

2002

Lorri Naele Scott v. Russell Scott : Petition for Rehearing

Utah Court of Appeals

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Russell-Emanuel Scott; Sui Juris.

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IN THE UTAH COURT OF APPEALS

LORRI NAEGLE SCOTT

Petitioner and Appellee,

vs.

RUSSELL SCOTT

Respondent and Appellant.

PETITION FOR REHEARING
PURSUANT U. R. APP. P.,
RULE 35

Case No. 20020672-CA

PETITION FOR REHEARING

RUSSELL SCOTT, by and through Agent Russell-Emanuel :Scott, Appellant, petitions the Utah Court Of Appeals to rehear the Memorandum Decision of April 22, 2004 pursuant Utah Rules of Appellate Procedure, Rule 35 and in accord Utah R. App. P., Rule 10(a)(3) for rehearing and reviewing said decision which is subject for rehearing/review on the basis of manifest error(s) in want of subject matter jurisdiction .

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Subject Matter Jurisdiction

Term refers to court's power to hear and determine cases of the general class or category to which proceedings in question belong; the power to deal with the general subject involved in the action.

Standard Oil Co. v. Montecatini Edison S. p. A., D.C. Del, 342 F.Supp. 125, 129

"Jurisdiction over a defendant requires both personal and subject matter jurisdiction."

Boles v. State, 717 So.2d 877 (1998)

"In its most fundamental or strict sense, 'jurisdiction' means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties, but the term may also refer to the situation where a court that has jurisdiction over the subject matter has no power to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites; action 'in excess of jurisdiction' by a court that has jurisdiction in a fundamental sense is not void, but only voidable."

People v. Burnett, 83 Cal.Rptr.2d 629, 71 Cal.App 151 (1999)

"Judgment made when the court lacks subject matter jurisdiction is void."

Clark v. State, 727 N.E.2d 18, transfer denied 741 N.E.2d 1247 (2000)

"When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action."

Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah App. 1989)

Service Of Process.

The service of writs, complaints, summonses, etc., signifies the delivering to or leaving them with the party to whom or with whom they ought to be delivered or left; and, when they are so delivered, they are then said to have been served. In the pleading stage of litigation, is the delivery of the complaint to the defendant either to him personally or, in most jurisdictions, by leaving it with a responsible person at his place of residence. Usually a copy only is served and the original is shown. The service must furnish reasonable notice to defendant of proceedings to afford him opportunity to appear and be heard. (Pursuant U.R.C.P., Rule 4)

1. The first question of Manifest error is: Did the trial Court ever obtain in personam and subject matter jurisdiction? When in fact, Petitioner by service of process failed serving Respondent of:

- a. Motion For Order To Show Cause

On the 29th day of January, 2001, Respondent is served this document one of two that were served by Deputy Constable Patrick Bishop is that of a signed

RS
Not
1

Order by Honorable Judge Fratto to appear February 07, 2001, to date Respondent has not been served with said Motion For Order To Show Cause as filed with the Court on the 19th day of January, 2001.

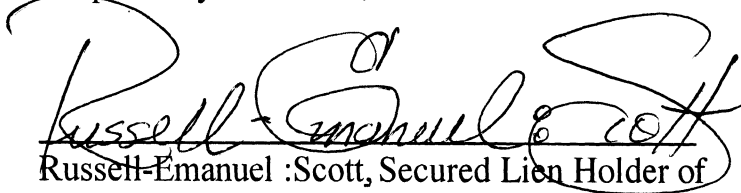
- i. Without said motion, Respondent does not have a clue what Petitioner is seeking relief under an order to show cause (which is some six (6) days before the summons is due for the answering of the complaint. Respondent requested the court to vacate said order to show cause hearing.
 - ii. The verified complaint is timely answered by Respondent, however Petitioner scheduled a hearing for default judgment which then became a hearing under the motion to show cause that lacks service of process.
 - iii. A temporary Order results from the hearing under order to show cause that remains void for want of service.
2. The second question of Manifest Error is: Pursuant Varian-Eimac, Inc. v. Lamoreaux, and Clark v. State, supra, is it possible that Petitioner granted sole custody of our two children based on a Child Support Obligation Worksheet that is in and of itself not served by process as required by the rule of law on Respondent?
- a. Respondent asks the Court to rehear and review based on the law and based on the parents establishment of visitation time with the Petitioner being the primary care giver as is established and continues as well, and should the Court remand the matter to trial Court should not the said child support obligation worksheet be based on joint physical custody (See fact(s) of paragraph 3 below)?
 - b. If at all possible under law, Respondent was hoping for joint shared parenting plan, which of itself became confusing to the trial court.
3. The third question of Manifest Error is: Without in-personam and subject matter

jurisdiction does the trial court have the power to grant Petitioner sole custody when in fact the current statute provides pursuant the definition of U.C.A. § 78-45-2(13) wherein it states “Joint physical custody” means the child stays with each parent overnight for more than 30% of the year?”

- a. The exhibits of the calendar(s) as agreed by both Petitioner and Respondent as entered into evidence by Petitioner displays that Respondent has the children overnight for more than forty (40%) percent of the year.
 - b. In Petitioner’s pleading of Objection To Respondents Amended Statement of the Evidence and Proposed Statement of Evidence dated the 8th day of May, 2003, provides under paragraph 5 (Visitation) “Lori has consistently encourage the boys visits with their father. In fact Russ had the boys 86 of 212 days (January through July 2001) although he claims to have had them much more.” It is more than clear that 86 of 212 days is forty one (41%) percent of the time stated.
4. The fouth question of Manifest Error is: Respondent without notice from the opposing party, how is it possible for the Respondent to enter into an action of a defense posture without having knowledge of Petitioner’s Financial Declaration and/or a so-called filing before the trial Court of a Statement Opting Out Of ADR Program?

Dated: this 19th day of May, 2004

Respectfully submitted,


Russell-Emanuel :Scott, Secured Lien Holder of
RUSSELL SCOTT

MAILING CERTIFICATE

I hereby certify that on this 19th day of May, 2004, I mailed, postage prepaid one accurate copy of the foregoing PETITION FOR REHEARING PURSUANT U.R.A.P., RULE 35, by depositing the same in the U.S. mail, postage prepaid, on this for the following:

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