm jurisdiction under UCA §78-27-24.

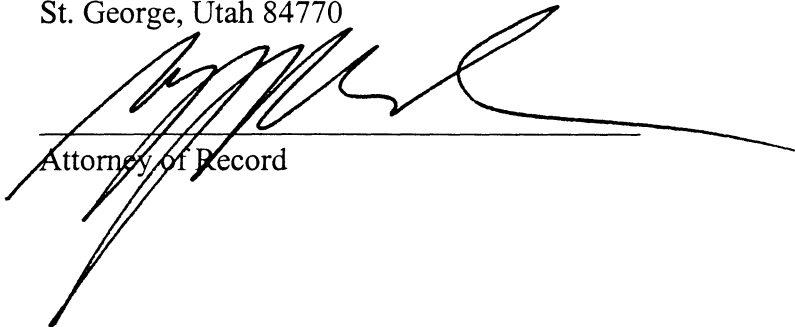
Based on the foregoing, the trial court's Order dismissing the Plaintiff's Complaint should be set aside and the Plaintiff should be permitted to proceed to a trial on the merits in the State of Utah to resolve the remaining issues between the parties.

DATED this 14 day of June, 1999.

  
G. Michael Westfall  
of and for  
GALLIAN, WESTFALL, WILCOX & WRIGHT

I, G. Michael Westfall, certify that on May , 1999, I served two copies of the attached Reply Brief of Appellant upon LaMar J. Winward, the counsel for the Appellee in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

LaMar J. Winward  
150 North 200 East, #204  
St. George, Utah 84770

  
Attorney of Record

## **APPENDIX**

**COPY**

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59 South 100 East  
St. George, UT 84770  
(435) 628-1682

Attorney for Plaintiff

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

---

MARGARET LUCILE LENT,	)	
	)	<b>DOCKETING STATEMENT</b>
Plaintiff,	)	
	)	
vs.	)	
	)	
NORMAN FLOYD LENT,	)	Civil No. 981568-CA
	)	Judge
Defendant.	)	

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Pursuant to Rule 9, Utah Rules of Appellate Procedure, Plaintiff/Appellant Margaret Lucille Lent, hereby submits her Docketing Statement.

1. **DATE OF ENTRY OF JUDGMENT OR ORDER APPEALED FROM:**

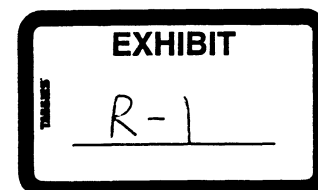
Order of Dismissal, entered August 3, 1998

2. **NATURE OF POST-JUDGMENT MOTION(S) AND DATE(S) FILED:**

There have been no post-judgment motions filed.

3. **DATE OF FILING OF NOTICE OF APPEAL:**

The Notice of Appeal was filed on September 1, 1998.



4. **JURISDICTION:**

The Utah Court of Appeals has jurisdiction over this appeal pursuant to §78-2a-3(h), Utah Code Annotated 1953, as amended.

5. **NAME OF TRIAL COURT OR AGENCY:**

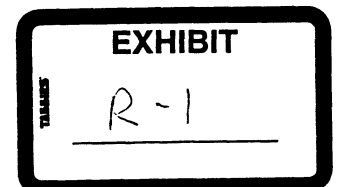
This appeal is from an Order of Dismissal entered by the Fifth Judicial District Court in and for Washington County, State of Utah, the Honorable James L. Shumate, presiding. Said Order of Dismissal dismissed all of Plaintiff's claims in a divorce proceeding except her request that the marriage be terminated. The Fifth District Court ruled that, although it had jurisdiction over the marriage and could therefore dissolve the same, it had no jurisdiction over Defendant.

6. **STATEMENT OF FACTS:**

Plaintiff filed a Verified Complaint for Divorce in this matter on May 14, 1997. Defendant filed a Motion to Dismiss for Lack of Jurisdiction on or about September 10, 1997, claiming that he had not resided in Utah with Plaintiff during their marriage.

In response to Defendant's Motion to Dismiss, Plaintiff alleged that Defendant had lived and worked in Utah on several occasions during the marriage while he worked on projects in this state. Plaintiff also alleged that one of the differences between the parties that resulted in the action for divorce was Defendant's marital infidelity which occurred in Utah while he was working and living in this state.

Plaintiff also claimed that Defendant had stayed at her residence in Utah on several occasions since she moved here in 1992, but she acknowledged they had not shared the same bed during those stays.



At a hearing held on November 10, 1997, the Trial Court denied the Motion to Dismiss.

As he was permitted to do, Defendant renewed his Motion to Dismiss on June 16, 1998, this time supported by his Affidavit, claiming that he had not engaged in any extra-marital relationship within the State of Utah.

Plaintiff responded to this Second Motion to Dismiss by acknowledging that she could not prove that Defendant's acts of infidelity occurred within the borders of the State of Utah, but maintained that he was living in Utah when the infidelity occurred.

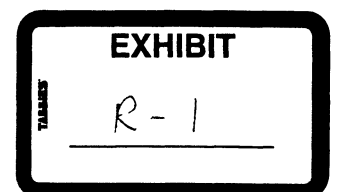
At the hearing on Defendant's Motion to Dismiss, which was combined with a hearing on Plaintiff's Motion to Bifurcate, Plaintiff testified that grounds for the divorce included differences arising out of Defendant's excessive use of alcohol and that he had committed those acts in Utah. The Court granted the Motion to Bifurcate, finding that it had jurisdiction over the marriage, but also granted the Motion to Dismiss, ruling that Defendant did not have sufficient contacts with Utah for the Court to determine any issues other than dissolution of the marriage. This appeal followed that Order of Dismissal.

**7. ISSUE FOR REVIEW AND STANDARD OF REVIEW:**

**A. ISSUE:**

Did the Trial Court err by ruling that Utah does not have jurisdiction over Defendant where acts that created the irreconcilable differences that exist between the parties and which were relied on in granting the Decree of Divorce occurred in the State of Utah?

**B. STANDARD OF REVIEW:**



The standard of review of this appeal is *de novo* because the issue of jurisdiction is one of law. See Liska v Liska, 902 P.2d 644, 646-47 (Utah App. 1995); Holm v Smilowitz, 840 P.2d 157, 160 (Utah Ap 1992).

8. **DETERMINATION OF CASE BY SUPREME COURT:**

Not applicable--the Court of Appeals has original appellate jurisdiction over this appeal.

9. **DETERMINATIVE LAW:**

U.C.A. §78-27-24(6)

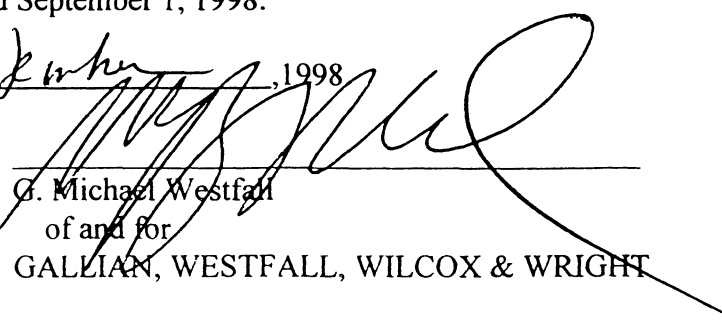
10. **RELATED APPEALS:**

None.

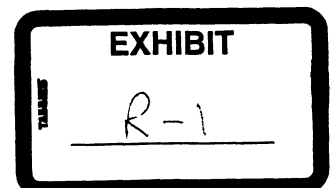
11. **ATTACHMENTS:**

- a. Bifurcated Decree of Divorce filed August 11, 1998.
- b. Order of Dismissal filed August 3, 1998.
- c. Findings of Fact and Conclusions of Law in Re: Bifurcated Decree of Divorce, filed August 11, 1998.
- c. Notice of Appeal filed September 1, 1998.

DATED this 22d day of September, 1998

  
G. Michael Westfall  
of and for  
GALLIAN, WESTFALL, WILCOX & WRIGHT

Attorney for Defendant/Appellant





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FILED  
FIFTH JUDICIAL DISTRICT COURT  
'98 SEP 1 PM 4 01  
WASHINGTON COUNTY  
BY \_\_\_\_\_

Attorney for Plaintiff/Appellant

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR  
WASHINGTON COUNTY, STATE OF UTAH

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MARGARET LUCILE LENT,	)	
	)	<b>NOTICE OF APPEAL</b>
Plaintiff/Appellant,	)	
	)	
vs.	)	
	)	
NORMAN FLOYD LENT,	)	Civil No. 974500368
	)	Judge James L. Shumate
Defendant/Respondent.	)	

---

Notice is hereby given that Plaintiff/Appellant, Margaret Lucille Lent, by and through her attorney of record, G. Michael Westfall of the law firm of GALLIAN, WESTFALL, WILCOX & WRIGHT, hereby appeals to the Utah Court of Appeals the final Order of Dismissal of the Honorable James L. Shumate entered in this matter on August 3, 1998. The appeal is taken from such part of the Judgment that dismisses all issues except for the issue of divorcing the parties themselves.

DATED this 1st day of September, 1998.

GALLIAN, WESTFALL, WILCOX & WRIGHT

  
\_\_\_\_\_  
G. Michael Westfall

EXHIBIT

R-2