1-21-2014

Baird-Sallaz v. Gugino Appellant's Brief Dckt. 41301

IN THE SUPREME COURT OF THE STATE OF IDAHO

RENEE L. BAIRD-SALLAZ, Plaintiff-Respondent, JEREMY J. GUGINO, Chapter 7 Bankruptcy Trustee for the Bankruptcy Estate of Renee L. Baird Intervenor-Respondent, vs. DENNIS J. SALLAZ, Defendant-Appellant.	)	SUPREME COURT NO. 41315 Fourth Dist. Case NO. CV DR 04-01075M

APPELLANT'S OPENING BRIEF

Appeal from the District Court of the Fourth Judicial District
for the County of Ada

Honorable Kathryn A. Sticklen, District Judge, Presiding

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I.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This appeal presents a collateral attack on the entry of the magistrate court's 2005 decree that purportedly granted Dennis Sallaz and Renee Baird a divorce, and that was the basis for the later judgment that divided community property. The Appellant Dennis argues that because he and Renee's attempted 1996 Oregon marriage was never valid under that State's law, it was never valid under Idaho law. Consequently, there was never a marriage "res" over which the magistrate court could exercise any subject matter jurisdiction either to dissolve the parties' non-existent marriage in 2005, or to later determine, and then to divide, non-existent community property in 2012. This appeal is brought from the 2012 community property judgment.

B. COURSE OF PROCEEDINGS BELOW

There is no requirement in Idaho law which establishes that as a "condition precedent," (I.R.C.P. 9(c)), to the commencement of a divorce action that the parties must actually plead the existence of a valid marriage. Therefore, as based upon the alleged marriage between Renee Baird and Dennis Sallaz that had occurred in the State of Oregon on July 4, 1996, Renee filed a complaint for divorce in Fourth District Ada County court on May 27 2004 (R, pp. 13-16). A decree granting the divorce was entered July 28, 2005, which decree reserved the "community

property" and "community debt" issues for later trial (R, pp. 23-24; *See*, Finding of Fact No. 1, R, pg. 127).

The ensuing resolution of the parties' "community property" and "community debt" issues involved sixteen days of trial and was conducted over a nine month period, including November 15 through 19, 2005; April 10 through 14, 2006; July 17 through 21, 2006; and July 27, 2006. There were several hundred exhibits admitted into evidence, many of which were of substantial length (R, pg. 126).

The magistrate court's initial Findings of Fact, Conclusions of Law and Order were issued October 30, 2007 (R, pp. 25-67). In July 2008 both parties filed motions to amend the magistrate court's Findings of Fact, Conclusions of Law and Order (R, p. 82-96). These motions were heard by the magistrate court in a series of hearings that occurred between September 2008 and May 2009. The magistrate court issued an order on the motions to amend on July 20, 2009, and issued an order of amendment on those motions on July 29, 2009 (R, 97-125).

Two and a half years passed before the magistrate court issued its Amended Findings of Fact, Conclusions of Law and Order, and the Amended Final Judgment on January 4, 2012 (R, pp. 126-172). The reasons for this delay were stated by the magistrate court on page 2 of those Amended Findings of Fact, and Conclusions of Law (R, pg. 127).

The Appellant Sallaz filed a timely appeal to the district court from the entry of the January 4, 2012 judgment on February 9, 2012 (R, pp. 193-196). Following the decision of the

district court on intermediate appeal (R, pp. 349-360), a timely appeal to this Court was filed on August 8, 2013 (R, pp. 361-65).

Two post-judgment occurrences have significantly affected the issues that are raised on this appeal. First, the Plaintiff/Respondent Renee Baird filed a voluntary Chapter 7 bankruptcy petition. *See, In Re: Renee L. Baird,* Case No.12–00904-JDP, (United State Bankruptcy Court, D.Ida.) (R. pp. 199-204). As a consequence of that filing, it was necessary for the Defendant/Appellant, Dennis Sallaz, to obtain an order from the Bankruptcy Court to lift the automatic stay in order to proceed with the appeal before the district court, along with this appeal (R, pg. 231-33). Then, once the appeal before the district court was perfected, the bankruptcy trustee filed a motion to intervene in that appeal (R, pp. 205-208).

Because community property issues, in which the bankruptcy trustee had a bona fide interest, were actually raised on the intermediate appeal to the district court (R, pg. 250), the Appellant Sallaz did not object to the trustee's participation as to those issues (R, pg. 210). But at the same time, the Appellant Sallaz also noted a challenge had been made to the validity of the Oregon marriage by way of an independent action filed in Fourth District Court, Ada County, and in that respect, that action also raised the question of the trustee being somewhat, "ill-equipped to proceed as the real party in interest in the place of Ms. Baird on these questions concerning the scope and extent of the marital estate that existed between herself and the Appellant Sallaz" (R, pg. 210).

The second post-judgment occurrence that has affected the issues that are raised in this appeal has been set out in the affidavit of Dennis J. Sallaz that was submitted to district court (R, pp. 216-221). In that affidavit the Appellant Sallaz describes how he learned for the first time that Respondent Baird had been "boasting about getting her 'community property' from me even though she had never married me." Sallaz Aff., ¶ 7, (R, pg. 217). Upon further investigation, the Appellant Sallaz determined that no Oregon marriage license ever existed (R, pp. 281-82). Consequently, on that basis alone, the parties' alleged marriage would be invalid under Idaho law as a consequence of the absence of any valid marriage license *Dire v. Dire-Blodgett*, 140 Idaho 777, 102 P.3d 1096 (2004).

An independent action, already referred to above, was therefore commenced to determine the validity of the Sallaz marriage (*Sallaz v. Sallaz*, Fourth Dist. Ada County Case No. CV OC 12-17666). The bankruptcy trustee's petition to intervene in that action was granted (R, pp. 343-45), as was his immediate motion to then dismiss that action, on the basis that it was an impermissible collateral attack upon the January 4, 2012 judgment, out of which this appeal arises (R, pp. 339-40).

Within the intermediate appeal to the district court, that court was also requested to issue a temporary remand to the magistrate court, if it was deemed that the record before the district court was inadequate to determine the subject matter jurisdiction question presented on that appeal as to the necessity of a valid marriage in order to decree a divorce and divide community

property (R, pg. 258). The district court declined, perceived to be done primarily on the grounds of some concept of "estoppel" (R, pp. 350-53).

After the appellate record was settled on this appeal, the Appellant Sallaz filed two motions, both of which were denied by this Court. Sallaz again requested remand to the magistrate court to fully develop the factual record as to the validity of the marriage. Sallaz also made a binding-declaration that unlike the intermediate appeal to the district court, where he had actually raised issues and challenged the actual division of community property, in this appeal he needed only going challenge the validity of the marriage itself. Therefore, in that context, Sallaz questioned the continued right of the bankruptcy trustee to participate in this appeal, since the state of existence of a marriage itself does not constitute "property of the bankruptcy estate."

Unlike the intermediate appeal before the district court, on which three discrete issues were presented to the court, two of which directly challenged the magistrate court's division of community property (R, pg. 250), in this appeal only one question is being presented to this Court. If the parties were never married under Idaho law, then there was never any community property, and all community property issues are thereby eliminated. Therefore the question of the validity of the marriage only really needs to be presented to this Court.

If this Court should determine a valid marriage exists (somehow under Idaho law), the magistrate's property determinations in the divorce were so entangled with third party interests – Real Homes LLC, Daryl Sallaz, Sallaz & Gatewood, Chtd., Steve Sumner, and so on, – those

third party interests – as they so choose – can separately bring independent actions to collaterally challenge the magistrate court's determinations which have allegedly affected their individual interests, when they were not a party to the action.

In a final gesture of full candor, the Appellant Sallaz believes he has been more than forthcoming through the presentation of the filing of his pre-briefing motions, in alerting both the Office of the Trustee of the Bankruptcy Court, and this Court, as to the nature and extent of the issues intended by the effects of this appeal. No one is being ambushed or blind-sided by any sudden abandonment of issues that directly relate to "property of the bankruptcy estate." The decision of the Trustee to proceed in this appeal was with full disclosure of the nature and extent of the issues to be presented by Appellant.

C. STATEMENT OF FACTS

Because the only issue raised in this appeal goes to the validity of the parties' 1996 Oregon "marriage", there is little in the record on appeal to present in this Statement of Facts. As noted above in the outline of the Proceedings Below, Appellant Sallaz, since the discovery that his Oregon marriage was invalid, had made an effort to commence an independent action to place that question at issue, and had requested both the district court, on intermediate appeal, and this Court, to remand for further development of the factual record. If the factual record is sparse, it is not due to the lack of any effort by the Appellant Sallaz to augment that record.

As declared on the face of the divorce complaint, the parties were allegedly married on July 4, 1996 in Oregon (R., pg. 14). As indicated by the attachment provided in **Appendix A** to the Appellant's Brief, on the intermediate appeal to the district court, the state of Oregon has confirmed there is no record of any such marriage in any of its counties, or of record with its Oregon Department of Vital Statistics, most specifically, there is no record of a "marriage license" (R., pp. 281-82).

As based upon the Affidavit of Dennis J. Sallaz, filed in *Baird-Sallaz v. Sallaz*, Fourth District, Ada County Case No. 04-01075 D on September 28, 2012, the individual who "solemnized" their marriage, Rick Willard, had no authority under Oregon law, and the necessary documentation required by Oregon law was never obtained or filed, making that Oregon marriage void ab initio. Sallaz Aff., ¶¶ 3-11. Failing to be valid under Oregon law, that marriage could not be recognized under Idaho law. I.C. § 32-209.

D. STANDARD OF REVIEW

Whether a court lacks subject matter jurisdiction presents a question of law over which an appellate court exercises free review. *State v. Peterson*, 153 Idaho 157, 160, 280 P.3d 184, 187 (Ct.App.2012). A defect in subject matter jurisdiction can be raised at any time, including for the first time on appeal. *State v. Miller*, 151 Idaho 828, 832, 264 P.3d 935, 939 (2011).

A court's lack of subject matter jurisdiction cannot be waived by a party, and the parties

cannot consent to the court's assumption of jurisdiction, whether through conduct or acquiescence, nor be estopped from asserting its absence. *State v. Bosier*, 149 Idaho 664, 666, 239 P.3d 462, 464 (Ct.App. 2010). Because courts are obligated to ensure their own subject matter jurisdiction, that question must be raised and addressed "sua sponte" by the court itself, if and when necessary. *In re City of Shelley*, 151 Idaho 289, 294, 255 P.3d 1175, 1180 (2011).

A judgment that has been entered by a court without subject matter jurisdiction is void, and can be challenged at any time, including a collateral attack. *Meyers v. Hansen*, 148 Idaho 283, 291, 221 P.3d 81, 89 (2009). Relief from a void judgment is not discretionary. *McClure Engineering, Inc., v. Channel 5 KIDA*, 143 Idaho 950, 953, 155 P.3d 1189, 1192 (Ct.App.2006). A void judgment can be attacked at any time by any person adversely affected by it. *Cuevas v. Barraza*, 152 Idaho 890, 894, 277 P.3d 337, 341 (2012).

When a required valid and lawfully established marriage never existed in the first instance, then no subject matter jurisdiction exists in any court to dissolve that non-existent marriage. *See e.g., Cannon v. Cannon*, 677 N.E.2d 566, 567 (Ind.App.1997); *In the Matter of Marriage of J.B. and H.B.*, 326 S.W.3d 654, 667 (Tex.App.2010); and *Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335, 1338 (Utah App.1991).

When subject jurisdiction does exist, that portion of a decree that has granted the divorce itself will be upheld, even though a portion of that decree must be set aside because it is void for lack of personal jurisdiction over third parties, or due to its lack of subject matter jurisdiction

over certain subject property addressed by the court *Wood v. Wood*, 100 Idaho 387, 389, 597 P.2d 1077 (1979).

II.

ISSUE PRESENTED ON APPEAL

Did a valid marriage exist between Dennis Sallaz and Renee Baird upon which the magistrate court was entitled to exercise subject matter jurisdiction to divide the purported community property allegedly owned by those parties in granting the Amended Final Judgment and Decree which was entered on January 4, 2012?

III.

ARGUMENT

A. In The Absence Of A Valid Marriage "Res" The Magistrate Court Had No Subject Matter Jurisdiction To Take Any Action – To Either Dissolve The Parties' Non-Existent Marriage, Or To Later Determine And Then Divide Non-Existent Community Property

This appeal arises directly from the magistrate court's January 4, 2012 judgment that determined and divided the parties' "community property" (R, pp. 173-192). That 2012 judgment was in turn necessarily derived, and dependent upon, the underlying July 28, 2005 divorce decree (R, pp. 23-24). The magistrate court in its Amended Findings of Fact and Conclusions of Law declared that the issues of property and debt division had been retained for trial after the entry of the divorce decree (R, pg. 127).

In this appeal Appellant Sallaz argues that because he and Respondent Baird failed to

enter into a valid marriage in the state of Oregon on July 4, 1996, no marriage "res" ever came into existence. In the absence of a valid marriage entered into under Oregon law, that could be recognized under Idaho law, I.C. § 32-209, the magistrate court below lacked the required subject matter jurisdiction to either enter a decree of divorce, *Dire v. Dire-Blodgett*, 140 Idaho 777, 779, 102 P.3d 1096, 1098 (2004) ("They were never married. Therefore, the magistrate judge correctly dismissed Dire's divorce action."), or to determine and divide the parties' non-existent community property (I.C. §§ 32-712, 32-713, 32-714, 32-903, and 32-906).

This Court is requested to vacate both the January 4, 2012 community property judgment, and the July 28, 2005 divorce decree upon which that community property judgment was based and derived, on the grounds there was a lack of subject matter jurisdiction.

Because the magistrate court lacked subject matter jurisdiction, the resulting judgments were void. Because the judgments were void, they are now subject to collateral attack. On the intermediate appeal below the Appellant Sallaz cited recent authority in support of his argument that the questions of subject matter jurisdiction, and the collateral attack upon a judgment entered without subject matter jurisdiction, can be brought at any time, including for the first time on appeal (R, pp. 320-22, 326-29). These arguments appear to have been essentially ignored by the district court (R, pp. 350-53).

Therefore, that same authority is again cited here, and Sallaz further argues that existing Idaho law, along with past Idaho precedent, and current Idaho public policy, support his argument that

his appeal presents a question of subject matter jurisdiction for the court to decide.

Collateral attacks upon void judgments are specifically permitted under Idaho law, as declared by the Idaho Supreme Court in *Cuevas v. Barraza*, 152 Idaho 890, 277 P.3d 337 (2012):

> Generally, "final judgments, whether right or wrong, are not subject to collateral attack." *Kukuruza v. Kukuruza*, 120 Idaho 630, 632, 818 P.2d 334, 336 (Ct.App. 1991) (emphasis original). **However, a void judgment can be attacked at any time by any person adversely affected by it**. *Burns v. Baldwin*, 138 Idaho 480, 486, 65 P.3d 502, 508 (2003). This Court "narrowly construe[s] what constitutes a void judgment." *Hartman v. United Heritage Prop. & Cas. Co.*, 141 Idaho 193, 197, 108 P.3d 340, 344 (2005).
>
> > In order for a judgment to be void, there must generally be some jurisdictional defect in the court's authority to enter the judgment, either because the court lacks personal jurisdiction **or because it lacks jurisdiction over the subject matter of the suit**. *Puphal v. Puphal*, 105 Idaho 302, 669 P.2d 191 (1983). A judgment is also void where it is entered in violation of due process because the party was not given notice and an opportunity to be heard. *Prather v. Loyd*, 86 Idaho 45, 382 P.2d 910 (1963) . . .
>
> *Id.* (quoting *McGrew v. McGrew*, 139 Idaho 551, 558, 82 P.3d 833, 840 (2003)). *See also Meyers v. Hansen*, 148 Idaho 283, 291, 221 P.3d 81, 89 (2009). . . .

153 Idaho at 894, 277 P.3d at 341 (emphasis added).

A judgment that has been entered by a court without subject matter jurisdiction is void, and can be challenged at any time, including a collateral attack. *Meyers v. Hansen*, 148 Idaho 283, 291, 221 P.3d 81, 89 (2009). **Relief from a void judgment is not discretionary**. *McClure Engineering, Inc., v. Channel 5 KIDA*, 143 Idaho 950, 953, 155 P.3d 1189, 1192 (Ct.App.2006). Because an issue concerning absence of subject matter jurisdiction can be raised for the first time

on appeal, relief from a void judgment also can be requested and granted on appeal. *See e.g.*, *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 286 n. 10, 207 P.3d 1008, 1017 n. 10 (2009).

Over the years, through long-standing practice and precedent, issues of "jurisdiction" have "predominated" in Idaho divorce litigation. *See e.g.*, *Vierstra v. Vierstra*, 153 Idaho 873, 880, 292 P.3d 264, 271 (2012) ("This Court has previously held that a divorce decree is final and 'no jurisdiction exists to modify property provisions of a divorce decree.' *Borley v. Smith*, 149 Idaho 171, 178, 233 P.3d 102, 109 (2010) (quoting *McBride v. McBride*, 112 Idaho 959, 961, 739 P.2d 258, 260 (1987))." *See also*, *Fix v. Fix*, 125 Idaho 372, 376, 870 P.2d 1331, 1335 (Ct.App.1993) (discussing the distinctions between the continuing jurisdiction on custody and support issues and the res judicata effect on any non-appealed property issues).

In *Wood v. Wood*, 100 Idaho 387, 597 P.2d 1077 (1979) the Idaho Supreme Court upheld a judgment granting the dissolution of the marriage itself, based upon the existence of subject matter jurisdiction over the marriage "res," while reversing the remainder of the decree on matters concerning custody, support, and the division of community property, due to its absence of personal jurisdiction. In reaching this result, the Court held:

> However, the district court did not need in personam jurisdiction over the wife in order to dissolve the parties' marriage. A divorce action is classified as an action in rem or quasi in rem and substituted service authorizes such proceedings. *Newell v. Newell*, 77 Idaho 355, 298 P.2d 663 (1956), *cert. den.* 352 U.S. 871, 77 S.Ct. 91, 1 L.Ed.2d 76. If a judgment is only void in part and such void portion can be separated from the balance, relief may be granted to that extent. . . .

100 Idaho at 389, 597 P.2d at 1079.

In essence, the holding of *Wood* was to the effect that the court had the necessary subject matter jurisdiction to dissolve the parties' marriage, even though it lacked the necessary personal jurisdiction to resolve the other issues. In *Donaldson v. Donaldson*, 111 Idaho 951, 956, 729 P.2d 426, 431 (Ct.App.1986), the Idaho Court of Appeals declared that, "Historically, jurisdiction over the marital status has been held to exist wherever one of the parties is domiciled. *Williams v. North Carolina*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942). In many states, including Idaho, the marital status has been treated as though it were a "res" that follows each party from one domicile to another. . . ." *See also*, *Dire v. Dire-Blodgett*, 140 Idaho 777, 779, 102 P.3d 1096, 1098 (2004) ("They were never married. Therefore, the magistrate judge correctly dismissed Dire's divorce action.").

Within the title and chapter of Idaho Code on divorce actions, jurisdiction over those actions was addressed in section 32-715:

> **32-715. Jurisdiction of actions.** – Exclusive original jurisdiction of all actions and proceedings under this chapter is in the district court, but a judge thereof at chambers may make all necessary orders to carry out the provisions of this chapter; and the powers and jurisdiction granted district judges by section 1-901 shall apply to proceedings under this chapter.[1]

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[1] The cross-referenced section 1-901 was repealed almost 40 years ago in 1975, *see*, 1975 Ida.Sess.L., ch. 242, § 1. Repealed § 1-901 addressed the jurisdiction of judges at chambers, and the probable reference here was to subsection 11, which declared, "To exercise all powers expressly conferred upon a judge by any statute of this state, as contradistinguished from the court." This legislative delegation of "exclusive original jurisdiction" to the district courts has

In the exercise of this subject matter jurisdiction by an Idaho court, there is only one way that a "marriage," which is otherwise recognized as valid under Idaho law, can be dissolved by that court, and that is as declared in subsection 2 of I.C. § 32-601:

> **32-601. Dissolution of marriage. – Marriage is dissolved only**:
>
> 1. By the death of one of the parties; or,
>
> 2. By the judgment of a court of competent jurisdiction decreeing a divorce of the parties.

(Emphasis added). The division of the parties' community property upon divorce is addressed in I.C. §§ 32-712, 32-713, and 32-714. That community property only exists, if the parties have entered into a valid marriage. I.C. § 32-903 ("All property . . . owned . . . **before marriage** . . . shall remain his or her sole and separate property") and I.C. § 32-906 ("All other property acquired **after marriage** . . . is community property") (emphasis added).

A court's initial acquisition of the required subject matter jurisdiction to determine and divide the parties' alleged community property interests requires the establishment of two factors. First, the actual existence of a "de jure" marriage itself under Idaho law, which is sometimes is being referred to as "the marriage res." I.C. §§ 32-201 & 32-301. Second, personal jurisdiction over the parties to the alleged marriage within that divorce action in order to divide the community property. I.C. § 32-712; *Wood v. Wood, supra.*

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been largely subdelegated to the magistrate division of those courts. *See*, I.C. § 1-2208; and I.R.C.P. 82(c)(1) & (2).

If the first factor – the existence of a valid marriage itself – is not established, then there can be no community property whatsoever to divide. *Stewart v. Stewart*, 143 Idaho 673, 677, 152 P.3d 544, 548 (2007) ("Any division of property in a divorce proceeding begins with the presumption that all property acquired after marriage is community property."). Nor does a court in a divorce action have any authority to award the separate property of either party to the other party *Schneider v. Schneider*, 151 Idaho 415, 426-27, 258 P.3d 350, 361-62 (2011).

In this case, the second factor – personal jurisdiction over the parties – is mentioned simply for the purpose of illustrating that subject matter jurisdiction must first exist in order to dissolve a marriage.

In this case, after the magistrate court entered its January 4, 2012 judgment dividing the parties' community property, evidence then emerged that a valid marriage under Oregon law had never existed between Dennis Sallaz and Renee Baird that could be recognized under Idaho law (R, pp. 216-220). In the absence of a valid marriage under Idaho law, no community property ever existed to be divided in that January 4, 2012 judgment. I.C. §§ 32-903 and 32-906.

In the absence of a valid marriage under Idaho law, no marriage "res" ever existed, such that the court had no subject matter jurisdiction to either dissolve the non-existent marriage or to identify and divide non-existent community property *Wood v. Wood*, 100 Idaho 387, 597 P.2d 1077 (1979). Likewise, there is no jurisdiction found to exist in a divorce proceeding for the court to award the separate property of one party to the other party. *Schneider v. Schneider*, 151

Idaho 415, 426-27, 258 P.3d 350, 361-62 (2011); *Pringle v. Pringle*, 109 Idaho 1026, 1028, 712 P.2d 727, 729 (Ct.App. 1985).

On intermediate appeal, the district court rejected Appellant Sallaz's subject matter jurisdiction challenge on the basis that (1) subject matter jurisdiction only relates to the general authority of a court to entertain a certain type of action; that (2) Sallaz is estopped from now challenging the validity of the marriage after having previously asserted the validity of the marriage; and that (3) this issue cannot be raised for the first time on appeal (R, pp. 351-53).

On the direct question of subject matter jurisdiction, the district court relied on *Department of Health and Welfare v. Housel*, 140 Idaho 96, 90 P.3d 321 (2004) in which a magistrate had declared an earlier child support order "to be void because the Housels were still married and not legally separated when the order was entered" 140 Idaho at 100, 90 P.3d at 325. The Court determined that I.C. § 56-203A authorized the Department of Health and Welfare to bring an action for support in cases of abandonment or nonsupport, even if the children's parents were neither divorced, nor separated.

Ultimately, the Court held that even if the magistrate had been correct – there was no authority to award child support if the parents were married – the judgment would still not be void for lack of subject matter jurisdiction. In reaching this conclusion the Court reasoned as follows:

> During the October 2, 2001, hearing, the magistrate stated that the December 14, 1998 child support order was void since such an order could not be

> issued where the parents are married and not legally separated. Even if this statement were correct, the December 14, 1998 default order would be merely erroneous. "A judgment that incorrectly interprets a rule of law does not divest the court of jurisdiction over the subject matter or over the parties." *Gordon*, 118 Idaho at 807, 800 P.2d at 1021 (citing *Brown's Tie & Lumber Co. v. Kirk*, 109 Idaho 589, 710 P.2d 18 (Ct.App.1985)). "Jurisdiction is the power to decide erroneously as well as correctly." 20 AM.JUR. 2d Courts § 59 (1995). "'If the judgment is erroneous, the unsuccessful party's remedy is to have it set aside or reversed in the original proceeding.'" *Brown's*, 109 Idaho at 591, 710 P.2d at 20 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 17 cmt. d (1982)). Because no appeal was taken from the original order of child support, it was error for the magistrate to void the order some three years after the fact. Otherwise there would be no finality to judgments entered if the same or a different judge determined that there had been a misapplication of the law regardless of the time that had elapsed and the reliance that had been placed on the judgment. It is clear that the decision of the magistrate setting aside the earlier default judgment did so on the basis that it was void because of a perceived misapplication of the law. The magistrate erred in declaring the December 14, 1998, order void.

140 Idaho at 101, 90 P.3d at 326.

What seems to emerge from the facts of the *Housel* decision is a question of entitlement. There didn't seem to be any dispute about the fact that the three children whose welfare was at issue were in fact neglected or abandoned, but instead the only question was whether the Department had authority to seek a support order when those children's parents were neither divorced, nor separated? This aspect of the case separates and clearly distinguishes it from the facts that are presented in this case, which had implicated the, "kind and character," inquiry under subject matter jurisdiction that had been set out in another excerpt from the *Housel* decision:

> The next question is whether the magistrate court lacked subject matter

jurisdiction. "**Subject matter jurisdiction is the right and abstract power of the tribunal to exercise power over cases of the kind and character of the one pending**." *Young Elec. Sign Co. v. State*, 135 Idaho 804, 809, 25 P.3d 117, 122 (2001) (quoting *Knight v. Dep't of Ins.*, 124 Idaho 645, 649, 862 P.2d 337, 341 (Ct.App.1993)). "Lack of subject matter jurisdiction can be raised at any time." *Fisher v. Crest Corp.*, 112 Idaho 741, 744, 735 P.2d 1052, 1055 (Ct.App.1987) (citation omitted). This Court has narrowly construed the ability to void a judgment, however, on the basis of a defect in a court's subject matter jurisdiction. As the Court explained in *Gordon v. Gordon*:

> In the sound interest of finality, the concept of void judgment must be narrowly restricted. And it is.
>
> By jurisdiction over the subject matter the cases mean that the court must have jurisdiction or power to deal with the class of cases in which it renders judgment. . . . In brief, then, except for the rare case where power is plainly usurped, if a court has the general power to adjudicate the issues in the class of suits to which the case belongs its interim orders and final judgments, whether right or wrong, are not subject to collateral attack, so far as jurisdiction over the subject matter is concerned.

118 Idaho 804, 807, 800 P.2d 1018, 1021 (1990) (quoting 7 Moore's Federal Practice and Procedure, ¶ 60.25[2], p. 60-225-230 (1990)) (emphasis in original).

140 Idaho at 326, 90 P.3d at 326 (emphasis added).

The Court in *Housel* was declaring that notwithstanding the magistrate court's error with respect to authority of the Department of Health and Welfare to order support for children, where parents are neither divorced nor separated, that because the court's actions with respect to "child support – although erroneous – was nonetheless within the scope of its subject matter jurisdiction under the "kind and character" test.

An altogether different matter is presented here for this Court's decision. At least three

problems arise if *Housel* were to be applied to the facts before this Court, upon the same rationalization as it was applied in *Housel*. **First**, as addressed in *Dire v. Dire-Blodgett*, 140 Idaho 777, 102 P.3d 1096 (2004), such a holding will result in a judicial revival of "common law" marriage, in direct contravention of the 1996 legislative determination that such marriages could no longer be created or recognized after that date under Idaho law. **Second**, it would place Idaho within the very small list of states that recognize a doctrine of "marriage by estoppel", being itself a variation of a common law type-of- marriage. *See e.g., Guzman v. Alvares*, 205 S.W.3d 375, 379-882 (Tenn. 2006). **Third,** a significant body of existing Idaho precedent, which has always been expressly based upon a "jurisdictional" foundation that underlies the community property division that is made in Idaho divorce decrees would be overturned. *See e.g., Fix v. Fix*, 125 Idaho 372, 376, 870 P.2d 1331, 1335 (Ct.App.1993).

Other states, that have addressed this issue, have held that when a valid and lawful marriage never existed in the first instance, then no subject matter jurisdiction existed in any court to dissolve that non-existent marriage. *See e.g., Cannon v. Cannon*, 677 N.E.2d 566, 567 (Ind.App.1997); *In the Matter of Marriage of J.B. and H.B.*, 326 S.W.3d 654, 667 (Tex.App.2010); and *Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335, 1338 (Utah App.1991).

Although the district court, on intermediate appeal, declined to directly address this issue, the Appellant Sallaz is now directly placing that question before this Court in this appeal. In the

absence of a valid marriage, the magistrate court simply lacks the requisite subject matter jurisdiction to either dissolve the parties' non-existent marriage, or to determine or divide the parties' non-existent community property. In the absence of that required subject matter jurisdiction, any resulting judgment is void and must be declared so and vacated.

B. The Appellant Sallaz And Respondent Baird Did Not Enter Into A Valid Oregon Marriage That In Any Respect Ever Could Be Recognized Under Idaho Law

Admittedly, there was a long-recognized public policy, the presumption as to the validity of an attempted marriage, was one of the strongest presumptions known in the law. *In re Brock's Estate*, 94 Idaho 111, 115, 482 P.2d 86, 90 (1971) (citing authorities). Subject only to public policy exceptions, the state of Idaho, both by statute, I.C. § 32-209, and specifically, by common law, followed the rule that a marriage valid in the state where it was contracted is also valid within the state of Idaho. *Hilton v. Stewart*, 15 Idaho 150, 164-65, 96 P. 579, 583 (1908).

On January 1, 1996 Idaho's public policy[2] changed entirely as a result of the amendment to Idaho's statutes that eliminated further recognition of common law marriages in this State. They were abolished after January 1, 1996. *See*, 1995 Ida.Sess.L., ch. 104, pp. 334-36. In addition, I.C. § 32-301 was amended by that same Act, by the inclusion of new language, the effect of which declared that any marriage entered into in violation of the provisions of Title 32,

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[2] Public policy for the State of Idaho is provided by statutes, judicial decisions, and the Idaho constitution. *Bakker v. Thunder Spring-Wareham, L.L.C.*, 141 Idaho 185, 189, 108 P.3d 332, 336 (2005).

Idaho Code, "shall be void." (emphasis added) (*See*, 1995 Ida.Sess.L., ch. 104, § 4, pg. 335. "On and after January 1, 1996, any marriage contracted or entered into in violation of the provisions of this title shall be void.") (emphasis added). A "void marriage" is one that is invalid from its inception. *See*, BLACK'S LAW DICTIONARY, at pg. 1062, Ninth Edition (West, 2009). When the legislature uses the word "shall" in a statute, that usage conveys the existence of a mandatory obligation. *Twin Falls County v. Idaho Commission on Redistricting*, 152 Idaho 346, 349, 271 P.3d 1202, 1205 (2012).

Six months after Idaho eliminated the recognition of common law marriages in this State, the Appellant Sallaz and Respondent Baird, through arrangements that were only made by the Respondent Baird, attempted to enter into a ceremonial "marriage" in Oregon on July 4, 1996, after which they returned to Idaho to begin their life together and took up residence at the Appellant Sallaz's home as their permanent residence. Idaho's law, on the recognition of marriages entered into in other states, is specifically identified in I.C. § 32-209, which declares as follows:

> **32-209. RECOGNITION OF FOREIGN OR OUT-OF-STATE MARRIAGES** – All marriages contracted without this state, **which would be valid by the laws of the state or country in which the same were contracted**, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state.

(Emphasis added).

The presumption of a valid marriage in this case stands rebutted. There is no record of an Oregon marriage license ever issued, either prior to the parties' attempted nuptials (ORS 106.041) or recorded in the public records following the ceremony (ORS 106.170). A search of Oregon public records reveals there is no such license (R, pp. 281-82). When confronted with rather similar facts, a Florida appellate court upheld a lower court's finding that a valid marriage did not arise under Oregon law when the parties in that case did not obtain an Oregon marriage license. *Preure v. Benhadj-Djillali*, 15 So.3d 877, 878 (Fla.Dist.Ct.App.2009) ("Consequently, the trial court did not err in concluding that a valid marriage did not occur under Oregon law, given the evidence that the parties intended a purely religious ceremony and that a legal marriage would occur later, and took no steps to obtain a marriage license, which enjoys particular significance where Oregon's general savings clause is sought to be invoked.").

The reference to Oregon's general savings clause was to ORS 106.150(2), which provides as follows:

> All marriages, to which there are no legal impediments, solemnized before or in any religious organization or congregation according to the established ritual or form commonly practiced therein, are valid. In such case, the person presiding or officiating in the religious organization or congregation shall deliver to the county clerk who issued the marriage license the application, license and record of marriage in accordance with ORS 106.170.

The Florida Court interpreted the "legal impediment" language of this Oregon statute as imposing a marriage license requirement under Oregon law as a condition precedent to entering into a valid marriage under that state's law in further reliance upon precedents of the Oregon

appellate courts:

> We conclude this savings clause is inapplicable because it presupposes the existence of a marriage license issued by the appropriate county clerk. The lack of a marriage license in this case was a legal impediment because the parties neither sought nor obtained an Oregon marriage license in connection with the 2003 religious ceremony. By referencing delivery of the marriage license to the appropriate county clerk, this statute ascribes legal significance to the existence of such license, which itself evidences the intent of the parties to enter into a legal marriage.
>
> Additionally, Oregon decisional law indicates that a lawful marriage presumes that the parties at least undertook efforts to satisfy the state's requirements for a valid marriage, one of which is to obtain a marriage license. Or.Rev.Stat. § 106.041(1) (2003). *See, e.g., Johnson v. Baker*, 142 Or. 404, 20 P.2d 407 (1933); *In re Wilmarth's Estate*, 556 P.2d at 992. . . .

15 So.3d at 878.

There is no reason to believe that Idaho's abolition of the recognition of "new" common law marriages in this state, after January 1, 1996, would result in Idaho's refusal to recognize as valid those common law marriages formed in other states, where such marriages are recognized. Idaho never has been "hostile" to the institution of common law marriage itself. *Metropolitan Life Ins. Co. v. Johnson*, 103 Idaho 122, 126, 645 P.2d 356, 360 (1982). But neither Oregon (since 1925 – *Hurad v. McTeigh*, 113 Or. 279, 295, 232 P. 658, 663 (Or. 1925)), nor Idaho (since January 1, 1996 – I.C. § 32-301) recognize newly formed common law marriages, and it would be against Idaho public policy to recognize a common law marriage that had been formed in either of these states, after the above-referenced dates.

Notwithstanding the strong public policy that favors the recognition of marriage, as a

direct consequence of Idaho's Legislative abolition of any further recognition of common law marriage after January 1, 1996, it has been the recognized public policy of this State since that time that any marriage entered into without a valid marriage license is absolutely void. This result was declared in *Dire v. Dire-Blodgett*, 140 Idaho 777, 102 P.3d 1096 (2004), and is consistent with the interpretation of Oregon law that was applied by the Florida Court in *Preure v. Benhadj-Djillali*, 15 So.3d 877, 878 (Fla.Dist.Ct.App.2009). In *Dire*, the Court unequivocally declared this result:

> "The legislature of each state has the power to control and to regulate marriages within its jurisdiction. This includes the power to regulate the qualifications of the contracting parties and the proceedings essential to constitute a marriage." *Duncan v. Jacobsen Constr. Co.*, 83 Idaho 254, 260, 360 P.2d 987, 990 (1961). By the amendments made in 1995, the Idaho legislature has clearly required a license in order to have a valid marriage. Idaho Code § 32-201 expressly states, "Consent alone will not constitute marriage; it must be followed by the issuance of a license and a solemnization as authorized and provided by law." Both the issuance of the license and solemnization are required. Idaho Code § 32-301 states, "On and after January 1, 1996, any marriage contracted or entered into in violation of the provisions of this title shall be void." The provisions of Title 32, Idaho Code, require both the issuance of a license and solemnization. The duties of the officiating officer were also amended to provide that he or she must "first require the presentation of the marriage license." Again, that is consistent with the clear legislative intent that a marriage license is required in order to have a valid marriage. Because the parties in this case chose not to obtain a marriage license, their purported marriage violated the provisions of Title 32, Idaho Code, and is therefore void. Idaho Code § 32-301. They were never married. Therefore, the magistrate judge correctly dismissed Dire's divorce action.

140 Idaho at 779, 102 P.3d at 1098.

Because the July 4, 1996 Sallaz-Baird marriage was not valid under Oregon law, it was

not entitled to recognition as a valid marriage under Idaho law. I.C. § 32-209.

In the absence of a valid marriage, there was no subject matter jurisdiction in the magistrate court to take up the action to grant a divorce to a non-existent marriage. *Dire*, *supra.* The parties cannot consent to the court's assumption of jurisdiction through conduct or acquiescence, nor be estopped from asserting its absence. *State v. Bosier*, 149 Idaho 664, 666, 239 P.3d 462, 464 (Ct.App. 2010). A judgment entered without subject matter jurisdiction is void and can be challenged at any time, including a collateral attack. *Meyers v. Hansen*, 148 Idaho 283, 291, 221 P.3d 81, 89 (2009).

Relief from a void judgment is not discretionary. *McClure Engineering, Inc., v. Channel 5 KIDA*, 143 Idaho 950, 953, 155 P.3d 1189, 1192 (Ct.App.2006). Because courts are obligated to ensure their own subject matter jurisdiction, that question must be raised and addressed "sua sponte" by the court itself, if necessary. *In re City of Shelley*, 151 Idaho 289, 294, 255 P.3d 1175, 1180 (2011).

C. The Appellant Sallaz Is Not Estopped By The Entry Of The 2005 Divorce Decree, And Its Certification As "Final" By Issuance Of A Rule 54(b) Certificate, From Now Challenging The Validity Of The Parties' 1996 Oregon Marriage As Based Upon The Entry Of The 2012 Community Property Judgment

If anything, the bankruptcy trustee, as the responding party in this appeal before the district court, and in all likelihood the only responding party before this Court, has been persistent and dogged in his attempts to characterize this appeal as "untimely", arising from the

July 28, 2005 divorce decree itself, instead of from the January 4, 2012 judgment on the community property issues. The fact that the underlying jurisdictional basis for both judgments – a valid marriage – is the same, serves as no apparent concern to the bankruptcy trustee.

As already argued, in simplest terms, if there was no valid marriage, there never was any community property. As an asset of the bankruptcy estate, Respondent Baird's property interests, arising from "community property" are entirely dependent upon a valid marriage for its very existence. As declared at the a beginning of this brief, Appellant Sallaz has already placed before this Court, by means of pre-brief motions, the question of whether the bankruptcy trustee has a right, not only to merely "protect" the property of the estate, but also the right to become actively engaged as a participant in the state-law questions characterizing the property of the estate, and perhaps going even further in participating in the characterization of what constitutes, or even the creation of, property of the estate. *In re Thompson*, 454 B.R. 486, 491-92 (Bkrtcy.D.Idaho 2011) ("'Property of the estate' is defined broadly by § 541(a)(1) to include 'all legal or equitable interests of the debtor in property as of the commencement of the case.' While the question whether the interests claimed by Debtors are 'property of the estate' is a federal one to be decided by federal law, the Court must look to state law – in this case Idaho law – to determine whether, and to what extent, Debtors had any legal or equitable interests in property as of the commencement of the bankruptcy case. *McCarthy, Johnson & Miller v. North Bay Plumbing, Inc. (In re Pettit)*, 217 F.3d 1072, 1078 (9th Cir.2000) (*citing Butner v. United States*,

440 U.S. 48, 54-55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979)).").

In this matter, questions concerning the validity of the parties' marriage did not arise until after the entry of the January 4, 2012 judgment that created and divided the parties' "community property" (R, pp. 216-220). Inquiries were made which revealed no Oregon marriage license ever existed (R, pp. 281-82). The district judge, on intermediate appeal, raised the question of why the Appellant Sallaz's suspicions were not aroused earlier, (R, pg. 351, fn. 2), to which question he has responded in the memorandum submitted in opposition to the bankruptcy trustee's motion to dismiss this appeal, as he relied upon the "presumption of regularity" that otherwise attaches to such proceedings.[3] The district court ruled that Appellant Sallaz was simply "estopped" from raising and challenging the jurisdictional basis of the magistrate court's actions because of his own conduct, and by the passage of so much time:

> Dennis is estopped from asserting before the magistrate that the divorce decree should be granted, and then asserting here, many years later, that it was error for the magistrate court to grant his request. *See, e.g.*, *Ross v. Ross*, 103 Idaho 406, 408-09, 648 P.2d 1119, 1121-22 (1982) ("[W]e . . . hold that following

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[3] In Idaho, as in most states, there is a recognized "presumption of regularity" in the performance of official duties by public officers. *State v. Bever*, 118 Idaho 80, 83, 794 P.2d 1136, 1139 (1990) ("There is a presumption of regularity in all that a court does."); and *Horner v. Ponderosa Pine Logging*, 107 Idaho 1111, 1114, 695 P.2d 1250, 1253 (1985). That presumption even extends to the performance of the office of a notary public which can be undertaken by just about anyone qualified who posts a bond and pays the minimal fee. *Farm Bureau Finance Co., Inc. v. Carney*, 100 Idaho 745, 750, 605 P.2d 509, 514 (1980). If the individuals who solemnize marriages are considered of equal dignity, with at least a notary public in their status in performing this particular public function, then certainly an argument exists that a "presumption of regularity" should also attach to the performance of this particular official duty.

> the principles of quasi estoppel plaintiff is estopped from alleging that error occurred in the trial court's granting of the decree of divorce . . . she is estopped to deny its validity." *See also Swope v Swope*, 112 Idaho 974, 979, 739 P.2d 273, 278 (1987) ("In *Ross* we held that the wife was estopped by her conduct from denying the finality of an uncertified partial summary judgment granting a divorce."). [footnote omitted]

(R, pp. 351-52).

As Appellant Sallaz has already argued in the memorandum he previously submitted to the Court in opposition to the bankruptcy trustee's motion to dismiss this appeal, the district court's reliance upon *Ross* and *Swope* is just inapt. In contrast to the situations presented in those two cases, here, the effect of setting aside the parties' July 28, 2005 divorce decree would not "restore" a marital relationship, but instead would serve to confirm the fact no marriage between Dennis Sallaz and Renee Baird had ever existed!

As to the point upon which the district court relied in deciding the appeal below, "estoppel" is not a basis upon which a court can avoid the question of subject matter jurisdiction. The Idaho Supreme Court most recently addressed this issue in *City of Eagle v. Idaho Dept. of Water Resources*, 150 Idaho 449, 247 P.3d 1037 (2011):

> Estoppel is not appropriate where jurisdiction is at issue. This Court recently explained in *State v. Urrabazo*, 150 Idaho 158, 162-63, 244 P.3d 1244, 1248-49 (2010):
>
> "Subject matter jurisdiction is the power to determine cases over a general type or class of dispute." *Bach v. Miller*, 144 Idaho 142, 145, 158 P.3d 305, 308 (2007). The source of this power comes from Article V, Section 20, of the Idaho Constitution, which provides that district courts "shall have original jurisdiction in all cases, both at law and in equity, and *such appellate jurisdiction as may be conferred by law*." Idaho Const.,

> art. V, § 20. This issue is so fundamental to the propriety of a court's actions, that *subject matter* jurisdiction can never be waived or consented to, and a court has a sua sponte duty to ensure that it has subject matter jurisdiction over a case. *See* Idaho R. Civ. P. 12(g)(4).

(Emphases added).
150 Idaho at 454, 247 P.3d at 1042.

Finally, upon the close of oral argument on appeal before the district court, Judge Sticklen raised her own inquiry as to what she thought was an Idaho statute, which apparently was a reference to I.C. § 32-308, in which a marriage solemnized in "full belief" of its validity by the persons so married, cannot thereafter be questioned due to the absence of "jurisdiction or authority." (Tr., pg. 36, L 2, to pg. 37, L. 10). Appellant in this appeal would state the question raised by this appeal is the validity of this Oregon " marriage", and it is to be judged under Oregon law, not Idaho law. **Idaho Code § 32-308 does not apply to the facts of this case**.

The guiding principles on the application of Oregon law to the validity of the parties' marriage were set out in the analysis used by the Florida Court in *Preure v. Benhadj-Djillali*, 15 So.3d 877, 878 (Fla.Dist.Ct.App.2009), as set out above at pp. 28-29. Under Oregon's general savings clause, ORS 106.150(2), the failure of the officiant at the marriage to see that the marriage license is recorded is fatal ("the person presiding or officiating in the religious organization or congregation shall deliver to the county clerk who issued the marriage license the application, license and record of marriage in accordance with ORS 106.170.").[4]

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[4] ORS 106.170 provides: Report of marriage to county clerk A person

No party to this appeal has contested the fact no Oregon marriage license exists (R, pp. 281-82). That's because none exists. Under the controlling Idaho precedent in *Dire v. Dire-Blodgett*, 140 Idaho 777, 102 P.3d 1096 (2004), the absence of a marriage license is to be the dispositive question as to the existence of valid Idaho marriage. In sum, if there never was a valid marriage, then there was never a marriage res over which the magistrate court ever had any subject matter jurisdiction to decree a divorce, and if there was never a valid marriage, then there was never any community property over which the magistrate court ever had any subject matter jurisdiction to determine and divide between parties.

IV.

CONCLUSION

On the basis the magistrate court lacked subject matter jurisdiction because Dennis Sallaz and Renee Baird never entered into a valid married, this Court on appeal is requested to vacate both the January 4, 2012 community property judgment, and the July 28, 2005 divorce decree upon which that community property judgment was based and derived.

Respectfully Submitted this 21st day of January, 2014.

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Vernon K. Smith
Attorney for the Appellant

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solemnizing a marriage shall, within 10 days after the marriage ceremony, complete the original application, license and record of marriage form and deliver the form to the county clerk who issued the marriage license. The person solemnizing the marriage may keep a copy of the application, license and record of marriage form.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 21st day of January, 2014 two true and correct copies of the foregoing APPELLANT'S BRIEF were served upon the following:

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