3-24-2014

Baird-Sallaz v. Gugino Appellant's Reply 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. 41301 Fourth Dist. Case NO. CV DR 04-01075D

APPELLANT'S JOINT REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho, in and for the County of Ada
Kathryn A. Sticklen, District Judge, Presiding

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I.

REPLY ARGUMENT

The nature of the responses made by Respondent, Renee Baird, and Intervenor Bankruptcy Trustee, Jeremy Gugino, are similar enough in substance and content that Appellant Sallaz will reply to both briefs in a single joint Reply brief. Unless the argument made in this reply is specifically directed to a response of one or the other of those responding parties, this reply argument should be considered as directed to arguments that have been made by both of those responding parties.

A. "Consent"And "Estoppel" Are No Defense To Lack Of Subject Matter Jurisdiction

Since the 2004 decision in *Dire v. Dire-Blodgett*, 140 Idaho 777, 102 P.3d 1096 (2004), it has been made clear Idaho's Legislative change in Idaho's public policy, effective January 1, 1996, eliminated any future recognition of common law marriage in this state, and that any marriage entered into in this state, after that date, to be valid, requires a marriage license. The attempted marriage at issue in this appeal is purported to have arisen under Oregon law on July 4, 1996. If valid under Oregon law, then Idaho will recognize that marriage as valid under I.C. § 32-209. Oregon law requires a license for a valid marriage to exist under that state's statutes. *Preure v. Benhadj-Djillali*, 15 So.3d 877 (Fla.Dist.Ct.App.2009) (applying Oregon law).

Both of the responding parties have continued to argue in this appeal, that Appellant Dennis Sallaz has either omitted facts, or has been evasive, by his failure to acknowledge that in

the proceedings below he "admitted" the existence of the marriage by his answer to the complaint, and by sworn testimony he offered in proceedings before the magistrate court and in depositions. The Record below is certainly clear, and no one – least of all Dennis Sallaz – is attempting to hide from that Record. The point has been made repeatedly in Appellant's Opening brief that, in the context of the subject matter jurisdiction, as it is raised here, these alleged "admissions" are simply irrelevant to the determination of that question in this appeal.

The parties, by agreement or otherwise, can never confer subject matter jurisdiction upon the court. *City of Eagle v. IDWR*, 150 Idaho 449, 454, 247 P.3d 1037, 1042 (2011), *citing to*, *State v. Urrabazo*, 150 Idaho 158, 162-63, 244 P.3d 1244, 148-49 (2010). The public policy implications that arise from the arguments that have been made by the responding parties in this appeal is to the effect that both the Idaho Legislature's public policy determination that common law marriages will not be entered into in this state after July 1, 1996, and the requirement solemnized marriages must be represented by a license, can simply be evaded by a judicial admission, perhaps even one that had been entered into by collusion. *See*, *Griff, Inc. v. Curry Bean Co., Inc.,* 138 Idaho 315, 321, 63 P.3d 441, 447 (2003) (declaring the effect of a judicial admission).

On the other hand, Appellant Sallaz has argued that in the absence of the existence of an actual "marital res", there is no subject matter jurisdiction in the court to decree a divorce of a non-existent marriage, or to divide any community property – because there is no community

estate from which there is an property to divide. This is a non-waivable jurisdictional issue. It cannot be avoided, and just as importantly, it is one that can be raised at any time.

The responding parties in this appeal, particularly to be directed to Respondent Renee Baird, have argued that at some point in time jurisdictional challenges should be cut off. (Respondent's re-statement of the second issue presented on appeal at pg. 7; argument presented at pp. 12-14). In reply to that argument, Appellant Sallaz would point to the Idaho Supreme Court's decision in *State v. Lute*, 150 Idaho 837, 252 P.3d 1255 (2011), as decided on subject matter jurisdictional grounds, in which a criminal conviction was reversed nine years after Appellant Lute's entire sentence had been completed, on the basis the grand jury that had indicted him had done so after the expiration of its term, such that there was no indictment at all! 150 Idaho at 841, 252 P.3d at 1259.[1] Certainly, the decision in *Lute* rebuts the responding parties' argument that at some point in time jurisdictional issues must simply be "cut-off."

B. A Court Has "Sufficient Jurisdiction" To Determine If A Marriage Exists Before It Can Then Exercise Divorce Jurisdiction

Both the district court below, (R., pp. 350-353), and the Trustee-Intervenor in this appeal, (Intervenor's Brief on Appeal at pp. 8-9), have asserted a position to Appellant's challenge over the magistrate's lack of subject matter jurisdiction in the divorce proceedings below, to the effect that the magistrate court had "sufficient jurisdiction" to determine the threshold question

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[1] The Idaho Court of Appeals in, *State v. Wolfe*, 2013 WL 6014054 (November 14, 2013) applied res judicata to bar Wolfe's subject matter jurisdiction argument, as based upon

whether it had subject matter jurisdiction. At no time during these judicial proceedings has Appellant Sallaz ever argued that any court lacked "jurisdiction" to determine its own "subject matter" jurisdiction. In the opening brief, Appellant Sallaz specifically cited the rule that a court has "sua sponte" authority to raise and ensure its own subject matter jurisdiction. *In re City of Shelley*, 151 Idaho 289, 294, 255 P.3d 1175, 1180 (2011). More to the point, it is this very Idaho appellate authority, on this very question of law, that neither the district court below, nor the responding parties in this appeal, have either raised, distinguished or even cited.[2]

In 1980, the Idaho Supreme Court, in *Freiburghaus v. Freiburghaus*, 100 Idaho 730, 604 P.2d 1209 (1980) reversed the issuance of a writ of prohibition in a divorce proceeding that concerned the existence of a common law marriage. The entire holding of the Court on this issue was as follows:

> The Court having jurisdiction over the matter had the power to make the alimony and attorney fee awards. I.C. § 32-704 states:
>
> > "While an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony any money necessary to enable wife to support herself or her children or to prosecute or defend the action."
>
> While it might be, as argued by counsel for the respondent and found by the district court in issuing the writ of prohibition, that the magistrate erred in finding that a marriage existed, any such error would be one in the exercise of jurisdiction, but not in excess of jurisdiction. *Gasper v. District Court, supra.*

State v. Lute. The Idaho Supreme Court has granted review. Case No. 41705-2014.

[2] To the extent Idaho Rule of Professional Conduct 3.3(a)(2) applies, the Appellant Sallaz invokes that rule on this argument. *See*, 2013 Idaho Court Rules Vol. 2, pg. 598.

> Having held that the magistrate did not act in excess of his jurisdiction it is unnecessary to consider whether there was a plain, speedy, and adequate remedy at law.

100 Idaho at 732, 604 P.2d at 1211.

After remand, the case was again appealed, and was assigned to the Court of Appeals. This time, in *Freiburghaus v. Freiburghaus*, 103 Idaho 679, 651 P.2d 944 (Ct.App.1982), that Court found that no common law marriage ever existed, on the basis that the parties had never held themselves out publicly as being married, an essential element of common law marriages, as it was then-recognized in the state of Idaho. Due the absence of a valid marriage, the Court of Appeals reversed the decree of divorce.

Although the Idaho Supreme Court directly addressed, and upheld, the exercise of subject matter jurisdiction of the magistrate in respect to the support issues in the first *Freiburghaus* decision, that holding was essentially procedural, as arising out of I.C. § 32-704. Ultimately, the determination made by the Court of Appeals in the second *Freiburghaus* decision is consistent with the argument Appellant Sallaz has presented to this Court, and as was later reached by the Supreme Court in *Dire v. Dire-Blodgett*. In the absence of a valid marriage, a court lacks the required subject matter jurisdiction over a "marriage res" necessary to grant a divorce, or to divide community property.

C. Responding Parties Have Pointed To No Evidence Establishing A Valid Oregon Marriage

This appeal could have been brought to a rapid conclusion if either of the responding

parties established the existence of a valid Oregon marriage between Renee Baird and Dennis Sallaz. 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 at the time Sallaz-Baird attempted to marry in July, 1996. Both states require a marriage license before a valid marriage will arise. *Dire v. Dire-Blodgett*, 140 Idaho 777, 102 P.3d 1096 (2004), and *Preure v. Benhadj-Djillali*, 15 So.3d 877 (Fla.Dist.Ct.App.2009) (applying Oregon law).

After this appeal was filed, on November 13, 2013 the Appellant Sallaz filed a motion challenging the standing of the Intervenor-Respondent, as being a real party in interest in this appeal, on the basis that the only issue raised in this appeal was that of subject matter jurisdiction based upon the absence of a valid and enforceable marriage between Dennis Sallaz and Renee Baird. Between the date that motion was filed, and the filing of the two Response Briefs in this appeal on February 18 and 19, 2014, 97 days passed in which any record substantiating the Oregon marriage could have been produced by those responding parties. No record, not even any declaration concerning a marriage license, has been provided by those responding parties in their briefing or motions to this Court. Not even any statement that a marriage license was taken out, but then not filed, or that it was filed late, or that it was lost or misplaced. Simply no explanation is proffered -nothing. This certainly should suggest that a verifying Oregon marriage license, concerning the alleged Sallaz-Baird marriage, does not – and never did – exist.

An appellate court can take judicial notice on the same basis as any other court of this state. *Trautman v. Hill*, 116 Idaho 337, 340, 775 P.2d 651, 654 (Ct.App.1989), cited authoritatively in *Crawford v. Dept. of Correction*, 133 Idaho 633, 636 n. 1, 991 P.2d 358, 361 n. 1. (1999).[3] Idaho's ability to recognize an Oregon marriage between Dennis and Renee under I.C. § 32-209 is dependent upon the existence of a valid Oregon marriage. No record of such an Oregon marriage license – in any form – exists, let alone in this case. The only indication in the record in this appeal is that response from state of Oregon, confirming no such Oregon marriage license exists in the public records of that state (R., pp. 281-282). The responding parties on this appeal have not directly objected to that evidence below, nor did they move to strike it from the record in this appeal, as they know Oregon's response to be fact.

Without the ability to recognize a common law marriage after January 1, 1996, current Idaho law can only recognize an out-of-state marriage that is valid where contracted. In Oregon, as in Idaho, this means there must be positive proof by means of a marriage license. Because there is no evidence of the existence of an Oregon marriage license in this case, there can be no valid Oregon marriage between Dennis and Renee for the magistrate to create a basis from which to recognize such a marriage in Idaho under I.C. § 32-209. Consequently they had no marriage that could have been dissolved in an Idaho divorce proceeding, much less any Idaho community

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[3] Judicial notice is taken of adjudicative facts not subject to reasonable dispute and capable of accurate and ready determination. In *Martin v. Camas County*, 150 Idaho 508, 512, 248 P.3d 1243, 1247 (2011) an, "adjudicative fact" was defined as "[a] controlling or operative

property that could have arisen and divided in that divorce proceeding. Likewise, 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).

D. "Marriage Res" Is Fundamental To Subject Matter Jurisdiction In All Divorce Proceedings

The parties to this appeal are sharply divided on the significance of the question concerning the absence of an actual license or certificate of marriage between Dennis and Renee in respect to the ability of a court to grant a divorce, then determine and then divide the parties' property. Appellant Sallaz considers the issue to be one of subject matter jurisdiction, as the absence of a "marital res" prevents a court from either granting a divorce or dividing non-existent community property. Because the question necessarily goes to the court's subject matter jurisdiction, the parties therefore cannot, merely by their consent, confer that jurisdiction upon the court, nor can that issue be barred by either doctrine of estoppel or waiver. *City of Eagle v. Idaho Dept. of Water Resources*, 150 Idaho 449, 454, 247 P.3d 1037, 1042 (2011) ("Estoppel is not appropriate where jurisdiction is at issue.").

The responding parties have argued the question presented is not one of subject matter jurisdiction, but that instead it is only a matter of justicability, which when considered within the

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fact, rather than a background fact; . . . ."

doctrine of mootness, results in a court simply declining to exercise its jurisdiction. Respondents would argue that in any event, by the consent of the parties, as provided in the pleadings, it can simply eliminate any issue concerning the existence of a valid marriage. *See*, Trustee-Intervenor's Brief at pp. 8-9; *See*, Respondent's Brief at pp. 8-14.

So with that clear distinction, the table is set for this Court to now decide in this appeal whether a valid "marital res" does, as a matter of law, constitutes a fundamental and critical condition precedent to the existence and exercise of an Idaho court's subject matter jurisdiction in an action for divorce, or whether, in the alternative, any jurisdictional prerequisite that may be required in a divorce action can be met and satisfied by the simple expediency of a well-drafted divorce complaint, met by specific admissions forthcoming from the answer to that complaint.

Let's take the example of a man and a woman, within the state of Idaho in 1997, undertake to merely exchanged "marriage" vows in front of their friends, thereafter cohabited as "husband and wife," for the next 17 years, and during that time bought property, produced four biological children, filed joint tax returns, accumulated and held a good deal of "jointly-owned" property, and generally held themselves out as "married", what should prevent them from obtaining a divorce on the same basis as any other married person can in 2014?

- Should one party be able to file a divorce complaint, to which the other party then "admits," which then creates through that "admission" the very same "marriage" as if they had observed the formalities otherwise legislatively required under Idaho law at the time they entered into the relationship?

- Does it matter that the effect of such a divorce complaint would serve to validate

common law marriage, which has been abolished by the Idaho Legislature?

- ➤ Does it matter that the effect of such a divorce complaint would serve to validate a marriage undertaken without required formalities of Idaho law (I.C. § 32-301), particularly a marriage license?

- ➤ Does it matter that the effect of such a divorce complaint would allow for the division of "community property," which has been reserved to only those individuals recognized as "married" (I.C. § 32-903 & 906) under Idaho law?

- ➤ Does it matter that the effect of such a divorce complaint would largely, through judicial recognition or judicial estoppel, usurp public policy functions that are exclusively reserved to the Idaho Legislature?

If the existence of a valid marriage is reduced to nothing more than a mere "pleading requirement" created at the time of divorce, then the parties to a divorce action – perhaps acting collusively – need only plead and "admit' the existence of a valid marriage, and ignore the law. If the responding parties to this appeal are held to be correct in their analysis of Idaho law, then no jurisdictional bar exists to prevent persons who have not contracted a marriage recognized under Idaho law from invoking the "jurisdiction" of a divorce court, and obtaining the benefits of a court-ordered divorce, including the division of "community property."

On the other hand, if Appellant Sallaz is correct in his analysis of Idaho law, then the parties who have not contracted to create a valid marriage recognized under Idaho law can "never", by their mere consent or "admissions", confer subject matter jurisdiction upon a court to grant them a divorce or divide non-existent community property, nor can those persons ever be "estopped" from raising that jurisdictional defect.

E. Rule 52, 59, And 60 Motions Are Not Conditions Precedent To Challenge A Court's Lack of Subject Matter Jurisdiction On Appeal

The Bankruptcy Trustee, as the Intervenor-Respondent in this appeal, has argued this appeal is nothing more than an attempt by Appellant Sallaz to "solve his irreparable mistake of failing to comply with the relevant Civil Rules." Intervenor's Brief on Appeal at pg. 11. No authority is cited by the Trustee to support this argument. In fact, there is no requirement a timely motion filed under Rules 52, 59, or 60 is a condition precedent to a timely appeal. Instead, there is a substantial body of Idaho case law to the contrary proposition that a Rule 60(b) motion should not be used as a substitute for a timely appeal. *See e.g.*, *Maynard v. Nguyen*, 152 Idaho 724, 727, 274 P.3d 589, 591 (2011).

Within the Civil Rules, the controlling provision appears to be Rule 12(g)(4), which declares as follows:

> **Rule 12(g). Waiver or preservation of certain defenses.**
>
> . . .
>
> (4) **Whenever** it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(Emphasis added). This rule, that the question of subject matter jurisdiction is always a first priority, and is consistent with the general rule that 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).

It is quite likely that the 14-day time limit in which to bring timely motions under either Rule 52 or 59 had passed by the time the facts underlying the jurisdictional question raised in this appeal had even emerged following entry of the January 4, 2012 Judgment, making any motions under those rules impossible. As the case law so consistently has held, any judgment that has been entered without subject matter jurisdiction is void. *Meyers v. Hansen*, 148 Idaho 283, 291, 221 P.3d 81, 89 (2009). Consequently, any attempt to set aside a judgment under Rule 60(b) could also have been made under Rule 60(b)(4). Rule 60(b) also declares that:

> This rules does not limit the power of a court to: (i) entertain an independent action to relieve a party from a judgment, order or proceeding, . . .

Once alerted to the fact that Renee Baird had effectively enticed Dennis Sallaz to enter into a "non- marriage" from the initiation of the "Portland ceremonial wedding", it took the passage of time before the truth surfaced, and then the need to investigate the Oregon record to determine whether those allegations "they were never married" was true. The actual Oregon record absolutely confirmed the undisputed evidence as to the absence of any marriage license for these parties, and is dated August 13, 2012. (R., pg. 281). The issue itself was raised earlier, and preserved, as asserted to the court by the February 9, 2012 Notice of Appeal to the District Court. (R., pg. 194).

Consequently, Dennis Sallaz thought it just as appropriate to also pursue the independent action route, by which a full factual record on the question could then be developed, and against which the Respondent Baird and the Intervenor Trustee vigorously opposed, causing it to be

dismissed, essentially upon the idea there was an adequate remedy available by virtue of the pending appeal. *See*, *Sallaz v. Baird-Sallaz*, Fourth Dist., Ada County Case No. CV-OC 2012-17666, filed on 9/28/2012, and dismissed on 12/14/12, (R., pp. 339-340).

F. Neither Baird Nor Trustee-Intervenor Are Entitled To Award Of Attorney's Fees

As a party, proceeding pro se on this appeal, Respondent Renee Baird is not entitled to an award of attorney's fees, even if she could somehow prevail in this appeal. *Capstar Radio Operating Co. v. Lawrence*, 153 Idaho 411, 425, 283 P.3d 728, 742 (2012); and *Cobbley v. City of Challis*, 138 Idaho 154, 160, 59 P.3d 959, 965 (2002). Nor has she cited any authority to support her argument that she should be allowed to make a surrogate request for an award of attorney's fees on behalf of the bankruptcy trustee, as the Intervenor Respondent in this appeal.

As to the request for Attorney's fees made by Intervenor Respondent, the trustee has done nothing more than make a bare request for an award of attorney's fees under I.C. § 12-121, without providing any citation of authority to support that request, and without providing any substantive argument to support any basis for that request, recognizing this to be a substantial issue and question of jurisdictional law, the cornerstone of a court's foundation for authority. A request for attorney fees must be supported by both argument and authority. See *Poole v. Davis*, 153 Idaho 604, 288 P.3d 821 (2012), In that holding, the Idaho Supreme Court declared that, "Further, this Court has held that a party requesting attorney fees on appeal must provide, in its initial brief, 'authority and argument establishing a right to fees,' and that merely citing 'statutes

and rules authorizing fees, without more, is insufficient.' *Carroll v. MBNA Am. Bank*, 148 Idaho 261, 270, 220 P.3d 1080, 1089 (2009)." 153 Idaho at 609, 288 P.3d at 826 (emphasis added).

A prevailing party on appeal may be awarded attorney fees under I.C. § 12-121 only when the Court is left with the abiding belief that the appeal was brought, pursued, or defended frivolously, unreasonably, or without foundation.

Sixty-nine days before filing Appellant's Opening Brief in this appeal, Appellant Sallaz filed his motion to fundamentally challenge the standing of the Bankruptcy Trustee to participate in this appeal. In that motion he declared the only issue to be raised in the appeal was the question of the magistrate court's lack of subject matter jurisdiction to proceed in the divorce action, given the absence of a valid underlying marriage. Ever since that question first emerged, shortly after entry of the January 4, 2012 judgment on the community property issues, and then followed by Renee Baird's voluntary Chapter 7 bankruptcy petition, the responding parties in this appeal have vigorously opposed every attempt by Appellant Sallaz to determine the "factual record" in respect to the parties' purported "Oregon marriage". Ironically, and as clearly allowed by the appellate rules, neither responding party ever objected to, let alone moved to strike, – either on the district court appeal, or in this appeal – the Sallaz affidavit that identified the event of his first awareness, or the Oregon record that has declared there is no public record of any alleged Sallaz-Baird marriage.

Instead, both responding parties in this appeal have followed the tact of simply ignoring

and avoiding the essential issue of subject matter jurisdiction, the fundamental question raised by Appellant Sallaz in this appeal, and rather than grappling with that critical issue, or even responding to the important public policy questions that were presented as a result of that jurisdictional issue, they instead attach themselves to such ideas as waiver, admission, consent, estoppel, and untimeliness. Regardless of how this Court should view its precedence to resolve this jurisdictional question in this appeal, the record on appeal supports a determination the question has been raised, preserved, and presented by this appeal, and has neither been brought nor pursued frivolously or unreasonably by Appellant Sallaz, as it presents a foundational question of law, fundamental to the authority of a court to take action in divorce cases, and the very statutory enactments that created Idaho's "valid marriage" laws are now on the line.

Therefore, both Respondent Baird and the Intervenor Respondent's request for attorney's fees under I.C. § 12-121 should be denied.

II.

CONCLUSION

As requested in Appellant's Opening Brief, on the basis that the magistrate court lacked subject matter jurisdiction because Dennis Sallaz and Renee Baird never entered into a valid Oregon marriage, this Court on appeal is requested to vacate the January 4, 2012 community property judgment, and fundamental thereto, to vacate and set aside the underlying July 28, 2005 divorce decree, upon which that community property judgment was based and derived, as it was

void and of no effect from the date of entry thereof.

Respectfully Submitted this 23rd day of March, 2014.

Vernon K. Smith
Attorney for Appellant
Dennis J. Sallaz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 23rd day of March, 2014 two true and correct copies of the foregoing APPELLANT'S JOINT REPLY BRIEF were served upon the following:

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