

1990

Van Der Stappen v. Van Der Stappen : Reply Brief

Utah Court of Appeals

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DOCKET NO.

900530(A)

COURT OF APPEALS

SUMMARY OF ARGUMENT

According to the record before this Court, Appellant was not aware of the impediment to the marriage until after the Decree of Divorce was entered. Therefore Appellant raised his jurisdictional defense as soon as he had knowledge of the defense.

Appellee cites two cases to refute Appellant's defense of lack of subject matter jurisdiction. The first case is a Kansas case which appears to address in personam jurisdiction rather than subject matter jurisdiction. Clearly once a person accepts in personam jurisdiction of the court, they cannot later object to in personam jurisdiction. However, subject matter jurisdiction is another matter.

The second case cited by Appellee is a Utah case which clearly states that the Court has no jurisdiction over the subject matter in a case such as this. Appellee cites the case because the Court went on to overlook the jurisdictional problem due to fraud. In the case before the Court, there is no fraud and therefore there is no jurisdiction over the subject matter.

The Court did abuse its discretion in its Findings that Appellant was aware of the impediment prior to the Decree of Divorce. The only record before the Court is the Affidavit of

Plaintiff that states at the time of the Affidavit, he had only recently become aware of the impediment. The standard of review of this Court is that it will presume the trial Court used appropriate discretion unless the record clearly shows to the contrary. In this case, the record clearly shows to the contrary.

Appellee has misapplied the standard of review for a Motion for New Trial which requires a showing of manifest abuse of discretion. That standard of review is not appropriate in this case as there has not been a Motion for a New Trial.

ARGUMENT

APPELLANT HAS NOT WAIVED HIS DEFENSE OF LACK OF SUBJECT MATTER JURISDICTION AT THE TRIAL COURT LEVEL

According to the only record before the court, Plaintiff's Affidavit, Appellant was not aware of the impediment to the marriage until after the Decree of Divorce. That being the case, Appellant was unable to assert his jurisdictional defense until he became aware of the impediment.

Appellee cites two cases in support of her position that Appellant is estopped from asserting the defense of lack of subject matter jurisdiction. The first case cited Rinehart v. Rinehart, 83 P.2d 628 (Kansas 1938) appears to be a case where the court is addressing in personam jurisdiction rather

than subject matter jurisdiction. Essentially the argument is that once the individual has accepted jurisdiction of the court the party is then estopped from denying such jurisdiction. Further, her arguments regarding the application of the statute do not apply in this case. All of this seems to indicate that the jurisdiction spoken of in Rhinehart is in personam jurisdiction rather than subject matter jurisdiction.

The second case referred to by Appellee is the same case which Appellant cites in support of his position. In Caffal v. Caffal, 5 Utah 2d 407, 303 P.2d 386 (1956) the Utah Supreme Court clearly stated there was no subject matter jurisdiction to hear a divorce when there was not a valid marriage. However, Appellee cites the portion of the case which indicates that if the party is aware of the impediment at the time of filing for divorce, then the party is estopped from alleging lack of subject matter jurisdiction.

The situation in Caffal was that of fraud. The husband was aware of the impediment and never informed the court of the impediment at the time of the divorce action. Furthermore, there was about a two-year period before any action was taken to attempt to set aside the divorce. The fraud aspects of Caffal are not present in the case before the court. Simply

put, Appellant believes Caffal supports his proposition that there is no subject matter jurisdiction.

Appellant asks the court to apply practical reasoning to this case. Had Appellant known about the impediment, he certainly would have disclosed that information to his attorney, and his attorney would have advised him that an annulment would have been in his best interest where he did not wish to pay alimony. Consequently, Appellant would have pursued a Decree of Annulment in the first place rather than waiting, unless, as is his testimony, Appellant was not aware of the impediment until after the Decree of Divorce was entered. This is the same factual pattern as Jones v. Jones, 161 So. 836 (Fla. 1935). In Jones, the court felt that the marriage was voidable rather than void because there was a presumptively valid common law marriage after the removal of the impediment. However, the court still felt that the marriage was voidable because the parties seeking to set aside the marriage entered a Decree of Annulment with an innocent party not being made aware of the impediment until after the Decree of Divorce. Likewise, Appellant is an innocent party and should not be penalized for what he was not made aware of prior to the entry of the Decree of Divorce.

It is difficult to imagine that Appellant should be estopped from asserting a defense he was not aware was applicable at the time of the original divorce action. Therefore, in light of Caffal and in light of the evidence before the court, Appellant asks this court to find that the trial court lacked subject matter jurisdiction to enter a Decree of Divorce.

THE TRIAL COURT DID ABUSE ITS DISCRETION ON ITS
FINDINGS OF PLAINTIFF'S MOTION TO SET ASIDE THE DECREE

Appellant is frankly confused by Appellee's argument that the trial court did not abuse its discretion in its findings or its entry of a Decree of Divorce. The findings and entry of the divorce are not at issue on appeal to Appellant's knowledge, however the findings of the court regarding Plaintiff's Motion to Set Aside the Decree are at issue. Appellee correctly cites Donohue v. Int. Health Care, Inc., 748 P.2d 1067, 68 (Utah 1987) that the standard of review is that the higher court will presume the court used appropriate discretion unless the record clearly shows to the contrary. Of course, Appellant's argument is that the only record before the court is directly contrary to the court's findings regarding the Motion to Set Aside Decree of Divorce.

Appellee states that there was testimony heard by the trial judge on November 9, 1989, at the time of the actual divorce hearing. However, there is no record before the court to clarify what that testimony was. Appellant is doubtful that at the time of the divorce hearing, any testimony was offered that both parties were aware of the impediment to the marriage at the time the marriage was entered into. If that testimony had been offered, it would seem that the trial court would have taken exception to that testimony. Nevertheless, Appellee has waived any arguments which that testimony may have presented to that court by not producing the record. (See Utah Rules of Appellate Procedure, Rule 11).

Appellee also cites Amos v. Bennion, 517 P.2d 1008. Appellee quotes Amos as saying that a "ruling . . . will not be disturbed on appeal except when there is a clear and manifest abuse of discretion." When in fact it stated a "ruling on a Motion for a new trial will not be disturbed on appeal except . . . abuse of discretion." Id at 1010. Appellant feels that Amos has been misquoted in this particular instance or at least mis-applied.

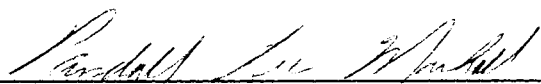
CONCLUSION

Appellee has narrowed the scope of appeal by conceding in her brief that there is no issue of common law marriage.

Consequently the issues to be decided by this court all revolve around the ability of the trial court enter a Decree of Divorce on a marriage which is void ab initio. Appellant asks this court to find that the trial court lacked subject matter jurisdiction to enter a Decree of Divorce that the trial court erred in assuming a void ab initio marriage must have a Decree declaring it void in order to be void, that the trial court erred in not declaring the Decree of Divorce void, thus the trial court erred in finding that both parties were aware of the existence of the impediment and that the trial court abused its discretion in not granting the motion to Set Aside the Judgment pursuant to Rule 60 of the Utah Rules of Civil Procedure.

DATED this 31st day of March, 1991.

JEAN ROBERT BABILIS & ASSOCIATES

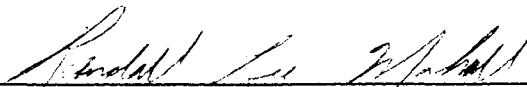


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Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the foregoing APPELLANT'S REPLY BRIEF was mailed, postage prepaid, this 2nd day of April, 1991, to the following:

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