

2005

# Janice Ririe Kunz v. Richard L. Kunz : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Ronald C. Barker; attorney for appellants.

William P. Morrison, Grant W.P. Morrison; attorneys for appellant.

---

## Recommended Citation

Brief of Appellant, *Kunz v. Kunz*, No. 20050374 (Utah Court of Appeals, 2005).

[https://digitalcommons.law.byu.edu/byu\\_ca2/5757](https://digitalcommons.law.byu.edu/byu_ca2/5757)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

[http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

In re the Marriage of: :  
 : Case No.: 20050374 CA  
JANICE RIRIE KUNZ and :  
RICHARD L. KUNZ (deceased). :  
 :

On Appeal from an Order of the Third District Court,  
Salt Lake Department, Honorable Sandra N. Peuler presiding

Attorneys for Appellant

Attorney for Appellants

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

List of All Parties to the Proceeding  
Pursuant to URAP 24(a)(1):

Petitioner:

Janice R. Kunz

Counsel:

William P. Morrison (7587)  
Grant W. P. Morrison (3666)  
MORRISON & MORRISON, LC  
352 East 900 South  
Salt Lake City, UT 84111  
Tel: 801/359-7999

Respondents:

Lillie Spencer

Ronald C. Barker (0208)  
Barker Law Office  
2870 South State St.  
Salt Lake City, UT 84115  
Tel: 801/486-9636

Lynne Kunz

Same

Estate of Richard Kunz

Has not been served with the  
petition; has not entered an  
appearance

## TABLE OF CONTENTS

	<u>Page:</u>
LIST OF ALL PARTIES TO PROCEEDING PURSUANT TO URAP 24(a)(1) .....	i
TABLE OF CONTENTS .....	ii
TABLE OF CASES & AUTHORITIES .....	iv
STATEMENT OF JURISDICTION .....	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW & THE STANDARD OF REVIEW .....	1
DETERMINATIVE AUTHORITIES .....	3
STATEMENT OF THE CASE .....	4
A. Nature of the Case .....	4
B. Course of the Proceedings and the Disposition Below .....	4
C. Statement of Facts .....	6
SUMMARY OF THE ARGUMENT .....	10
ARGUMENT .....	11
I. THE LOWER COURT ERRED IN DISPOSING OF THIS CASE ON SUMMARY JUDGMENT .....	11
A. Two Critical Errors Were Committed Below, Each of Which Warrants Reversal .....	12
B. Janice's Petition Was Timely Filed within One Year of the Date on Which Her Married to Richard Was Terminated ..	20
II. JANICE'S MARRIAGE TO RICHARD IS THE ONLY MARRIAGE ENTITLED TO LEGAL RECOGNITION .....	22

CONCLUSION ..... 27

CERTIFICATE OF SERVICE ..... 28

ADDENDUM

ADDENDUM A: Determinative/Helpful Authorities

ADDENDUM B: Order of 11/16/04; Order of 3/24/05

ADDENDUM C: Excerpts from Transcripts of Oral  
Argument

ADDENDUM D: Excerpts from Ilona Bray, FIANCE &  
MARRIAGE VISAS: A COUPLE'S GUIDE TO U.S.  
IMMIGRATION (3rd ed. 2005)

## TABLE OF CASES & AUTHORITIES

	<u>Page:</u>
<b>CASES:</b>	
<u>Anderson v. American Liberty Lobby, Inc.</u> , 477 U.S. 242, 255 (U.S. 1986) .....	13
<u>Auerbach's, Inc. v. Kimball</u> , 572 P.2d 376, 377 (Utah 1977) .....	17
<u>Brandt. v. Springville Banking Co.</u> , 353 P.2d 460 (Utah 1960) .....	15
<u>Briggs v. Holcomb</u> , 740 P.2d 281 (Utah Ct. App. 1987) .....	1
<u>Canfield v. Albertsons, Inc.</u> , 841 P.2d 1224 (Utah App. 1992) .....	13
<u>Downtown Athletic Club v. Horman</u> , 740 P.2d 275 (Utah Ct. App.), <i>cert. denied</i> , 765 P.2d 1277 (Utah 1987) .....	17, 19
<u>Durham v. Margetts</u> , 571 P.2d 1332 (Utah 1977) ..	1
<u>Hill v. Allred</u> , 28 P.3d 1271 (Utah 2001) .....	21, 22
<u>Jackson v. Dabney</u> , 645 P.2d 613 (Utah 1982) ....	16
<u>Lutwak v. United States</u> , 73 S.Ct. 481, 344 U.S. 604 (1953) .....	25
<u>Reeves v. Geigy Pharmaceutical, Inc.</u> , 764 P.2d 636 (Utah Ct. App. 1988) .....	2
<u>United Park City Mines Co. v. Greater Park City Co.</u> , 870 P.2d 880, 885 (Utah 1993) .....	2
<u>United States v. Rubenstein</u> , 151 F.2d 915 (2nd Cir. 1945), <i>cert. denied</i> 326 U.S. 766 (1945)	25

<u>United States v. Yum</u> , 776 F.2d 490 (4th Cir. 1985) .....	25
<u>Webb v. McGhie Land Title Co.</u> , 549 F.2d 1358 (10th Cir. 1977) .....	15
<u>Winegar v. Froerer Corp.</u> , 813 P.2d 104 (Utah 1991) .....	2, 13

#### **STATUTORY AUTHORITIES:**

8 U.S.C. §§ 1154 (1994) .....	25
8 U.S.C. § 1184 (1994) .....	25
8 U.S.C. § 1186a (1994) .....	25
Utah Code Ann. § 78-2a-3(2) (h) .....	1
Utah Code Ann. § 30-1-4.5 .....	3, 20
Utah R. Civ. P. 7 .....	3
Utah R. Civ. P. 12 .....	3, 19
Utah R. Civ. P. 26 .....	17
Utah R. Civ. P. 56 .....	3, 11, 19

#### **TREATISES & OTHER AUTHORITIES:**

Ilona Bray, <u>FIANCE &amp; MARRIAGE VISAS: A COUPLE'S GUIDE TO U.S. IMMIGRATION</u> (3rd ed. 2005) .....	26
---	----

In re the Marriage of: :  
: Case No.: 20050374 CA  
JANICE RIRIE KUNZ and :  
RICHARD L. KUNZ (deceased). :  
:

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(h).

**Issue #1:** Did the lower court err in dismissing Janice Kunz's petition for common law marriage on summary judgment, finding that Janice did not have enough evidence to support her claim while at the same time disallowing her the opportunity to engage in any discovery? **Standard of Review:** Upon review of a grant of summary judgment, the appellate court will apply the same standard as that applied by the trial court. Durham v. Margetts, 571 P.2d 1332 (Utah 1977); Briggs v. Holcomb, 740 P.2d 281 (Utah Ct. App. 1987).

Because disposition of a case on summary judgment denies litigants the benefit of a trial on the merits, the



appellate court must review the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the losing party, and affirms only where it appears there is no genuine dispute as to any material issues of fact.

Reeves v. Geigy Pharmaceutical, Inc., 764 P.2d 636 (Utah Ct. App. 1988). Further, since summary judgment is granted as a matter of law rather than fact, the appellate court is free to reappraise the trial court's legal conclusions. Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991). **Record**

**Citation:** This issue was raised below at R. 12, 16-18, 63-64, 66-68, 126-28, 154-58, and during oral argument (transcripts found in Record at 189-243.)

**Issue #2:** Does the one-year statute of limitations serve as a bar to Janice's petition, where such petition was commenced within one year of the termination of her marriage to the decedent, and also within one year of the date on which she learned of the fraudulent marriage between the decedent and Lynne Kunz? **Standard of review:** This issue involves a question of law. On appeal, questions of law are reviewed de novo under the correction of error standard of review, and appellate courts will accord no particular deference to the lower court's conclusions. United Park

City Mines Co. v. Greater Park City Co., 870 P.2d 880, 885 (Utah 1993). **Record Citation:** R. at 155-56, 201-02.

**Issue #3:** Does the mere act of obtaining a marriage certificate bar an interested party from attacking the marriage as fraudulent? **Standard of review:** See issue #2 above. **Record Citation:** R. at 14-15, 35-36, 46, oral argument transcripts (R. at 189-243, *passim*).

#### **DETERMINATIVE AUTHORITIES**

The following authorities are either determinative of this appeal, or are of such central importance to merit their inclusion herein:

Utah Code Ann. § 30-1-4.5 (validity of marriage not solemnized).

Utah R. Civ. P. 7 (motion practice).

Utah R. Civ. P. 12 (motion to dismiss).

Utah R. Civ. P. 56 (summary judgment).

A copy of the foregoing authorities is attached hereto at Addendum A.

## STATEMENT OF THE CASE

### A. Nature of the Case:

This appeal is from an Order of the Third District Court, Salt Lake Department, Honorable Sandra N. Peuler presiding, dismissing on summary judgment Janice Kunz's petition for judicial declaration of common law marriage, concluding that the decedent Richard Kunz was already legally married to a different party, Lynne Kunz, thereby precluding the possibility of finding a valid marriage between Janice and Richard.

### B. Course of the Proceedings and the Disposition Below:

On April 6, 2004, Janice Kunz (hereinafter "Janice") filed a verified petition for judicial declaration of common law marriage, seeking an Order declaring her the common law spouse of Richard Kunz ("Richard"), who passed away on July 9, 2003. Two parties were served with a copy of the petition, to wit: Lynne Kunz, an individual claiming to be the decedent's legal wife; and, Lillie Spencer, a purported "spiritual wife" of the decedent, who was never legally married to him.

Before Janice was able to serve the petition on the

decedent's personal representative, Lillie Spencer filed a motion for summary judgment or to dismiss on April 19, 2004. Acting in concert with Spencer, and using the same counsel, Lynne Kunz filed her own motion for summary judgment, reasserting the same arguments raised in Spencer's motion. After counsel for Janice filed an affidavit seeking an opportunity to engage in discovery, the matter was heard at oral argument on September 17, 2004. The domestic court commissioner then issued a recommendation, concluding that the matter would be treated as a motion for summary judgment and that the motion would be granted in favor of Lillie Spencer and Lynne Kunz (hereinafter sometimes collectively referred to as the "appellees").

Thereafter, on September 24, 2004, Janice timely filed an objection to the commissioner's recommendation, coupled with a request for oral argument. Appellees subsequently filed a response to Janice's objection on October 8, 2004, and later submitted an affidavit in support of attorney fees on November 8, 2004. Janice filed a motion to strike the attorney fee affidavit on November 9, 2004. Shortly thereafter, Judge Peuler issued an Order on November 16, 2004, upholding the commissioner's recommendation of summary

judgment dismissal and denying Janice's request for oral argument.

On March 3, 2005, a hearing was held before the domestic court commissioner on the issue of attorney fees. Following the hearing, the commissioner issued a recommendation denying attorney fees. Appellees objected to the recommendation, and the matter was therefore presented to Judge Peuler for a decision. On March 24, 2005, Judge Peuler entered an Order denying the objection and upholding the commissioner's recommendation. Janice then commenced the instant appeal on April 20, 2005. No prior or related appeals have been taken.

C. Statement of Facts:

1. Janice and Richard Kunz were married in the Salt Lake Temple on June 18, 1953. Previously, neither party had ever been married. (Verified Petition, ¶ 4 (Record at 2)).

2. Thereafter, the parties became followers of the doctrine of plural marriage, and in 1961 they divorced in order to allow Richard to marry another spouse, Rachel Kunz, in a civil ceremony. (R. at 2, ¶¶ 5-6.)

3. Despite Janice and Richard's divorce, the two

continued to reside together, hold property together, and otherwise acted as if they were married. (R. at 2, ¶¶ 6-7.)

4. Rachel Kunz subsequently passed away in approximately May of 1994. (R. at 2, ¶ 8.)

5. Thereafter, Janice and Richard continued to reside together as common law husband and wife. (R. at 2, ¶ 7.)

6. Sometime later, Richard took another spiritual wife, Lillie Spencer, but he did not legally marry her. (R. at 2, ¶ 9; Affidavit of Janice Kunz, ¶ 8 (R. at 22)).

7. On or about September 17, 1999, Richard purported to marry another individual, Lynne R. Kunz, in a secret civil ceremony, with a marriage license and certificate issued. (R. at 2, ¶ 10; R. at 22, ¶ 9; R. at 46.)

8. At the time of his marriage to Lynne, Richard was already common law married to Janice. (R. at 2, ¶ 11.)

9. The marriage to Lynne was done in utter secrecy, without Janice's knowledge. (Affidavit of Janice Kunz, ¶ 9 (R. at 22); Affidavit of Viroque Kunz, ¶¶ 3-4 (R. at 46)). It was done as a matter of expediency and as a favor to Lynne, to allow her--a British citizen--to remain in the country on an expiring visa. (R. at 35-36, ¶¶ 10-14; R. at 46, ¶¶ 3-4)). Lynne was already the plural wife of a

different husband, Andrew Williams, but she was unable to legally marry him because he had already taken a legal wife. (Affidavit of Debbie Darger, ¶¶ 11-12 (R. at 35-36); Affidavit of Viroque Kunz, ¶3-4 (R. at 46)).

10. Following their "civil union", Lynne did not cohabit with Richard, nor did the couple hold themselves out as husband and wife, nor did they hold property together, nor did they have children together. (Affidavit of Debbie Darger, ¶¶ 11-14 (R. at 35-36); Affidavit of Janice Kunz, ¶¶ 9-10 (R. at 22)).

11. By contrast, Janice and Richard continued to reside together, and held themselves out as husband and wife and acquired a general reputation in the community as married. This situation existed from June 18, 1953, through July 9, 2003, when Richard passed away. (Verified Petition, ¶¶ 12-14 (R. at 2-3); Affidavit of Janice Kunz, ¶¶ 6, 11-12 (R. at 22-23)).

12. Janice and Richard had two children together during their marriage. (Verified Petition, ¶ 15 (R. at 3)).

13. Janice and Richard held property together jointly during their marriage. (Affidavit of Janice Kunz, ¶¶ 6, 11-12 (R. at 22-23)).

14. On June 18, 2003, the date of Janice and Richard's 50th wedding anniversary, Lillie presented the couple with an anniversary card, congratulating them on their golden anniversary. The card reads in pertinent part: "Richard and Janice[,] God Bless You on Your Golden Anniversary." (Id., ¶ 13 (R. at 23)).

15. Richard died on July 9, 2003, at age 68. (Verified Petition, ¶ 2 (R. at 1)). Lynne attended his funeral, but not as his surviving widow. Instead, she attended the funeral with her real husband, Andrew Williams, along with Andrew's other wife, Teresa. The funeral log shows them signing in as follows: "Andrew, Lynne & Teresa Williams." (Attachment to Affidavit of William P. Morrison of 6/2/04 (R. at 71)).

16. At the grave site, Andrew Williams made some remarks about Richard, stating that he had done a lot for Andrew's family, his wives, and himself. Andrew made these comments with his wife Teresa on one arm, and his other wife Lynne on the other. (Affidavit of Viroque Kunz, ¶4 (R. at 46)).

17. Janice filed her verified petition for judicial declaration of common law marriage on April 6, 2004. (R.



at 1.) Service of process of the verified petition on Lynne was accomplished by way of service on Andrew Williams at a common address. (Affidavit of William P. Morrison of 2/2/04, ¶ 12 (R. at 67); Constable's Affidavit of Service, R. at 48)). Lynne has not contested the validity of such service. (See Court Docket, *passim*.)

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

Janice is the only party entitled to legal recognition of her marriage to Richard. From the date of the couple's legal union in the Salt Lake Temple in 1953, continuing for the next fifty years until the time of Richard's death in July of 2003, the parties resided together, held property together, had children together, and held themselves out and acquired a reputation in the community as husband and wife.

By contrast, the secret marriage of Richard and Lynne was nothing other than a sham. It was a marriage of expediency, nothing more. At no time did these two individuals ever reside together, have children together, hold property together, file taxes together, or hold themselves out as husband and wife and establish a reputation as such in the community. Rather, their union

was simply undertaken to allow Lynne to remain in the country on an expiring visa. This so-called marital union was a fraud when it was undertaken, and it remains a fraud to this date. There is no basis in law or fact to uphold the marriage, nor to afford it any legal recognition. This Court should therefore reverse the lower court's grant of summary judgment in favor of the appellees, and reinstate Janice's petition forthwith.

#### **ARGUMENT**

##### **I. THE LOWER COURT ERRED IN DISPOSING OF THIS CASE ON SUMMARY JUDGMENT**

This is not a case that should have been decided on summary judgment. The issues involved in this case are factually unique, and are believed to be matters of first impression. Such issues do not lend themselves well to summary disposition. On summary judgment, the law must be well settled in favor of the moving party, and the moving party must show the nonexistence of any genuine issues of material fact. Utah R. Civ. P. 56(c). In the instant case, the law is not well settled, and the fundamental issue in the case is sharply disputed, to wit: whether Lynne is the

surviving widow of the decedent, or whether such title properly belongs to Janice. In light of the foregoing, it was imprudent for the lower court to dispose of this case on summary judgment. As the following discussion will demonstrate, the lower court granted summary judgment in error, and this Court should therefore reverse the lower court's decision and remand this case for further proceedings.

**A. Two Critical Errors Were Committed Below,  
Each of Which Warrants Reversal**

It is submitted that the domestic court commissioner made two fundamental errors in granting summary judgment below, which errors were perpetuated by the lower court. First, the commissioner improperly weighed the evidence, choosing to disbelieve the claim made by Janice in her affidavit that she did not know of Lynne's marriage to Richard until after Richard had passed away. Second, the commissioner improperly concluded that Janice lacked the requisite evidence to show the invalidity of Lynne's marriage to Richard, while at the same time denying Janice the opportunity to obtain additional evidence through the

process of discovery. Both of these errors warrant reversal of the lower court's decision.

The first error shows that the lower court did not properly follow the law in entering summary judgment in favor of the appellees. On summary judgment, it is not the proper role of the court to weigh the evidence. Instead, the role of the court is to view the evidence in the light most favorable to the nonmoving party. Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991); Canfield v. Albertsons, Inc., 841 P.2d 1224, 1226 (Utah App. 1992). As stated by the United States Supreme Court: "**The evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor.**" Anderson v. American Liberty Lobby, Inc., 477 U.S. 242, 255 (U.S. 1986) (emphasis added).

In the instant case, the domestic court commissioner improperly weighed the evidence. Instead of believing Janice's evidence, which showed that Janice was unaware of the purported marriage between Richard and Lynne until after Richard's death (Affidavit of Janice Kunz, ¶ 9 (Record at 22)), the commissioner viewed this evidence skeptically. This is clear from two statements made by the commissioner during oral argument. The first statement is reported at

page 216 of the Record, wherein the following remark is made: "Then somewhere around 1999 we get Lynn and Richard. **Supposedly** Janice doesn't know about it. It's a secret marriage." (R. at 216 (Addendum C, at 28:19-20) (emphasis added)). The commissioner's use of the word "supposedly" shows marked skepticism on her part as to the truthfulness of Janice's affidavit.

The second indication of the commissioner's disbelief of Janice's evidence is found at pages 223 and 224 of the Record, wherein the the following exchange is reported:

THE COURT: [T]here were a few facts that I wanted to get clear. Janice didn't know about the marriage to Lynn, **supposedly**, until the log--the funeral log, if I recall. They never knew each other? They never knew each other--never met?

MR. MORRISON: I can't say for certainty whether that's true, but I don't--

THE COURT: She has resided with Richard every day, every moment?

MR. MORRISON: When you say "she" you mean--

THE COURT: Janice.

MR. MORRISON: --Janice.

THE COURT: Every day, every moment since really their marriage?

MR. MORRISON: Not totally correct because

he's also split part of his time with Lillie Spencer, so I don't want to mislead the Court on that.

THE COURT: Okay. So Lillie Spencer signed the marriage certificate with Lynn, and so how would he not--how would she not know? Did these--they never talk, Lillie and Janice never talk, and they wouldn't have mentioned this little certificate that has Lillie's name on it where he's spending half of his time?

(Record at 223-24 (copy attached hereto at Addendum C, at 31-32, LL 15-26, 1-12) (emphasis added)).

Here, we clearly see the commissioner weighing the evidence, and effectively disregarding the allegation made in Janice's affidavit that she knew nothing of the Lynne and Richard wedding until after Richard had died. Janice cited this improper weighing of the evidence in her objection to the commissioner's recommendation, but the lower court did nothing to rectify the matter. Instead, the lower court summarily affirmed the commissioner's grant of summary judgment without a hearing. This was improper, and warrants reversal in and of itself. See Webb v. McGhie Land Title Co., 549 F.2d 1358 (10th Cir. 1977) (summary judgment is a drastic action, not favored except in those rare instances where a trial on the merits would be fruitless); Brandt. v. Springville Banking Co., 353 P.2d 460 (Utah 1960) (stating

that because summary disposition denies litigants the benefits of a trial, courts are, and should be, reluctant to invoke the remedy); Jackson v. Dabney, 645 P.2d 613 (Utah 1982) (same).

The second fundamental error that was made below concerns the lower court's refusal to allow Janice to engage in any discovery. This is important, because the lower court made a ruling that cut against Janice with a double edged sword. The court ruled that Janice did not have sufficient evidence to support her claim that Lynne's marriage to Richard was a fraud, while at the same time barring Janice from obtaining additional evidence to support her claim through the process of discovery.

At oral argument, the domestic court commissioner hammered this matter home. She stated in her ruling: "Looking at all of the facts, the petitioner was married and then subsequently divorced from the decedent, Mr. Kunz, and she wants that declared now to be a common law marriage, which on its face I have to invalidate the certified copy of the marriage between Lynn and Richard in 1999. To do that there has to be clear and convincing evidence that that was fraud. I don't have--**that is a higher level. It is just**

under a criminal standard. I don't have that level. It doesn't rise to that level. I can't see that I shouldn't grant the summary judgment because on its face and the documents presented, the evidence presented is there is a valid marriage." (Record at 228 (Addendum C, at 36:11-22) (emphasis added)).

Janice timely submitted an objection to the commissioner's recommendation, asserting in part that discovery should be allowed before a ruling was entered on the summary judgment motion. How else could Janice hope to prove, by the commissioner's standard, that a fraud occurred by "clear and convincing evidence"? Yet the lower court overruled Janice's objection and upheld the commissioner's recommendation, concluding that further discovery was unnecessary. (Order of November 16, 2004, at 1 (Record at 272)). This was clear error.

Under Utah law, it is generally not appropriate for a court to rule on a pending summary judgment motion until after the deadline for discovery cutoff has passed, because information may be learned through discovery sufficient to defeat the motion. Such was the holding in Auerbach's, Inc. v. Kimball, 572 P.2d 376, 377 (Utah 1977) and Downtown



Athletic Club v. Horman, 740 P.2d 275 (Utah Ct. App.), cert. denied, 765 P.2d 1277 (Utah 1987). Notably, these cases was decided before the adoption of Rule 26 of the Utah Rules of Civil Procedure. The rule of law laid down in these cases is even more apropos now, because Rule 26 strictly prohibits parties from engaging in any discovery until after the parties have held an attorney's planning meeting and have submitted a case management order, which does not occur until after an answer is filed. Utah R. Civ. P. 26(d).

In this case, counsel for Janice cited to the Horman decision and requested that no ruling on the pending summary judgment motion be made until after the parties had conducted discovery. In addition, counsel filed an affidavit requesting an opportunity to engage in discovery. Among other things, the subject affidavit stated that written discovery requests were needed, as well as several depositions. Counsel requested an opportunity to depose Lillie Spencer, Lynne Kunz, and Andrew Williams. Counsel also stated that discovery was particularly necessary on the validity of the solemnized marriage between the decedent and Lynne Kunz. Since this marriage was done in utmost secrecy, not much information was available about the same, thus

warranting the need for discovery. Further, counsel stated that discovery needed to be conducted on the issue of Lynne's marriage to Andrew Williams. Such matter was relevant because of its bearing on Janice's claim that Lynne's marriage to Richard was a sham, inasmuch as she was already married to someone else.

The domestic court commissioner refused to allow any discovery. Such ruling was upheld by the lower court, which concluded that "further discovery was unnecessary." (Order of 11/16/04; R. at 272.) This ruling was entered in error. It was simply not appropriate for the lower court to have resolved this matter on summary judgment, without affording Janice an opportunity to engage in any discovery. Such result is unsound and contrary to law. Not only is it contrary to the Horman case, but it is also contrary to the Utah Rules of Civil Procedure. Where, as here, the court elects to treat a Rule 12(b)(6) motion as a motion for summary judgment, each party must as a matter of law be afforded an opportunity to present all material evidence to the court that is relevant to the motion. Rule 12 provides in pertinent part: "If, on a motion asserting the defense number (6) to dismiss for failure of the pleading to state a

claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and **all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.**" Utah R. Civ. P. 12(b) (emphasis added).

The lower court's entry of summary judgment in favor of the appellees, without affording Janice the opportunity to engage in discovery and present all pertinent and relevant evidence to the court, runs afoul of the law and must be overturned. This Court should therefore reverse the lower court's decision, and remand this case for further proceedings.

**B. Janice's Petition Was Timely Filed within One Year of the Date on which Her Marriage to Richard Was Terminated**

There is no basis for concluding that Janice's petition was untimely filed. Under Utah law, petitions for judicial declaration of common law marriage must be commenced within one year of the date on which the marriage relationship terminated. Utah Code Ann. § 30-1-4.5(2). In the instant

case, Janice's marriage to Richard was terminated by his death in July of 2003. Her petition was filed in April of 2004, well within the one year limitation period. Therefore, her petition was timely filed.

Appellees' may attempt to claim that Lynne's solemnized marriage to Richard in September of 1999 ended Janice's common law marriage to him, thus rendering her petition untimely when it was filed in April of 2004. This argument, however, is unavailing, because Lynne fraudulently concealed her marriage to Richard. Under Utah law, it is well settled that acts of fraudulent concealment toll the statute of limitations. Hill v. Allred, 28 P.3d 1271, \_\_\_\_\_ (Utah 2001). In the instant case, Janice has asserted that Lynne's marriage to Richard was a fraud, which was concealed from the public. The evidence before this Court shows that such marriage was undertaken in utmost secrecy, and was done not to effectuate a valid marriage but to try to skirt immigration laws and allow Lynne to remain in the country on an expiring visa. The evidence further shows that Janice knew nothing of the Lynne and Richard marriage until after Richard had passed away. Under Utah law, these facts are sufficient to toll the statute of limitations, at least

until Janice discovered the fraud or, through the exercise of reasonable dilligence, should have discovered it.

Indeed, this is the law laid down by the Utah Supreme Court in Hill, a case in which appellees' counsel served as an attorney of record.

Based upon the foregoing, the statute of limitations on Janice's petition did not begin to run until she discovered the fraudulently concealed marriage of Lynne and Richard. This discovery was not made until after Richard had passed away, according to Janice's affidavit. Since Janice's petition was commenced within one year of the date of Richard's death, the petition was timely filed under any factual scenario. Hence, the statute of limitations does not provide a sound basis for upholding the dismissal of Janice's petition. This Court should therefore reinstate the petition and allow it to proceed on its merits.

## **II. JANICE'S MARRIAGE TO RICHARD IS THE ONLY MARRIAGE ENTITLED TO LEGAL RECOGNITION**

Everything that appellees have done in this case has been geared toward prevailing on procedural grounds, not on the merits. Instead of submitting an answer to Janice's

petition, appellees have filed a motion for summary judgment or to dismiss. Instead of allowing some discovery to be taken before seeking a ruling on their motion, appellees have opposed Janice's request for discovery. Instead of submitting a detailed affidavit supporting the validity of Lynne's marriage to Richard, appellees have tendered a terse affidavit from Lynne, seeking to uphold the form of a paper marriage certificate over the substance of a valid marriage.

On appeal, appellees have continued their pattern of advancing form over substance, procedure over merit. Once again, we see every effort being made to attack Janice's appeal on procedural grounds, not on its merits. This is evident by the two motions for summary disposition that appellees have already filed, seeking a premature resolution of this appeal without reaching the merits of the case. The only fair inference to be drawn from appellees' actions is that they are afraid of the merits of this case, which do not support their position. Indeed, the merits overwhelmingly favor Janice.

For a period of over 50 years, Janice has dutifully stood at Richard's side as his friend, companion and spouse. During this time, she resided with him, held property

jointly with him, had children with him, and held herself out as his wife. Her union with Richard bears all of the stamps and indicia of a valid marital relationship. By contrast, what evidence has Lynne offered to show a valid marital relationship with Richard? Nothing more substantive than a scrap of paper. Consider her affidavit, and its woeful silence as to any indication of a valid marriage to Richard. Does the affidavit allege any period of courtship with Richard? No. Does it allege any cohabitation with Richard? No. Does it allege that any children were born of their union? No. Does it allege that the parties held any property jointly together? No. Does it allege the filing of any joint tax returns? No. Does it allege any honeymoon being undertaken after the parties married? No. Does it allege any holding out by the two as husband and wife? No. Does it allege the establishment of a reputation in the community as that of husband and wife? No.

In its silence, the affidavit of Lynne Kunz actually tells the real story. It speaks of immigration fraud. It speaks of marriage fraud. It speaks of a fraud on the court.

Unfortunately for Lynne, the law does not provide any

legal recognition of sham marriages. The definition of a sham marriage is one that is undertaken in jest for an unlawful purpose, with no intent by the parties to establish a life together. United States v. Yum, 776 F.2d 490 (4th Cir. 1985). Such marriages have always been improper, but have recently come under great scrutiny and widespread attack as being a huge source of abuse with respect to immigration laws. In this arena, sham marriages are undertaken to allow an immigrant to enter or remain in the country and receive priority for permanent residency status. Id. Again, this is unlawful. A sham marriage is a fraud marriage, and the parties thereto are subject to severe criminal penalties. See, e.g., Lutwak v. United States, 73 S.Ct. 481, 344 U.S. 604 (1953); Yum, 776 F.2d at \_\_\_\_\_; United States v. Rubenstein, 151 F.2d 915 (2nd Cir. 1945), *cert. denied* 326 U.S. 766 (1945); see also 8 U.S.C. §§ 1154, 1184, 1186a (1994) (Immigration Marriage Fraud Amendments of 1986).

In this case, Janice has alleged that the marital union of Lynne and Richard was a sham. It was a sham from the outset, done for an unlawful purpose. It was undertaken for the sole and express purpose of allowing Lynne, a British



citizen, to remain in the country on an expiring visa. The marriage ceremony itself was done in utmost secrecy, and following the ceremony there was no cohabitation by the parties nor an intent to remain together as husband and wife. This by its very definition is marriage fraud. As stated by author Ilona Bray in her legal treatise, *FIANCE & MARRIAGE VISAS: A COUPLE'S GUIDE TO U.S. IMMIGRATION* (3rd ed. 2005), "[a] sham marriage is one that is entered into in order to get around the U.S. immigration laws. **For a marriage to be valid under the law, it is not enough that the couple had a real marriage ceremony and got all the right governmental stamps on their marriage certificate. They have to intend to live together in a real marital relationship following the marriage ceremony--and prove their intention through their actions."** (Emphasis added) (excerpted at Addendum D)).

The marriage certificate that Lynne and Richard obtained may have been real, but their purported martial union was not. At all times material herein, Lynne was already the putative plural wife of Andrew Williams. She had no intent to marry Richard, other than to obtain a piece of paper allowing her to remain in the country and defraud the United States. Janice is the real spouse and widow of the

decendent, and her marriage to Richard is the only one worthy of legal recognition. This Court should therefore reverse the lower court's dismissal of her petition, and reinstate the same forthwith.

**CONCLUSION:**

Based upon the foregoing, Janice respectfully asks this Court to reverse the lower court's entry of summary judgment in favor of the appellees. The lower court dismissed Janice's petition for common law marriage in error. This Court should therefore reverse the lower court's decision, and remand the case for further proceedings.

DATED this 22<sup>nd</sup> day of August, 2005.

MORRISON & MORRISON, L.C.

WP Morrison

William P. Morrison  
Grant W. P. Morrison  
Attorneys for Appellant  
Janice R. Kunz

CERTIFICATE OF SERVICE

This certifies that on the 22<sup>nd</sup> day of August, 2005, I caused to be mailed, via U.S. mail first-class and postage-prepaid, two true and correct copies of the foregoing Appellant Brief to the following

Ronald C. Barker  
Barker Law Office  
Attorney for Appellees  
2870 South State St.  
Salt Lake City, UT 84115

DATED: 8/22/05

WP Morrison  
William P. Morrison  
Attorney for Appellant

## ADDENDUM

# ADDENDUM A

**30-1-2.1. Validation of marriage to a person subject to chronic epileptic fits who had not been sterilized.**

All marriages, otherwise valid and legal, contracted prior to the effective date of this act, to which either party was subject to chronic epileptic fits and who had not been sterilized, as provided by law, are hereby validated and legalized in all respects as though such marriages had been duly and legally contracted in the first instance. 1983

**30-1-2.2. Validation of interracial marriages.**

All interracial marriages, otherwise valid and legal, contracted prior to July 1, 1965, to which one of the parties of the marriage was subject to disability to marry on account of Subsection 30-1-2(5) or (6), as those subsections existed prior to May 14, 1963, are hereby valid and made lawful in all respects as though such marriages had been duly and legally contracted in the first instance. 1995

**30-1-2.3. Validation of marriage to a person with acquired immune deficiency syndrome or other sexually transmitted disease.**

Each marriage contracted prior to October 21, 1993, is valid and legal but for the prohibition described in Laws of Utah 1991, Chapter 117, Section 1, Subsection 30-1-2(1) regarding persons afflicted with acquired immune deficiency syndrome, syphilis, or gonorrhea, is hereby valid and made lawful in all respects as though that marriage had been legally contracted in the first instance. 1995

**30-1-3. Marriage in belief of death or divorce of former spouse — Issue legitimate.**

When a marriage is contracted in good faith and in the belief of the parties that a former husband or wife, then living and not legally divorced, is dead or legally divorced, the issue of such marriage born or begotten before notice of the mistake shall be the legitimate issue of both parties. 1953

**30-1-4. Validity of foreign marriages — Exceptions.**

A marriage solemnized in any other country, state, or territory, if valid where solemnized, is valid here, unless it is a marriage:

- (1) that would be prohibited and declared void in this state, under Subsection 30-1-2(1), (3), or (5); or
- (2) between parties who are related to each other within and including three degrees of consanguinity, except as provided in Subsection 30-1-1(2). 1996

**30-1-4.1. Marriage recognition policy.**

(1) (a) It is the policy of this state to recognize as marriage only the legal union of a man and a woman as provided in this chapter.

(b) Except for the relationship of marriage between a man and a woman recognized pursuant to this chapter, this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and a woman because they are married.

(2) Nothing in Subsection (1) impairs any contract or other rights, benefits, or duties that are enforceable independently of this section. 2004

**30-1-4.5. Validity of marriage not solemnized.**

(1) A marriage which is not solemnized according to this chapter shall be legal and valid if a court or administrative order establishes that it arises out of a contract between a man and a woman who:

- (a) are of legal age and capable of giving consent,
- (b) are legally capable of entering a solemnized marriage under the provisions of this chapter;

(c) have cohabited,

(d) mutually assume marital rights, duties, and obligation, and

(e) who hold themselves out as and have acquired a uniform and general reputation as husband and wife.

(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. 2004

**30-1-5. Marriage solemnization — Before unauthorized person — Validity.**

(1) A marriage solemnized before a person professing to have authority to perform marriages shall not be invalidated for lack of authority, if consummated in the belief of the parties or either of them that he had authority and that they have been lawfully married.

(2) This section may not be construed to validate a marriage that is prohibited or void under Section 30-1-2. 2001

**30-1-6. Who may solemnize marriages — Certificate.**

(1) Marriages may be solemnized by the following persons only:

(a) ministers, rabbis, or priests of any religious denomination who are:

(i) in regular communion with any religious society; and

(ii) 18 years of age or older;

(b) Native American spiritual advisors;

(c) the governor;

(d) mayors of municipalities or county executives;

(e) a justice, judge, or commissioner of a court of record;

(f) a judge of a court not of record of the state;

(g) judges or magistrates of the United States;

(h) the county clerk of any county in the state, if the clerk chooses to solemnize marriages;

(i) the president of the Senate;

(j) the speaker of the House of Representatives; or

(k) a judge or magistrate who holds office in Utah when retired, under rules set by the Supreme Court.

(2) A person authorized under Subsection (1) who solemnizes a marriage shall give to the couple married a certificate of marriage that shows the:

(a) name of the county from which the license is issued; and

(b) date of the license's issuance.

(3) As used in this section:

(a) "Judge or magistrate of the United States" means:

(i) a justice of the United States Supreme Court;

(ii) a judge of a court of appeals;

(iii) a judge of a district court;

(iv) a judge of any court created by an act of Congress the judges of which are entitled to hold office during good behavior;

(v) a judge of a bankruptcy court;

(vi) a judge of a tax court; or

(vii) a United States magistrate.

(b) (i) "Native American spiritual advisor" means a person who:

(A) (I) leads, instructs, or facilitates a Native American religious ceremony or service; or

(II) provides religious counseling; and

(B) is recognized as a spiritual advisor by a federally recognized Native American tribe.

(ii) "Native American spiritual advisor" includes a sweat lodge leader, medicine person, traditional religious practitioner, or holy man or woman.

—**New trial.**

Provision that notice of hearing on motion be served not later than five days before the time specified for the hearing does not apply to motion for new trial and such notice is not integral part of motion for new trial; rule does not change procedure whereby a motion can be called up at any time parties desire to do so. *Howard v. Howard*, 11 Utah 2d 149, 356 P.2d 275 (1960).

—**Compliance with rule.**

—**Actual notice.**

The trial court may dispense with technical compliance with the five-day notice provision of Subdivision (d) if there is satisfactory proof that a party had actual notice and time to prepare to meet the questions raised by the motion. *Jensen v. Eames*, 30 Utah 2d 423, 519 P.2d 236 (1974); *Sandy City v. Salt Lake County*, 794 P.2d 482 (Utah Ct. App. 1990), rev'd on other grounds, 827 P.2d 212 (Utah 1992).

—**Ineffective notice.**

Eight days' notice of trial was ineffective to give five days' notice when notice was by mail, since Saturday, Sunday, and three days for mailing were to be deducted from eight-day period. *Mickelson v. Shelley*, 542 P.2d 740 (Utah 1975).

—**Time to prepare.**

Plaintiff was not prejudiced by two-day notice of hearing to release property subject to writ of attachment where he had adequate time to prepare for hearing and defendant was required to post cashier's check in lieu of security.

*Jensen v. Eames*, 30 Utah 2d 423, 519 P.2d 236 (1974).

—**Continuance.**

—**Surprise.**

Neither plaintiff's failure to serve motion for continuance five days before date set for hearing nor failure to file affidavits accompanying motion justified denial of motion where plaintiff's counsel did not learn of reason for plaintiff's inability to appear at hearing in time to make motion five days before hearing and Rule 10(b) does not expressly require affidavits to accompany motion for continuance. *Bairas v. Johnson*, 13 Utah 2d 269, 373 P.2d 375 (1962).

Cited in *Goddard v. Bundy*, 121 Utah 299, 241 P.2d 462 (1952); *Mower v. Bohmke*, 9 Utah 2d 52, 337 P.2d 429 (1959); *Western States Thrift & Loan Co. v. Blomquist*, 29 Utah 2d 58, 504 P.2d 1019 (1972); *Connelly v. Rathjen*, 547 P.2d 1336 (Utah 1976); *Genuine Parts Co. v. Larson*, 555 P.2d 285 (Utah 1976); *McEwen Irrigation Co. v. Michaud*, 558 P.2d 606 (Utah 1976); *Utah Chiropractic Ass'n v. Equitable Life Assurance Soc'y*, 579 P.2d 1327 (Utah 1978); *Reagan Outdoor Adv., Inc. v. Utah DOT*, 589 P.2d 782 (Utah 1979); *Albrecht v. Uranium Servs., Inc.*, 596 P.2d 1025 (Utah 1979); *Ute-Cal Land Dev. v. Intermountain Stock Exch.*, 628 P.2d 1278 (Utah 1981); *Bennion v. Hansen*, 699 P.2d 757 (Utah 1985); *K.O. v. Denison*, 748 P.2d 588 (Utah Ct. App. 1988); *P & B Land, Inc. v. Klungervik*, 751 P.2d 274 (Utah Ct. App. 1988); *Huston v. Lewis*, 818 P.2d 531 (Utah 1991); *Wilcox v. Geneva Rock Corp.*, 911 P.2d 367 (Utah 1996); *Low v. City of Monticello*, 2002 UT 90, 54 P.3d 1153.

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 20 Am. Jur. 2d Courts § 20 et seq.; 56 Am. Jur. 2d Motions, Rules, and Orders § 10; 62B Am. Jur. 2d Process §§ 114-117, 227-229.

**C.J.S.** — 60 C.J.S. Motions and Orders § 8; 66 C.J.S. Notice § 27 et seq.; 71 C.J.S. Pleading §§ 98, 114, 219; 72 C.J.S. Process §§ 72, 78.

**A.L.R.** — Vacating judgment or granting new trial in civil case, consent as ground of after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Attorney's inaction as excuse for failure to timely prosecute action, 15 A.L.R.3d 674.

Validity of service of summons or complaint on Sunday or holiday, 63 A.L.R.3d 423.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 A.L.R.3d 845.

Consequences of prosecution's failure to file timely brief in appeal by accused, 27 A.L.R.4th 213.

What constitutes bringing an action to trial or other activity in case sufficient to avoid dismissal under state statute or court rule requiring such activity within stated time, 32 A.L.R.4th 840.

### PART III. PLEADINGS, MOTIONS, AND ORDERS

#### Rule 7. Pleadings allowed; motions, memoranda, hearings, orders, objection to commissioner's order.

(a) *Pleadings.* There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) *Motions.* An application to the court for an order shall be by motion which, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(c) *Memoranda.*

(c)(1) *Memoranda required, exceptions, filing times.* All motions, except uncontested or ex parte motions, shall be accompanied by a supporting memorandum. Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered without leave of court. A party may attach a proposed order to its initial memorandum.

(c)(2) *Length.* Initial memoranda shall not exceed 10 pages of argument without leave of the court. Reply memoranda shall not exceed 5 pages of argument without leave of the court.

The court may permit a party to file an over-length memorandum upon ex parte application and a showing of good cause.

(c)(3) *Content.*

(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

(c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

(c)(3)(C) A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.

(c)(3)(D) A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

(d) *Request to submit for decision.* When briefing is complete, either party may file a "Request to Submit for Decision." The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

(e) *Hearings.* The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing shall be separately identified in the caption of the document containing the request. The court shall grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.



(f) *Orders.*

(f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

(g) *Objection to court commissioner's recommendation.* A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection in the same manner as filing a motion within ten days after the recommendation is made in open court or, if the court commissioner takes the matter under advisement, ten days after the minute entry of the recommendation is served. A party may respond to the objection in the same manner as responding to a motion. (Amended effective November 1, 2003; April 1, 2004.)

**Advisory Committee Note.** — The practice for courtesy copies varies by judge and so is not regulated by rule. Each party should ascertain whether the judge wants a courtesy copy of that party's motion, memoranda and supporting documents and, if so, when and where to deliver them.

Paragraph (f) applies to all orders, not just orders upon motion.

**Amendment Notes.** — The 2003 amendment deleted "denominated as such" after "counterclaim" in Subdivision (a); rewrote Subdivisions (b) and (c); and added Subdivisions (d) to (g).

The 2004 amendment inserted "or in proceedings before a court commissioner" in Subdivision (b); substituted the first paragraph in Subdivision (c)(2) for a list of maximum lengths for different types of memoranda; in Subdivision (f)(2), substituted "serve upon the other parties" for "file" in the first sentence and added the last sentence; in Subdivision (g), substituted "recommendation" for "recommended order" several times and substituted "made in open court" for "entered" and added the clause beginning "or, if" in the second sentence; and added the second paragraph of the Advisory Committee Note.

**Compiler's Notes.** — This rule is similar to Rule 7, F.R.C.P.

**Cross-References.** — Amendment of pleadings to conform to evidence, motion for, U.R.C.P. 15(b).

Commencement of action, U.R.C.P. 3.

Consolidation of defenses made by motion, U.R.C.P. 12(g).

Counterclaim and cross-claim, U.R.C.P. 13.

Defenses and objections, U.R.C.P. 12.

Denial of motion, pleading after, U.R.C.P. 12(i).

Directed verdict and judgment notwithstanding the verdict, motion for, U.R.C.P. 50.

Dismissal of actions, U.R.C.P. 41.

Eminent domain proceedings, contents of complaint in, § 78-34-6.

Evidence in support of motion, U.R.C.P. 43(b).

Execution and proceedings supplemental thereto, U.R.C.P. 69A et seq.

Extraordinary relief, U.R.C.P. 65B.

Forcible entry or detainer, proof required, § 78-36-9.

Form of pleadings, U.R.C.P. 10.

"Judgment" defined, U.R.C.P. 54(a).

One form of action, U.R.C.P. 2.

Partition of property, complaint to set forth interests of all parties, § 78-39-2.

Pleading special matters, U.R.C.P. 9.

Relief from judgment or order, U.R.C.P. 60.

Requirements of signature, U.R.C.P. 11.

Service and filing of motions, pleadings and other papers, U.R.C.P. 5.

Special forms of writs abolished, U.R.C.P. 65B(a).

Supreme Court, rulemaking power of, § 78-2-4.

Temporary restraining orders, setting aside, U.R.C.P. 65A.

Time for service of written motions, U.R.C.P. 6(d).

## COLLATERAL REFERENCES

**Utah Law Review.** — Recent Developments in Utah Law — Legislative Enactments — Attorney's Fees, 1989 Utah L. Rev. 342.

Case Law Development: I. Appellate Review and Procedure, 1998 Utah L. Rev. 585.

**Brigham Young Law Review.** — Curbing Discovery Abuse in Civil Litigation: Enough Is Enough, 1981 B.Y.U. L. Rev. 579.

Curbing Discovery Abuse in Civil Litigation: We're Not There Yet, 1981 B.Y.U. L. Rev. 597.

Note, Appellate Review of Rule 11 Issues — De Novo or Abuse of Discretion? *Thomas v. Capital Security Services, Inc.*, 1989 B.Y.U. L. Rev. 877.

Rule 11 and Federalizing Lawyer Ethics, 1991 B.Y.U. L. Rev. 959.

Fines Under New Federal Civil Rule 11: The New Monetary Sanctions for the "Stop-and-Think-Again" Rule, 1993 B.Y.U. L. Rev. 879.

**Am. Jur. 2d.** — 61A Am. Jur. 2d Pleading §§ 339 to 349.

**C.J.S.** — 71 C.J.S. Pleading §§ 339 to 366.

**A.L.R.** — Liability of attorney, acting for client, for malicious prosecution, 46 A.L.R.4th 249.

Inherent power of federal district court to impose monetary sanctions on counsel in absence of contempt of court, 77 A.L.R. Fed. 789.

Comment Note — General principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, 95 A.L.R. Fed. 107.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for defamation, 95 A.L.R. Fed. 181.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in action for wrongful discharge from employment, 96 A.L.R. Fed. 13.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for securities fraud, 97 A.L.R. Fed. 107.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in actions for infliction of emotional distress, 98 A.L.R. Fed. 442.

Imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, pertaining to signing and verification of pleadings, in anti-trust actions, 99 A.L.R. Fed. 573.

Procedural requirements for imposition of sanctions under Rule 11, Federal Rules of Civil Procedure, 100 A.L.R. Fed. 556.

**Rule 12. Defenses and objections.**

(a) *When presented.* Unless otherwise provided by statute or order of the court, a defendant shall serve an answer within twenty days after the service of the summons and complaint is complete within the state and within thirty days after service of the summons and complaint is complete outside the state. A party served with a pleading stating a cross-claim shall serve an answer thereto within twenty days after the service. The plaintiff shall serve a reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court, but a motion directed to fewer than all of the claims in a pleading does not affect the time for responding to the remaining claims:

(a)(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(a)(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) *How presented.* Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to

which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) *Motion for judgment on the pleadings.* After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) *Preliminary hearings.* The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) *Motion for more definite statement.* If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) *Motion to strike.* Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) *Consolidation of defenses.* A party who makes a motion under this rule may join with it the other motions herein provided for and then available. If a party makes a motion under this rule and does not include therein all defenses and objections then available which this rule permits to be raised by motion, the party shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) *Waiver of defenses.* A party waives all defenses and objections not presented either by motion or by answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) *Pleading after denial of a motion.* The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) *Security for costs of a nonresident plaintiff.* When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the

plaintiff to file a \$300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) *Effect of failure to file undertaking.* If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action. (Amended effective Sept. 4, 1985; April 1, 1990; November 1, 2000.)

**Compiler's Notes.** — This rule is similar to Rule 12, F.R.C.P.

**Cross-References.** — Motions generally, U.R.C.P. 7.

#### NOTES TO DECISIONS

Jurisdiction over the person.  
 Motion for judgment on pleadings.  
 —Matters outside of pleadings.  
 —Answers to interrogatories.  
 —Rights of opposing party.  
 Motion for more definite statement.  
 —Bill of particulars.  
 —Criteria.  
 —Motion to dismiss distinguished.  
 —Purpose.  
 —Delay.  
 —Obtaining evidence.  
 Motion to dismiss for failure to state a claim.  
 —Explained.  
 —Habeas corpus.  
 —Improper.  
 —Proper.  
 —Standard.  
 —Standard of review.  
 Motion to dismiss for lack of venue.  
 —Forum-selection clause in contract.  
 Presentation of defenses.  
 —Assigned claims.  
 —Fraud.  
 —How presented.  
 —Affirmative defenses.  
 —Divorce.  
 —Election of remedies.  
 —Failure to state claim upon which relief can be granted.  
 —General and special appearances.  
 —Statute of frauds.  
 —Venue.  
 —When presented.  
 —Amended answer.  
 Security for costs of nonresident plaintiff.  
 —Failure to file.  
 Standard of review.  
 Statute of limitations.  
 Summary judgment.  
 —Conversion of motion to dismiss.  
 —Court's discretion.  
 —Court's initiative.  
 —Defenses.  
 —Opportunity to present pertinent material.  
 —Preclusion.  
 —Issues of fact.  
 Waiver of defenses.  
 —Defect of parties.  
 —Defective service of process.  
 —Exceptions.  
 —Subject matter jurisdiction.  
 —When issues raised.  
 —Failure to join indispensable party.

—Failure to pay consideration.  
 —Mutual mistake.  
 —Statute of frauds.  
 —Statute of limitations.  
 —Waiver.  
 Cited.

#### **Jurisdiction over the person.**

When urging the trial court to exercise personal jurisdiction based only on documentary evidence, a plaintiff must make only a prima facie showing that the trial court has personal jurisdiction over the nonresident defendant in order to proceed to trial on the merits. *Anderson v. American Soc'y of Plastic Surgeons*, 807 P.2d 825 (Utah 1990), cert. denied, 502 U.S. 900, 112 S. Ct. 276, 116 L. Ed. 2d 228 (1991).

Trial court erred in granting a Nevada casino's motion to dismiss a Utah patron's personal injury suit, where the patron's complaint alleged sufficient facts to support general personal jurisdiction over the casino by the State of Utah. *Ho v. Jim's Enters., Inc.*, 2001 UT 63, 29 P.3d 633.

#### **Motion for judgment on pleadings.**

Motion for judgment on the pleadings to decide upon distribution of trust assets was inappropriate in a proceeding among trust beneficiaries to determine distribution and offsets. *Cafferty v. Hughes*, 2002 UT App 105, 46 P.3d 233, aff'd, 2004 UT 22, 89 P.3d 148.

#### **—Matters outside of pleadings.**

#### **—Answers to interrogatories.**

Answers to interrogatories are not a part of the pleadings for purposes of judgment on the pleadings and if the court considers them the other party must have the privilege of offering answering affidavits as upon a motion for summary judgment. *Securities Credit Corp. v. Willey*, 1 Utah 2d 254, 265 P.2d 422 (1953).

#### **—Rights of opposing party.**

On review of a motion on the pleadings treated as a motion for summary judgment under Subdivision (c), the party against whom the judgment has been granted is entitled to have all the facts presented, and all the inferences fairly arising therefrom, considered in a light most favorable to him. *Young v. Texas Co.*, 8 Utah 2d 206, 331 P.2d 1099 (1958).

#### **Motion for more definite statement.**

#### **—Bill of particulars.**

A motion for a more definite statement, and

**Rule 56. Summary judgment.**

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(Amended effective November 1, 1997; November 1, 2004.)

**Amendment Notes.** — The 2004 amendment substituted “move for summary judgment” for “move with or without supporting affidavits for a summary judgment in his favor”

## ADDENDUM B

THIRD DISTRICT COURT, STATE OF UTAH  
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

In re the Marriage of:

JANICE RIRIE KUNZ and RICHARD  
L. KUNZ (deceased).

ORDER

CASE NO. 044902035

JUDGE SANDRA N. PEULER

On September 17, 2004, Commissioner Susan C. Bradford granted Lynee Kunz and Lillie Spencer's Motions For Summary Judgment thereby dismissing petitioner Janice Kunz's "Verified Petition For Judicial Declaration Of A Common Law Marriage." Now, petitioner brings the matter before this Court on her objection to Commissioner Bradford's recommendation. Specifically, petitioner contends that issues of material fact preclude summary judgment.

As an initial matter, the Court agrees with Commissioner Bradford and declines to accept Mr. Morrison's Rule 56(f) affidavit. The Court finds, with respect to the legal matters at issue, further discovery is unnecessary. Furthermore, with respect to her pending motion, petitioner requests oral arguments. Such request is denied as oral arguments were heard before Commissioner Bradford, and this Court has fully considered the transcript of that hearing.

Now, after consideration of the pending motion and relevant

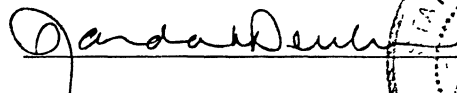
legal authorities, the Court affirms Commissioner Bradford's September 17, 2004, recommendation granting summary judgment. The Court reaches this conclusion based upon the fact that even if the decedent Richard Kunz and petitioner Janice Kunz had a common law marriage, their alleged "union" was never legally defined as such prior to his 1999 marriage to Lynne R Kunz. See, Utah Code Ann. 30-1-4.5. Additionally, after 1999, Mr. Kunz, did not have the ability to consent to a common law marriage with Janice Kunz because he was legally married to Lynne R Kunz.

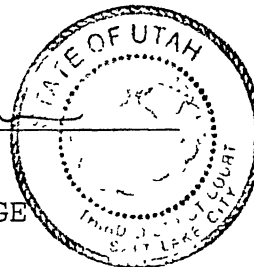
For these reasons petitioner's objection is hereby denied and Commissioner Bradford's recommendation is affirmed.

This is the final Order of this Court and no further Order is necessary.

Dated this 16 day of November, 2004.

BY THE COURT:

  
SANDRA N. PEULER  
DISTRICT COURT JUDGE





MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing **ORDER**, to the following, this 16 Day of Nov,

2004:

Ronald Barker  
2870 South State Street  
Salt Lake City, Utah 84115-3692

Grant W Morrison  
William P Morrison  
Morrison & Morrison  
352 East 900 South  
Salt Lake City, Utah 84111

R. Grotapen

COPY

Grant W. P. Morrison (3666)  
William P. Morrison (7587)  
MORRISON & MORRISON, L.C.  
Attorneys for Petitioner  
352 East 900 South  
Salt Lake City, UT 84111  
Telephone: (801) 359-7999  
Facsimile: (801) 359-1774

**FILED DISTRICT COURT**  
**Third Judicial District**

**MAR 24 2005**

**SALT LAKE COUNTY**

By \_\_\_\_\_  
Deputy Clerk

THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

SALT LAKE COUNTY, STATE OF UTAH

---

In re the Marriage of:	:	ORDER DENYING RESPONDENTS'
	:	REQUEST FOR ATTORNEY FEES
JANICE RIRIE KUNZ and RICHARD	:	
L. KUNZ (deceased).	:	Civil No.: 044902035
	:	
	:	Judge: PEULER
	:	Commissioner: BRADFORD

---

This matter came on for a hearing before Commissioner Bradford on March 3, 2005, at 9:30 a.m., on Petitioner's Motion to Strike Respondents' Affidavit in Support of Attorney Fees. Petitioner was represented at the hearing by her attorneys, Grant W. P. Morrison and William P. Morrison. Respondents were represented at the hearing by their attorney, Ronald Barker. The Court having considered the pleadings on file and the arguments of counsel, and having been fully advised in the premises, now for good cause showing hereby ORDERS, ADJUDGES, AND DECREES as follows:

1. Respondents' request for attorney fees is denied as untimely. Respondents' request has not been presented to the Court in the form of a technical motion for attorney fees.

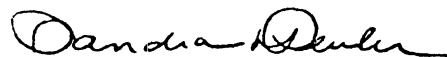
Instead, the request was presented by way of an affidavit in support of attorney fees, and as part of respondents' initial motion for summary judgment. The motion for summary judgment was heard and adjudicated by Commissioner Bradford on September 17, 2004, at which time the Commissioner made a recommendation that did not award attorney fees to either party. Respondents did not timely file an objection to the recommendation, which was subsequently affirmed by the Court on November 16, 2004, in an Order that was deemed a "final Order". The proper vehicle for presenting respondents' request for attorney fees was in the form of an objection to the Commissioner's recommendation of September 17, 2004. Because respondents did not timely file an objection to the recommendation, they are now time-barred from doing so.

2. Section 30-3-3 of the Utah Code does not apply to this proceeding, because this is not an action to establish an order of custody, parent-time, child support, alimony, or division of property in a domestic case. Instead, this is simply an action to seek the judicial declaration of a common law marriage.

3. No attorney fees shall be awarded to either party.

DATED this 24 day of March, 2005.

BY THE COURT:



---

SANDRA N. PEULER  
DISTRICT COURT JUDGE

151  
\_\_\_\_\_  
SUSAN C. BRADFORD  
DOMESTIC RELATIONS COMMISSIONER

Approved as to form:

3

CERTIFICATE OF SERVICE

This certifies that on the 4th day of March, 2005, I caused to be mailed, first-class and postage-prepaid, a true and correct copy of the foregoing proposed Order Denying Respondents' Request for Attorney Fees to the following:

Ronald C. Barker  
Attorney for Respondents  
2870 South State Street  
Salt Lake City, UT 84115-3692

W P Monson

## ADDENDUM C

IN THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, STATE OF UTAH

**COPY**

\_\_\_\_\_  
IN RE THE MARRIAGE OF, )  
 )  
 )

) Case No. 044902035  
)  
)

RICHARD L. KUNZ,  
\_\_\_\_\_ )

Hearing  
Electronically Recorded, on  
September 17, 2004

BEFORE: THE HONORABLE SUSAN BRADFORD  
Third District Court Commissioner

APPEARANCES

For the Petitioner:

WILLIAM P. MORRISON  
MORRISON & MORRISON  
352 E. 900 S.  
Salt Lake City, UT 84111  
Telephone: (801) 359-7999

For the Respondent:

RON BARKER  
2870 South State St.  
Salt Lake City, UT 84115  
Telephone: (801) 486-9636

Transcribed by: Beverly Lowe, CSR/CCT

1909 South Washington Avenue  
Provo, Utah 84606  
Telephone: (801) 377-0027

1 But from the time that he married the last person before he died,  
2 some four-and-a-half years, she couldn't have filed either  
3 administratively or in the Court seeking to have that marriage or  
4 that relationship declared to be a valid common law marriage.

5 So having lost the ability to do so, and a time limit  
6 being fixed by statute, the only sensible construction is that  
7 when the right to sue stopped the statute started. When she lost  
8 her right to sue to have her marriage declared valid as a common  
9 law marriage, the statute of limitations had to start then.  
10 That's got to be the latest. That's (inaudible). I think that's  
11 dispositive in the case.

12 THE COURT: Okay.

13 MR. BARKER: Thank you.

14 THE COURT: Thank you. Mr. Morrison?

15 MR. MORRISON: Thank you, your Honor. I'll stand if  
16 that's allowed.

17 THE COURT: Certainly. Thank you, sir.

18 MR. MORRISON: Just remain at this table. There's a  
19 fundamental flaw in the respondent's argument, and that is this:  
20 they're claiming that she should have filed it more timely,  
21 immediately or within one year after Lynn Kunz purported to marry  
22 Richard, the decedent.

23 The flaw in that argument is in our affidavit we lay  
24 out -- this is in Janice Kunz's affidavit that we've submitted to  
25 the Court, paragraph 9 of that affidavit, "It was only after my



1 husband passed away that I found out about his purported marriage  
2 to Lynn Kunz." This was so secretive that nobody knew about it.

3 One, we've since found out that one of Mr. Kunz's  
4 children was advised of that marriage, but nobody else knew about  
5 it.

6 THE COURT: So you're saying she had no idea?

7 MR. MORRISON: How could she do this? That's exactly  
8 right. She can't do something that she has no information to go  
9 off of, no notice of. It's not as if they were moving in  
10 together, opening up joint bank accounts, filing joint tax  
11 returns. The whole thing was a sham from the very beginning.

12 What they're attempting to do is perpetrate a fraud  
13 upon the State of Utah by going out and getting this marriage  
14 certificate and passing that off as a valid marriage. That's  
15 right in our affidavit. I don't -- apparently they've missed  
16 that, but that is a key issue in this case.

17 Our client cannot undertake an action that she doesn't  
18 know that she's supposed to undertake. That's the first point  
19 that I'd like to make.

20 Just continuing on with those thoughts--

21 THE COURT: Okay. Let me ask you a question on that.  
22 Let's assume for a moment that Mr. Kunz is alive and that he has  
23 10 plural wives, and they all walk out the same day, and they all  
24 come into court and they file for a common law marriage. How  
25 many common law marriages can the Court find?

1 MR. MORRISON: There's only one valid marriage allowed  
2 in Utah.

3 THE COURT: That's correct. So how do I find in this  
4 particular case we have a decedent, we have purportedly a  
5 marriage certificate, your client or Janice is divorced. That's  
6 not argued. No one disputes that fact. They divorced. Everyone  
7 agrees they divorced.

8 Now unless that's a fraud you can't have it both ways.  
9 You can't claim marriage is fraud and divorces are fraud and  
10 everything in this case is a fraud that's happened in 50 years.  
11 They married, they divorced, and then supposedly they have lived  
12 together all along, but there's another marriage in here, and she  
13 has just supposedly found out about that and doesn't think it's  
14 valid. She thinks it's a sham marriage.

15 So you're saying Lynn perpetrated for these three-and-  
16 a-half years this sham marriage and your client didn't do  
17 anything -- didn't know about it, couldn't do anything. Didn't  
18 know about it until when?

19 MR. MORRISON: Until after the funeral was held,  
20 after -- this isn't in evidence before the Court. All I can say  
21 is based on the evidence that is before the Court--

22 THE COURT: It was after. I realize I'm asking you  
23 these questions, and again, I'll make the decision whether it's a  
24 12(b) or a motion 56, and I've asked Counsel also questions that  
25 may go beyond the parameters, but that's because I'm very curious

1 about the facts of this case, and maybe you can fill in details  
2 for me.

3 MR. MORRISON: We would like to do that. We would like  
4 to reach the merits of the case at some point. Did the Court  
5 have other questions on that particular issue?

6 THE COURT: No. Did -- are you challenging that the  
7 marriage license is valid?

8 MR. MORRISON: We're disputing the validity of Lynn's  
9 marriage to Richard.

10 THE COURT: But is the marriage license invalid?

11 MR. MORRISON: I think it's invalid to the extent that  
12 she's not capable of marrying somebody else. We assert in our  
13 pleadings that she was already married to another individual,  
14 Andrew Williams.

15 THE COURT: I think there are divorce documents on  
16 Andrew; is that correct? Do you dispute the validity of the  
17 divorce documents on Andrew?

18 MR. MORRISON: These type of arrangements are very  
19 unique, as the Court understands.

20 THE COURT: They are unique. I see that Counsel -- we  
21 at least have a sense of humor knowing that the factual scenario  
22 is unique.

23 MR. MORRISON: There's an effort here to try to avoid  
24 running afoul of criminal law.

25 THE COURT: That's right, because it's a bigamy issue,

1 and if they're skirting one issue and asking for the relief on  
2 the other, it's like we want to perpetrate a fraud over here, but  
3 we want our cake and eat it, too. I mean it does circle all  
4 around that. We all see that.

5 MR. MORRISON: That's correct. These are the facts that  
6 are before the Court. We've introduced a document -- the funeral  
7 log that shows that Lynn Kunz, her name appears on that log.  
8 There's an entry there for Andrew, Lynn and another plural  
9 spouse, Teresa Williams. Not signed as Lynn Kunz, instead  
10 Andrew, Lynn and Teresa Williams.

11 THE COURT: But you would -- you're not making the  
12 argument that we can have three or four or five common law  
13 marriages. You're saying there can only be one, and I think that  
14 you've clearly stated that.

15 MR. MORRISON: That's right, your Honor. That's  
16 correct.

17 THE COURT: So your client also stated in an affidavit  
18 that he spent his time between Lillian and Janice. So who takes  
19 precedence as to the common law between them?

20 MR. MORRISON: Our claim came first out of anybody, so  
21 we're first in line.

22 THE COURT: Okay.

23 MS. MORRISON: I think that is important because we just  
24 have a new precedent from the Utah Supreme Court that just barely  
25 came down, State of Utah vs. Thomas Arthur Green just recently

1 handed down on September 3<sup>rd</sup>, 2004 where they did address the  
2 common law marriage aspect--

3 MR. BARKER: Citation?

4 MR. MORRISON: You can get a copy of it just on the  
5 fifth floor. It's too new to have a citation, but it is docket  
6 No. 20010788.

7 MR. BARKER: What is the title of the case?

8 MR. MORRISON: State of Utah vs. Thomas Arthur Green.

9 THE COURT: What is the holding in that case?

10 MR. MORRISON: A number of holdings. He was declared  
11 guilty. His conviction on the charge of bigamy was affirmed.  
12 With respect to the common law marriage aspect, they allowed the  
13 State to file a petition to have him judicially declared married  
14 to one of these plural spouses, and the spouse that he was  
15 married to was the first in line. He had some previous spouses  
16 that had divorced him, and those were actual legitimate divorces.  
17 They parted ways. That left this individual, Linda Kunz -- that  
18 could be some distant relationship with these parties here.

19 THE COURT: We may be in that case before we're done.

20 MR. MORRISON: It would not surprise me. But  
21 effectively that's what the Court did is they allowed the Court  
22 to enter a civil finding of a common law marriage with respect to  
23 the first spouse in line.

24 THE COURT: Tell me, in that factual case was there any  
25 wife afterwards that had a valid marriage license?

1 MR. MORRISON: Not that I'm aware of.

2 THE COURT: So that we're comparing factually similar  
3 cases, because in this case one of the key factual issues is that  
4 marriage license to Lynn.

5 MR. MORRISON: That's--

6 THE COURT: I mean a critical factual issue, and I want  
7 to know if the Court overlooked a marriage solemnized, or at  
8 least in our particular case, a marriage license that was granted  
9 by the clerk of the court, that the officiating officer that  
10 signed it it's -- they are criminal charges that go to the person  
11 doing this kind of ceremony if they're illegally marrying people.  
12 Likewise, the fraud that would be committed by that that goes to  
13 that.

14 So in that particular case there was no standing  
15 marriage that needed to be--

16 MR. MORRISON: Not that I'm aware of.

17 THE COURT: --taken aside and declared a sham or  
18 whatever, like we're trying to do in this case. A different  
19 scenario. I just want to make sure that I'm not -- that we don't  
20 have exactly the same factual scenario, and it seems that the  
21 difference is in this case you have this marriage with Richard to  
22 Lynn that occurred in 1999.

23 MR. MORRISON: I just don't know if it's--

24 THE COURT: They divorced -- she divorced -- in 1991 or  
25 1992, she divorced Andrew.

1 MR. MORRISON: On paper, at least.

2 THE COURT: Well, arguably all these people could live  
3 in one big commune, but for the State's purposes, I can only have  
4 one person married at a time. I mean they could be living, you  
5 know, 800 people all in one big group, but I can only legally  
6 ascertain -- and I'm grateful that both attorneys agree there can  
7 only be one marriage. Whether that's a common law marriage or a  
8 civilly declared marriage, there can only be one between -- or  
9 two people at any given time as husband and wife. So that we do  
10 agree on.

11 MR. MORRISON: We do.

12 THE COURT: Gratefully.

13 MR. MORRISON: And I didn't mean to -- I keep jumping in  
14 before the Court has finished.

15 THE COURT: No, that's okay. I had a question on that,  
16 and it's appropriate to bring it up and make me aware of it.  
17 Thank you.

18 MR. MORRISON: Just to respond to the Court's question  
19 on this Green case, I am not aware of an actual solemnized  
20 marriage that was overlooked in favor of the first marriage.

21 THE COURT: Okay.

22 MR. MORRISON: I don't know if it's spelled out. I  
23 just--

24 THE COURT: I don't know if it is, either. I couldn't  
25 address that, Counsel. I don't know.

1           MR. MORRISON: It's a fairly lengthy opinion, over 20  
2 pages long.

3           THE COURT: Okay.

4           MR. MORRISON: My father was involved in this case, just  
5 assisting the lead Counsel, John Bucher, since he had some  
6 problems with the bar. My father was asked to step in and help  
7 with oral argument, but I am not aware of all of the facts in  
8 that particular case.

9           THE COURT: Okay. Thank you.

10          MR. MORRISON: Just a couple of more things to touch on.  
11 I appreciate the Court being fully aware of all of the pleadings  
12 and having read through everything. With respect to Lillie  
13 Spencer, we have an acknowledgment from her -- and this is again  
14 an exhibit that we have introduced. This is a happy anniversary  
15 card. Just so it's right at the top of the Court's fingertips,  
16 may I present another copy to the Court?

17          THE COURT: Certainly.

18          MR. BARKER: We don't dispute the date. (Inaudible) for  
19 purpose of this motion.

20          THE COURT: Couldn't it be possible that a lot of people  
21 in polygamy setting could have 30<sup>th</sup> wedding anniversaries and 50<sup>th</sup>  
22 wedding anniversaries and 45<sup>th</sup> wedding anniversaries all  
23 coinciding at various times?

24          MR. BARKER: Well, sure.

25          THE COURT: In that realm where they have spiritual



1 marriages.

2 MR. MORRISON: The point we're trying to make on that  
3 is Lillie is here trying to contest the validity of Janice's  
4 marriage to Richard, and here she is acknowledging it, just less  
5 than a year ago. Or at this point now it's been a little over a  
6 year, but June 18<sup>th</sup>, 2003. "God bless you on your golden  
7 anniversary, Richard and Janice. Happy anniversary with lots of  
8 love, Lillie." That just goes toward the holding out evidence  
9 that we need to introduce.

10 MR. BARKER: We don't dispute that for purposes of this  
11 motion.

12 THE COURT: Okay. Mr. Morrison, anything further that--

13 MR. MORRISON: What we're looking for is some kind of an  
14 indicia of an actual marriage between Lynn and Richard. It's not  
15 in their affidavit. Instead we get a very scarce affidavit on  
16 file from Lynn Kunz. It doesn't say how she met Mr. Kunz. It  
17 doesn't say how long they courted before they decided to marry.  
18 It doesn't say that they cohabitated after their marriage. It  
19 doesn't say they had children together, had joint bank accounts,  
20 joint vehicles, joint real estate.

21 THE COURT: But would they have done this marriage for  
22 purposes to skirt bigamy charges?

23 MR. MORRISON: I think they did the marriage to skirt  
24 the immigration problem that Lynn was facing.

25 THE COURT: Oh, so it does have a purpose. Isn't that

1 done every day in the United States by many, many people?

2 MR. MORRISON: I think it's investigated. If it is  
3 intentionally done strictly for that reason, I believe that can  
4 be set aside as an unlawful marriage. That's my understanding.  
5 I'm not an expert on that.

6 THE COURT: Okay. So the purpose for this one was to  
7 skirt immigration laws for -- was it Lynn?

8 MR. MORRISON: For Lynn. She was here on a soon-to-be-  
9 expired visa. Her husband -- her actual husband, Andrew  
10 Williams, already had a solemnized marriage, apparently, to  
11 another individual, Teresa. That's the other name on the funeral  
12 log.

13 THE COURT: Uh-huh.

14 MR. MORRISON: So he could not marry her and get her  
15 to remain in the country. Mr. Kunz offered a helping hand.

16 THE COURT: Well, but she was divorced from Andrew some  
17 time -- I mean it looks like five years prior. It wasn't one of  
18 these things that was hatched overnight. Is that right?

19 MR. MORRISON: That's what we've got as far as the  
20 evidence.

21 THE COURT: I mean from what I'm looking at, they got a  
22 divorce in 1992 in England, and Lynn and Richard get married in  
23 1999. Was she in England at the time of their marriage? Is that  
24 what you're saying? Or she was here and her visa was about to  
25 run out?

1 MR. MORRISON: She was in the United States and her visa  
2 was about to expire.

3 THE COURT: He married her for that reason and do you  
4 know any other reason? And Lynn is saying something to the  
5 contrary, I guess.

6 MR. MORRISON: We'd like to do some discovery. If it's  
7 disputed how can we resolve it on summary judgment?

8 THE COURT: Tell me, do you think that the documents --  
9 I guess it comes down to this. Do the documents on their face,  
10 do we take them as prima facia evidence of what they are, or do  
11 we go behind them and say, "Well, if they perpetrated a fraud,  
12 why didn't she perpetrate a fraud? She did a divorce, didn't  
13 marry and allowed this to happen." At what point do we call the  
14 fraud on anyone that's perpetrated the fraud and allow them to  
15 get the benefit of that? At what point is the fraud called if  
16 what they're all doing is skirting all the laws so that they can  
17 perpetrate their religious beliefs and really call what it is as  
18 a fraud.

19 MR. MORRISON: That's a good question. Somebody is  
20 entitled to be the spouse, and that's what we have to determine.

21 THE COURT: So at what point does the Court say, "If  
22 you're going to try and perpetrate a fraud then we're going to go  
23 by what you have -- the documents that you have done. We will  
24 not let you continue to perpetrate frauds on the Court, and you  
25 will be held to the standard. If you enter a marriage, you're

1 held to that marriage. If you get a divorce you're held to that  
2 divorce." How do we know which fraud -- where to stop and where  
3 to start?

4 MR. MORRISON: I would respectfully submit that my  
5 client out of any of the parties is the least to blame and has  
6 not committed any fraud. Her divorce -- we can recognize that.  
7 We're not trying to set aside that divorce. We're seeking to  
8 have her determined to be the common law spouse.

9 THE COURT: Uh-huh. That's fair.

10 MR. MORRISON: Other questions from the Court?

11 THE COURT: No.

12 MR. MORRISON: We'll go ahead and submit it, your Honor.

13 THE COURT: Okay. Thank you. Mr. Barker?

14 MR. BARKER: Very briefly if I may respond.

15 THE COURT: Sure.

16 MR. BARKER: Even if, as they claim, she didn't know  
17 about the third marriage--

18 THE COURT: Let's say she didn't know about the marriage  
19 to Lynn, and it was only at his death -- she's reading a funeral  
20 log and is shocked to find this out.

21 MR. BARKER: Let's assume that's true, and for purposes  
22 of the motion I guess we have to assume that.

23 THE COURT: Let's assume that, because we must assume it  
24 in a light most favorable.

25 MR. BARKER: Right, but the second marriage, she surely

1 knew about that 14-year marriage or whatever it was.

2 THE COURT: The one with Rachel?

3 MR. BARKER: Rachel, yeah.

4 THE COURT: Okay.

5 MR. BARKER: She can't contend that she's still married  
6 to him, or that she has a common law marriage--

7 THE COURT: During their marriage, no.

8 MR. BARKER: No.

9 THE COURT: But technically she could try and get it  
10 declared from the time after Rachel to--

11 MR. BARKER: She could have done, and of course, what we  
12 really come down to is is the Court going to inquire as to why  
13 people marry? If we start doing that we open the door that --  
14 we'd be in the mire. No marriage would be safe. They want the  
15 Court to inquire as to why Richard married Lynn. Well, he  
16 married her, and they stayed married four-and-a-half years.

17 During that time if the plaintiff had decided that she  
18 wanted to have a valid marriage, she could have asked him to  
19 marry her, or she could have asked that the Court declare that  
20 their relationship be a common law marriage. She didn't do it.  
21 She waived her rights. She just sat on her rights for 50 years.

22 Another thing I think we need to consider is the  
23 statute. It's not a statute of limitations; it's a statute of  
24 repose. It says must. It's a statute of repose. It can't be  
25 tolled because you didn't know, which is what their affidavit is

1 trying to do. It's a statute of repose. They didn't file within  
2 the year. They're absolutely barred.

3 As the Court said, these are official documents.  
4 They're undisputed. They haven't challenged any of them. All  
5 they're saying is that, "We think that because there's a funeral  
6 log signed by some unknown person," that may create inference  
7 that they were going by different names that somehow it's not a  
8 valid marriage because the name Williams was used and she had  
9 been divorced from him for five years. That's so highly  
10 speculative that it doesn't come to the muster required for a  
11 56(f) affidavit.

12 THE COURT: Well, people get divorced and keep old names  
13 and remarry, too.

14 MR. BARKER: Well, of course they do. The fact that if  
15 she signed this anniversary card, we don't know if she's talking  
16 about a legal marriage or a religious marriage.

17 THE COURT: Mr. Morrison, let me ask you a question.  
18 Is your client seeking a common law marriage back to when? What  
19 about Rachel's marriage and then a death? Is she trying to claim  
20 a marriage for that time period?

21 MR. MORRISON: I haven't really thought that issue  
22 through just because--

23 THE COURT: Because it's really been touched on. It's  
24 saying wait a second, she married, they divorced, and then he  
25 marries Rachel. We've got Rachel, and they're arguably married

1 to Rachel. Now if she's trying to go back 50 years, how does  
2 she eviscerate Rachel's marriage? How can you be common law  
3 married to Rachel? How does that one happen? How do we take out  
4 Rachel's marriage and her subsequent death, at least for the time  
5 period of those 14 years. So it couldn't have occurred right  
6 there, unless you're arguing that that one wasn't valid either.

7           So arguably we could take it back to Rachel's death,  
8 assuming they all lived together as one big happy family for 50  
9 years. Let's assume that for just the sake of argument.

10           The law can only recognize one, so we have the first  
11 nine years or so with Janice. Then we go to Rachel for about 14  
12 years. Then Lillie -- and there's never really a marriage that  
13 you have -- either of you have told me that is recognized or  
14 solemnized by the State of Utah. That was arguably either a  
15 common law marriage with the two of them, or with your client,  
16 Rachel is out of the picture. But there's no one that's really  
17 married to Richard that has been established by the law within  
18 one year anywhere in that time period. Nothing gets established.

19           Then somewhere around 1999 we get Lynn and Richard.  
20 Supposedly Janice doesn't know about it. It's a secret marriage.  
21 I guess we could find out Richard is married to lots of other  
22 people that we don't know about, too. That's conceivably  
23 possible, but for our purposes we do have this marriage  
24 certificate.

25           Your client is claiming no, it was a fraud on her. Is

1 it a fraud on her? Didn't Lynn and Richard have the capacity to  
2 enter into any relationship they wanted to? How can she  
3 challenge if they want to enter into a marriage? Did they do  
4 that to take away property? Did they do that in some way to harm  
5 Janice? How were Janice's rights affected, and if they were  
6 affected, why wasn't Janice in court? I'm just trying to  
7 logically think this through, so if you will bear with me in time  
8 how this would really pan out, what does this really mean?

9 I see that you're both -- you're sort of smiling and  
10 nodding because you see the horns of a dilemma too. I'm sure you  
11 see it. So it's -- we're now to the point where Richard is  
12 deceased, and Janice either wants to go back to her divorce in  
13 1961 or her marriage in 1953 and say, "I have standing over all  
14 others, including Rachel and that marriage, including Lynn and  
15 that marriage, and whatever common law marriage might have been  
16 the case with Lillian or if there's a question with Lillian now,  
17 the two of us can battle it out, and according to the Green case  
18 I'm first in line. I'm the common law marriage." Do I basically  
19 have that right?

20 MR. MORRISON: (Inaudible).

21 THE COURT: According to your client's argument, that's  
22 what she's seeking, and according to Mr. Barker's client's  
23 argument, a marriage is a marriage, a divorce is a divorce, and  
24 you can only have one marriage going at one time between one man  
25 and one woman according to Utah law. Anything else is bigamy.



1           So we have documents that show the marriage and the  
2 divorce with Janice. There was an intervening time period where  
3 Janice, if she was there, could have gotten a common law marriage  
4 truly, but he married Rachel. I don't think anybody is claiming  
5 he didn't marry Rachel. No one has told me they weren't married,  
6 and then they divorced -- or actually she died, and that lasts  
7 for about 14 years.

8           Then we have the relationship with Lillian, which was  
9 never solemnized in any kind of legal sense, and then we have the  
10 marriage in 1999 to Lynn. Janice wants those all taken out, and  
11 Mr. Barker is saying can't do. We have a legal document that  
12 says they were married. For that purpose she can't now undo that  
13 one, and she has passed the time period for a common law marriage  
14 because they were married, and you're saying can't do because she  
15 didn't know about it.

16           Okay. Have I missed anything? I mean basically  
17 factually. If I have, just let me know. I just want to make  
18 sure I -- I think I have your arguments, I think -- I hope  
19 correct.

20           MR. BARKER: The one thing you didn't mention is our  
21 argument is that the last marriage has the strong presumption,  
22 and I've got a whole series of research on it, if the Court would  
23 like.

24           THE COURT: Okay.

25           MR. BARKER: I haven't read the Green case. I don't

1 know if that (inaudible) or not

2 THE COURT: Certainly for purposes of common law,  
3 they're saying the first one if there's a string of people, if  
4 there is no valid marriage in the Green case.

5 MR. BARKER: We really appreciate the time you've  
6 devoted to this. It's obviously you're worked hard on it. It's  
7 difficult.

8 THE COURT: Quite frankly, I can tell you one place I'm  
9 not going. I'm not going to do a 12(b)(6). I think if anything  
10 it moves to the -- a summary judgment area. On the petition  
11 alone it's generally discouraged to do 12(b)(6) motions, and I  
12 think both attorneys know that. The law is quite clear on that.  
13 That's really a hard one to leap to. So I'm not inclined to do a  
14 12(b)(6) motion. I would be looking at this more as a 56(f)  
15 motion, a summary judgment, to be quite honest.

16 The question for me is do I have any genuine issue as to  
17 a material fact. If I do then it's appropriate to do discovery  
18 because if there's even one issue that is disputed that could  
19 potentially be disputed that requires that scrutiny, then it must  
20 be given in a light most favorable to the non-moving party, which  
21 would be Mr. Morrison and his client.

22 What I'm going to do is take a five-minute break and go  
23 sort out in my mind what you have told me, because I think that's  
24 appropriate, but you know I'm not going to do a 12(b)(6). I'm  
25 not going to go there. It's a question of the summary judgment

1 and whether there is any genuine issue of fact that is in  
2 dispute. That is the only issue, and I think it comes down to  
3 that. That's where we're at, and both attorneys are nodding. I  
4 think you know that, too.

5 MR. BARKER: Very good.

6 THE COURT: So with that, give me five minutes while --  
7 because I want to sort out in my mind what you have told me here  
8 and sort of digest it, and I think you would appreciate more a  
9 decision right now today because no matter what I do you will  
10 object to it -- some side will object to it, and you will get it  
11 with Judge Peuler shortly that way, which it deserves, and I  
12 respect that you would do that. S \*\*

13 It is appropriate that you zealously represent your  
14 client no matter who does that objection. If I knew in my mind  
15 right now I'd tell you, but I want to go and think it through and  
16 deal with it, and then I'll be right back so that I digest it  
17 clearly for me. Thank you.

18 (Nothing further on disc)

REPORTER'S CERTIFICATE

STATE OF UTAH            )  
                              ) ss.  
COUNTY OF UTAH        )

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

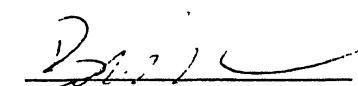
That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

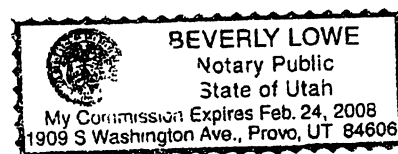
I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 22<sup>nd</sup> day of October 2004.

My commission expires:  
February 24, 2008

  
Beverly Lowe  
NOTARY PUBLIC  
Residing in Utah County



1 MR. BARKER: Very good.

2 THE COURT: So with that, give me five minutes while --  
3 because I want to sort out in my mind what you have told me here  
4 and sort of digest it, and I think you would appreciate more a  
5 decision right now today because no matter what I do you will  
6 object to it -- some side will object to it, and you will get it  
7 with Judge Peuler shortly that way, which it deserves, and I  
8 respect that you would do that.

9 It is appropriate that you zealously represent your  
10 client no matter who does that objection. If I knew in my mind  
11 right now I'd tell you, but I want to go and think it through and  
12 deal with it, and then I'll be right back so that I digest it  
13 clearly for me. Thank you.

14 (Short recess taken)

15 THE COURT: (Court already in session when recorder was  
16 turned on) a couple more questions because I -- there were a few  
17 facts that I wanted to get clear. Janice didn't know about the  
18 marriage to Lynn, supposedly, until the log -- the funeral log,  
19 if I recall. They never knew each other? They never knew each  
20 other -- never met?

21 MR. MORRISON: I can't say for certainty whether that's  
22 true, but I don't--

23 THE COURT: She has resided with Richard every day,  
24 every moment?

25 MR. MORRISON: When you say "she" you mean--

26 THE COURT: Janice.

1 MR. MORRISON: --Janice.

2 THE COURT: Every day, every moment since really their  
3 marriage?

4 MR. MORRISON: Not totally correct because he's also  
5 split part of his time with Lillie Spencer, so I don't want to  
6 mislead the Court on that.

7 THE COURT: Okay. So Lillie Spencer signed the marriage  
8 certificate with Lynn, and so how would he not -- how would she  
9 not know? Did these -- they never talk, Lillie and Janice never  
10 talk, and they wouldn't have mentioned this little certificate  
11 that has Lillie's name on it where he's spending half of his  
12 time?

13 MR. MORRISON: That's a good question. We're in  
14 litigation right now with Lillie Spencer as far as -- there's a  
15 trust agreement that we're looking at, but I can't really answer  
16 that question.

17 THE COURT: Okay.

18 MR. MORRISON: Other than what we've got presented as  
19 far as the evidence before the Court up to this point.

20 THE COURT: Okay. Mr. Morrison, I'm going to tell you  
21 what -- or ask you, tell me what disputed facts there are that  
22 needs more discovery. Tell me what is really disputed. Do you  
23 want to go behind the marriage of Lynn and Richard and find out  
24 why, why they married?

25 MR. MORRISON: We'd like to do some discovery in these  
26 areas. We want to find out--

1           THE COURT: If it's determined to be a valid marriage  
2 where does that put your client?

3           MR. MORRISON: If their marriage is valid then I think  
4 we're done.

5           THE COURT: I think so, too.

6           MR. MORRISON: Yeah.

7           THE COURT: So what do you need to know to know if  
8 that's a valid marriage? You've got a certified copy of a  
9 marriage license. On its face that's a prima facie case that  
10 it's valid, arguably, prima facie case. To prove some kind of  
11 fraud you have a clear and convincing standard. Tell me what you  
12 need to know that you don't know.

13          MR. MORRISON: I think we have a pretty good idea of  
14 where we stand on the case, and I think we have a pretty good  
15 idea of the facts. We would like an opportunity to look into a  
16 couple of areas to flesh out the arguments that we've presented.  
17 We want to have -- there's a lot of questions that the Court has  
18 asked me that I can only speculate on today. I would like to be  
19 able to pin those down so I'm not just guessing.

20          THE COURT: Arguably the time period -- Janice knew of  
21 the marriage to Rachel?

22          MR. MORRISON: Yes, she did.

23          THE COURT: She couldn't possibly be claiming a common  
24 law marriage either prior to Janice -- Rachel's death. Couldn't  
25 possibly.

26          MR. MORRISON: I think we can go from at least back to

1 the date of her death. I think we're on safe ground there.

2 THE COURT: That would be -- in any possible realm she  
3 couldn't possibly be claiming before that time.

4 MR. MORRISON: Only with respect to an interpretation of  
5 the *Green* case that says you go back to the first case -- the  
6 first marriage.

7 THE COURT: Then you have to knock out a valid marriage.

8 MR. MORRISON: If it was valid to begin with. If he's  
9 already married to somebody else then how can that be valid?

10 THE COURT: But he's divorced. He was divorced from  
11 your client, and that is acknowledged as an undisputed fact.

12 MR. MORRISON: That's correct. He divorced her and  
13 continued to be married to her.

14 THE COURT: Okay. So in essence, it feels like I'm  
15 either tacitly approving polygamist relationships by allowing  
16 these common laws marriages, divorces, marriages, divorces to  
17 accumulate so that we don't have to count any of the marriages,  
18 we just go back to the first one. We allow that perpetration of  
19 a fraud on the courts and society in favor of the first  
20 polygamist wife, disregarding all of the fraud that had been  
21 committed since that time, and the tacit approval of the first  
22 wife, correct?

23 MR. MORRISON: Did the Court want me to respond to that,  
24 or--

25 THE COURT: If you would like.

26 MR. MORRISON: I can see no reason to give any



1 protection whatsoever to the marriage relationship between Lynn  
2 Kunz and Richard Kunz. It wasn't a valid marriage. They weren't  
3 living together as husband and wife, and for all of those reasons  
4 we've presented prior in our initial presentation.

5 THE COURT: But your client was cohabitating with  
6 Richard and Lillie up to the death.

7 MR. MORRISON: Well, there were separate residences. I  
8 want to keep that straight, but--

9 THE COURT: But there was mutual cohabitations going on.

10 MR. MORRISON: Correct, pursuant to their--

11 THE COURT: But their cohabitation takes precedent over  
12 the marriage?

13 MR. MORRISON: Over Lynn's marriage, which was a sham  
14 that we've asserted.

15 THE COURT: Okay. Is there anything further you would  
16 like to say, Mr. Barker?

17 MR. BARKER: I agree with the Court. We've got to go by  
18 the records, by the documents. We can't go behind a marriage  
19 and inquire why did the people decide to marry, or why did they  
20 decide not to marry. If we start doing that no marriage would  
21 have a solid foundation. As a matter of public policy we've got  
22 to rely on these documents unless someone comes in with clear and  
23 convincing proof to show deprivation, and the person has to have  
24 clean hands that does that, and they don't. Thank you.

25 THE COURT: Thank you very much. I'm prepared to make  
26 a recommendation in this matter. This is a motion for summary

1 judgment or to dismiss. It is factually unique, to say the  
2 least. I have not had a case of this factual scenario ever  
3 before, and it is -- I don't know that it may be new to the  
4 entire system. I can -- quite certain that might be the case  
5 here in Utah.

6 So for our purposes here in the motion for summary  
7 judgment or to dismiss, and the question I've already told you  
8 I'm not going to do the alternative 12(b)6 motion. I'm entering  
9 this as a motion for summary judgment, or rather I'm reviewing it  
10 as a motion for summary judgment.

11 Looking at all of the facts, the petitioner was married  
12 and then subsequently divorced from the decedent, Mr. Kunz, and  
13 she wants that declared now to be a common law marriage, which on  
14 its face I have to invalidate the certified copy of the marriage  
15 between Lynn and Richard in 1999. To do that there has to be  
16 clear and convincing evidence that that was fraud. I don't  
17 have -- that is a higher level. It is just under a criminal  
18 standard. I don't have that level. It doesn't rise to that  
19 level.

20 I can't see that I shouldn't grant the summary judgment  
21 because on its face and the documents presented, the evidence  
22 presented is there is a valid marriage. There has been a valid  
23 marriage since 1999 in this case, and I don't have anything that  
24 stands in the way to show that it is not a valid marriage other  
25 than conclusary statements, which is not the test under a 56(f)  
26 matter, and so the motion for summary judgment is granted.

1           You have 10 days to file an objection with Judge Peuler.  
2   I appreciate your thoughtful arguments, your time. They are both  
3   well taken. You have ably represented your clients on both  
4   sides.

5           MR. BARKER: Thank you.

6           THE COURT: Thank you.

7           MR. BARKER: We commend the Court for its careful  
8   consideration.

9           THE COURT: Thank you.

10          MR. MORRISON: Thank you, your Honor.

11          THE COURT: Thank you, Mr. Morrison.

12          (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH            )  
                              ) ss.  
COUNTY OF UTAH        )

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this \_\_\_\_\_ day of \_\_\_\_\_ 2004.

My commission expires:  
February 24, 2008

\_\_\_\_\_  
Beverly Lowe  
NOTARY PUBLIC  
Residing in Utah County

## ADDENDUM D



[home](#)

[Family Law & Immigration](#)

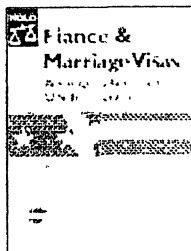
Quicken WillMaker Plus 2006 is now available! [Click for Details.](#)

## **Fiancé & Marriage Visas: A Couple's Guide to U.S. Immigration**

Order online or call **1-800-728-3555**

[Security & Privacy](#)

by Attorney [Ilona Brav](#)



P

**Pub. Date:** Jul 2005

**Edition:** 3rd

**Pages:** 512 pp

**ISBN:** 1-4133-0397-8

[Email to a Friend](#)

[View Product Details](#)

### **Book**

Paperback book.

Usually ships in 24 hours.

[View shipping info.](#)

List Price: \$34.99

**Our Price: \$0.00**

You Save: \$34.99

[ADD TO CART](#)  
IMAR

[Summary](#) [Reviews](#) [Table of Contents](#) **[Sample Chapter](#)** [Updates](#)

### **Chapter 1:**

[< Prev](#) [Next >](#)

#### **C. Using a Fake Marriage to Come to the U.S.**

It is illegal for anyone to get married solely for the purpose of getting, or helping someone to get, permanent residence in the United States. There are stiff fines and possible jail terms for people who are convicted of this crime. But we would be foolish not to address the fact that many people attempt to fake a marriage to obtain a green card.



**If you are getting married for legitimate reasons, you can skip this section and continue reading at Section D.**

If you are considering a fake, or sham, marriage, you probably already know that what you are planning is illegal. You should also know that this book is written with the assumption that you are marrying for love, not for a green card. We are not going to give you any special tips on making a fraudulent marriage look real. However, we will outline the risks for you.

#### **1. What Is a Sham Marriage?**

A sham marriage is one that is entered into in order to get around the U.S. immigration laws. For a marriage to be valid under the law, it is not enough that the couple had a real marriage ceremony and got all the right governmental stamps on their marriage certificate. They have to intend to live in a

real marital relationship following the marriage ceremony -- and prove their intention through their actions. If the couple doesn't intend to establish a life together, their marriage is a sham. (For more on what USCIS considers to be a real or bona fide marital relationship for purposes of green card eligibility, see Chapter 2, Section B.)

## **2. Will You Get Caught?**

Detecting marriage frauds is a top priority for USCIS. USCIS officers still quote a survey from the 1980s which found that up to 30% of marriages between aliens and U.S. citizens are suspect. That survey has since been shown to be deeply flawed, but its legacy lives on.

In order to detect frauds, the immigration authorities require a lot of proof that a marriage is real, including more documentation than for other family-based immigration applicants. They subject marriage-based immigrants to a longer and more detailed personal interview and a two-year testing period for couples who have been married fewer than two years.

The government will not normally follow you around or investigate your life beyond the required paperwork and the interviews it always conducts. But it has the power to look deeply into your life if the authorities get suspicious. Government inspectors can visit your home, talk to your friends, interview your employers, and more. By requiring more of married couples than others, the government has already set up a system that gives it a lot of information about whether your marriage is real.

What is the U.S. government's view of a normal marriage? The statutes and regulations don't go into detail on this, so the following comes from a combination of court cases and attorneys' experiences.

According to USCIS, the normal couple has a fair amount in common. They share a language and religion. They live together and do things together, like take vacations, celebrate important events or holidays, and have sex and children. Normal couples also combine financial and other aspects of their lives after marriage. They demonstrate their trust in one another by sharing bank and credit card accounts and ownership of property, such as cars and houses.

The government requires applicants to prove that they share their lives in a way similar to what is described above. Applicants do this by providing copies of documents like rental agreements, bank account statements, and children's birth certificates. The government further tests the validity of the marriage by talking to the applicant and usually to his or her spouse. Every marriage-based applicant for a visa or green card (including fiancés), whether they are applying in the United States or overseas, will have to attend a personal interview with a U.S. government official.

U.S. government officials have developed amazing talents for discovering fraud by examining what look like insignificant details of people's lives. To ferret out lies, they have learned to cross-check dates and facts within the application forms and between the application forms and people's testimony.

**EXAMPLE:** Rasputin has married Alice, a U.S. citizen, in the hopes of obtaining a green card. They submit an application for a green card in the United States. At Rasputin's green card interview, the officer asks for his full name, his address, and how he entered the United States. Rasputin can't believe how easy this all is. The officer goes on to ask for the dates of all of Rasputin's visits to the United States, the date of his divorce from his previous wife and the dates of all of his children's births. Rasputin is getting bored. Then the officer notices something funny. The date of birth of Rasputin's

last child by his former wife is a full year after the date of their supposed divorce. The officer becomes suspicious, and Rasputin and Alice are taken to separate rooms for fraud interviews. They are examined in minute detail about their married lives. When neither of them can remember what the other one eats for breakfast or what they did for their last birthdays, the case is denied and referred to the local Immigration Court for proceedings to deport Rasputin.

If a couple has been married for less than two years when the immigrant first receives residency, USCIS gets a second chance at testing the validity of the marriage. The immigrants in such couples don't get a permanent green card right away. Instead, the law requires that their first green card expire after another two years. (The technical term is that the immigrant has "conditional residency.")

When the two years are up, both members of the couple must file an application for the immigrant's permanent residency. They must include copies of documents showing that they are still married and sharing the important elements of their lives. This form is mailed to a USCIS office. As USCIS knows, it is extremely difficult for members of sham marriages to keep things together for a full two years, even on paper. If the marriage appears to be a real one when the two years is up, the conversion from conditional to permanent residency won't involve an intensive investigation -- the application process doesn't even include an interview if the written application looks legit.

**EXAMPLE:** Maria married Fred, a U.S. citizen, in order to get a green card. Fred was a friend of Maria's, who simply wanted to help her out. Maria manages to get approved by the consulate at her immigrant visa interview, and enters the United States. Because their marriage is new, Maria is given two years as a conditional resident. During those two years, Maria overdraws their joint checking account three times. Fred gets angry and closes the account. Maria has an accident with their jointly owned car and it goes to the junk yard. Fred buys another car in his own name and won't let Maria drive it. Fred gets fed up and wonders why he got into this in the first place. He falls in love with someone else and insists that Maria move out. At the end of her two years of conditional residency, Maria can't get Fred to answer her phone calls. In desperation, she fills out the application form on her own, fakes Fred's signature and lists his address as her own. However, the only documents she can attach are the same bank account statements and car registration she submitted to the consulate two years ago. USCIS checks the files and notices this. They call her and Fred in for an interview. It's not long before the truth comes out and enforcement proceedings are begun.

As you see from the examples above, people who enter into sham marriages most often trip themselves up just trying to get through the standard process. It's not that USCIS can read people's minds or that it spends all its time peeking into applicants' bedrooms. They simply catch a lot of people who thought that a fake marriage was going to be easier than it really is.

### **References to the Immigration Laws in This Book**

Throughout this book are references to the federal immigration laws that govern immigration through marriage and to the regulations that describe how USCIS will apply those laws to you. (They look like this: "I.N.A. § 319(a), 8 U.S.C. § 1430(a)," or "8 C.F.R. § 316.5.") We include these references where we feel it is important to indicate our sources for information and to help you research the immigration laws on your own. See Chapter 17 for more detail on what these references mean and how you can look them up.



### 3. What Happens If You Are Caught

The law pretty much speaks for itself on what happens to immigrants who commit marriage fraud. You can face prison, a fine or both:

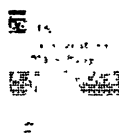
*Any individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than \$250,000, or both (I.N.A. § 275(c), 8 U.S.C. § 1325(c)).*

The U.S. citizen or resident could also face criminal prosecution, including fines or imprisonment, depending on the facts of the case. They are most likely to be prosecuted for either criminal conspiracy (conspiring with the immigrant is enough; see *U.S. v. Vickerage*, 921 F.2d 143 (8th Cir. 1990)), or for establishing a "commercial enterprise" to get people green cards (see I.N.A. § 275(d), 8 U.S.C. § 1325(d)).

The extent to which these penalties are applied depends on the specifics of each case. The government tends to reserve the highest penalties for U.S. citizens or residents engaged in major conspiracy operations, such as systematically arranging fraudulent marriages. But that doesn't mean that small-time participants in marriage fraud can count on a soft punishment -- though most immigrants will probably simply be deported and never allowed to return.

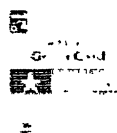
### Next: D. How to Use This Book

[Back to Top](#)



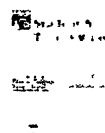
#### U.S. Immigration Made Easy

Use this plain-English legal book to enter, live in and work in the U.S. temporarily or permanently.



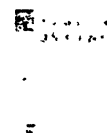
#### How to Get a Green Card

This essential book gives you all the critical information you need to get a green card.



#### Student & Tourist Visas: How to Come to the U.S.

All the forms, information and instructions anyone needs to travel or attend school in the United States.



#### Becoming a U.S. Citizen: A Guide to the Law, Exam & Interview

Covering the topics that most immigration guides don't, this book is the most complete resource available today.