

1990

# Van Der Stappen v. Van Der Stappen : Brief of Appellant

Utah Court of Appeals

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## Recommended Citation

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BRIEF

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A10

KEY NO.

9005

IN THE UTAH COURT OF APPEALS

WILBERT W. VAN DER STAPPEN,

Plaintiff/Appellant

VS.

GAYLENE VAN DER STAPPEN,

Defendant/Appellee

Appeals No. 900530-CA

BRIEF OF THE APPELLANT

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF WEBER, STATE OF UTAH

JUDGE STANTON M. TAYLOR

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ARGUMENT PRIORITY 16

FILED

JAN 23 1991

COURT OF APPEALS

WILBERT W. VAN DER STAPPEN,  
Plaintiff/Appellant

GAYLENE VAN DER STAPPEN,  
Defendant/Appellee

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- Jones v. Jones, 161 So.2d 836 (Fla. 1935),
- Persche v. Jones, 387 N.W.2d 32 (S.D. 1986).
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**JURISDICTION OF UTAH COURT OF APPEALS**

Jurisdiction over this matter is conferred upon the Court of Appeals by Utah Code Annotated 78-2(a)-3(2)(g) (1989). As this is a district court case involving domestic relations, specifically divorce or annulment.

This appeal is from a final order of the Second Judicial District Court, County of Weber, State of Utah, the Honorable Stanton M. Taylor.

### **STATEMENT OF THE ISSUES**

A. WHETHER THE TRIAL COURT ERRED IN ASSUMING THAT THE VOID MARRIAGE MUST HAVE HAD A DECREE DECLARING IT VOID TO BE VOID.

**Standard of review:** "An error is reversible if there is a reasonable likelihood that a more favorable result would have been obtained by the complaining party in the absence of the error." Harris v. Utah Transit Auth., 671 P.2d 217, 222 (Utah 1983).

**Supporting authority:** Proctor v. Ins. Co. of N. America, 714 P.2d 1156, 1158 (Utah 1986); Sanders v. Indus. Comm'n., 230 P. 1026 (Utah 1924); Rice v. State, 370 N.E.2d 902, 903 (Ind. 1977); Persche v. Jones 387 N.W.2d 32, 37 (S.D. 1986); Utah Code Ann. 30-1-2(2) (1989).

B. WHETHER THE TRIAL COURT ERRED IN NOT DECLARING THE DECREE OF DIVORCE VOID WHERE THE PARTIES MARRIAGE WAS, BY DEFINITION, VOID AB INITIO.

**Standard of review:** "An error is reversible if there is a reasonable likelihood that a more favorable result would have been obtained by the complaining party in the absence of the error." Harris v. Utah Transit Auth., 671 P.2d 217, 222 (Utah 1983).

**Supporting authority:** 52 Am Jur 2d, Marriage, section 67, p. 920; Utah Code Ann. 30-1-2(2) (1989); Utah Code Ann. 30-1-17 (1989).

C. WHETHER THE TRIAL COURT ERRED IN ASSUMING JURISDICTION OVER A DIVORCE ACTION PURSUANT TO UTAH CODE ANN. 30-1-17.2 WHERE THE PUTATIVE MARRIAGE WAS VOID AB INITIO.

**Standard of review:** "An error is reversible if there is a reasonable likelihood that a more favorable result would have been obtained by the complaining party in the absence of the error." Harris v. Utah Transit Auth., 671 P.2d 217, 222 (Utah 1983).

**Supporting authority:** Caffal v. Caffal 303 P.2d 286, 288 (Utah 1956); Utah Code Ann. 30-1-17 (1989); Utah Code Ann. 30-1-17.2 (1989).

D. WHETHER THE TRIAL COURT ERRED IN FINDING THAT BOTH PARTIES WERE AWARE OF THE EXISTENCE OF THE IMPEDIMENT.

**Standard of review:** "An error is reversible if there is a reasonable likelihood that a more favorable result would have been obtained by the complaining party in the absence of the error." Harris v. Utah Transit Auth., 671 P.2d 217, 222 (Utah 1983).



**Supporting authority:** Uckerman v. Lincoln Nat'l. Life Ins. Co., 588 P.2d 142 (Utah 1978); Time Commercial Financing Corp. v. Brimhall, 575 P.2d 701, 703 (Utah 1978); Powers v. Gene's Building Material, Inc., 567 P.2d 174, 176 (Utah 1977).

E. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN NOT GRANTING PLAINTIFF/APPELLANT'S MOTION TO SET ASIDE JUDGMENT PURSUANT TO RULE 60 OF THE UTAH RULES OF CIVIL PROCEDURE.

**Standard of Review:** Abuse of discretion. "This court will presume that the discretion of the trial court was properly exercised unless the record clearly shows the contrary." Donohue v. Int. Health Care, Inc., 748 P.2d 1067, 68 (Utah 1987).

**Supporting authority:** Donohue v. Int. Health Care, Inc., 748 P.2d 1067, 68 (Utah 1987).

**DETERMATIVE STATUTES**

**Utah Code Ann. 30-1-2(2) (1989).**

(2) when there is a husband or wife living, from whom the person marrying has not been divorced;

**Utah Code Ann. 30-1-17 (1989).**

When there is doubt as to the validity of a marriage, either party may, in a court of equity in a county where either party is domiciled, demand its avoidance or affirmance, but when one of the parties was under the age of consent at the time of the marriage, the other party, being of proper age, shall have no such proceeding for that cause against the party under age. The judgment in the action shall either declare the marriage valid or annulled and shall be conclusive upon all persons concerned with the marriage.

**Utah Code Ann. 30-1-17(2) (1989).**

If the parties have accumulated any property or acquired any obligations subsequent to the marriage, or there is a genuine need arising from economic change of circumstances due to the marriage, or if there are children born, or expected, the court may make temporary and final orders, and subsequently modify the orders, relating to the parties, their property and obligations, the children and their custody and visitation, and the support and maintenance of the parties and

## **STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE**

This case is an appeal from the District Court memorandum decision denying Plaintiff/Appellant's motion to set aside Decree of Divorce. Plaintiff/Appellant is the husband of a void marriage and seeks to have the Decree of Divorce set aside because the marriage was void ab initio.

### **B. COURSE OF PROCEEDINGS AND DISPOSITION IN TRIAL COURT**

The husband, now the Appellant, filed a divorce Complaint on May 17, 1988. The Decree of Divorce was signed December 20, 1989. A Motion to Set aside Decree of Divorce was filed January 22, 1990. The trial court heard oral arguments on the Plaintiff's Motion on February 26, 1990, at 10:30 a.m.. At that time the trial court asked that the parties brief the matter and that it be reheard. The parties briefed their positions and a hearing was held on May 14, 1990, at 11 a.m.. The trial judge then entered his memorandum decision denying Plaintiff's Motion to Set Aside Decree of Divorce.

### **C. RELEVANT FACTS**

The parties herein were married to each other on June 15, 1984, in Teton County, State of Wyoming. (See Findings of Fact and Conclusions of Law, signed December 20, 1989). Gaylene Van Der Stappen ("Appellee") had been previously been married to Richard Paul Opheikens. At the time the parties herein were married,

Appellee was not yet divorced from Richard Paul Opheikens. (See Exhibit B attached to Affidavit of Plaintiff dated January 19, 1990). Wilbert Van Der Stappen ("Appellant") was not aware that Appellee's previous divorce had not been finalized. (See Affidavit of Plaintiff, paragraph 5). After Appellee's previous marriage was finally dissolved, the parties continued to live together until sometime before the divorce action was filed. After the Decree of Divorce was entered, Appellant, having been made aware of the impediment of the marriage, sought to have the Decree of Divorce set aside pursuant to Rule 60 of the Utah Rules of Civil Procedure to have a Decree of Annulment entered. It is relevant that the entire case was decided on unrecorded oral arguments. The only evidentiary facts submitted to the court on the motion to set aside Decree of Divorce was an Affidavit of Plaintiff in support of his Motion. The Defendant never filed an Affidavit in objection to Plaintiff's motion, nor was there any other evidence entered. The record essentially consists of pleadings, motions, orders and minute entries, etc.

#### **SUMMARY OF THE ARGUMENT**

The type of marriage in this case, that of a second marriage where the first marriage of the wife has not yet been dissolved is prohibited and declared void in Utah. Not only is it void, it is void ab initio. Consequently, the law states that it is not

necessary to have the marriage declared void by Decree of court or administrative order. Rather, the marriage is void by legislative declaration and nothing more need happen to make it null. This argument is supported by Utah Case Law, as well as general common law.

Since the marriage is void ab initio, then it is impossible to enter a Decree of Divorce, as there never was a marriage. The marriage in this case is not voidable where it can be ratified, confirmed, or the parties have some option to either declare it annulled or do otherwise. In this case, the marriage is void. Utah Statute makes allowance to determine the validity of a marriage but in this case there is no determination to be made. Clearly on its face and by the factual evidence available in the way of exhibits attached to Affidavit of Plaintiff, the marriage is clearly void. Therefore, there is no need for any type of judicial decree, in particular, a Decree of Divorce cannot stand.

Additionally, the trial court lacked subject matter jurisdiction to issue the Decree of Divorce. Utah Case Law has established lack of jurisdiction where there is no legal marriage.

Also, there is no common law marriage in this case, as the statutory requirements were not fulfilled. It is essential for a common law marriage to be recognized, the court must recognize it within one year after the relationship has terminated. As the

requirements of the statute were not fulfilled, the court cannot now recognize a common law marriage. Consequently, there cannot be a divorce as there was not a common law marriage.

Moreover, had there been a common law marriage, equity would allow the innocent party, namely Appellant, to have the marriage annulled due to fraud.

There is almost no evidentiary record in this case. The only evidentiary record is the Affidavit of Plaintiff, signed by Plaintiff on the 19th day of January, 1990, which states that at the time of signing the Affidavit, he had only recently discovered the impediment to the marriage. Oral arguments were heard on Plaintiff's Motion but the arguments were not recorded. Likewise there was no testimony taken. Based on the scant evidentiary evidence provided, the trial court found that both parties were aware of the impediment shortly after the marriage was contracted. Appellant believes this is an abuse of the court's discretion based on the factual record before the trial court, as well as the law.

To conclude, the marriage was void from its inception. It was not necessary to decree the marriage void, as the legislature had done that expressly. If the marriage was void, then the Decree of Divorce should also be void. A common law marriage never occurred, as the statutory requirements were never fulfilled. Had they been fulfilled, Appellant would still be entitled to an annulment of the

marriage. The court's only conclusion from this can be that the Decree of Divorce is void and that the marriage should be considered void ab initio, and if necessary, an annulment entered.

#### **ARGUMENT**

##### **A. THE PUTATIVE MARRIAGE BETWEEN APPELLANT AND APPELLEE WAS VOID AB INITIO**

"The following marriages are prohibited and declared void: ...  
(2) When there is a husband or wife living, from whom the person marrying has not been divorced...." Utah Code Ann. 30-1-2 (1989).

According to the statute, the marriage is prohibited and is declared void. This would indicate that the legislature declared such marriage void as a matter of law. The Utah Court of Appeals "will interpret and apply the statute according to its literal wording unless it is unreasonably confused or inoperable." Cox v. Rock Products v. Walker Pipeline Const., 754 P.2d 672, 676 (Utah Ct. App. 1988). Since the language clearly states that the marriage is declared void, an ordinary interpretation of the statute would imply that the legislature has declared the marriage void, and consequently "no judicial Decree is ordinarily necessary to avoid the result." Rice v. State, 370 NE.2d 902, 903 (Ind. 1977), see also Persche v. Jones, 387 NW.2d 32, 37 (S.D. 1986).

"It is within the legislative power to prohibit bigamy or polygamy." 52 Am Jur 2d, Marriage, section 67, p. 920. Simply

put, the marriage is void from its inception, meaning that it is not necessary for a judicial Decree to destroy what never was created.

Indeed, "the general rule is that no decree is necessary to declare a bigamous marriage void." 52 Am Jur 2d, Marriage, section 67, p. 920.

More importantly, the Utah Supreme Court has held that no decree of a court is necessary to determine a marriage nullity when the marriage is void ab initio. See Sanders v. Industrial Comm. 230 P 1026 (Utah 1924). Sanders was a case before the industrial commission to determine whether a putative wife was a Defendant. The Utah Supreme Court held that since the marriage was void ab initio pursuant to the then-current version of U.C.A. 30-1-2, no decree was necessary to void the marriage.

The Utah Supreme Court has recently reaffirmed that "a second marriage before a divorce has ended a prior marriage is void ab initio." Proctor v. Ins. Co. of No. America, 714 P.2d 1156, 1158 (Utah 1986). In the same paragraph the court also stated that such a marriage is illegal. Id. at 1158. Where the court has recently reaffirmed that the second marriage prior to removal of impediment is void ab initio, it stands to reason that the court should also reaffirm that no Decree is necessary, as stated in Sanders.



**B. THE DECREE OF DIVORCE MUST BE VOID WHERE  
THE MARRIAGE WAS VOID**

Utah law is clear that a second marriage entered into prior to the first marriage being dissolved is void ab initio as well as illegal, and that no court decree is necessary. If that is the case, there cannot be a valid Decree of Divorce, as there was no valid marriage to be terminated.

This is not a situation where the marriage was voidable (see U.C.A. 30-1-2(2)). The marriage was "void from its very inception. It is not merely voidable, and therefore cannot be ratified or confirmed and so made valid." 52 Am Jur 2d, Marriage, section 67, p. 920. In this case, the putative marriage is clearly void ab initio. The marriage, as a legal matter, never existed.

Utah statute provides that where there is doubt as to the validity of the marriage, either party may demand its avoidance or affirmance. In the proceeding "the judgment and the action shall either declare the marriage valid or annulled . . . ." Utah Code Ann. 30-1-17 (1989). The action that has previously been before the District Court was the divorce action. Since that time it has been established that there is in fact no question but that the putative marriage was invalid. However, should the question be presented to the court, the court must then determine either that

the marriage is valid or annulled. Neither has been done by the court. The court has simply ruled that the divorce shall stand.

In effect, Appellant has sought relief pursuant to Utah Code Ann. 30-1-17 (1989) by attempting to set aside the Decree of Divorce pursuant to Rule 60 of the Utah Rules of Civil Procedure.

Based upon Utah Code Ann. 30-1-17 (1989), Appellant is entitled to his relief, and the court should grant the annulment, declaring the marriage void.

#### **C. THE TRIAL COURT LACKED SUBJECT MATTER**

##### **JURISDICTION TO ISSUE A DECREE OF DIVORCE**

The Utah Supreme Court acknowledged in Caffal v. Caffal, 303 P.2d 286 (Utah 1956) "that the court here had not jurisdiction of the subject matter since there had been no legal marriage." Id. at 288. The putative marriage in Caffal is quite similar to the situation at bar. In Caffal it was the wife whose previous marriage which had not been dissolved prior to the putative marriage, and the parties were nonetheless "married". Later there was a divorce which the husband subsequently opposed after the Decree had been entered due to the husband's default.

The important similarities go toward the court's remarks about jurisdiction. The court acknowledged in that situation that they did not have jurisdiction over the matter. However, the court felt that the husband had unclean hands in the matter as he was

aware of the impediment at the time of the marriage.

Therein lies the key difference between Caffal and the case at bar. While Caffal is similar to the present case insofar as the court's lack of jurisdiction. The differences between the two cases preclude this court from following Caffal to the same result. In the case at bar, Appellant was not aware of the impediment at the time they were married and was not made aware of the impediment until some time after the Decree of Divorce was entered.

Whereas in Caffal the court felt the husband had committed some fraud on the court by not raising any objections at the time of the divorce, the husband in this case was not aware of the impediment at the time of the divorce. In effect, the husband in this case is an innocent party and should not be punished for the fraud, whether intentionally or unintentionally committed by the wife.

In Caffal the husband waited several years before objecting to the divorce. In the case at bar, Appellant's objection was timely made.

The court should follow the ruling in Caffal that the subject matter jurisdiction does not lie over a void marriage in this case, but should not follow the court in Caffal in finding rational to skirt the jurisdictional problem and sustain the Decree of Divorce.

**D. THERE IS NO COMMON LAW MARRIAGE IN THIS CASE**

**AND THUS NO VALID MARRIAGE**

Assuming arguendo that since the parties Appellant and Appellee continued to cohabit after the impediment to their marriage was removed, the marriage might be considered a valid "common-law" marriage pursuant to Utah Code Ann. 30-1-4.5 (1989). However, the statute requires that determination of a common law marriage must occur during the relationship, or within one year following the termination of that relationship. The Decree of Divorce was signed on or about December 20, 1989. The trial court did not make a determination at that time that there was a common law marriage relationship. Since the time of the putative divorce, more than one year had expired. Therefore it is now impossible for a common law marriage to be recognized by the court.

Based on the statute the court cannot imply a common law marriage, as it was never declared as such. The statute specifically requires that there must be a determination by a court or administrative order that there is a common law marriage. Utah Code Ann. 30-1-4.5(1) (1989). Unlike the marriage which is void ab initio, the common law marriage does not exist until it is declared as such by a judicial or administrative order.

**E. IF THERE WERE A COMMON LAW MARRIAGE, THE  
MARRIAGE WOULD STILL BE VOID OR VOIDABLE**

Even assuming, arguendo, that there were a common law marriage between Appellant and Appellee, equity would preclude such a conclusion based on fraud. The innocent party should not be prevented from having a marriage which was initially void declaring that marriage void. Jones v. Jones, 161 So.2d 836 (Fla. 1935). If Appellant were aware of the impediment after the fact, he still should have the opportunity to have the marriage declared void. Id. If nothing else, at least the marriage should be declared voidable, and again, Appellant should have the opportunity to request judicial annulment of the marriage. See Jones v. Jones, supra., and Rickard v. Trousard, 508 So.2d 260 (Ala. 1987).

In Jones, the facts are very similar to the case at hand. The wife was still married to a previous husband when she married her current husband, Mr. Jones. Some time after the marriage, the husband filed for divorce, seeking custody of his daughter. While the suit was still pending, undisposed of, the husband first discovered that there was an impediment to the marriage. The husband thereupon prayed for an annulment rather than a divorce. In the wife's Answer, she prayed for support for herself as well as custody of the daughter and support for the child. The final

Decree awarded entirely the affirmative relief sought by the wife. The case was then appealed and came before the Florida Supreme Court.

The Florida Supreme Court held that even though there may have been a common law marriage, "where an absolutely void bigamous marriage is innocently contracted by one of the parties, in ignorance of the existing impediment, and as a result of fraud and deceit practiced upon him by the opposite party, the fact that such void marriage is subsequently ripened into a presumptively valid common law marriage through continued cohabitation of the parties after the disbarring prior marriage has been dissolved by death, should not bar or preclude the innocent party to such fraud from treating the resulting common law marriage as one that is voidable within a reasonable time after discovery of the fraud practiced upon him, and thereupon having a judicial annulment of same, such as was sought in this case." Jones, at 839.

The Florida Court then concluded that first of all, the original marriage was void ab initio, and did not require judicial decree to avoid the marriage. Id. at 839. Secondly, the court held that where the husband was an innocent party to the fraud, not being aware of the impediment, he had the right to have the marriage annulled within a reasonable time upon discovering the impediment.

In the case at bar, Appellant seeks the same relief. He only recently became aware of the impediment and is now seeking to overturn the divorce so that it can be recognized as a void marriage.

**F. THE ONLY EVIDENTIARY RECORD IN THIS CASE IS THE  
AFFIDAVIT OF PLAINTIFF**

The only evidentiary record in this case is the Affidavit of Plaintiff, signed on the 19th day of January, 1990. The Appellate Court "will not consider any facts not properly cited to, or supported by, the record." Uckerman v. Lincoln Nat'l Life Ins. Co., 588 P.2d 142, 144 (Utah 1978).

Where the record is devoid of evidence, it "consequently does not, and cannot, support the findings below." Time Commercial Financing Corp. v. Brimhall, 575 P.2d 701, 703 (Utah 1978).

Additionally, there is no transcript in this matter. Where there is no transcript available for the Appellate Court to review, the court "has nothing before it to review". Powers v. Gene's Building Material, Inc., 567 P.2d 174, 176 (Utah 1977). In Powers, Defendant discussed with the trial judge in chambers - and without making a record - the possibility of the trial judge being disqualified. The Supreme Court of Utah concluded that since there was no record to resort to, there was nothing to review.

In the case at bar, the record is almost void of any indicia

of what the trial court could have used to determine that Appellant was aware of the impediment to the marriage early in the disputed marriage. There is nothing in the record to justify the court's decision, but there is evidence to oppose it. The only evidence before the Court of Appeals is in the form of the Affidavit of Plaintiff which states that he only recently became aware of the impediment. The Affidavit should be sufficient to preclude the trial court's ruling that Appellant was aware of the impediment early in the marriage. Consequently, the Trial Judge's ruling that subsection (b)(2) (newly discovered evidence) and 3 (fraud) of Utah Rules of Civil Procedure Rule 60 cannot stand, nor can the court's findings that both parties were aware of the problem from the beginning stand as there is no evidentiary basis for the trial court's finding.

The only other record in this case is the memorandum decision of the trial court signed June 14, 1990, and the findings and conclusion and Order which were all signed September 25, 1990, as well as the briefs submitted by the parties in support of their legal arguments. This part of the record cannot be considered as an evidentiary record as they are findings, conclusions, and orders based upon the facts presented to the trial court.



**G. THE TRIAL COURT ERRED IN ITS FINDINGS THAT BOTH  
PARTIES WERE AWARE OF THE EXISTENCE OF THE IMPEDIMENT**

As previously argued, the only factual record before the court was the affidavit of Plaintiff. In the Affidavit, Plaintiff states that he "recently discovered that Defendant was not divorced from her previous husband..." (See Affidavit of Plaintiff, paragraph 5). As there is no other factual record for the court to base its findings, it would be error for the trial court to find that both parties were aware of the void status of the marriage from a time shortly after the ceremony.

"An error is reversible if there is reasonable likelihood that a more favorable result would have been obtained by the complaining party in the absence of the error." Harris v. Utah Transit Auth., 671 P.2d 217, 222 (Utah 1983). In the case at bar, Appellant believes that he would not have agreed to the present terms of the Decree had he known there was a void marriage. (See Memorandum Decision, page 2). Just as in Jones v. Jones, supra. Appellant believes that he should not be obligated to pay any alimony to his "ex-wife" based on a void marriage, and had he known the marriage was void he would have taken that position from the start.

The Court of Appeals must look only at the record which is before it, which is essentially only the Affidavit of Plaintiff.

The record is not sufficient to support the trial court's finding that Appellant was aware of the impediment to the marriage early on, consequently, the trial court has committed reversible error in finding that "both parties were aware of the problem from the beginning." Memorandum Decision dated June 14, 1990, page 2.

**H. THE TRIAL COURT ABUSED ITS DISCRETION IN  
DENYING APPELLANT'S MOTION TO SET ASIDE DECREE**

"The general rule concerning abuse of discretion is that this court will presume that the discretion of the trial court was properly exercised unless the record clearly shows the contrary." Donohue v. Int. Mtn. Health Care, Inc., 748 P.2d 1067 (Utah 1987).

The record before the Court of Appeals clearly shows that Appellant was not aware of the impediment to the marriage until after the Decree of Divorce was entered by the trial court. However the trial court found that both parties were aware of the problems from the beginning, although there is no evidence in the record to support such finding. The court then goes on to state that "it believes the judgment was not void since the marriage had not been declared void ab initio prior to the entry of the Decree." Memorandum Decision, dated June 14, 1990, page 2. The court also said it could only "assume" that without a Decree of Annulment, the marriage could be dissolved by divorce. Based upon the record, in particular, the trial court's memorandum decision, in reviewing

that in light of the law that has been presented to this court, clearly the trial court abused its discretion in denying Appellant's Motion to Set Aside the Judgment, or clearly neither the facts nor the law supported the judge's decision.

#### CONCLUSION

The marriage, which is the subject of this appeal, was void ab initio. Consequently the Decree of Divorce should also be void. Appellant does not wish to shirk his duties in supporting his child. However, as the parties were only living together for a short period of time, and the marriage was void from its inception, Appellant asks this court that the Decree of Divorce be voided, and that he not be required to pay alimony. The court may either void the Decree of Divorce and leave it at that, or may remand the matter for a determination by the trial court of what equity requires at this point.

DATED this the 22<sup>nd</sup> day of January, 1991.

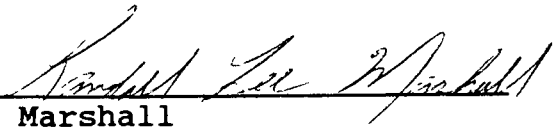
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\_\_\_\_\_  
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CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the foregoing Appellant's Brief was mailed, postage prepaid, this 22<sup>nd</sup> day of January, 1991, to the following:

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