

1959

# George Popp v. Arie Peter Roth and Gerarda Roth : Brief of Appellant

Utah Supreme Court

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William G. Fowler; Counsel for Appellant;

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In the Supreme Court  
of the State of Utah

FILED

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GEORGE POPP,

*Plaintiff and Appellant,*

vs.

ARIE PETER ROTH and GERARDA  
ROTH, his wife,

*Defendants and Respondents.*

Clerk, Supreme Court, Utah

Case  
No. 8956

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BRIEF OF APPELLANT

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# In the Supreme Court of the State of Utah

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GEORGE POPP,

*Plaintiff and Appellant,*

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ROTH, his wife,

*Defendants and Respondents.*

Case  
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## BRIEF OF APPELLANT

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### PRELIMINARY STATEMENT

The plaintiff and appellant, George Popp, will be referred to throughout this brief as plaintiff, and the defendants and respondents, Arie Peter Roth and Gerarda Roth, will be referred to as defendants or by name.

This appeal arises out of a complaint for writ of habeas corpus brought by plaintiff against defendants to determine whether Lore Popp, the alleged minor child of plaintiff, was illegally or unlawfully restrained by the defendants. The de-

fendants answered by denying that the minor child was illegally or unlawfully restrained, and alleging that the child was illegitimate and properly placed with defendants by the natural mother for the purposes of adoption.

The trial court determined that plaintiff was not entitled to custody of the child, and that the custody of defendants was lawful. This appeal is taken from said judgment and determination.

The trial in this matter was held on three days, to-wit: January 14 and 15, and June 27, 1958.

### STATEMENT OF FACTS

The appellant immigrated to the United States of America from West Germany in July of 1955, and became a resident of Peoria, Illinois (R. 44). The plaintiff is still a resident of Peoria.

The appellant first met Winifred Fleischmann (later his wife) in Germany shortly after World War II (R. 40), and commenced keeping company with one another socially in 1954 (R. 40-44). During the month of October, 1954, plaintiff and Winifred Fleischmann had sexual relations (R. 43) which, according to plaintiff, resulted in Winifred becoming pregnant (R. 45-46). Winifred left Germany arriving in the United States February 1, 1955, and became a resident of Peoria, Illinois (R. 100). She gave birth to the minor child Lore, at Peoria on the 15th day of June, 1955 (R. 44).

Prior to coming to the United States, plaintiff instituted divorce proceedings against the then Mrs. Popp at Nurnberg

Germany, and a divorce was granted Mrs. Popp upon her "Countercomplaint" (R. 149). A translation of the Final Decree was received in evidence in the instant action (Exhibit D-4). On the basis of oral arguments before the German Court, on June 21, 1955, the court made, *inter alia*, the following "Final Decree":

"II. The marriage of the parties contracted before the Registrar's Office Nurnberg is dissolved upon the Countercomplaint."

The determination of the German Court was issued June 28, 1955. Elsewhere in Exhibit D-4, the statement appears as follows:

"II. It is hereby certified that the above Decree becomes legally effective as of November 21, 1955."

After Winifred located a sponsor for him pursuant to immigration requirements plaintiff left Germany for the United States (R. 46). Plaintiff and Winifred Fleischmann were married at Peoria, Illinois, July 23, 1955.

On the 8th day of February, 1957, plaintiff and his wife, Winifred, made application by paternity affidavits to the State of Illinois requesting that a certificate of birth be prepared and filed showing the minor child, Lore, to be the legitimate child of George C. and Winifred Popp, and have the name "Lore Walburga Popp" (R. 184; Exhibits D-9 and D-10). Pursuant to these applications, the State of Illinois caused a new birth certificate to be issued and filed showing Lore to be the legitimate daughter of George C. Popp and Winifred Fleischmann Popp, which certificate is dated February 13, 1957 (R. 55; Exhibit P-2).

The plaintiff testified that he was advised by Winifred that he was the father of Lore (R. 46); that after their marriage, he and Winifred went to the Peoria County Court House to make application to have the birth certificate changed to reflect that he was the father of Lore (R. 48-49).

Plaintiff, Winifred, the child Lore, and a new daughter, Elizabeth, continued to live together as a family until September, 1957, when Winifred told plaintiff that she wanted to leave him (R. 49-50). Winifred left the home at Peoria taking the child, Lore, to Salt Lake City, Utah, leaving the younger child, Elizabeth, with plaintiff at Peoria (R. 50). Approximately 14 days later, he received a phone call from Winifred, who indicated that she wanted to place Lore for adoption (R. 50-51). Plaintiff refused her request (R. 51). During the conversation Winifred asked plaintiff, "if you have to sign some papers, will you sign some papers" (R. 50, 111-112, 124-125). Subsequently, Winifred did not advise plaintiff of the adoption "Because I just wasn't interested in calling him or writing him" (R. 125).

Following the phone conversation, plaintiff next heard from Winifred about November 1, 1957, receiving a letter post-marked "San Francisco," advising that she and Lore were in San Francisco (R. 51, 54, 109), and she subsequently told plaintiff that "Lore remained in San Francisco" (R. 109). Another letter arrived "Saturday after Christmas," (R. 51), prompting plaintiff to see a lawyer in Peoria (R. 53). He left for Salt Lake City, arriving January 1, 1958 (R. 53). On that date he located Winifred, and in reply to his inquiry to Lore's whereabouts, Winifred variously stated that Lore was in San Francisco and Florida (R. 53, 54, 109, 110).

In October, 1957, Winifred placed the child with defendants for purposes of adoption. On October 25, 1957, one of the judges of the Third Judicial District Court in and for Salt Lake County, State of Utah, made and entered an order placing said child with defendants for the purposes of adoption. The testimony of Winifred Popp, at the adoption proceeding, was published in this action (R. 103) and made a part of the record (R. 16-22). She testified that plaintiff, though admittedly married to her on July 23, 1955, was not the father of the child (R. 17). Winifred executed her consent to the adoption before the court (R. 18). Upon the basis of Winifred's testimony the court, in the adoption proceeding, made the following remarks:

"THE COURT: As the Court sees the situation, George C. Popp has no claim upon the child.

\* \* \* \*

"The Court makes an order from the evidence now before the Court that George C. Popp has no legal claim upon this child and that the proceedings for the petitioners may be held at this time.

\* \* \* \*

"THE COURT: The Court also finds from the evidence that this is an illegitimate child which entitles us to proceed without any regard to the natural father of the child.

\* \* \* \*

"THE COURT: As I view the matter and if I were doing it, I would take the view that whatever proceedings were had in Illinois would be defective and place upon him the burden of going forward to assert any claim he might have and upon her testimony a decree will be issued giving the adopting parents temporary

custody for the purpose of a year to lapse and in that connection we will make a finding that George C. Popp has no legal claim upon the child in this case" (R. 18, 19).

The plaintiff, admittedly, was not given notice of the adoption proceedings, nor did he ever consent to said adoption (R. 55).

The plaintiff testified that he came to Salt Lake City for the express purpose of recovering custody of Lore (R. 70).

Winifred Popp did not notify plaintiff that she was placing Lore for adoption (R. 81). She further testified that plaintiff treated the child unfairly by putting her to bed at 5:00 o'clock (R. 88), hitting her when she cried (R. 88, 101), by not allowing her toys (R. 89), and by leaving the children at home without a sitter for "an hour or two" (R. 103, 118). She testified further that "she talked to him" about his purported cruelty to the children (R. 120), but that she did not file a divorce or take any action against him in Illinois (R. 120). She left the children with plaintiff five evenings a week while she was working (R. 120). She admitted that plaintiff bought all the groceries and they were never hungry (R. 124), and that they lived in an apartment with a fenced yard and television (R. 89).

Plaintiff denied striking the child on the face, but stipulated to "spanking" her on the "hind end" when "she needed a spanking" (R. 134). He conceded striking the child on one occasion hard enough to bruise her when she climbed from her crib and fell to the floor, to remind her of the danger involved (R. 135). He bought the children's clothes and toys

(R. 136-137). He put the children to bed at 7:00-8:00 o'clock p.m. (R. 138). He loves Lore and wants to take the child back to Peoria (R. 140). No one has ever complained to him about his treatment of the children (R. 138). The plaintiff described the physical relation of his apartment to his neighbor, and advised that when he left the apartment while Winifred was at work, he made certain the neighbors looked in and kept a watch on the children, and that the neighbors could easily hear any crying or disturbance through the thin walls (R. 137, 142).

Lydia Fleischmann, sister of Winifred, testified on behalf of defendant, that she had lived in the home of plaintiff and his wife for two weeks in August, 1957, and visited their home occasionally when she lived elsewhere in Peoria (R. 176-177); that she saw plaintiff strike the child in the face when she was five month old (R. 170); that she saw "black and blue marks" on Lore's face when she was visiting plaintiff's home sometime in 1957 (R. 170-171); that when she was visiting with plaintiff in August, 1957, plaintiff went out "practically every night" (R. 171); and that she saw him with other women (R. 173).

Winifred Popp was recalled as a witness for defendants at the last hearing of June 27, 1958, and in reply to questions of counsel for defendants, stated that she was then residing with plaintiff at Peoria and intended to reconcile (R. 185-186).

## STATEMENT OF POINTS

### POINT I

AS A MATTER OF LAW, PLAINTIFF RIGHTFULLY AND LAWFULLY IS ENTITLED TO THE CUSTODY OF THE MINOR CHILD, LORE POPP, AND THE CHILD PRESENTLY IS ILLEGALLY AND UNLAWFULLY RESTRAINED BY THE DEFENDANTS.

- A. THE CHILD, LORE POPP, COULD NOT LAWFULLY BE ADOPTED BY THE DEFENDANTS WITHOUT THE CONSENT OF PLAINTIFF, AND HAVING FAILED TO SECURE SAID CONSENT THE CUSTODY OF THE DEFENDANTS MUST BE DEEMED UNLAWFUL AND WITHOUT RIGHT.
- B. THE PRESUMPTION OF THE VALIDITY OF THE SECOND MARRIAGE OF PLAINTIFF TO WINIFRED POPP AS A MATTER OF LAW HAS NOT BEEN REBUTTED BY CLEAR AND CONVINCING EVIDENCE OF INVALIDITY.
  - i) THE STATUS AND VALIDITY OF A MARRIAGE CONTRACT AND THE STATUS OF LEGITIMACY OF OFFSPRING MUST BE DETERMINED BY THE LAW OF ILLINOIS, THE DOMICILIARY STATE.
  - ii) A VALID MARRIAGE AND LEGITIMACY HAVING BEEN ESTABLISHED BY THE LAWS OF ONE STATE, IT MUST BE RECOGNIZED BY ALL STATES.

- C. ASSUMING THAT THE MARRIAGE OF PLAINTIFF TO WINIFRED POPP WAS CONTRACTED AT PEORIA, ILLINOIS, DURING THE INTERLOCUTORY PERIOD OF A PRE-EXISTING GERMAN DECREE OF DIVORCE, THE MARRIAGE NONETHELESS WAS VALID AND LAWFUL.
- D. EVEN ASSUMING, *ARGUENDO* ONLY, THAT THE MARRIAGE CONTRACTED BY THE PARTIES IN ILLINOIS WAS VOID, THE STATUS OF THE MINOR CHILD IS LEGITIMATE WITHIN THE MEANINGS OF ILLINOIS STATUTES AND BY REASON OF PUBLIC POLICY.

## POINT II

AS A MATTER OF LAW PLAINTIFF IS A FIT AND PROPER PERSON TO HAVE THE CONTROL AND CUSTODY OF HIS MINOR CHILD, LORE POPP.

## ARGUMENT

### POINT I

AS A MATTER OF LAW, PLAINTIFF RIGHTFULLY AND LAWFULLY IS ENTITLED TO THE CUSTODY OF THE MINOR CHILD, LORE POPP, AND THE CHILD PRESENTLY IS ILLEGALLY AND UNLAWFULLY RESTRAINED BY THE DEFENDANTS.

- A. THE CHILD, LORE POPP, COULD NOT LAWFULLY BE ADOPTED BY THE DEFENDANTS

WITHOUT THE CONSENT OF PLAINTIFF, AND  
HAVING FAILED TO SECURE SAID CONSENT  
THE CUSTODY OF THE DEFENDANTS MUST  
BE DEEMED UNLAWFUL AND WITHOUT  
RIGHT.

The evidence is clear to the effect that adoption proceedings were commenced in the Third Judicial District Court for Salt Lake County, and that an order was made granting custody of Lore Popp to the defendants (See transcript of proceedings, dated October 23, 1957, R.16-22). Likewise, it is apparent that no consent was executed or given by plaintiff to the proceedings placing the child, Lore, for adoption. Indeed, the court observed that the child was "illegitimate" and that plaintiff herein "has no legal claim upon this child" (R. 19). And, this conclusion was reached by the court upon the basis of Winifred's testimony that she had not married the natural father (R. 17), although a finding was made by that court that Winifred was married to plaintiff (R. 143). At no time in the adoption proceeding was the court concerned that plaintiff herein might have been, in fact, the natural father, to warrant giving notice or securing his consent to the adoption. This cavalier action constituted a real and awesome judicial abrogation of personal rights.

Defendants are holding the child, Lore, in their custody under color of right having its basis in the adoption proceedings. It is submitted that the order placing the child for adoption is a sham and not in compliance with the law.

Section 78-30-4, Utah Code Annotated, 1953, provides that a "legitimate child cannot be adopted without the consent

of the parents, if living \* \* \* .” Our entire problem revolves around the word “legitimate,” for if the child, Lore, is legitimate, as that term is used in our statute, the action of the court in placing the child patently was unlawful.

Plaintiff contends that the child was legitimated by a subsequent marriage of the parents, that the plaintiff acknowledged the child as his, and that he took the child into his home and treated her as his lawful child. The competent evidence shows that plaintiff and Winifred entered into a marriage considered lawful in Illinois. The plaintiff and Winifred made application, pursuant to Illinois law, to change the birth records of the child to reflect them to be the parents, and thereby legitimate the child. This action, it is submitted, was sufficient to legitimate the child so as to require plaintiff’s consent to an adoption.

Succinctly stated, defendants contend that the second marriage can be attacked collaterally, that the second marriage was absolutely void, and, that the child is illegitimate, notwithstanding the efforts made or that might be made by the plaintiff and his wife to legitimate the child. It is concluded by defendants that the child is “illegitimate” as that term is used in our statute, *supra*, to obviate plaintiff’s consent.

B. THE PRESUMPTION OF THE VALIDITY OF THE SECOND MARRIAGE OF PLAINTIFF TO WINIFRED POPP AS A MATTER OF LAW HAS NOT BEEN REBUTTED BY CLEAR AND CONVINCING EVIDENCE OF INVALIDITY.

The presumption in favor of validity of a second marriage

is one of the strongest presumptions known to the law (35 Am. Jur., Marriage, Sec. 192), and this is especially so where the legitimacy of children is attacked (see annotation, 14 A.L.R. 2d 7). As stated in *Anderson v. Anderson*, (121 Utah 237, 240 P. 2d 966, 967):

“ \* \* \* the presumption of validity of the second marriage ‘is one of the strongest disputable presumptions known in law’ ” (citing *In re Pilcher’s Estate*, 114 Utah 72, 197 P. 2d 143).

In *Re Biersack*, 96 Misc. 161, 159 NYS 519, affirmed 179 App. Div. 916, 165 NYS 1077, where the legitimacy of a child depended upon the validity of a second marriage it was held that the presumption is in favor of legitimacy, as well as the marriage, and that it would prevail unless the rebutting evidence was clear and irrefragable proof of every element of fact necessary to defeat the presumption. The decision further pointed out that the evidence must not only establish the fact and validity of the earlier marriage, but exclude every basis which might conceivably rescue the second marriage from invalidity (see also *Welch v. All Persons*, 78 Mont. 370, 254 Pac. 179; *Tompkins v. Commonwealth*, 117 Ky. 138, 77 S.W. 712; *Fowler v. Texas Exploration Co.*, (Tex. 1926) 290 S.W. 818; *State v. Rocker*, 130 Iowa 239, 107 N.W. 645; *Bowman v. Little*, 101 Md. 273, 61 A. 223).

Where the fact of a second marriage is shown, the subsequent marriage is sufficient to raise the presumption that the first marriage was terminated by divorce. For reasons of applicability of the doctrines of conflicts of law, as will be pointed out below, the courts of Illinois have applied this

presumption (See *Matthews v. Jones* (1945, CA 5th Cir.) 149 F. 2d 893; *Re Estate of Panico* (1932) 268 Ill. App. 585; *Winter v. Dubble*, 251 Ill. 200, 95 NE 1093; See also *Re Pilcher's Estate*, *supra*).

The plaintiff is quite willing to agree that the presumption in favor of the second marriage is not conclusive to the point that plenary proof is necessary. The rebuttal evidence must, however, be sufficiently clear and conclusive as fairly to preclude any other result (*Kolombatovich v. Magma Copper Co.*, 43 Ariz. 314, 30 P. 2d 832). As stated by this Honorable Court in *Anderson v. Anderson*, *supra*, the evidence must be "clear and convincing" (at 968).

i) THE STATUS AND VALIDITY OF A MARRIAGE CONTRACT AND THE STATUS OF LEGITIMACY OF OFFSPRING MUST BE DETERMINED BY THE LAW OF ILLINOIS, THE DOMICILIARY STATE.

For our purposes here, we must examine the validity of plaintiff's second marriage and the legitimacy of the child, Lore, by the law of Illinois. The marriage was performed and consummated at Peoria, Illinois; the child was born there; and, the family resided there at all times material hereto.

The validity of a marriage must be determined by the law of the place where it is entered into (15 C.J.S., *Conflict of Laws*, Sec. 16C; *In re Sanders Estate* (Calif., 1957) 305 P. 2d 655; *Craddock's Case*, 310 Mass. 116, 37 N.E. 2d 508, 146 A.L.R. 116; *Scott v. Scott*, 153 Neb. 906, 46 N.W. 2d 627, 23 A.L.R. 2d 1431; *Owen v. Owen*, 127 Colo. 359, 257

P. 2d 581; 43 A.L.R. 2d 1081). Moreover, a marriage valid where consummated is valid everywhere (*Heflinger v. Heflinger*, 136 Va. 289, 118 S.E. 316, 32 A.L.R. 1088; *Hoagland v. Hoagland*, 27 Wyo. 178, 193 Pac. 843, 32 A.L.R. 1104).

By the same token, the laws of the state of domicile of the father, mother, and child fixes the legitimacy of the child (*Kowalski v. Wojtowski*, 19 N.J. 247, 116 A. 2d 6, 53 A.L.R. 2d 556). Once legitimated under the laws of the domicil, this status is retained through life by the child wherever it may go (11 Am. Jur., Conflict of Laws, Sec. 17, citing *Mund v. Rehaume*, 51 Colo. 129, 117 Pac. 159; 15 C.J.S., Conflict of Laws, Sec. 16 h.)

ii) A VALID MARRIAGE AND LEGITIMACY  
HAVING BEEN ESTABLISHED BY THE LAWS  
OF ONE STATE, IT MUST BE RECOGNIZED  
BY ALL STATES.

It must be assumed that plaintiff and Winifred Popp entered into a marriage lawful in form and ceremony, and did comply with the laws of the State of Illinois. It might be noted again that the court in the adoption proceedings made a finding that the marriage had been consummated. The testimony of plaintiff, coupled with documentary evidence received at the trial, establish this fact beyond doubt. Chapter 3, Section 163, Ill. Rev. Stat., 1953, provides, in this regard:

"An illegitimate child whose parents intermarry and is acknowledged by the father as the father's child shall be considered legitimate."

Assuming then, no other disabling factor, the marriage

performed in Illinois was sufficient to cloak the child, Lore, with the respectability of legitimacy, and having attached can not be undone (see also *Miller v. Pennington*, 218 Ill. 220, 75 N.E. 919).

A certified copy of the birth certificate of the child was received in evidence (Exhibit P-2) designating plaintiff and Winifred Popp as the parents of Lore, which certificate was granted after compliance with Illinois law requiring documentary evidence of paternity and marriage (Exhibits D-9 and D-10), and which certificate is issued "in the same form as certificate of birth for a legitimate child" (Chapter 111½, Sec. 48b, Ill. Rev. Stat., 1953). By issuing this certificate in compliance with Illinois statutes the child is treated as legitimate, and it must be presumed that such action was taken in accordance with law.

C. ASSUMING THAT THE MARRIAGE OF PLAINTIFF TO WINIFRED POPP WAS CONTRACTED AT PEORIA, ILLINOIS, DURING THE INTERLOCUTORY PERIOD OF A PRE-EXISTING GERMAN DECREE OF DIVORCE, THE MARRIAGE NONETHELESS WAS VALID AND LAWFUL.

Although the marriage consummated at Peoria, Illinois, by plaintiff and Winifred Popp, has every apparent advantage of legality, still it has been contended that the decree of the German Court should be construed so as to treat it as void. This effort is made in order to convert a child, legitimate by the law of Illinois, into an illegitimate child to justify the purposes of the adoption proceeding. This action smacks of

unfairness and is destructive of the sanctity of marriage and family.

The German Decree has two statements which have a material bearing upon the dissolution of the prior marriage, as follows:

"II. The marriage of the parties contracted before the Registrar's Office Nurnberg is *dissolved* upon the Countercomplaint. (Emphasis supplied.)

\* \* \* \*

"II. It is hereby certified that the above Decree becomes legally effective as of November 21, 1955."

Significantly, the former provision bearing the date, June 28, 1955, clearly purports to dissolve the marriage, whereas the latter provision postpones the effective date of the dissolution for reasons unknown. The latter provision is not unlike interlocutory proscriptions on remarriage common to many states of the United States. But, this is not to say that such proscriptions delay the dissolution of the marriage.

In the absence of continental authorities upon the extra-territorial effect of such a restraint on remarriage, the situation is best compared with construction of such a restraint by our own courts.

Our situation can be compared with a divorce granted in one state containing a prohibition against remarriage or a statement postponing the effective date of the decree during a prescribed period of time, and where one of the parties moves to another state and remarries while the proscription is extant. It is of significance that the party usually changes his domicile

to the second state and does not go there for the express purpose of evading the marriage restraint imposed by the first state.

As a general proposition it uniformly is held that a marriage is valid according to the law of the place where it was celebrated, notwithstanding that at the time thereof one of the parties is subject to an inhibition against remarriage imposed by the decree of divorce or by statute of the state where a previous divorce was granted (In Re Sanders Estate (Calif., 1957), 305 P. 2d 655; Packard v. Packard (Iowa, 1950) 45 N.W. 2d 269; Criss v. Industrial Commission, 348 Ill. 75, 18 N.E. 572; see annotations, 32 A.L.R. 1142, 51 A.L.R. 325; see generally People v. Woodley, 22 Cal. App. 674, 136 Pac. 312; Bauer v. Abrahams, 73 Colo. 509, 216 Pac. 259; Green v. McDowell, 210 Mo. App. 517, 242 S.W. 168; Dimpfel v. Wilson, 107 Md. 329, 68 Atl. 561; and Goodwin v. Goodwin (N.Y.) 142 N.Y. Supp. 1102). Where it was not the intention of the person under the disability simply to avoid the law of the divorce state, and where he intends to establish domicile in the marriage state, such marriage is valid and unassailable (Owen v. Owen, 178 Wisc. 609, 190 N.W. 363). As stated in *Harvey v. Oklahoma* (Okla., 1925), 298 Pac. 862, 51 A.L.R. 321:

“ \* \* \* It is generally held that the inhibition in a decree of divorce has no extraterritorial effect, and is enforceable only in the State where the divorce is granted, and that outside of such State the marriage is generally treated as valid, although there is some division in the authorities.”

Also to the effect that a restraint on remarriage has no extra-territorial effect see *Boyles v. Wallace*, 208 Ala. 213, 93 So.

908; *Fisher v. Fisher*, 250 N.Y. 313, 165 N.E. 460, 61 A.L.R. 1523; *Yeats v. S.* (Okla.), 236 Pac. 62; *Plummer v. Davis* (Okla.), 36 P. 2d 938; and *People v. Woodley*, 22 Cal. App. 674, 136 Pac. 312, which also looked to the law of the place of marriage to determine validity.

In *Bauer v. Abrahams*, *supra*, the Colorado Supreme Court treated with a situation identical to the case at bar. In that case a divorce was obtained in Kansas, which Decree provided that the marriage was "dissolved," but "that the decree does not become absolute and take effect until the expiration of six months from said time." During the six-month period, a marriage was consummated by one of the parties in New Mexico, and the marriage was determined to be valid. And being valid where consummated in New Mexico, it must be given full force and effect everywhere (see *Willey v. Willey*, 22 Wash. 115, 60 Pac. 145).

In *re Sanders* (Calif. 1957) 305 P. 2d 655, a petition was brought to remove an administrator of the estate on the ground that the marriage of the administrator and deceased was void because of a prior existing marriage. The marriage in question had taken place while one party was under a disability imposed by a divorce obtained in Oklahoma. The Oklahoma statute prohibited remarriage during a six-month interlocutory period, and also provided that the decree would not take effect until six months after the judgment. The California court stated that the disabling features of the Oklahoma statute had no extraterritorial effect; accordingly, the marriage was valid where consummated outside of Oklahoma.

In a 1950 decision, the Iowa Supreme Court construed the following Kansas statute:

“Every decree of divorce shall recite the day and date when the judgment was rendered in the cause, and that the decree does not become absolute and take effect until the expiration of six months from said time” (Sec. 60-1514).

One of the parties to a Kansas divorce subject to and during this disabling feature, remarried in Iowa. The Iowa court held that when a person remarries during this period in another state where the marriage is not unlawful it will be upheld as a legal marriage, viewing the prior marriage as dissolved when granted (*Pickard v. Pickard*, supra, citing *Wheelock v. Freiwald* (8th Cir.) 66 F. 2d 694, 700).

The Illinois courts have subscribed to the doctrine that extraterritorial effect will not be given to disabling periods in divorce decrees. In *Criss v. Industrial Commission*, 348 Ill. 75, 180 N.E. 572, the Illinois Supreme Court examined the extraterritorial effect of an Alabama divorce decree which provided that in no event was a party to the divorce to remarry before the expiration of sixty days after the decree. In addition the Alabama code provided that a decree without personal service is not absolute for twelve months inasmuch as the divorce can be set aside within that period should the defaulted defendant discover the divorce. The Illinois court held that the presumption was in favor of the validity of a marriage consummated in Illinois a few days after the Alabama decree of divorce was granted, as the marriage was not prohibited by Illinois law. The Illinois Supreme Court further observed that unless the prohibition upon remarriage was expressly

prohibitive of remarriage in another state, the remarriage provision applied only in Alabama.

And in *VanVoorhis v. Brintball*, 86 N. Y. 18, 40 Am. Rep. 505, it was held that although a decree of divorce granted in New York forbade remarriage of the husband, the children of his subsequent marriage celebrated in another state where it was valid were legitimate in New York although such marriage would have been invalid if celebrated in New York.

The reluctance of courts to give extraterritorial effect to such proscription, is because of the strong public policy in favor of the validity of marriage (see Note, 26 Harvard Law Review 536). Professor Joseph H. Beale, in an article entitled *Marriage and the Domicile*, in 54 *Harvard Law Review* 501, writes concerning prohibition upon remarriage, at 517:

“ \* \* \* But the application of this injunction to a marriage contracted abroad would result in the bastardization of its issue as well as in a declaration that the parties are living in a state of concubinage. This Pyrrhic victory can hardly justify the common law in classing these unions with incest and polygamy, and the courts have usually so held when faced with the question.”

The evidence tending to show a proscription against remarriage and postponing the effective date of the decree would not be sufficient in the instant case, as a matter of law, to rebut the presumption of the validity of the second marriage. By any fair and sensible construction, the German divorce decree presents an ambiguous result. In the first instance, the divorce is clearly terminated when granted by the language of the decree; thereafter, the effective date of the divorce is postponed.

The postponement reasonably can be explained as a method to preserve an appeal, a social effort to discourage divorce actions followed by hasty remarriages, or a cooling off period intended to reconcile the parties. Moreover, under any construction, it is doubted that the couple could cohabit together during the interlocutory period.

To decline to give extraterritorial effect to the interlocutory period of the German decree can only be consonant with wholesome public policy. This Honorable Court can restore to Lore Popp the cloak of legitimacy and honor which was stripped from her by the trial court against the evidence and the law, and this laudable action would be in conformity with the great majority of state decisions upon the subject. Such a result would also save plaintiff from the stigma of having committed the crimes of bigamy and unlawful cohabitation, not to mention the legitimacy of the second child born to plaintiff and Winifred Popp.

D. EVEN ASSUMING, *ARGUENDO* ONLY, THAT THE MARRIAGE CONTRACTED BY THE PARTIES IN ILLINOIS WAS VOID, THE STATUS OF THE MINOR CHILD IS LEGITIMATE WITHIN THE MEANINGS OF ILLINOIS STATUTES AND BY REASON OF PUBLIC POLICY.

Two Illinois statutes, when construed jointly, would assure the legitimacy of the minor child even though it were concluded, as a matter of law, that the marriage ceremony at Peoria, Illinois, was of no lawful effect.

As indicated hereinabove, Chapter 3, Section 163, Ill.

Rev. Stat., 1953, considers a child legitimate where the parents intermarry and is acknowledged by the father as the father's child. Chapter 89, Section 17a, Ill. Rev. Stat., 1953, provides in substance that where two parties have attempted by a lawful form of marriage ceremony in apparent compliance with law to be joined in marriage and cohabit together as husband and wife, and there is issue born of such cohabitation, issue is legitimate although the attempted marriage is declared void or might be declared void.

Reading these statutes together, and applying their spirit and meaning to the instant case, assuming the marriage to be void or voidable, it would be consistent with public policy to treat the child, Lore, as legitimate. In a sense she is issue of a marriage, though the marriage was celebrated subsequent to her birth. And she is legitimate for all purposes, including the requirement that the consent of the plaintiff be secured to any contemplated adoption of the child in Utah.

This result is wholesome and saves the child from the stigma of bastardy and the errors of the parents. Being remedial, the legitimation statutes are ordinarily construed liberally by the courts (see Note, Status of Issue of Void Marriages, 56 Harvard Law Review 624).

## POINT II

AS A MATTER OF LAW PLAINTIFF IS A FIT AND PROPER PERSON TO HAVE THE CONTROL AND CUSTODY OF HIS MINOR CHILD, LORE POPP.

Viewing all the competent evidence in a light most favorable to defendants, it is submitted as a matter of law that the plaintiff is a fit and proper person to have the custody of his minor child, Lore Popp.

At the first hearing on this matter before the trial court, Winifred testified in substance that plaintiff had upon occasion struck the child, and had manifested rather strict parental discipline and control over the child. It is apparent from her testimony that she was biased and only justifying her calloused act of placing the child for adoption. The testimony of the sister of Winifred, Lydia Fleischman, (R. 168-183) hardly bolsters the testimony of Winifred, as Lydia's contacts with plaintiff and Winifred were too infrequent and the basis for her observations too speculative and remote.

The plaintiff testified convincingly that he loved his child dearly and wanted to return with her to Peoria. His testimony that he treated the child fairly and with every consideration for her health, welfare and happiness is credible, honest and forthright. That he exhibited a disciplinary attitude and required obedience is not to say that he was unfit or immoral.

As a general proposition, the legal right of a fit and suitable parent to the custody of his child ought not to be denied him as against an opposing claimant having no legal right to the child (*Sherry v. Doyle*, 68 Utah 74, 249 Pac. 250, 48 A.L.R. 131). As pointed out by this Honorable Court in *Sherry v. Doyle, supra*, " \* \* \* it may well be presumed that the care and custody of a child, and its interest and welfare, will best be subserved under the control of the parent." In the same opinion it was further observed:

“Unless the plaintiff is immoral or unfit, such association and companionship of the father and the child is the right of both and ought not to be denied to either. The comforts and benefits of such an association with one of the child’s own flesh and blood usually are far more advantageous than an association with strangers.”

There is nothing in the record to show that the child’s mental, moral, or physical welfare or her future happiness or development will be adversely affected by favoring the father in this regard (*Baldwin v. Nielson*, (Utah, 1946) 174 P. 2d 437; cf. *Walton v. Coffman* (Utah, 1946) 169 P. 2d 97).

## CONCLUSION

It is respectfully submitted that the plaintiff rightfully and lawfully is entitled to the custody of his minor child, Lore Popp, against the defendants who have no claim to custody; and that plaintiff, as the natural father, is a fit and proper person to have the care, control and custody of his said child.

Respectfully submitted,

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