

2005

Janice Ririe Kunz v. Richard L. Kunz : Brief of Appellee

Utah Court of Appeals

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In re the Marriage of: _____)

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

Court of Appeals #: 20050374
Trial Court Civil No.: 044902035

) Judge: Sandra N. Peuler

) Commissioner: Bradford

Appeal from Order of Third District Court, Salt Lake Department
Honorable Sandra H. Peuler Presiding.

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UTAH APPELLATE COURTS
OCT 18 2005

List of involved Parties

[URAP 24(a)(1)]

Petitioner:

Janice B. Kunz - ("JANICE") - Lawfully married Richard in 1953 - divorced 1961.

Janice B. Kunz - Richard's polygamous wife - 1961 until Richard's 2003 death.

Respondents:

Lynne Kunz ("LYNN") - Lawfully married Richard - 1999 until Richard's 2003 death.

Lillie Spencer - ("LILLIE") - Richard's polygamous wife - 1999 until Richard's 2003 death.

Other involved persons:

Richard Kunz, deceased ("RICHARD") - Died 2003.

Married to Janice in 1953. Divorced in 1961. They never remarried.

Rachael - Lawfully married to Richard from 1961 until her death in 1994.

Lynne - Lawfully married to Richard - 1999 until Richard's death.

Janice - Polygamous wife - 1961 until Richard's death.

Lillie - Polygamous wife - 1999 until Richard's death.

Rachael Kunz - deceased - ("RACHEL"). Lawfully married Richard 1961. She died 1994.

Table of Authorities

Utah Appellate Cases

<i>Albretson v. Judd</i> , 709 P.2d 347 (Utah 1985)	3
<i>Alder v. Bayer Corp, AGFA Div.</i> , 63 P.3d 1068 (Utah 2002)	10
<i>Anderson Development Co. V. Tobias</i> , 116 p. 3D 323 (Utah June 2005)	10
<i>Day v. Meek</i> , 976 P.2d 1201, 1204-1206, (Utah 1999)	15
<i>ECO Marketing, Inc. V. Hardesty</i> , (Unpublished Opinion found at 2003 WL 21290892) ...	19
<i>Farley v. Sikes</i> , 918 P.2d 895 (Ut. Ct. App. 1996)	3
<i>Jensen v. IHC</i> , ¶ 70-77, 82 P.3d 1076	15
<i>Lee v. Gaufin</i> , 367 P.2d 572 (Utah 1993)	15
<i>McKell v. Wells Fargo Bank</i> , 100 P.3d 1159, ¶ 7	3, 4
<i>Sandy City v. Salt Lake County</i> , 794 P.2d 484 (Ut Ct. App 1990)	9
<i>State v. Bowers</i> , 57 P.3d 1065 (Utah 2002)	3
<i>State v. Housekeeper</i> , 62 P.3d 444 (Utah 2002)	3
<i>United Park City Mines v. Greater Park City Co.</i> , 870 P.2D 880, 885 (Utah 1993)	3
<i>WebBank v. American General Annuity Service Corp.</i> , 54 P.3d 1139 (Utah 2002)	10

Federal Cases

<i>Eschbaugh v. Industrial Com'n</i> , 677 N. E. 2d 438 (5th Dist. 1996);	14
---	----

Utah Statutes

UC § 30-1-4.5	3, 8, 13-16
Utah Code Ann. § 78-2a-3(2)(h)	1

Utah Court Rules

URAP 4(a)	2, 4
URCP 56(e)	7
URCP 56(f)	8, 9, 12
Utah Rules of Appellate Procedure 33	19, 20

Treatises

51 Am. Jur. 2d <i>Limitation of Actions</i> § 30	14, 15
--	--------

Table of Contents

STATEMENT OF JURISDICTION	1
---------------------------------	---

REFERENCE TO PARTIES	1
----------------------------	---

STATEMENT OF ISSUES PRESENTED FOR REVIEW & STANDARD OF REVIEW	2
Issue #4: Whether the Court lacks jurisdiction	2
Issue #5: Whether Divorcee’s claims are barred by UC § 38-1-4.5	3
Issue #6: Whether Divorcee’s claims are barred by a statute of repose	4

STATEMENT OF THE CASE	4
-----------------------------	---

STATEMENT OF FACTS	5
2. Summary of relevant facts.	5
3. No response to immaterial facts.	6
4. Disputed material alleged “Facts.”	6
(a) ¶ 7 & 9 - Alleged secret marriage to Lynne	6
(b) ¶ 9 - Alleged reason for Richard-Lynne marriage.	6
(c) Deceased Husband’s death certificate shows widow as his spouse.	7

SUMMARY OF ARGUMENT	7
5. Divorcee’s appeal should be dismissed because:	7
(a) Untimely attorney fee request did not extend time for appeal.	7
(b) Statutory bar to Janice’s petition.	8
(c) UC § 30-1-4.5 is a statute of repose.	8
(d) Morrison’s insufficient URCP 56(f) affidavit	8
(e) Attorney fees for frivolous appeal.	9

RESPONSE TO “ARGUMENT”	9
------------------------------	---

I SUMMARY JUDGMENT WAS PROPER	9
6. Insufficient URCP 56(f) affidavit.	9
7. Divorcee failed to meet her burden to effectively oppose MSJ.	10
8. No disputed material issues have been identified.	11

A (P. 12-20)	
Court properly applied the law to undisputed facts	11
9. Conflicting evidence not weighed.	11
10. Insufficient URCP 56(f) affidavit re discovery	12

B - (P. 20–22)

Divorcee’s Petition is barred as untimely	13
11. Court held that Divorcee claims did not meet statutory requirements.	13
12. Failure to meet jurisdictional requirements is an absolute bar.	14
13. Statute of repose is an absolute bar.	14
14. Failure to adduce evidence of fraud.	15
15. Divorcee’s waiver.	16
16. Lillie has equal standing as a common-law wife	16
II DIVORCE ENDED DIVORCEE’S MARRIAGE TO DECEASED HUSBAND	17
17. Summary disposition efforts.	17
18. Divorce ended Divorcee’s marriage to Deceased Husband.	17
19. Unsupported accusations should be disregarded	18
20. Request for attorney fees re appeal	18
III CONCLUSION	20
IV CERTIFICATE OF SERVICE	21

APPENDIX

Appendix 1: Rule 4 - Utah Rule of Appellate Procedure .

Appendix 2: Court of Appeals Jun 1, 2005 - URAP 10(f) Order denying Motions for Summary Disposition & reserving issues for plenary presentation and consideration in connection with the appeal.

Appendix 3: R. 94-95 - Marriage license re 9/17/99 marriage between Richard Lyman Kunz & Lynne Rosetta Miller.

In re the Marriage of: _____)

JANICE RIRIE KUNZ and RICHARD) Case No.: 20050374
L. KUNZ (deceased)
)

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

See inside cover of brief for identification of parties. In this brief the parties are generally identified by their first name or status as follows:

1953 - Civilly married to Richard [R. 7B, ¶ 1].

1961 - Richard and Janice are divorced. [R. 7B, ¶ 2] They never remarried.

Notwithstanding the divorce, Janice claims to have continued to cohabit with Richard as a Plural Wife [R. 7B, ¶ 4 & 9].

1961 - Civil married to Richard, which marriage was terminated by her death in 1994 [R. 7B, ¶ 3 & 5].

1999 - Became Richard's plural wife, which continued until his death in 2003.
[R. 7B, ¶ 6 & 9].

Lynne Kunz - “**Widow**” or “**Lynne**”.

1999 - Civil marriage to Richard, which continued until his death in 2003.

[R. 7C, ¶ 7].

Richard Kunz - “**Deceased Husband**” or “**Richard**”.

Addenda to Divorcee’s brief are listed by letter of the alphabet. Addendum to Widow and Plural Wife’s brief is listed by numbers.

STATEMENT OF ISSUES PRESENTED FOR REVIEW &

STANDARD OF REVIEW

In addition to the issues for review as stated in Janice’s (“**DIVORCEE’S**”) Brief, the following issues are presented for review:

Issue #4: Whether the Court lacks jurisdiction. Whether the Court lacks jurisdiction to consider this appeal because the Notice of Appeal was not timely filed. Judge Peuler’s 3/24/05 Order, which denied Widow and Plural Wife’s motion for attorney fees because the motion was not timely filed, did not extend the time within which Divorcee could appeal from Judge Peuler’s 11/16/04 “Final Order” [Add. B].¹

Judge Peuler’s 11/16/04 Order was a “final order” [Add. B]. The 30 days time within which an appeal could be taken from that Order, as allowed by URAP 4(a),² expired on 12/16/04. Divorcee’s Notice of Appeal was filed 4/20/05, which was more than four months

¹ Copy of Judge Peuler’s 11/16/04 Order is Add. B to Appellants’ Brief herein.

² See URAP 4(a), a copy of which is attached hereto as Add. 1 hereto.

after the time for appeal had expired. The appeal was a nullity, This Court lacks jurisdiction and the appeal should be dismissed.

Standard of review: This issue involves a matter of law, to which a correction of error standard applies, according no particular deference to the lower court's conclusions. *State v. Housekeeper*, 62 P.3d 444 (Utah 2002); *United Park City Mines v. Greater Park City Co.*, 870 P.2D 880, 885 (Utah 1993); *Albretson v. Judd*, 709 P.2d 347 (Utah 1985); *Farley v. Sikes*, 918 P.2d 895 (Ut. Ct. App. 1996); *State v. Bowers*, 57 P.3d 1065 (Utah 2002).

Issue #5: Whether Divorcee's claims are barred by UC § 38-1-4.5. Whether Divorcee's claims are statutorily barred by the one year time limitation following termination of a relationship [UC § 38-1-4.5(2) - **App. A**], and by the requirement that both parties be capable of entering into a valid marriage [UC § 38-1-4.5(1)(a) &(b) - **App. A**]. Janice's claims are barred because she did not file her petition within one year after Richard's right to such a declaration was extinguished by his marriage to Lynne.

Standard of review: This issue involves a matter of law, to which a correction of error standard applies, according no particular deference to the lower court's conclusions. See citations quoted in Issue #4 above. Questions of statutory interpretation are reviewed for correctness, affording no deference to the district court's legal conclusions.³

³ *McKell v. Wells Fargo Bank*, 100 P.3d 1159, ¶ 7 and cases there cited.

Issue #6: Whether Divorcee's claims are barred by a statute of repose. The time and circumstance limitations⁴ on Divorcee's right to obtain a judicial declaration that her relationship with Richard ripened into a common law marriage is a statute of repose, which bars her right to file a petition after Richard became disabled from such a declaration by his marriage to Lynne. Because it is a Statute of Repose, time limitations cannot be tolled.

Standard of review: This issue involves a matter of law, to which a correction of error standard applies, according no particular deference to the lower court's conclusions. Questions of statutory interpretation are reviewed for correctness, affording no deference to the district court's legal conclusions.⁵ See citations quoted in Issue #4 above.

STATEMENT OF THE CASE

1. Widow and Plural Wife supplement the last ¶ of sub-paragraph ""B", page 6 of Appellants' "Statement of the Case"⁶ by adding thereto the following two paragraphs:

(1) **Judge Peuler's 11/16/04 Order was a "final order" [Add. B].**⁷ The 30 day period within which an appeal from that final order could have been filed as required under URAP 4(a)⁸ expired on 12/16/04. No appeal from that order

⁴ See issue #5 above.

⁵ *McKell v. Wells Fargo Bank*, 100 P.3d 1159, ¶ 7 and cases there cited.

⁶ See page 6 in the ¶ immediately above heading "C. Statement of Facts".

⁷ Copy of Judge Peuler's 11/16/04 Order is **Add B** to Appellants' Brief herein.

⁸ See URAP 4(a), a copy of which is attached hereto as **Add. 1** hereto.

was filed within that 30 days Divorcee's Notice of Appeal was not filed until 4/20/05, which was more than four months after the time for appeal had expired. Divorcee argues that her appeal was timely because it was filed within 30 days after the Court denied Appellees' motion for attorney fees, however, the denial was because that motion was untimely [**Add. B**]. That untimely motion for fees did not extend Divorcee's appeal time.

(2) **Motion for summary disposition.** Widow and Plural Wife's Motions for Summary Disposition and for attorney fees were denied by a 6/01/05 Order which deferred ruling on said matters and the fee request "pending plenary presentation and consideration of the appeal" [**App. 2**]. Widow and Plural Wife still seek fees.

STATEMENT OF FACTS

2. **Summary of relevant facts.** A detailed summary of facts is not included herein because most of those matters are not relevant to the issues involved in this appeal. However, Widow and Plural Wife's 6/14/04 Reply includes a detailed summary of deceased husband's's three civil marriages, his divorce, the death of his second spouse, his plural wives, etc. [R 72-80], to which verified copies of underlying documents are attached thereto [R. 81-113].

3. **No response to immaterial facts.** Widow and Plural Wife dispute many of Divorcee's alleged "Facts" and dispute the spin they have tried to put thereon.⁹ They have not responded to many alleged "facts" because they are not material to the issues involved in this appeal.
4. **Disputed material alleged "Facts."** Widow and Plural Wife Dispute the following alleged "Facts" listed in Divorcee's brief, because they are untrue, conclusionary and/or because they have not been established by competent evidence, etc.:
 - (a) **¶ 7 & 9 - Alleged secret marriage to Lynne.** Without reference to competent affidavits, Divorcee incorrectly argues that the Richard-Lynne Marriage was allegedly "done in utter secrecy." Divorcee's citations to the record do not identify or establish any facts which support their secrecy claim. To the contrary, they were openly married by a Utah Judge.¹⁰ Divorcee's claim that said marriage was done "without her knowledge" is insufficient to establish or support her "secrecy" claim.¹¹
 - (b) **¶ 9 - Alleged reason for Richard-Lynne marriage.** Divorcee's claim that the Richard-Lynne marriage was a sham to allow Widow to remain in the U. S. on an

9

For example no supporting facts have been presented by Divorcee's in support of her conclusion that Richard Kunz 9/17/99 marriage to Lynne Kunz was allegedly done in "secret."

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See marriage certificate, App. 3.

See ¶ 9, P. 7 in § C of their Statement of the Case" in Appellants' "Statement of Facts."

expiring visa is contrary to documentary evidence¹². In support of said claim they submit only inadmissible conclusionary statements wherein they argue that Richard & Lynne did not cohabit, etc. The conclusionary statements relied upon by Divorcee are from Debbie Kunz [R. 36-36, ¶ 10-14], Viroque Kunz [R. 46] and Divorcee [R. 22, ¶ 6, 11 & 12], none of said affidavits affirmatively establish that any of them (1) had personal knowledge of the alleged “facts”, (2) that any of them were competent to testify as to such matters, (3) that none of said affidavits state facts which would be admissible in evidence, etc. Those affidavits are inadmissible and insufficient to oppose the MSJ because they fail to meet the minimum affidavit requirements for affidavits as imposed by URCP 56(e).¹³

- (c) **Deceased Husband’s death certificate shows widow as his spouse.** Richard’s death certificate, [R. 112-113] shows Lynn as his widow.

SUMMARY OF ARGUMENT

5. Divorcee’s appeal should be dismissed because:

(a) **Untimely attorney fee request did not extend time for appeal.** Widow and Plural wife’s request for attorney fees was denied because the fee request was not timely filed. Accordingly, the court lacked jurisdiction to consider their motion for attorney fees. Because the court lacked jurisdiction to consider the Widow and Plural

¹² See ¶ 1-5, R 172-176.

¹³ See URCP 56(e) requirements in footnote 12 below.

Wife's motion for attorney fees, that motion did not extend the time for filing the appeal and as a result the Court lacks jurisdiction over this appeal.

(b) **Statutory bar to Janice's petition.** Time limits imposed by UC § 30-1-4.5 [Add. "A" to App. brief] are an absolute statutory bar to Divorcee's petition seeking to have her relationship with Deceased Husband declared a common law marriage *over 2 ½ years after* Richard married Widow. See discussion in ¶ 12 below.

(c) **UC § 30-1-4.5 is a statute of repose.** As a statute of repose, UC § 30-1-4.5 limits the time and circumstances within which Divorcee could have filed a petition asking that her relationship with Deceased Husband be declared a common law marriage. Because it is a statute of repose, and not a statute of limitations, the statutory time limits therein are not subject to being extended by tolling. Because a statute of repose is not subject to tolling, Mr. Morrison's argument that if he were allowed discovery he might be able to prove that the Lynne-Richard marriage was fraudulent, is without merit. Even if Mr. Morrison were able to prove fraud, (no fraud existed) this would not extend the absolute time limited by the statute of repose.

(d) **Morrison's insufficient URCP 56(f) affidavit.** Even if the time limits imposed by UC § 30-1-4.5 could be tolled by fraud (no such tolling can occur), no evidence has been adduced which if proven would justify tolling. Morrison's URCP 56(f) Affidavit seeking discovery was grossly insufficient to meet the minimum requirements for such an affidavit. See discussion in ¶ 10 below.

(e) **Attorney fees for frivolous appeal.** Widow and Plural Wife should be awarded their attorney fees incurred in defending against this frivolous appeal. See discussion in ¶ 19 below.

RESPONSE TO “ARGUMENT”

I

SUMMARY JUDGMENT WAS PROPER

6. **Insufficient URCP 56(f) affidavit.** Although the facts may be unique, the applicable issues of law are well settled under Utah law. Utah Law was properly applied by the trial court to the undisputed facts. In his insufficient URCP 56(f) Affidavit, in an effort to avoid SJ [R 65-71].¹⁴ Morrison speculates that if Divorcee were afforded discovery she might be able to discovery some as yet unidentified disputed material issue of fact for trial The trial Court properly ruled¹⁵ that Morrison’s URCP 56(f) affidavit did not sufficiently identify evidence to be sought through discovery which would be sufficient (if proven) to defeat Widow and Plural Wife’s SJ.¹⁶ The Court

¹⁴

Citations to authorities and detailed discussions as to the reasons why Morrison’s Affidavit fails to comply with minimum URCP 56(f) requirements are found in R. 55, ¶ 14-15 and R. 139-140, ¶ 7-8. See detailed discussion re URCP 56(f) affidavits in *Sandy City v. Salt Lake County*, 794 P.2d 484 (Ut Ct. App 1990).

¹⁵ See Order dated 11/16/04. [App. 3].

¹⁶

Minimum standards for URCP 56(f) affidavit. At a minimum a URCP 56(f) Affidavit must: (a) describe the type of additional discovery needed, (b)

specifically held that “with respect to the legal matters at issue, further discovery is unnecessary.” [Add. “B” to Divorcee’s Brief]. Because there are no disputed *material* facts, Summary judgment was properly granted. *Alder v. Bayer Corp, AGFA Div.*, 63 P.3d 1068 (Utah 2002); *WebBank v. American General Annuity Service Corp.*, 54 P.3d 1139 (Utah 2002).

7. **Divorcee failed to meet her burden to effectively oppose MSJ.** Divorcee failed to meet the burden of proof required to adequately oppose Appellees’ MSJ. Instead she merely speculates that if she were allowed to conduct discovery that she might be able to find some disputed issue of fact for trial. The Utah Supreme Court recently ruled that as a minimum, to contest a properly supported MSJ,¹⁷ the opposing party was required:

To successfully defend against a motion for summary judgment, the nonmoving party must set forth facts “sufficient to establish the existence of an element essential to that party's case.” Failure to do so with regard to any of the essential elements of that party's claim will result in a conclusion that the moving party "is entitled to a judgment as a matter of law." "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case

the time required to complete that discovery, (c) specify the facts they believe the discovery would produce, (d) how it would defeat the pending MSJ. (e) reasons specified must be “adequate” and (f) they must show that the party is not merely on a “fishing expedition” for purely speculative facts.

¹⁷

Anderson Development Co. V. Tobias, 116 p. 3D 323 (Utah June 2005). Citing *Burns v. Cannondale Bicycle Co.*, 876 P.2d 415, 419 (Utah Ct.App.1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

necessarily renders all other facts immaterial." (quoting Fed.R.Civ.P. 56(c). (Emphasis added).

Divorcee has failed to meet this burden of proof as to the issues discussed in ¶ 7 above.

8. **No disputed material issues have been identified.** Since Divorcee has failed to identify any material issue of fact, a trial would be a useless act. Widow and Plural wife respond to Divorcee's arguments re alleged errors by the trial court (as discussed in sub-paragraph "A") [See P. 12, ¶ "A" of Appellants' 8/22/05 brief] as follows:

A
(P. 12-20)

Court properly applied the law to undisputed facts

9. **Conflicting evidence not weighed.** Contrary to Divorcee's argument (P. 11-12), the SJ decision did not result from weighing conflicting evidence. Even though the Commissioner expressed surprise at some of Divorcee's incredible claims, said matters were not material to her decision. Instead, the MSJ was entirely based on undisputed facts and well settled Utah law. The Commissioner's oral decision included the following [ADD. C, P. 36, lines 11-26:

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. (Emphasis added).

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

In her 11/16/04 Order Judge Peuler denied oral arguments based upon her review of a transcript of Commissioner Bradford's hearing. [Add. B].

10. **Insufficient URCP 56(f) affidavit re discovery.** Morrison filed an insufficient URCP 56(f) Affidavit [R. 65-71] in an attempt to delay the MSJ so as to allow discovery. As discussed above, the Court denied Divorcee's request and ruled that Morrison's affidavit was insufficient to comply with URCP 56(f) requirements. Curiously, Divorcee has not challenged the Court holding that Morrison's URCP 56(f) affidavit was insufficient. Even now, Divorcee has not identified any disputed material issue of fact to be tried. Among other deficiencies, Morrison's affidavit generally discussed potential legal issues, but he failed to identify any specific material evidence expected to be obtained through discovery. [See footnotes #7, 8 and 10, pages 5-8 above].

B - (P. 20-22)

Divorcee's Petition is barred as untimely

11. **Court held that Divorcee claims did not meet statutory requirements.** As a condition precedent to Divorcee obtaining an order validating her relationship with Deceased Husband as a common law marriage under UC § 30-1-4.5 [Add. "A" to App. brief] she must prove that she has met the statutory requirements. Judge Peuler's 11/16/04 ruling [P. 2 in Add. "B" to App. brief] held that Divorcee did not meet those statutory requirements::

The Court reaches this conclusion (affirming Commissioner Bradford's summary judgment of dismissal) based on 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 Lynn R. Kunz. (Emphasis added).**

Because Divorcee did not bring her petition during a period while Deceased Husband was capable of entering into a statutory common law marriage, the time with which she was required to file petition is not subject to tolling and is absolutely barred as discussed below and in ¶5 above.

12. **Failure to meet jurisdictional requirements is an absolute bar.** Before Divorcee could obtain a declaration of a valid common law marriage under UC § 30-1-4.5, she must prove that she and the Deceased Husband both met the statutory requirements. Judge Peuler's ruled [Add. "A" to App. brief - quoted in ¶ 8 above] that they did not meet the statutory requirements (a) in UC 30-1-4.5(1)(a) [capable of entering into a common law marriage, etc.] & (b) [after his marriage to Lynne, Richard was not capable of giving consent or entering into a solemnized marriage] and(b) that because their "union" was not declared to be a common law marriage within 1 year after his right to seek such a declaration was lost as a result of his marriage to Lynne, [as required by UC § 30-1-4.5(1)(a) & (b) and UC § 30-1-4.5(1)].

Failure to meet those statutory requirements is an absolute bar to granting Divorcee's petition to declare that a common law marriage resulted from her relationship with Deceased Husband. Unlike a statute of limitation, a statutory jurisdictional limitations period is not an affirmative defense subject to tolling, waiver or estoppel.¹⁸ In addition, a jurisdictional time limitation cannot be modified, and non-compliance with such a limitation is an absolute bar.¹⁹

13. **Statute of repose is an absolute bar.** A statute of repose extinguishes a cause of action after a fixed period of time, regardless of when the cause of action accrued,

¹⁸

Eschbaugh v Industrial Com'n, 677 N. E. 2d 438 (5th Dist. 1996); 51 Am. Jur. 2d *Limitation of Actions* § 30 and authorities there cited.

¹⁹ *Miller v New Jersey State Dept of Corrections*, 145 F. 3d 616 (3d Cir. 1998).

potentially barring a plaintiff's suit before there has been an injury or before the cause of action has arisen.²⁰ UC § 30-1-4.5(2) [Add. "A" to App. brief] is a statute of repose which reads in relevant part as follows:

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. . . (Emphasis added).

Divorcee's argument that the time period is subject to tolling under the discovery rule is without merit. As discussed above, a statute of repose cannot be tolled.

14. **Failure to adduce evidence of fraud.** Even if the time within which Divorcee could have filed a petition seeking a declaration that her relationship with Deceased Husband had ripened into a statutory common-law marriage were not barred (it is barred for the reasons discussed above), her Petition must be denied because she has failed to adduce any proof of her claim of a fraudulent concealment of the marriage between Deceased Husband and his Widow. See discussions in ¶ 4, 6, 8 and quotation from Commissioner Bradford's decision where she discusses Divorcee's failure to adduce clear and convincing evidence of fraud in ¶ 9 above.

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See 51 Am. Jur. 2d *Limitation of Actions* § 31 and 32 and authorities there cited, including citation therein to *Lee v. Gaufin*, 367 P.2d 572 (Utah 1993) as authority. Utah cases which discuss and approve statutes of repose include the following: *Jensen v. IHC*, ¶ 70-77, 82 P.3d 1076; *Day v. Meek*, 976 P.2d 1201, 1204-1206, (Utah 1999).

15. **Divorcee's waiver.** The trial court properly held that by her failure to ask the Court to declare her relationship with Deceased Husband to be a common law marriage during a period of 50 years, that she waived her right to do so [P. 26, lines 17-21 in Add. "C" to Appellant's brief].
16. **Lillie has equal standing as a common-law wife.** Both Lillie and Janice co-habited with Richard and but for his marriage to Lynne either might have qualified to be declared his common-law wife under UC § 30-1-4.5. If there were to be a declaration of a common-law marriage, why shouldn't Lillie instead of Lynne be declared to be Richard's common-law wife? Morrison's argument that the first plural wife should have priority over later plural wives in being declared to be the common-law wife makes little sense. During oral argument Morrison admitted that if Richard's marriage to Lynne was valid, that Janice had no claim: [Add. "C", page 33, lines 1-6].

THE COURT: If it's [1999 marriage between Richard and Lynne] determined to be a valid marriage where does that put your client?

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

THE COURT: I think so, too

MR. MORRISON: Yeah.

However, since there was a valid 1999 marriage between Lynne and Richard, after that time Richard had no capacity to have his relationship with either Lille or Lynne declared to be a common law marriage.

II

DIVORCE ENDED DIVORCEE'S MARRIAGE TO DECEASED

HUSBAND

17. **Summary disposition efforts.** Contrary to Divorcee's argument [P. 22-23], Widow and Plural Wife attempts to obtain summary disposition in this matter were and continue to be good faith attempts to demonstrate that this Court lacks jurisdiction, that Divorcee's claims are wholly without merit, etc.
18. **Divorce ended Divorcee's marriage to Deceased Husband.** Divorcee makes the curious argument that because she continued to live with deceased husband after they were divorced, the Court should overlook his later marriages to two women, should ignore his polygamous relationships with other women, should ignore the statutory time and fact limitations on the Court's ability to declare a statutory common-law marriage, for some unexplained reason, and in some undefined manner, Divorcee now asks the Court to declare that she should be judicially recognized as deceased Husband's widow [App. brief P. 23-24; 26-27]. As Commissioner Bradford

observed, Divorcee, is, in effect, asking the Court to give judicial approval to her misconduct:

THE COURT: Okay. So in essence, **it feels like I'm either tacitly approving polygamist relationship** by allow these common law marriages, divorce, marriages, divorces to accumulates so that we don't have to count any of the marriages, we just go back to the first one. **We allow that perpetration of a fraud on the courts and society in favor of the first polygamist wife, disregarding all of the fraud that had been committed since that time, and the tacit approval of the first wife, correct?** (Emphasis added).

Divorcee's ongoing attempt to obtain judicial approval of her misconduct should not be tolerated. The Court should affirm the summary judgment dismissing her petition.

19. **Unsupported accusations should be disregarded.** Without supporting evidence, Divorcee's counsel wildly speculates as to the reasons Deceased Husband and Widow married, and he then asks the court to deny based on his suspicions their marriage might be subject to challenge [P. 24-26]. His speculation is so lacking in merit that it does not require a response, other than to deny his claims.
20. **Request for attorney fees re appeal.** Widow and Plural Wife should be awarded reasonable attorney fees incurred in defending against Divorcee's frivolous appeal.²¹
Among other things, attorney fees should be awarded because the appeal was not

²¹ See ¶ 1 of App. 3.

brought or asserted in good faith and because it is without merit.²² Utah case law also approves the award of attorney fees where, as here, the appeal lacks merit.²³ The

22

RULE 33. DAMAGES FOR DELAY OR FRIVOLOUS APPEAL; RECOVERY OF ATTORNEY'S FEES

(a) Damages for Delay or Frivolous Appeal. Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney. (Underlining emphasis added).

(b) Definitions. For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper. (Underlining emphasis added).

23

See the 2003 decision in *ECO Marketing, Inc. V. Hardesty*, (Unpublished Opinion found at 2003 WL 21290892), where under circumstances where the appeal lacked merit the Utah Court of Appeals awarded attorney fees to the respondent where, as here, the applicable law was clear. The Court reasoned as follows, which reasoning is equally applicable in the present case:

In the case before us, an accord and satisfaction was reached as a matter of law. **The law** in regard to what constitutes an accord and satisfaction, **in this context, has been clear for many years.** See *Estate Landscape*, 844 P.2d at 330 ("Where, as here, the check is tendered under the condition that negotiation will constitute full settlement, mere negotiation of the check

amount awarded as attorney fees should be fixed based upon affidavits filed after the Court rules on this motion, so that all fees incurred can be included in the award.

III

CONCLUSION

This appeal should be dismissed because it was filed after the time for an appeal had expired. This Court should affirm the dismissal by the trial court because when Deceased Husband married Widow, he disabled himself from entering into any common law marriage. Attorney fees incurred in connection with this appeal should be awarded to Widow and Plural Wife under URAP 33.

constitutes the accord, regardless of the payee's efforts or intent to negate the condition."); Marton Remodeling v. Jensen, 706 P.2d 607, 609 (Utah 1985) (holding that the negotiation of a check with a restrictive condition is an accord and satisfaction under the general rule even though the creditor wrote "not full payment" on the check before negotiation); Dishinger, 2001 UT App 209 at ¶ 26 (quoting Estate Landscape for the proposition that " 'mere negotiation of the check constitutes the accord, regardless of the payee's efforts or intent to negate the condition' " (citation omitted)); Cave View Excavating & Constr. Co. v. Flynn, 758 P.2d 474, 478 (Utah Ct. App.1988) (crossing out a restrictive condition before negotiating a check does not avoid an accord and satisfaction); *see also* Utah Code Ann. § 70A-3-311 (2001). **ECO's appeal is "not warranted by existing law" and ECO does not present "a good faith argument to extend, modify, or reverse existing law."** Utah R. App. P. 33(b). **Accordingly, we award Hardesty the requested attorney fees and costs incurred on appeal.** (Emphasis added).

Dated October 18, 2005.

BARKER LAW OFFICE, LLC

By: Ronald C. Barker
Ronald C. Barker

IV

CERTIFICATE OF SERVICE

I certify that I caused two true and correct copies of the foregoing Brief to be mailed
by first class mail October 18, 2005 to the following persons:

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

BARKER LAW OFFICE, LLC

By: Ronald C. Barker
Ronald C. Barker

Appendix

Appendix 1: Rule 4 - Utah Rule of Appellate Procedure.

Appendix 2: Court of Appeals June 1, 2005 - URAP 10(f) Order denying Motions for Summary Disposition & reserving issues for plenary presentation and consideration in connection with the appeal.

Appendix 3: R.94 - 95 - Marriage license re 9/17/99 marriage between Richard Lyman Kunz & Lynne Rosetta Miller.

Rule 3

RULES OF APPELLATE PROCEDURE

Note 69

payment the following day. *Van Wagoner v Barben*, 1894, 9 Utah 481, 35 P. 497 Appeal And Error ⇌ 370

RULE 4. APPEAL AS OF RIGHT: WHEN TAKEN

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion is filed in the trial court (1) for a new trial under Rule 24 of the Utah Rules of Criminal Procedure; or (2) to withdraw a plea under Utah Code Ann. § 77-13-6, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying the motion to withdraw the plea. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) **Filing prior to entry of judgment or order.** Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) **Additional or cross-appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) **Extension of time to appeal.** The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

THE UTAH COURT OF APPEALS

FILED
UTAH APPELLATE COURTS
JUN 1 - 2005

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In re the Marriage of:

Janice Ririe Kunz and
Richard L. Kunz
(deceased).

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)
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)

ORDER

Case No. 20050374-CA

RECEIVED

JUN 03 2005

RONALD C. BARKER
ATTY AT LAW

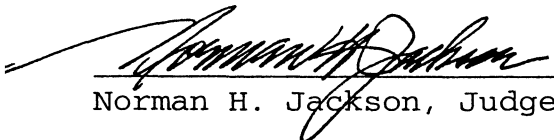
This matter is before the court on Appellees' first and second motions for summary disposition and request for attorney fees under rule 33 of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that Appellees' motions for summary disposition are denied, and a ruling on the issues raised therein is deferred pending plenary presentation and consideration of the appeal. See Utah R. App. P. 10(f).

IT IS FURTHER ORDERED that both parties' requests for an award of costs and attorney fees under rule 33 of the Utah Rules of Appellate Procedure are denied, without prejudice. This appeal shall proceed to the next procedural stage.

Dated this 15th day of June, 2005.

FOR THE COURT:


Norman H. Jackson, Judge

copy Rec'd

VOID IN 30 DAYS IF NOT USED

Marriage License

No 35847

The State of Utah

County of Salt Lake

To any person legally authorized to perform marriage, you are hereby authorized to join in matrimony

Mr. RICHARD LYMAN KUNZ of RIVERTON
in the county of SALT LAKE and state of UTAH
of the age of 64 years, and

M LYNNE ROSETTA MILLER of RIVERTON
in the county of SALT LAKE and state of UTAH
of the age of 50 years.

STATE OF UTAH }
COUNTY OF SALT LAKE } ss. *Witness my hand and official seal hereto affixed at my office in Salt Lake City, Utah this 17th day of SEPTEMBER 19 99*
SHERRIE SWENSEN, CLERK

By Nancy K. Murphy Deputy Clerk

I hereby certify that on the 17th day of September
in the year of one thousand nine hundred 99 in the city of SOUTH JORDAN
in said county of SALT LAKE I, the undersigned, a Judge
did join in matrimony according to law Mr. Richard Lyman Kunz
and M Lynne Rosetta Miller. The nature of the ceremony was
according to Utah Law and was a present mutual agreement
of marriage between the parties.

Signatures of parties involved in marriage

Richard Lyman Kunz
Signature of Groom
Lynne Rosetta Miller
Signature of Bride
Lillie Spencer
Signature of First Witness
Pam Thompson
Signature of Second Witness

Clinton E. Balmforth
Signature of Officiant
CLINTON E. BALM FORTH
Printed Name of Officiant
Judge
Title

USE BLACK INK

TO THE MARRIAGE OFFICIANT: Please complete and sign the bottom of the application and return both the application and official Marriage License to the Salt Lake County Clerk's Office, using the self-addressed envelope furnished for this purpose. Both the application & license must be returned within thirty (30) days. Failure to return this information within 30 days is a misdemeanor offense.

State of Utah

County of Salt Lake

I, the undersigned Salt Lake County Clerk do hereby certify that the annexed and foregoing is a true and full copy of an original document on file in my office.

Witness my hand and seal of said office this

22nd day of October 19 99

SHERRIE SWENSEN, CLERK

By [Signature] Deputy