

1999

## Sonia Kelley v. Wayne Kelley : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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SONIA KELLEY,	)	
	)	Appellate Court No. 990711-CA
Petitioner and Appellee,	)	Consolidated with
vs.	)	Appellate Court No. 990723-CA
WAYNE KELLEY,	)	Priority No. 15
	)	
Respondent/Appellant.	)	

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**REPLY BRIEF OF APPELLANT**

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Appeal from a Decree of Divorce Consolidated with an Appeal from an  
Order for Contempt and Ruling on Pending Motions Entered by the  
Second Judicial District Court for Davis County, State of Utah  
Honorable Rodney S. Page

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.Julia D'Alasandro

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REPLY BRIEF OF APPELLANT

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ARGUMENT

**I. UTAH CODE ANN. § 30-1-4.5(2) (1998) DOES NOT VIOLATE THE OPEN COURTS CLAUSE OF THE UTAH CONSTITUTION.**

The trial court in this case held that the one-year requirement of Utah Code Ann. § 30-1-4.5(2) (1998) did not violate article 1, section 11, of the Utah Constitution (the “open courts” clause). In her brief, appellee argues that the trial court was wrong and that subsection 2 violates the open courts clause.

Article 1, section 11, provides as follows:

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.

The trial court, in determining whether the statute at issue violated the open courts clause, first asked the question whether the nature of the right at issue was “of a type that its destruction may be addressed with reference to the open courts

provision.” Ruling on Plaintiff’s and Defendant’s Objections to Commissioner’s Recommendations dated January 28, 1998, at 12. (Addendum A, Brief of Appellant.) The trial court noted that, in general, the rights protected by article 1, section 11, were rights existing at common law at the time of statehood when the Utah Constitution was adopted. The trial court found that there was no cause of action for common law marriage at the time the Utah Constitution was adopted. *Id.* at 13.

The trial court cited *Whyte v. Blair*, 885 P.2d 791 (Utah 1994), for the proposition that: “Prior to 1987, Utah never recognized common law marriages; indeed, such marriages were expressly prohibited.” *Id.* at 793 (citations omitted). The court said that, because no right to common law marriage existed at the time of the adoption of the Utah Constitution, the open courts clause could not be violated by a time limitation on the determination of common law marriage. *Id.*

In her brief, appellee points out that the Utah Supreme Court has broadened the rights protected by article 1, section 11. In *Day v. State Ex Rel. D. of Public Safety*, 980 P.2d 1171 (Utah 1999), the court said: “First, the rights protected by Article 1, section 11 are not defined by those causes of action that existed in 1896.” *Id.* at 1183. The court added: “The determination of whether a person who is injured in ‘person, property, or reputation’ has been denied a remedy by due course of law should be decided by reference to the general law of rights and remedies at the time that the Legislature abrogates a remedy.” *Id.* at 1184.

Notwithstanding the fact that the rights protected by article 1, section 11, are not limited to those existing at the time of the adoption of the Utah Constitution, the open courts clause applies by its terms to remedies for injury done to person, property, or reputation. The “right” at issue here is not a right to recover for injury to person, property, or reputation; rather, it is the right to have a common law marriage recognized. By its own terms, the open courts clause does not apply to such a right.

Moreover, by enacting subsection 2 of section 30-1-4.5, the Utah Legislature did not abrogate an existing right. As the trial court noted, there was no right to have a common law marriage adjudicated prior to the passage of section 30-1-4.5. The legislature created the right to have a common law marriage recognized and imposed a time limitation on that right at the same time in the same statute. Since the legislature was creating a new right, nothing in the open courts clause prohibits the legislature from imposing a time limitation on the adjudication of the right.

All of the cases that appellee relies on deal with the abrogation of previously existing rights. For example, *Currier v. Holden*, 862 P.2d 1357 (Utah App. 1993), involved the right to petition for a writ of habeas corpus. As the court noted, the writ of habeas corpus occupies an “essential niche in the Anglo-American common law and is the only common law writ that received explicit protection in the United States and Utah Constitutions.” 862 P.2d at 1376 (citations omitted) (concurring opinion of Judge Orme). The availability of the writ, the court said, “provides ‘one of the most important of all judicial tools for the protection of individual liberty.’” *Id.* As the court said in *Currier*, the nature of the individual right impacted by a statute influences the level of scrutiny which a court should employ in examining that legislation. Generally, “a court will exercise stricter scrutiny in evaluating measures that encroach upon civil liberties than it will with respect to statutes that impact what can be characterized as only economic interests.” 862 P.2d at 1364 (citations omitted).

The right, if one exists, to have a common law marriage established is not found in the United States or the Utah Constitution, nor was it a part of the common law in Utah before 1987. Thus, the limitation of the time for adjudication of common law marriage imposed by the legislature when it created that right does not deserve strict scrutiny.

On the other hand, in *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 1999 UT 18, 974 P.2d 1194, the court held that the builders statute of repose did not violate article 1, section 11, although, in some circumstances, it cut off entirely the right to recover for certain injuries. The court applied the two-part test set forth in *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985):

First, section 11 is satisfied if the law provides an injured person an effective and reasonable alternative remedy "by due course of law" for vindication of his constitutional interest. The benefit provided by the substitute must be substantially equal in value or other benefit to the remedy abrogated in providing essentially comparable substantive protection to one's person, property, or reputation, although the form of the substitute remedy may be different. . . .

Second, if there is no substitute or alternative remedy provided, abrogation of the remedy or cause of action may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.

974 P.2d at 1198 (citation omitted).

By enacting the common law marriage statute, the legislature did not take away a previously existing right by imposing the one-year requirement. The legislature created the one-year requirement at the same time it created the right to have a common law marriage. Thus, the strict scrutiny requirements of the open courts clause do not apply.

Subsection 2 of Utah Code Ann. § 30-1-4.5 does not violate the open courts clause of the Utah Constitution.

## **II. THE UTAH SUPREME COURT'S HOLDING IN *IN RE MARRIAGE OF GONZALEZ*, 2000 UT 28, 385 UTAH ADV. REP. 89, DOES NOT APPLY TO THIS CASE.**

On January 28, 2000, the Utah Supreme Court issued its decision in *In re Marriage of Juanita Gonzales v. Martin Briceno*, 2000 UT 28, 385 UTAH ADV. REP. 89. In that case, the court dealt with the interpretation of the one-year limitation

period set forth in Utah Code Ann. § 30-1-4.5(2) (1998). Gonzales had filed a petition for adjudication of marriage. Gonzales and Briceno had lived together, and Briceno had set fire to Gonzales' home. Briceno had insurance through Metropolitan Property and Casualty Insurance Company. If Gonzales were Briceno's spouse at the time of the fire, she would have a claim under the Metropolitan policy. Metropolitan was allowed to intervene in the action.

The relationship between Gonzales and Briceno had terminated on October 21, 1995. On April 10, 1997, Metropolitan moved for summary judgment on the grounds that Gonzales had not obtained a judgment adjudicating her marriage within one year of its termination as required by Utah Code Ann. § 30-1-4.5(2). The trial court granted Metropolitan's motion for summary judgment based on Gonzales' failure to comply with the statutory time limit.

On appeal, the Utah Supreme Court considered whether subsection two of section 30-1-4.5 should be interpreted to require an adjudication of marriage within one year, or only the filing of a petition for adjudication of marriage within one year. The court concluded that subsection required only the filing of a petition for adjudication of marriage. Although the parties had raised constitutional issues, the court did not reach those issues, based on its interpretation of the statute.

In *Gonzales*, Metropolitan had argued that *Bunch v. Englehorn*, 906 P.2d 918 (Utah App. 1995), required that a petition for adjudication of marriage be brought and decided within one year of the relationship's termination. In *Bunch*, the parties had separated in August of 1990. In May of 1991, Bunch filed a divorce complaint against Englehorn. The trial court dismissed the complaint in June of 1993, on the grounds that no order was obtained establishing the marriage within the required time limit of one year. The Court of Appeals affirmed, holding that the order establishing the marriage must be obtained within one year of the termination of the relationship. In *Gonzales*, the Supreme Court distinguished *Bunch*: "We agree with Ms. Gonzales

that her case is clearly distinguishable inasmuch as it involves a petition to establish a marriage, not to obtain a divorce.” *In re Marriage of Gonzales*, 387 UTAH ADV. REP. at 95, fn. 7.

In this case, appellee did not file a petition for adjudication of marriage. Rather, in July of 1996, appellee filed a pleading entitled “Divorce Complaint.” That complaint alleged in the alternative that the original decree of divorce entered in July of 1994 had been fraudulently obtained, or that the parties were man and wife pursuant to Utah Code Ann. § 30-1-4.5. R. at 126, ¶ 3, and 127, ¶ 5.

Because this action was founded on a divorce complaint, rather than a petition for adjudication of marriage, it is distinguishable based on the language of footnote 7. *Gonzales* does not require that the trial court’s decision be affirmed.

#### CONCLUSION

Subsection 2 of Utah Code Ann. § 30-1-4.5 (1998) does not violate the open courts clause of the Utah Constitution, because it does not abrogate an existing right, nor does it modify or impinge upon a constitutionally guaranteed right.

The court’s holding in *In re Marriage of Gonzales*, 387 UTAH ADV. REP. 89, does not apply in this case, because this case does not involve a petition for adjudication of marriage.

This case should be reversed and remanded to the trial court.

DATED this 15 day of February, 2000.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT** to be mailed to the following, postage prepaid, this 15 day of February, 2000:

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