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IN THE UTAH SUPREME COURT

INA MARIE JOHNSON, Petitioner and Appellee, vs. NELDON PAUL JOHNSON, Respondent and Appellant.	**SUPPLEMENTAL BRIEF** **OF APPELLANT** **Case No. 20080274** **District Ct. No. 004401468**

APPELLANT'S SUPPLEMENTAL BRIEF

Appeal from a final order Fourth District Court, Utah County,

The Honorable Steven L. Hansen, Judge, Presiding.

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Respondent, Neldon P. Johnson, submits this supplemental brief:

I. Background

Respondent and Petitioner lived together for over thirty years. The parties never married. While cohabiting Respondent asked Petitioner to marry him twice. Both times she refused. The last refusal was a few months before Petitioner filed for divorce on July 20, 2000, alleging the parties were married May 3, 1964 in Arizona. Petitioner (as opposed to her attorney) signed the Complaint. Respondent's attorney, J. Bryan Dexter, filed an Answer admitting the marriage. Both parties indisputably knew they had never married. When Respondent answered Petitioner's divorce Complaint he believed the parties were nevertheless common law husband and wife because the parties had cohabited for many years. For this reason Respondent thought the lack of a marriage ceremony was of no legal significance and thus he admitted he was married and proceeded, prior to filing his Motion to Vacate, as though he and Petitioner were husband and wife. See Respondent's Affidavit in Support of Motion to Vacate (R. at 1909 - 1913). When he learned in about August 2007 that time alone was not enough to create a valid marriage, Respondent promptly (on September 18, 2007) filed a *Motion to Vacate Decree of Divorce and Amended Decree of Divorce and Motion to Dismiss for Want of Subject Matter Jurisdiction* ("Motion to Vacate"). The trial court denied Respondent's Motion to Vacate.

The trial court found it was undisputed the parties were never married and that the trial court lacked subject matter jurisdiction, but ruled Respondent was judicially estopped from asserting lack of jurisdiction because Petitioner had relied to her detriment on

Respondent's admission there was a marriage. The trial court relied on *Caffall v. Caffall*, 5 Utah 2d 407, 410 (1956) as "solid precedent" because Respondent changed his position more than one year after the parties' separation. Petitioner was now prevented from solemnizing the marriage relationship under Utah Code Ann., §30-1-4.5. The trial court reasoned:

> Respondent maintained his position that there was a legal marriage throughout the divorce proceedings and up until this point, six years later in the litigation. The respondent--excuse me--petitioner, has relied to her detriment on respondent's prior position that there was a legal marriage.
>
> Had he raised this issue at the outset, she could have proven the common law marriage and requested an annulment and she was precluded from doing that to her detriment based on the position he took.

R. at 2145:18.

Respondent briefed the issues raised by his appeal in his Opening Brief and Reply Brief, but welcomes the opportunity to address issues of first impression and specific issues raised by the *Caffall* case in the court below.

II. Can the Doctrine of Judicial Estoppel Overcome a Lack of Necessary Subject Matter Jurisdiction?

The general Utah rule is that subject matter jurisdiction cannot be conferred on the court by consent or waiver. *Transworld Systems, Inc. v. Robison*, 796 P.2d 407 (Utah App. 1990) 796 P.2d 407, 409. The majority rule in other jurisdictions is that subject matter jurisdiction cannot be conferred by consent, waiver **or estoppel**. See *In Re Marriage of Ben-yehoshua*, 91 Cal.App.3d 259, 263 (1979) 154 Cal.Rptr. See rule in other states, e.g.[1]

[1] *Moore v. City of Leeds*, CR-06-0760, at 16, 22 (Ala.Crim.App. 2-1-2008); *Swichtenberg v. Brimer*, 171 Ariz. 77 (App. 1991) 828 P.2d 1218; *Adoption House, Inc. v. A.R.*, 820 A.2d 402, 405 (Del.Fam.Ct. 2003) *Gainous v. Gainous*, 219 S.W.3d 97, 105 (Tex.App. [1st] 2006); *Guminski v. Vet. Med. Bd.*, 201 Ariz. 180, 184 (App. 2001); *Vann v. Cook*, 989 So.2d 556

Caffall is the only Utah case found by Respondent where subject matter jurisdiction, otherwise lacking, was satisfied or overcome by estoppel. Conversely, other Utah courts have held just the opposite of *Caffall.* For instance, in *Barton v. Barton*, 2001 UT App 199, 29 P.3d 13, the Utah Court of Appeals stated:

> . . . ."A court's initial inquiry should always be to determine whether it has jurisdiction to determine a controversy." [Citations omitted.]
>
> * * * *
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> . . . However, "`lack of subject matter jurisdiction cannot be stipulated around nor cured by a waiver. A lack of subject matter jurisdiction can be raised at any time and when subject matter [jurisdiction] does not exist, neither the parties nor the court can do anything to fill that void.'" (Citations omitted.)
>
> . . . In addition, subject matter jurisdiction under the UCCJA and the PKPA cannot be vested by agreement of the parties, . . . and such jurisdiction cannot be conferred on the court by a party's failure to interpose a timely objection to the court's assumption of jurisdiction. However, "`lack of subject matter jurisdiction cannot be stipulated around nor cured by a waiver. A lack of subject matter jurisdiction can be raised at any time and when subject matter [jurisdiction] does not exist, neither the parties nor the court can do anything to fill that void.'"

Barton at 16, emphasis added.

In *State v. Norris*, 2004 UT App 267, 97 P.3d 732, the Utah Court of Appeals said:

(Ala.Civ.App. 2008); *Green v. State*, CR 08-903 (Ark. 3-5-2009); *Adoption House, Inc. v. A.R.*, 820 A.2d 402 (Del.Fam.Ct. 2003); *Customers Parking, Inc. v. District of Columbia*, 562 A.2d 651 (D.C. 1989); *Langel v. Carroll Cty.*, 00-1669 (Iowa App. 8-28-2002); *Bd. Of Cty. Comm'rs. v. Park City*, 100,157 (Kan.App. 4-3-2009); *Coffey v. Kehoe Rock and Stone*, 270 S.W.3d 902, 904 (Ky.App. 2008); *Lee V. Mt. Ivy Press, L.P.*, 63 Mass. App. Ct. 538, 547-48 (2005); *In Re Petition of Rogers*, 243 Mich. 517, 522 (1928), 220 N.W. 808; *State ex rel. Moore v. Sharp*, 151 S.W.3d 104, 112 (Mo.App.S.D. 2004); *MBNA America Bank v. Hansen*, 16 Neb. App. 536, 539-40 (2008) 745 N.W.2d 609; *Garcia v. Gutierrez*, 2008-NMCA-116144 N.M. 761, 766, 192 P.3d 275; *In Matter of K.J.L.*, COA08-284-2, opinion unpaginated (N.C.App. 12-16-2008) 670 S.E.2d 269; *Shepard v. Lopez-Barcenas*, 200 Or. App. 692, 697 (2005)116 P.3d 254; *In Re Marriage of Rosen*, 33437, opinion unpaginated (W.Va. 6-26-2008); *Kennedy v. DHSS*, 199 Wis.2d 442, 449 (Ct.App. 1996) 544 N.W.2d 917; *State v. Corrado*, 78 Wn. App. 612, 615 (1995) 898 P.2d 860

> ¶ 5 "Subject matter jurisdiction is the power and authority of the court to determine a controversy and without which it cannot proceed." *Thompson v. Jackson*, 743 P.2d 1230, 1232 (Utah Ct.App. 1987) (per curiam). Subject matter jurisdiction "can neither be waived nor conferred by consent of the accused. Objection to the jurisdiction of the court over the subject matter may be urged at any stage of the proceedings, and the right to make such an objection is never waived." *James v. Galetka*, 965 P.2d 567, 570 (Utah Ct.App. 1998) (quotations and citations omitted). When subject matter jurisdiction is an issue, "[i]t is the duty of this court to `satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.'" *EEOC v. Chicago Club*, 86 F.3d 1423, 1428 (7th Cir. 1996) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 79 L.Ed. 338 (1934)).[fn2]

The tension created between *Caffall* and other Utah authority was pointed out in the body of the opinion and at [fn5] and [fn8] in *Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335, 1338 (Utah App. 1991), 815 P.2d 1335, as follows:

> . . . Furthermore, subject matter jurisdiction cannot be conferred upon a court by consent or waiver, and a judgment can be attacked for lack of subject matter jurisdiction at any time. . . .
>
> * * * *
>
> [fn5] Caffall seems inconsistent with the generally announced and fundamental legal proposition that "[s]ubject matter jurisdiction is the authority and competency of the court to decide the case," without which, the court may not validly act. Vijil, 784 P.2d at 1132 (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 (1969)). But see Note 8.
>
> * * * *
>
> [fn8] We are concerned that the outcome of this case poses the potential for future mischief, which mischief lies in the continued viability of Caffall, and that case's evident holding that when there is no valid marriage, a trial court lacks subject matter jurisdiction to enter a divorce decree. . . . Therefore, it appears that at this time we can do no more than question Caffall. The problems we see with Caffall will remain unresolved until dealt with by the supreme court.

Van Der Stappen at 1337, 1340.

Respondent agrees with *Van Der Stappen* that *Caffall* is not good law and urges this Court to find that the better reasoned rule for Utah and certainly the majority rule in other jurisdictions is that subject matter jurisdiction cannot be conferred by consent, waiver **or estoppel**. For further statements of the Utah rule on subject matter jurisdiction see e.g.[2]

III. Issues of First Impression Raised by *Caffall, supra*.

Even if the Court decides to uphold *Cafall,* the issue of conferring subject matter jurisdiction or, better stated, overcoming a lack of essential subject matter jurisdiction by invoking the equitable doctrine of judicial estoppel, is still an issue of first impression in Utah under the facts present here. Unlike *Caffall*, it is undisputed that **both** parties mislead the trial court about their marital status. In *Caffall*, only Vern Caffall misled the Court. The question of whether Petitioner can rely on the Respondent's acquiescence in her false representation that the parties were married in Arizona, notwithstanding her absolute knowledge that they were never married, is a case of first impression. Finally, determining what prospective application to give *Caffall* is an important issue first raised by the Utah Court of Appeals in *Van Der Stappen*[3].

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[2]*Barton v. Barton*, 2001 UT App 199 29 P.3d 13, 16, *Crump v. Crump*, 821 P.2d 1172, 1173-74 (Utah Ct.App. 1991); *Curtis v. Curtis*, 789 P.2d 717, 726 (Utah Ct.App. 1990); *Varian-eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 571 (Utah App. 1989); *Thompson v. Jackson*, 743 P.2d 1230, 1232 (Utah App. 1987) 743 P.2d 1230; *Schvaneveldt v. Clegg*, 74 Utah 427, 439 (1929) 280 P. 230; *Hardy v. Meadows et al.*, 71 Utah 255, 271-72 (1928) 264 P. 968; *Rose v. District Court of Millard County*, 67 Utah 526, 535-36 (1926) 248 P. 486.

[3] [fn5] Caffall seems inconsistent with the generally announced and fundamental legal proposition that "[s]ubject matter jurisdiction is the authority and competency of the court to decide the case," without which, the court may not validly act. Vijil, 784 P.2d at 1132

a. Distinguishing Caffall - *Both* Parties Misled The Court in This Case.

Here *both* parties always knew there was never a marriage ceremony. Both parties misled the court, Petitioner by pleading a marriage and Respondent by admitting it. But Respondent's admission was based on a good faith belief that he and Petitioner were common law husband and wife, owing to the length of cohabitation. Upon learning time alone did not create a valid marriage that Respondent immediately moved to vacate. Conversely, Petitioner has never given a reason for misleading the court.

Conversely, in *Caffall* the court found only Vern Caffall knew there was an impediment to the marriage, i.e., he knew he was not divorced from his prior wife when he contracted a marriage to Ruth Caffall. The Court held he alone perpetrated fraud and estopped him from denying the marriage or subject matter jurisdiction. To be sure, there were other equity arguments in *Caffall*. The *Caffall* Court was very concerned with what it perceived as Mr. Caffall's obvious and wrongful ploy to avoid paying child support. *Caffall* at 410. See also *Van Der Stappen* at [fn4].[4] The *Caffall* Court first applied traditional principles of subject matter jurisdiction saying: "It is true that the court here had no jurisdiction of the subject matter since there had been no legal marriage;" *Caffall* at 410. [Emphasis added.] Notwithstanding the *Caffall* Court's finding of no subject matter

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(citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 (1969)). But see Note 8.

[4] [fn4] Although not entirely clear, it appears that the support ordered in the Caffall divorce included both child support and alimony. The supreme court, however, addressed only Mr. Caffall's effort to avoid paying child support. *Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335, 1340 (Utah App. 1991).

jurisdiction it affirmed the decree of divorce as follows:

> Defendant waited more than nine years after the entry of the interlocutory decree and after his remarriage to a third party, and then filed his petition to vacate the decree . . . . We are of the opinion that the trial court properly denied defendant's petition to vacate the decree of divorce. . . . Were we to hold that estoppel will not lie here, we would be disposed to return the case to the district court with instruction to enter a decree of annulment and make a proper division of property, together with a reasonable award to reimburse plaintiff for the maintenance and support of the minor children since the entry of the decree of divorce in October, 1945. It is undisputed that defendant made some of the payments for support money under the decree he now assails.
>
> We are of the opinion that equity has been done by the decree of October, 1945, and the ruling of the district court in refusing to set the decree aside.

Caffall at 410-11.

b. Further Distinguishing Cafall - Enactment of UCA § 30-1-4.5.

It is important to note the *Caffall* decision predates Utah Code Ann., § 30-1-4.5. Equitable estoppel made more sense at the time and in the context of *Caffall* because there was no existing statutory remedy. Now there is. Although arguably the *Caffall* Court had other remedies available to it, such as the Bastardy Statute or annulment proceedings, it instead chose to decide the case on estoppel. *Caffall* at 408, 411. It appears the *Caffall* Court was very concerned with the disruptive effect of invalidating the prior divorce decree on the ongoing child support obligations of Vern Caffall.

Approximately thirty five years later the *Van Der Stappen* Court (a post Utah Code Ann., § 30-1-4.5 decision considering a motion to vacate for want of subject matter jurisdiction) held "to the extent *Caffall* controlled" it depended on when Mr. Van Der Stappen learned of the impediment to his marriage whether the divorce decree would be

upheld or not. Both *Caffall* and *Van Der Stappen* seem to turn to some extent on when a person learns of the impediment to the marriage.[5] Respondent agrees with footnote 5 of the *Van Der Stappen* decision, *supra*, that *Caffall* is inconsistent with general principles of Utah law on subject matter jurisdiction. Respondent believes the rule should not turn on when one learns of the impediment or voidness of his marriage, but rather the better rule for all Utah cases ought to be that subject matter cannot be conferred upon a court by consent, waiver **or estoppel**. In this case subject matter jurisdiction clearly was lacking and should not have been conferred or otherwise overcome by estoppel.

c. Under *Van Der Stappen*, Application of Estoppel Is Not Appropriate in the Present Case.

It is important to note that Respondent, like Wilbert W. Van Der Stappen in *Van Der Stappen, supra,* did not know there was a problem with his marriage until after the decree was entered. He, like Mr. Van Der Stappen, asserted subject matter as defense as soon as he knew about it. Also, as in *Van Der Stappen*, although Mrs. Van Der Stappen claimed she

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[5] To the extent that Caffall controls here, the trial court's refusal to set aside the divorce decree depends upon its finding that appellant learned of the nonfinal nature of appellee's prior divorce shortly after the parties' wedding, and before their divorce. This finding, however, cannot stand. The only record evidence on this issue of fact is appellant's affidavit, stating that he did not learn of the impediment to the marriage until after the divorce decree ending that marriage was entered. No evidence to the contrary appears in the record.[fn6]

Based upon the foregoing, because the only evidence in the record is to the effect that appellant did not learn of the impediment to his marriage with appellee until after entry of the divorce decree, we must hold that the trial court erred in failing to grant appellant's motion to set aside the decree. Under Utah R.Civ.P. 60(b)(5), that decree was void because the trial court, under Caffall, lacked subject matter jurisdiction.[fn8] *Van Der Stappen* at 1339.

told Mr. Van Der Stappen about the possible impediment to the marriage shortly after the parties were married, there was no evidence to support her allegation nor any evidence to contradict the affidavit of Mr. Van Der Stappen "that he had learned of the impediment to his marriage with appellee only after his decree of divorce from her was entered." *Van Der Stappen* at 1336. Likewise, the only evidence in the present case is Respondent's affidavit stating he admitted the marriage because he thought time alone created a valid marriage and as soon as he learned time alone did not create a valid marriage he filed a Motion to Vacate for want of subject matter jurisdiction. Finally, the *Van Der Stappen* Court also noted, just as here, there was no evidentiary hearing and the arguments of counsel are not evidence.[6]

IV. Timeliness Issues - Petitioner's Timeliness of Filing for Solemnization of the Marriage Pursuant to Utah Code Ann., § 30-1-4.5(2) vs. Respondent's Timeliness of raising Subject Matter Jurisdiction as a Defense.

a. Time to File an Action to Validate a Marriage is a Statute of Repose.

The parties had separated before the divorce Complaint was filed on July 20, 2000. Within months before the parties separated in the late 1990's, after watching the movie *Runaway Bride* (release date 30 July 1999 (USA)), Respondent asked Petitioner to marry him for a second time. Petitioner refused. It is uncontested that neither party sought to establish a marriage within the time permitted by the statute. These facts, contained in Respondent's

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[6] The representation of appellee's counsel that appellee had a different version of the facts is not sufficient to support the trial court's finding. At best, that representation is nothing more than unsworn hearsay and argument of counsel. While it may appear reasonable to suspect that appellant, wishing to avoid his alimony obligation under the divorce decree, is motivated to misrepresent when he learned of the impediment to the marriage, such suspicion also cannot be considered evidence. We are faced with a situation in which there is simply no evidence that can be marshaled to support the trial court's finding.[fn7] *Van Der Stappen* at 1339.

Affidavit, are uncontested and therefore taken as true. Setting aside for the moment arguments of equal knowledge, equity and clean hands and other arguments advanced in Respondent's briefs, Utah Code Ann., § 30-1-4.5(2)[7] imposes a one year time limit from the date of separation in order for either party to establish a marriage.

Utah Code Ann., § 30-1-4.5(2) is a statute of repose. This was conclusively decided in *In Re Marriage of Kunz,* 2006 UT App 151, 136 P.3d 1278, 1283-84. In pertinent part *Kunz* states as follows:

> ¶ 16 . . . Lillie and Lynne further argue that section 30-1-4.5(2) is a statute of repose, rather than a statute of limitations, and therefore, it cannot be tolled by the discovery rule. See *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 219 (Utah 1984) ("A statute of repose generally `set[s] a designated event for the statutory period to start running and then provide[s] that at the expiration of the period any cause of action is barred regardless of usual reasons for "tolling" the statute.'" (alterations in original) (quoting Restatement (Second) of Torts §899 cmt. g (1979))).
>
> * * * *
>
> ¶ 21 In relevant part, section 30-1-4.5(2) provides: "The determination or establishment of a marriage under this section must occur during the relationship . . ., or within one year following the termination of that relationship." Utah Code Ann. § 30-1-4.5(2). The time limit of section 30-1-4.5 runs from the occurrence of a specific event — the termination of the relationship, see id. — and is not related to any injury or legal right. Therefore, we agree with Lillie and Lynne that the one-year time limit of section 30-1-4.5(2) acts as a statute of repose. Consequently, we hold that the discovery rule cannot operate to toll the one-year limit of section 30-1-4.5(2). See *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 219 (Utah 1984).

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[7] (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.

> ¶ 22 Although section 30-1-4.5(2) is a statute of repose, we must still determine when the "termination of [the] relationship," Utah Code Ann. § 30-1-4.5(2), between Husband and Janice occurred and the one-year time period commenced. . . Furthermore, because the one-year limitation is a statute of repose, the intentional concealment of Husband's marriage to Lynne from Janice cannot preserve Janice's claim under section 30-1-4.5. See *Perry*, 681 P.2d at 219.
>
> See also *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 219 (Utah 1984).
>
> A statute of repose generally "set[s] a designated event for the statutory period to start running and then provide[s] that at the expiration of the period any cause of action is barred regardless of usual reasons for `tolling' the statute." Restatement (Second) of Torts § 899, comment g (1979).

The gravamen of the trial court's analysis was that Petitioner relied to her detriment on Respondent's acquiescence in the marriage and but for Respondent's changed position Petitioner could have solemnized the marriage under the statute. This constitutes an impermissible judicial rewriting (extension) of the statute. The trial court's analysis fails for at least two reasons.

First, *In Re Marriage of Kunz* makes it clear that section 30-1-4.5(2) is not subject to the traditional rules of equity, such as tolling of the statute under the discovery rule or even tolling for intentional concealment. Second, and unrelated to the statute of repose, but just as important, the trial court concluded *ipso facto,* as a matter of law without an evidentiary hearing, that Petitioner satisfied all the elements of Utah Code Ann., § 30-1-4.5(1), including the indispensable element of consent. Respondent vigorously disputes consent. It is undisputed Petitioner twice refused to marry Respondent. It is further undisputed the last time Petitioner refused to marry Respondent was just a few months before Petitioner filed for divorce. Her refusal is strong evidence she could not prove the consent element. A

common law marriage is proved like any other case, by a preponderance of the evidence. See footnote 7 above. Petitioner's refusal preponderates against a finding of consent. Therefore, at the very least it is not a given that she could meet the consent requirement of the statute. Consent is an essential element to validate a marriage under UCA §30-1-4.5. This Court in *Whyte v. Blair*, 885 P.2d 791 (Utah 1994) looked at factors important to the consent issue. *Whyte*, apparently quoting an Hawaiian case, *Maria v. Freitas*, 73 Haw. 266, 832 P.2d 259, 262 (1992) stated the following:

> [fn3] . . . . In contrast, strong evidence of consent, such as (1) living together for 19 years, (2) having a child, (3) having a general reputation as married, and (4) having the mother of one of the partners living with them, was held insufficient to establish consent where the woman refused the man's marriage proposals on several occasions and some of their financial affairs were handled separately. Maria v. Freitas, 73 Haw. 266, 832 P.2d 259, 262 (1992). In common law marriage cases, consent is the most frequently litigated issue. States vary widely in its treatment. Its development in Utah will necessarily proceed on a case-by-case basis.

Whyte at 794-95. See also *Hansen v. Hansen*, 958 P.2d 931, 933, 935-36 (Utah App. 1998).

b. Time to Assert The Defense of Want of Subject Matter Jurisdiction.

Respondent filed his Motion to Vacate on September 18, 2007, more than seven years after the Complaint was filed and six years after the Amended Decree of Divorce was entered on June 27, 2001. A search of Utah case law uniformly shows subject matter jurisdiction may be raised at any time. See e.g.[8] Conversely, Respondent found no Utah case holding

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[8]*State v. Martin*, 2009 Ut App 43, ¶ 8; *Victor Plastering v. Swanson Building Mat.,Inc.*, 2008 Ut App 474, 200 P.3d 657, 661; *State Ex Rel. C.D.*, 2008 Ut App 477, 200 P.3d 194, 212; *Decker v. Rolfe*, 2008 Ut App 70, 180 P.3d 778, 780; *State v. Holm*, 2006 Ut 31, 137 P.3d 726, 750; *Ameritemps, Inc. v. Labor Com'n*, 2005 Ut App 491, 128 P.3d 31, 35; *Chen v. Stewart*, 2004 Ut 82, 100 P.3d 1177, 1186 (¶ 34); *State v. Sun Sur. Ins. Co.*, 2004 Ut 74, 99 P.3d 818, 820; *State v. Norris*, 2004 Ut App 267, 97 P.3d 732, 741; *Fisher v. Fisher*, 2003 Ut App 91, 67 P.3d 1055, 1058; *State v. Valdez*, 2003 Ut App 60, ¶ 4, 65 P.3d 1191; *Housing Authority, County of Salt Lake v. Snyder*, 2002 Ut 28, 44 P.3d 724, 727; *Barton v. Barton*, 2001 Ut App 199, 29 P.3d 13,

subject matter was waived if not timely raised. The general rule is subject matter jurisdiction cannot be waived and can be raised at any stage of the proceedings, including for the first time on appeal. See, e.g., *Ameritemps, Inc. v. Labor Com'n*, 2005 Ut App 491, 128 P.3d 31.

> ¶ 10 Petitioners concede that they did not raise the issue of subject matter jurisdiction prior to their brief with this court. Notwithstanding that admission, we may consider it: "[Q]uestions regarding subject matter jurisdiction may be raised at any time because such issues determine whether a court has authority to address the merits of a particular case." *Housing Auth. v. Snyder*, 2002 UT 28, ¶ 11, 44 P.3d 724. In addition, because subject matter jurisdiction is a prerequisite to this court's power to consider the substantive issues, the requirement that the court have proper jurisdiction over the subject of the dispute cannot be waived. See, e.g., *Chen v. Stewart*, 2004 UT 82, ¶ 34, 100 P.3d 1177; *Barnard v. Wassermann*, 855 P.2d 243, 248 (Utah 1993). Issues relating to subject matter jurisdiction are threshold questions that should be addressed before resolving other claims. See *Snyder*, 2002 UT 28 at ¶ 11, 44 P.3d 724. Because we conclude that Petitioners' challenge to subject matter jurisdiction is properly before us, we consider it before addressing their challenge to the Board's substantive decision.

Id at 35-6.

The rule in Utah and, in so far as Respondent can determine, the majority rule elsewhere, is that a challenge based on subject matter is **never** waived. In other words, there is no statute of limitations or statute of repose on asserting want of subject matter jurisdiction. See *Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335 (Utah App. 1991) "a

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16; *Thomas v. Lewis*, 2001 Ut 49, 26 P.3d 217, 221; *Career Serv. Rev. Bd. v. Dept. Of Corr.*, 942 P.2d 933, 940 (Utah 1997); *Weiser v. Union Pacific R. Co.*, 932 P.2d 596, 597 (Utah 1997); *Glezos v. Frontier Investments*, 896 P.2d 1230, 1233 (Utah App. 1995); *Salt Lake City v. Ohms*, 881 P.2d 844, 866 (Utah 1994); *State v. Perank*, 858 P.2d 927, 930 (Utah 1992); *Barnard v. Wassermann*, 855 P.2d 243, 247 (Utah 1993); *Crump v. Crump*, 821 P.2d 1172, 1173-74 (Utah App. 1991); *Kennecott Corp. v. Utah State Tax Com'n*, 814 P.2d 1099, 1100 (Utah 1991); *Curtis v. Curtis*, 789 P.2d 717, 726 (Utah App. 1990); *Western Capital & Securities v. Knudsvig*, 768 P.2d 989, 992 (Utah App. 1989); *Utah Dept. of Bus. Reg. Etc. v. Public Serv.*, 602 P.2d 696, 699 (Utah 1979); *Glasmann v. Second District Court et al.*, 80 Utah 1, 7 (1932).

judgment can be attacked for lack of subject matter jurisdiction at any time." Id at 1337. Or, see *Barton v. Barton*, 2001 UT App 199, 29 P.3d 13, "[A] lack of subject matter jurisdiction can be raised at any time and when subject matter [jurisdiction] does not exist, neither the parties nor the court can do anything to fill that void.'" *Crump v. Crump*, 821 P.2d 1172, 1174 (Utah Ct.App. 1991) (quoting *Curtis v. Curtis*, 789 P.2d 717, 726 (Utah Ct.App. 1990)). *Barton* at 16.

The right to raise subject matter jurisdiction as a defense never becomes stale and never expires, whereas the provisions of UCA § 30-1-4.5(2) impose a one year statute of repose, which is not subject to rules of equitable tolling. The marriage solemnization statute is a 'use it or loose it' remedy. In addition to the marriage solemnization statute being unaffected by equitable tolling, Respondent claims other bars to estoppel, as summarized in the conclusion below.

CONCLUSION

This case presents issues of first impression. This case puts at issue what prospective application should be given to *Caffall,* which stands in opposition to Utah's general principles of subject matter jurisdiction. The Utah Court of Appeals is vested with original jurisdiction to hear divorce appeals and arguably will decide significantly more divorce appeals than the Utah Supreme Court will decide, but it is unable to overrule a decision of the Utah Supreme Court. Currently, to its overt dismay, and notwithstanding the enactment of Utah Code Ann., § 30-1-4.5(2), it is stuck with *Caffall*.

The trial court's decision is also contrary to well established Utah precedents such as

1) the need for Petitioner to have come to a court of equity with clean hands herself, 2) that Petitioner cannot claim reliance on Respondent's admission of marriage (thinking time created a marriage) when she had equal or better access to the relevant fact there never was a marriage, 3) that judicial estoppel requires a finding that all of the elements are satisfied, including Respondent acted with requisite bad faith, the kind of bad faith that shows intent to mislead the court, 4) assuming elements and facts not in evidence such as the consent issue required by Utah Code Ann. §30-1-4.5., to name a few that are briefed.

Lack of jurisdiction should end the matter. A court either has jurisdiction or it does not. If subject matter jurisdiction is lacking nothing the parties or court does can fill that void. *Barton* at 16. Respondent urges the better reasoned and clear majority rule in other jurisdictions is that subject matter jurisdiction cannot be conferred upon a court by consent, waiver **or estoppel.** Utah should follow the majority rule and add estoppel to its rule of law. Finally, even absent the straight forward subject matter jurisdiction analysis, judicial estoppel should not apply for the reasons raised here and in Respondent's prior briefs.

Respondent requests the Utah Supreme Court to reverse the trial court decision and remand this case to the trial court for entry of an order vacating all prior decrees and orders in this case and an order of dismissal for lack of subject matter jurisdiction.

DATED this 28th day of May, 2009.

_____

Robert D. Dahle
Denver C. Snuffer, Jr.
Attorneys for Respondent

PROOF OF SERVICE

I hereby certify that two true and correct copies of the forgoing **SUPPLEMENTAL BRIEF OF APPELLANT** were mailed, postage prepaid, faxed or hand delivered to the party listed below and ten (one containing an original signature) were filed with the Utah Supreme Court:

Rosemond G. Blakelock
75 South 300 West
Provo, Utah 84601
Attorney for Ina Marie Johnson

Sent Via:
_____ Mail (Postage Prepaid)
_____ Hand Delivery
_____ Facsimile

DATED this 28th day of May, 2009.

_____