UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHANNA SENATOR, Plaintiff, v. UNITED STATES OF AMERICA; DEPARTMENT OF INTERIOR BOARD OF INDIAN APPEALS, GALE A. NORTON, Defendants.	No. CV-05-3105-RHW Plaintiff's Motion for Summary Judgment

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiff Johanna Senator submits this motion for summary judgment as there is no genuine issue of disputed material fact, and she is entitled to judgment as a matter of law. In support of her motion, she attaches 1) the Declaration of Moni T. Law with declarations of Johanna Senator, Anna Sampson, and Jerry Meninick, 2) her Memorandum of Points and Authorities in Support of Summary Judgment with Table of Authorities, 3) the Statement of Material Facts with incorporation of evidence by reference to the Administrative Record, #11, and 4) Proposed Order granting Summary Judgment to Plaintiff.

Signed this 29th day of September, 2009 in Seattle, WA

S/MONI T. Law

Moni T. Law, WSBA #16945

MONI T. LAW CERTIFICATE OF SERVICE

I, Moni T. Law, counsel to plaintiff Johanna Senator, hereby declare under penalty of perjury that I attempted service by electronic filing through the ECF system a true and correct

copy of the Motion and Memorandum and Exhibits in Support of Summary Judgment on September 29, 2009 to defendants counsel: Frank A. Wilson, U.S. Attorney's Office in Spokane (USAWAE.FWilsonECF@usdoj.gov); Andrew Sean Biviano, U.S. Attorney's Office in Spokane (USAWAE.ABivianoECF@usdoj.gov); and Pamela Jean DeRusha at the U.S. Attorney's Office in Spokane (USAWAE.PDeRushaECF@usdoj.gov).

Signed on September 29, 2009 in Seattle, WA

Moni T. Law
S/ MONI T. Law, WSBA #16945

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHANNA SENATOR, Plaintiff, v. UNITED STATES OF AMERICA; DEPARTMENT OF INTERIOR BOARD OF INDIAN APPEALS, GALE A. NORTON, Defendants.	)	No. CV-05-3105-RHW PLAINTIFF'S STATEMENT OF FACTS

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiff Johanna Senator sets forth the following facts in support of her motion that there is no genuine issue of disputed material fact, and that she is entitled to judgment as a matter of law. The following facts are set forth in the Administrative Record, #11 in the index of this case file, and the attached declarations.

STATEMENT OF FACTS

1. Decedent Phillip Quaempts died intestate on March 2, 1996 at Toppenish, Washington leaving a home in which plaintiff continues to reside. Plaintiff has resided in the home for a total of 29 years. Pacer Docket No. 1, Plaintiff's Complaint, Exh. "A," decision of the Interior Board of Appeals dated September 25, 2005.

2. Plaintiff Johanna Senator resided with decedent for over 16 years as his spouse in a home in Brownstown, Washington, located on the Yakama Reservation. Mr. Quaempts and Ms. Senator married in a traditional religious ceremony, and held themselves out to their fellow tribal members and the general community as husband and wife, and were accepted as the same. See, Pacer Files No.11, Admin. Record, Declarations (Sworn Witness Statements) of elder Betty Moses, Joe M. Sampson, Sr., Cecil Sanchey, Arlene Wesley James, Janice Jacobson, David L. Jack, Darlene Thompson, Raymond L. Jack, Michael Bushman, and others. See also, Declarations of Johanna Senator and of Jerry Meninick accompanying this motion.
3. Mr. Quaempts' employer , the tribal roads department for the Yakama Nation, recognized Ms. Senator as his wife. See, Pacer No. 11 Admin. Record, Sworn Statements of Glen W. Lisle and Andrea J. Spencer.
4. Federal agencies including the I.R.S. recognized Ms. Senator as decedent's wife during his lifetime, accepting their taxes as a married couple. Pacer Files No.11, IRS Tax Returns.
5. The tribal elders and Yakama tribal community recognized Johanna Senator as Phillip Quaempts' widow at his death. See, Pacer File No. 11, Admin. Record, "Exhibit E," May 21, 1996 Employment Payroll Release decision of the Yakama Tribal Council's Executive Board, signed by Tribal Chairman Lonnie Selam, Sr.
6. Ms. Bernadine Napyer married Decedent in November 1973 and separated from him permanently, with no intent to reunite in May, 1980. See, Pacer File No.11, Administrative Record "Order Affirming Decision," 41 IBIA 252, fn. 1. Ms. Napyer lived with another man after the permanent separation from decedent and dissolution of their marital relationship. She

did not make any claim that she was the spouse of decedent for sixteen years up to the time of decedent's death.

7. Mr. Quaempts had no intent to reconcile with Ms. Napyer who moved out of the home, "splitting the blankets" and taking her possessions. Decedent informed others that he was divorced from Ms. Napyer. See, Declarations, Admin Record, Pacer No. 11. Yakama tribal custom recognized the actions of the parties as constituting a traditional divorce. See, Declaration of Jerry Meninick.
8. In November, 1980, Plaintiff and Decedent participated in a traditional religious marriage ceremony with lighting of candles in a Shaker church on the Yakama Reservation. See, Declarations of Johanna Senator and Jerry Meninick, and Admin Record, #11 including declaration of Christine Billy who was present at the ceremony.
9. Plaintiff and decedent were unaware of any alleged requirement to 'register' their traditional marriage ceremony. See, Admin. Record testimony at the BIA hearing of Ms. Senator.
10. The Yakama Tribal Court did not have a marriage registry to record traditional marriages in 1980. Nor does the court have such a registry today. In fact, no such registry has ever existed. See, Declaration of Anna Sampson, Yakama Nation tribal court clerk and administrator for over 30 years.
11. Bernadine Napyer has not been considered Decedent's widow by the tribal members, nor did she participate in funeral services or other activity as his widow. Instead, plaintiff Senator was recognized as Mr. Quaempts widow by elders and others on the reservation. See, Pacer Record No. 11, Sworn Statement of Betty Moses and testimony at the BIA probate hearing.

12. Johanna Senator incurred expenses for the estate which were accepted by the BIA probate proceedings as totaling $5,974.95, and she does not dispute the allowance of the claim.
13. Plaintiff's full claim is for reimbursement of an additional $8,021.73 and $4,000 which the IBIA court rejected and plaintiff appeals.

Signed this 29th day of September, 2009 in Seattle, WA
S/Moni T. Law
MONI T. LAW, WSBA #16945

CERTIFICATE OF SERVICE

I, Moni T. Law, counsel to plaintiff Johanna Senator, hereby declare under penalty of perjury that I attempted service by electronic filing through the ECF system a true and correct copy of Plaintiff's Statement of Facts on September 29, 2009 to defendants counsel: Frank A. Wilson, U.S. Attorney's Office in Spokane (USAWAE.FWilsonECF@usdoj.gov); Andrew Sean Biviano, U.S. Attorney's Office in Spokane (USAWAE.ABivianoECF@usdoj.gov); and Pamela Jean DeRusha at the U.S. Attorney's Office in Spokane (USAWAE.PDeRushaECF@usdoj.gov).

Signed this 29th day of September, 2009 in Seattle, WA
S/Moni T. Law
MONI T. LAW, WSBA #16945

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHANNA SENATOR, Plaintiff, v. UNITED STATES OF AMERICA; DEPARTMENT OF INTERIOR BOARD OF INDIAN APPEALS, GALE A. NORTON, Defendants.	No. CV-05-3105-RHW DECLARATION OF MONI T. LAW re/ Summary Judgment Declarations

I, Moni T. Law, hereby declare and affirm that the attached declarations are true and correct originals via electronic signature of plaintiff Johanna Senator, and Anna Sampson (Yakama Nation's Tribal Court Administrator of 30 years), and Jerry Meninick (former Yakama Tribal Council Chairman).

Signed this 29th day of September, 2009 in Seattle, WA

S/MONI T. Law

Moni T. Law, WSBA #16945

MONI T. LAW CERTIFICATE OF SERVICE

I, Moni T. Law, counsel to plaintiff Johanna Senator, hereby declare under penalty of perjury that I attempted service by electronic filing through the ECF system a true and correct copy of the attached declarations of Plaintiff, Ms. Sampson and Mr. Meninick on September 29, 2009 to defendants counsel: Frank A. Wilson, U.S. Attorney's Office in Spokane (USAWAE.FWilsonECF@usdoj.gov); Andrew Sean Biviano, U.S. Attorney's Office in

Spokane (USAWAE.ABivianoECF@usdoj.gov); and Pamela Jean DeRusha at the U.S. Attorney's Office in Spokane (USAWAE.PDeRushaECF@usdoj.gov).

Signed on September 29, 2009 in Seattle, WA

Moni T. Law
S/ MONI T. Law, WSBA #16945

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHANNA SENATOR, Plaintiff, v. UNITED STATES OF AMERICA; DEPARTMENT OF INTERIOR BOARD OF INDIAN APPEALS, GALE A. NORTON, Defendants.	No. CV-05-3105-RHW DECLARATION of JOHANNA SENATOR

I, JOHANNA SENATOR, declare under penalty of perjury under tribal, state and federal law that the following is true and correct and based upon personal observation and experience:

I am an enrolled member of the Yakama Nation. As stated in testimony at the BIA probate hearing for my husband's estate, we were married in the traditional and customary way recognized by our tribe. Our ceremony was properly witnessed and thereafter acknowledged as a legitimate ceremony. I was recognized as his widow during the funeral services and have been so recognized since his untimely death. His divorced wife makes an unreasonable claim as a widow when they had no relationship or union for almost 20 years before his death. The undisputed fact is that they were divorced in the traditional way, and he and I were married in the way recognized since time immemorial for our people. I miss my husband very much, and I am sad by the unfortunate legal battle that has ensued. He was loving and kind to everyone, and we were very close. We remodeled this home that we live in, and I have taken good care of it since his passing. Phillip had permanently terminated the relationship with his first wife Bernadine prior to our

marriage ceremony. In fact, she left him for another man taking her things and never returning. He informed everyone that they were divorced, and she did not consider it otherwise until he passed away. For over 16 years, my husband and I were happily married. I submitted reasonable claims for reimbursements from the estate, but the essential fact that I want the court to understand is that I was Phillip's wife when he passed away, and I trust that the court will see the truth in this undisputed fact. Recognizing me as the proper widow and applying the traditional law of the sovereign Yakama people is what I ask. I thank you for your consideration of my statement.

SIGNED in Brownstown/Toppenish, WA this 25th day of September, 2009.

S/Johanna Senator (electronically authorized signature)
JOHANNA SENATOR

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHANNA SENATOR, Plaintiff, v. UNITED STATES OF AMERICA; DEPARTMENT OF INTERIOR BOARD OF INDIAN APPEALS, GALE A. NORTON, Defendants.	)	No. CV-05-3105-RHW DECLARATION OF JERRY MENINICK

I, Jerry Meninick hereby declare under penalty of perjury under tribal, state and federal law that the following is true and correct and based upon personal observation and experience:

I am a former member and Chairman of the Yakama Nation Tribal Council. I presently work at the tribe but not in any capacity as a decision-maker on probate or land matters related to this case. I have been instructed and have conveyed the traditional customs of our people in various functions around the state and nation. It is an essential and undisputed fact that our traditional and customary laws have supremacy and pre-empt lower laws set by the state or federal government, or even by written code of the tribe. We indeed have a Cultural Committee and rely upon the wisdom of our elders in many determinations including the performance and recognition of traditional divorce and marriage ceremonies. I knew Johanna Senator's husband Phillip Quaempts Kuneki, and I, along with other enrolled members of our tribe, recognized them as husband and wife after he divorced his former wife Bernadine Napyer in the traditional Indian way (of 'splitting the blankets' and not reconciling). A traditional marriage ceremony for Phillip and Johanna was held at the Shaker Church after his divorce from Bernice. It is undisputed that

Phillip Quaempts never reconciled with Bernadine and instead was married to Johanna Senator at the time of his untimely death. Our tribe and its members recognized Ms. Senator as his widow, including in the traditional and customary funeral services.

DATED this 24th day of September, 2009.

Signed electronically in Toppenish, Washington

S/Jerry Meninick

JERRY MENINICK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHANNA SENATOR,) No. CV-05-3105-RHW
Plaintiff,)
v.)
UNITED STATES OF AMERICA;) DECLARATION OF ANNA
DEPARTMENT OF INTERIOR SAMPSON
BOARD OF INDIAN APPEALS,
GALE A. NORTON,)
Defendants.)
_____)

I, Anna Sampson, declare under penalty of perjury under tribal, state and federal law that the following is true and correct and based upon personal observation and experience:

I am the Court Administrator for the Yakama Nation Tribal Court. I have held this position for a number of years, having started as the court clerk in 1973. In my 36 years working for the court, I am aware that the court does not presently have, nor has it ever had a registry maintained for the recording of traditional marriages.

DATED this 24th day of September, 2009.

Signed electronically in Toppenish, Washington

S/Anna Sampson

ANNA SAMPSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHANNA SENATOR,
Plaintiff,
vs.
UNITED STATES OF AMERICA; DEPARTMENT OF INTERIOR BOARD OF INDIAN APPEALS; GALE A. NORTON,
Defendants.

Case No.: CV-05-3105-RHW

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Johanna Senator respectfully submits through counsel of record her brief in support of summary judgment. She appeals to this court for an order confirming what the traditions and customs of her sovereign people, the Yakama Nation have indisputably recognized- that she is the surviving spouse of decedent Phillip Quaempts. See, Plaintiff's Statement of Facts. As these material facts are undisputed, the issue is whether defendants herein, the federal agencies entrusted with probate matters of Indian people, will properly recognize that Johanna Senator is entitled to be recognized as decedent's widow as a matter of law.

II. ISSUE

Plaintiff appeals the decision of the Interior Board of Indian Appeals, United States Department of the Interior, dated September 28, 2005 as contrary to the customary laws of the Yakama people. At issue is the defendants' failure to recognize Indian custom divorce and Indian custom marriage. Plaintiff Senator incorporates by reference her prior briefs in the initial probate hearing before the Bureau of Indian Affairs probate court Judge William Hammet in August, 1998, and subsequent hearing, and her petition and brief for rehearing appealing the erroneous determination that she is not an heir to Decedent's estate. See, docket no. 11, Admin. Record. Also incorporated by reference is the plaintiff's complaint appealing the IBIA decision dated in September, 2005. See, docket no. 1, Plaintiff's Complaint.

III. Summary Judgment Standards

Summary judgment is proper if the moving party establishes that there are no genuine issues of material fact and it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1986). Inferences drawn from the facts are viewed in favor of the non-moving party. *T.W. Elec. Service v. Pacific Elec. Contractors,* 809 F.2d 626, 630-31 (9th Cir.1987). The nonmoving party, however, "must do more than show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). Defendants cannot rest on allegations or their pleadings, but must show by affidavit or other evidence that

specific material facts are in dispute which create genuine issues for trial. See, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

IV. Statement of Material Facts

Plaintiff's Statement of Facts annexed to Plaintiff's motion for summary judgment is incorporated in her brief by this reference.

V. Argument

A. Phillip Quaempts and Bernadine Napyer, married in November 1973 under a state of Washington marriage license, but obtained an equally valid divorce in May, 1980 by the recognized traditional Indian way, or customary law of the Yakamas.

The court below failed to apply the proper law, and thus reached an invalid conclusion on the issue of decedent's marital status at his death. The IBIA court ruled that decedent left as his "surviving spouse," a woman whom he permanently separated from with a mutual intent to never reconcile (See, 41 IBIA 252, fn. 1), whom lived with another man following the separation, whom the members of his tribe considered his divorcee, and whom he divorced in the traditional and customary way of what the elders refer to as 'splitting the blankets.' See, Plaintiff's Statement of Facts, Declaration of Jerry Meninick, and docket no. 11, Admin. Record (testimony of witnesses).

This absurd conclusion of the IBIA, contrary to decedent's clear intent, occurs as a result of the erroneous reliance upon a reference in the Yakama Law and Order Code, Revised Yakama Code Sec. 22.01.05(3). This restrictive provision was impossible to fulfill:

> "Tribal custom marriages consummated after the effective date of this Code shall be recognized as legal and binding if they are duly recorded within the records of the Tribal Court by signing of a Marriage Register maintained by the Clerk of the Court, and each party must sign such Register within five (5) days of the Tribal custom marriage ceremony."
> (emphasis added)

The clerk of the court, Anna Sampson, signed a declaration attached hereto that she was the clerk of the court in 1980 (at the time of the decedent's traditional custom marriage ceremony), and that no such registry existed. She goes on to state in her declaration that no such registry exists today and she is now the Tribal Court Administrator.

Plaintiff Johanna Senator is penalized and found to not be the surviving spouse because she and decedent failed to sign a traditional marriage register that has never existed. *See*, Declaration of Anna Sampson, Yakama Nation Tribal Court Administrator and clerk of thirty years.

The IBIA court stopped short of completing the proper analysis here, refusing to consider the issue of traditional divorce stating:

> "Because we hold that Appellant cannot otherwise establish that she had a valid marriage with Decedent, ***we need not and do not reach the question whether Ms. Quaempts' marriage to Decedent was terminated by Indian custom divorce." (emphasis added)***

See, docket no. 1, "Exhibit "A" to Plaintiff's Complaint, In re Estate of Phillip Quaempts," 41 IBIA 256, fn. 4.

The only reason plaintiff cannot establish a 'valid' marriage with Decedent is because she failed to sign something that did not exist then or now. Under the doctrine of impossibility, a party is excused from a particular obligation if it is impossible to perform. See, Taylor v. Caldwell, 3 B & S 826 (1863). In this landmark English contract case, Justice Blackburn established the doctrine of

common law impossibility and referenced the civil code of France and Roman law for the proposition that if the existence of a particular item is essential to a contract and that item is destroyed by no fault of the party, the parties are freed from obligation to deliver said item. In Taylor, a music hall that was the subject of a rental contract burned to the ground. In the instant case, the physical item that is being requested to complete this marriage contract never existed and plaintiff cannot be held to fulfilling an impossible task.

Instead, the BIA probate judge and IBIA panel should have applied RYC Sec. 2.02.07, which grants tribal court judges the power 'to recognize Yakama Tribal customs and traditions when deciding cases and applicable law." Federal courts must give full faith and credit to the laws of the sovereign Indian nations. See, Full Faith and Credit Act, 28 U.S.C. Sec. 1738 (1994).

In the case of In re Marriage of Napyer, 19 ILR 6078 (June 1992, attached), the Yakama Nation Tribal Court held that the adoption by the Yakamas of a marriage and divorce code did not abolish customary marriages and divorces. The court further held that "Yakama custom recognizes mutual agreement as one grounds for custom divorce." Id. The same should apply here for Mr. Quamepts' custom divorce. An appellant level Yakama tribal court has also referenced the deference to tradition and custom in the case of *In Re Yakama Indian Nation vs. David Sohappy*, Sr., Court No. A-86-14 (October, 1986). In the Sohappy case, the three-judge Court of Appeals panel held that the lower court "failed to consider the Yakima Tribal customs and Traditions in ruling under Section 2.02.07(2)(E). From time immemorial there was not any written laws for the Yakima Tribal customs and traditions for a time limit for any offense." As the declaration of Mr. Meninick also confirms, the traditional marriage and divorce customs of the Yakamas that were entered into by decedent have been recognized since "time immemorial." Meninick declaration.

Congress has provided legal protections for Native people to exercise their religion without interference. See American Indian Religious Freedom Act, 42 U.S.C. Section 1996 which states that the government shall:

> …protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, ***and the freedom to worship through ceremonials and traditional rites***.

Emphasis added. In this case, Johanna Senator and Phillip Quaempts were married in an Indian Shaker Church before traditional religious leaders. See, Statement of Facts, and docket no. 11, Admin. Record. To deny the validity of their marriage is to counter the spirit and letter of the law that protect these traditions as a civil right. See also, the 1968 Indian Civil Rights Act, 25 U.S.C. Section 1302(1).

B. Traditional and customary Indian law is a legitimate and recognized form of law, including in the area of divorce and marriage. Decedent divorced Ms. Napyer in the Indian customary way, and married Ms. Senator in the Indian way.

Indian traditional and customary law is recognized 'law' in the United States. The highest court has held that persons in "Indian country" were subject to the tribe's laws, clearly understood at the earliest time to be customary law. See, Ex Parte Crow Dog, 109 U.S. 556 (1883); Jones v. Meehan, 175 U.S. 1 (1899), and U.S. v. Quiver, 241 U.S. 602. 606 (1916).

"Custom" as law has been defined as follows:

> A 'custom' is a practice which has by its universality and antiquity acquired a force and effect of law, in a particular place or country, in respect to the subject matter to which is relates. It is a general practice, judicially noticed without proof.
> 21A Am. Jur 2d Customs and Usages Sec. 1 (1981).

In this case, declarant Jerry Meninick, a former chairman of the tribe and respected leader of the Yakama Nation describes the custom of 'splitting the blankets," whereby the parties mutually agree to separate, never reconcile and are considered divorced by the Creator and the people of the tribe. See, Declaration of Jerry Meninick. The unwritten laws of the people pre-date the written code, and are entitled to deference and application in the instant case. See, Declaration of Meninick.

In a case involving Navajo elders, the 10th Circuit held that the lack of an official record confirming the traditional marriage ceremony did not defeat the claim that they were a lawfully married couple. See, *U.S. v. Ben Jarvison*, 409 F.3d 1221 (10TH Cir. 2005). The facts in this case are even more persuasive when no such registry was made available to sign, and indeed has never been created.

C. Estoppel and laches apply to deny Ms. Napyer's claim as the 'surviving spouse.'

Courts have applied the doctrine of laches or estoppel to prevent a person from asserting a right where to do so would be unconscionable. Other factors in applying "laches" include that the party asserting a claim knew of the facts they later attack, unreasonably delay in asserting their rights, and materially prejudice the other party by their delay. See, *Davidson v. State of Washington*, 116 Wn.2d 13, 802 P.2d 1374 (1991). Ms. Napyer knew that her ex-husband was living with

another woman and had been considered his wife, and failing to question the validity of his new marriage now is materially prejudicial.

In a California case, the court held that the decedent's first wife could not question the validity of her Mexican divorce for the purpose of collecting property accumulated during the second marriage. She took no action to assert her 'marital status' until after the death of her former husband and the passage of many years of his living as husband and wife with another woman. See, *Hensgen v. Silberman*, 87 Cal. App. 2d 668, 197 P.2d 356 (1948). Here, Ms. Napyer similarly has taken no effort to assert her alleged rights for sixteen years before the decedent's death, and is barred by the doctrine of estoppel from doing so at this late date.

D. The marriage between decedent and Bernadine Napyer was defunct, and thus the traditional marriage relationship with plaintiff Senator is legitimate. Contrary to the opinion below, there was no bigamy committed here.

Under RCW 26.26.140, a defunct marriage exists where it can be determined that the spouses, by their conduct, indicate that they no longer have a will to continue as a union. See, *Peters v. Skalman*, 27 Wn. App. 247, 617 P.2d 448 (Div. II, 1980). See also, *Mackenzie v. Sellner*, 58 Wn.2d 102 (1961). Beyond the issue of community property distribution, the court is also reviewing how the 'ends of justice would be served." Id, at 104. Justice would not be served to conclude that a partner in a defunct marriage is to inherit the spousal share of the estate after his death. The factors are clearly present here for a defunct marriage: they lived apart for almost two decades before his death, the former wife lived with another man, decedent married another woman within six months of their traditional divorce, and Ms. Napyer and decedent did not hold themselves out in

any way as husband and wife after their permanent separation. They clearly did not have a will to continue as a union.

Although decedent did not file a state court action for divorce (the record below indicates that he retained an advocate who failed to file the documents, see no. 11, Admin. Record), a state sanctioned divorce would be final within 90 days of filing. See, RCW 26.09.030. Mr. Quaempts married plaintiff Senator six months after his permanent separation and traditional divorce from Ms. Napyer, twice the amount of time required when considering state law. Thus, the time that elapsed between the divorce from his first wife and the legitimate marriage to his second wife was reasonable and appropriate.

E. Plaintiff incurred expenses for the estate which should be reimbursed.

Ms. Senator disputes the conclusion of the lower court that she did not submit all claims prior to the conclusion of the first hearing. 41 IBIA 256. Ms. Senator made multiple requests to the Yakama Nation Tribal accounting office and after much effort secured a print out that was submitted to the record in this probate matter. Plaintiff's itemized statement and the tribe's accounting constituted a request for payment consistent with the probate rules. Further, contrary to the opinion at 257, plaintiff identified payments that "were for the sole benefit of Decedent" such as his tombstone and other expenses. See, docket no. 11, Admin. Record.

VI. CONCLUSION

Plaintiff respectfully requests a reversal of the decision by the IBIA court affirming the decision of the ALJ below. The question of who should be confirmed as decedent's lawful widow should be answered with the name "Johanna Senator." She is the woman who married him in a traditional religious

ceremony, was confirmed by the tribal community as his wife, and has been recognized as his widow since his death. Ms. Senator also should receive an appropriate reimbursement of payments expended for the estate, as set forth in the record, although her primary concern was the love of her life that she lost, not the financial loss. Ms. Senator has established that she is entitled to recognition as decedent's surviving spouse as a matter of law without genuine dispute of material facts. Summary judgment in her favor is therefore appropriate.

Signed in Seattle, Washington this 5th day of October, 2009.
S/MONI T. Law
Moni T. Law, #16945

CERTIFICATE OF SERVICE

I, Moni T. Law, counsel to plaintiff Johanna Senator, hereby declare under penalty of perjury that I attempted service by electronic filing through the ECF system Plaintiff's Memorandum of Points and Authorities for Summary Judgment on September 29, 2009 and October 5, 2009 to defendants counsel: Frank A. Wilson, U.S. Attorney's Office in Spokane (USAWAE.FWilsonECF@usdoj.gov); Andrew Sean Biviano, U.S. Attorney's Office in Spokane (USAWAE.ABivianoECF@usdoj.gov); and Pamela Jean DeRusha at the U.S. Attorney's Office in Spokane (USAWAE.PDeRushaECF@usdoj.gov).

Signed on October 5, 2009 in Seattle, WA

Moni T. Law
S/ MONI T. Law, WSBA #16945

create a sense of security and predictability in A.B.'s life. Finally, the court finds that verbal statements and methods of delivery need to be closely monitored by those individuals significant to A.B. to insure she is not subject to unnecessary stress, anxiety or trauma.

Based on the above findings the court orders that respondent J.C.W.'s request for reunification be held in abeyance until such point in time as A.B. is determined to be emotionally secure and ready for a transfer in placement. The court further orders that a visitation agreement be negotiated and developed for respondent J.C.W. and petitioners that includes, but is not limited to, the following issues: specific dates and times when respondent shall have supervised visits with A.B.; how holidays and special occasions will be handled; how visitation will be handled in the event respondent J.C.W. obtains employment; to what degree respondent J.C.W. can participate in major decisions regarding education or treatment matters, religious training and medical care affecting A.B.; what specific steps are going to be taken to reduce conflict or anger issues involving respondent J.C.W., the tribal Department of Social Services, M.W. and any other family members viewed as significant in A.B.'s life; how changes or modifications in scheduled visits, special events or other important matters will be communicated to the involved parties; how missed visits will be rescheduled; what topics should not be discussed in A.B.'s presence; what and when physical contact is not appropriate; what steps respondent J.C.W. must complete prior to unsupervised visitation being allowed; what counseling or therapy the involved parties will participate in to better meet A.B.'s needs and where said counseling or therapy can be obtained; how costs associated with any counseling or therapy will be handled; information as to where respondent J.C.W. is residing and how he may be contacted; and what the consequences will be for failing to comply with the terms of the agreement.

The court also orders that in the event A.B. exhibits persistent symptoms of distress, anxiety, withdrawal or regression after any changes in her visitation schedule, visitation shall revert back to the previously followed schedule until such time as A.B. accepts and feels comfortable with proposed changes in visitation.

In the event a visitation contract, acceptable to all parties and addressing the areas set out above, cannot be reached within thirty (30) days of the date of this order any party to this action can motion this court for an order imposing the terms of the contractual arrangement for visitation.

This matter is ordered set for review on May 14, 1992 at 9:30 a.m. to determine whether it is in A.B.'s best interest to change the visitation agreement, unless a party to this action requests a hearing prior to the above date.

YAKIMA NATION TRIBAL COURT

IN RE THE MARRIAGE OF HELEN NAPYER AND LOUIS NAPYER, SR.

No. 42-90 (Yak. Tr. Ct., Mar. 6, 1992)

Summary

The Yakima Nation Tribal Court holds that the 1959 Indian custom marriage of Helen Napyer and Louis Napyer, Sr. is valid despite conflicting provisions in the Yakima Indian Nation 1953 Law and Order Code. Although the court does not invalidate the 1953 Code provisions, the court notes that chapter 3, section 5 is inconsistent with the 1968 Indian Civil Rights Act, the 1978 American Indian Religious Freedom Act, and the 1977 Yakima Nation Codes, which each protect the practice of Indian tradition, customs and religion.

Full Text

Before PINKHAM, Judge

PINKHAM, Judge

Amended Court Order

This matter has come before the court on Helen Napyer's motion for summary judgment. The court is being requested to find the 1959 Indian custom marriage of Helen Napyer and Louis Napyer, Sr., valid despite conflicting provisions in the Yakima Indian Nation 1953 Law and Order Code, now the court makes the following findings of fact and conclusions based on the testimony of witnesses regarding traditional Yakima wedding trades.

Findings of Fact

1. Helen Sohappy Napyer, the petitioner, and Louis Napyer, Sr., participated in a wedding trade at the Indian community at Horn Dam at West Richland, Washington on June 9 of 1959. The family of Tumi Buck (Helen Napyer's aunt) traded for Helen Sohappy Napyer, and the family of Ambrose Whitefoot traded for Louis Napyer, Sr. (Mrs. Minnie Whitefoot was Louis Napyer's aunt).

2. Ambrose and Minnie Whitefoot gave Tumi Buck six or seven *Suptukay* (Indian suitcases) and a blanket full of clothing including a wing dress and Tumi Buck fed them and then gave them all of the dishes and root baskets and other items from the meal.

3. About a week later Tumi Buck took six or seven large *P'satanawas* (root bags) full of all kinds of roots and some men's clothing to Ambrose and Minnie Whitefoot's house. Minnie and Ambrose Whitefoot fed Tumi Buck and gave Tumi Buck the dishes and root baskets and other items from the meal.

4. Helen Jim, whom the court recognizes as a traditional elder with broad knowledge of the traditions and customs of the Yakima Nation, testified as to the nature of the traditional Yakima wedding trade: "Old people get married, Indian way, not go to White men, they trade each other."

5. The court finds that Helen and Louis Napyer's 1959 wedding trade was in accordance with Yakima traditions.

6. Helen Sohappy Napyer was previously married to Clayton Queahpama in a 1941 Indian custom marriage. That both parties were traditional people. That their marriage was dissolved by Indian custom in 1956 or 1957 by mutual agreement and permanent separation of the parties. That Yakima custom recognizes mutual agreement as one grounds for custom divorce.

7. Louis Napyer, Sr. had been previously married to Florence Eli, who died in 1951, and to Elaine Frank, from whom he was divorced in a tribal court action on August 4, 1958.

Conclusions of Law

1. The above evidence establishes that Helen Sohappy Napyer and Louis Napyer, Sr., were married in accordance with the Indian way and the Washat religion, which is very strong, and also in accordance with the customs of the Yakima Nation, by engaging in a traditional wedding trade between representatives of the families on both sides, the man's and the woman's.

2. That Helen Sohappy Napyer's prior marriage to Clayton Queahpama was dissolved by tribal custom divorce as recognized under Yakima tribal customs.

3. That Louis Napyer's prior marriages were terminated before his wedding trade with Helen Sohappy Napyer.

4. That under RYS § 2.02.07(2)(F) this court may recognize Yakima tribal customs and traditions when deciding cases and applicable law and under that authority this court finds as a matter of law that chapter 3, section 5 of 1953 Law and Order Code of the Yakima Indian Nation can be, and is, not considered in the present case as it conflicts with Yakima tribal custom in regard to marriage and divorce. Although the court does not in this decision invalidate the above 1953 Code provisions, the court notes that chapter 3, section 5 is inconsistent with the 1968 Indian Civil Rights Act, the 1978 American Indian Religious Freedom Act, and the 1977 Yakima Nation Codes, which each protect the practice of Indian tradition, customs and religion.

NAVAJO NATION SUPREME COURT

NAVAJO NATION v. MacDONALD JR.

No. A-CR-10-90 (Nav. Sup. Ct., Feb. 13, 1992)

Summary

In an appeal from criminal judgments entered against Peter MacDonald Jr. following a jury trial, the Navajo Nation Supreme Court rejects all but one of twenty-four assignments of error and twenty subclaims of error, and remands for a determination of whether the defendant should have been granted an evidentiary hearing to determine if his immunized testimony before a United States Senate investigations committee was improperly used in the case.

Full Text

Before TSO, Chief Justice, BLUEHOUSE and AUSTIN, Associate Justices

AUSTIN, Justice

This appeal is from criminal judgments entered against Peter MacDonald Jr. (MacDonald) by the Window Rock District Court on October 22, 1990. They were rendered on an October 17, 1990 jury verdict, finding MacDonald guilty of 23 counts of conspiracy, aiding and abetting bribery, aiding and abetting violations of the Navajo Ethics in Government Act, and other offenses. MacDonald filed a *pro se* appeal on November 1, 1990. On April 30, 1991, appointed appellate counsel filed a supplemental brief. The court heard oral argument on December 9, 1991.

This appeal addresses a series of legal proceedings, beginning with the filing of the initial complaints against MacDonald on December 19, 1989, extensive pretrial motions and hearings, petitions for extraordinary relief to this court, and a trial which lasted from September 26, 1990 through October 17, 1990. MacDonald's brief makes 24 assignments of error and 20 subclaims of error. They range from the sufficiency of the criminal complaint to the legality of the sentence, and address many issues in between. They cover so many basic issues of criminal law and procedure that if we wrote a detailed analysis on every claim, the opinion would be over a hundred pages long.

This opinion follows our decision in *Navajo Nation v. MacDonald Sr.*, No. A-CR-09-90, 6 Nav. R. _____ [19 Indian L. Rep. 6053] (Dec. 30, 1991). Where there are identical issues in that decision and this appeal, we rely upon the discussions of law in *MacDonald Sr.* We must, of necessity, briefly address many of the issues raised in this appeal.

To impose order on the process, we deal with all the assignments of error in broad categories, and combining subcategories under them. MacDonald's assignments of error are referred to by the Roman numeral assigned in the supplemental appellate brief. The specific issues are summarized in the following general questions:

1. Whether the judge, jury and counsel in the trial of this case were competent, and did they act within their jurisdiction? (Nos. XIII, XVI, XXII, XXIV, XXIII, XVII, XI, XVIII and XIX.)

2. Whether there were errors in court rulings on pretrial matters that denied MacDonald a fair trial? (Nos. III, VI, XII, and IV.)

3. Whether MacDonald should have been granted an evidentiary hearing to determine if his immunized testimony before a Senate investigations committee was improperly used in this case? (No. V.)

4. Whether the sentence imposed violates MacDonald's right against cruel and unusual punishment? (No. XXI.)

We vacate the judgments of conviction due to our ruling on assignment of error no. V, the requirement for a pretrial hearing on the use of immunized testimony. Consequently, we will not address issues of evidence and proof, pending a further hearing in the trial court. Assignments of error nos. I, II, VII, VIII, IX, X, XX, XIV and XV are therefore reserved pending the outcome of that hearing.

I. Judge, Jury and Counsel

A. Judge Disqualification

MacDonald contends that the trial judge, Judge Robert Yazzie, should have recused himself because of ex parte communications and a personal animosity against Peter MacDonald Sr., a co-defendant. MacDonald contends that because his father, MacDonald Sr., once attempted to remove Judge Yazzie from office, he had reasons to exercise animosity against both defendants. (XIII.)

The right to an impartial judge is an essential element of due process and the basic right of a criminal defendant. *McCabe v. Walters*, 5 Nav. R. 43 (1985). The standard for the disqualification of a judge is that there must be facts which show bias and prejudice, which influences the judge so that there may not be a fair trial. *Estate of Peshlakai*, 3 Nav. R. 180 (Shiprock D. Ct. 1981); *Toledo v. Benally*, 4 Nav. R. 142 (Window Rock D. Ct. 1983). Thus, the facts brought out in the record, consisting of the motion and affidavits of disqualification and any findings by the trial court, must be reviewed to determine whether the court abused its discretion in denying the motion for disqualification.

The record reveals that, for the most part, MacDonald complains of prosecutorial errors or debatable questions of law, and not the conduct of the trial judge. Furthermore, MacDonald does not explain what the ex parte communications are and facts showing animosity are not present. The assignment is conclusive and not supported by the record. We must not forget that the jury was the trier of fact, so the ultimate responsibility of determining guilt was not in the judge's hands. The record does not show, and MacDonald does not demonstrate, that Judge Yazzie expressed any actual animosity towards MacDonald either during the pretrial phase of the case or during the trial itself.

MacDonald Sr. previously sought to disqualify Judge Yazzie on the ground of specific bias, and we held that he caused

IN THE YAKIMA TRIBAL COURT
COURT OF APPEALS
FOR THE CONFEDERATED TRIBES AND BANDS OF
THE YAKIMA INDIAN NATION

IN RE:

YAKIMA INDIAN NATION,
Appellant,
vs
DAVID SOHAPPY, SR., et al,
Appellee.

Court No. A-86-14

ORDER

On October 2, 1986 a Motion for Reconsideration was filed by Randall Tulee, on behalf of Robert Root a defendant in the above noted matter. The Motion asked that the judges reconsider the decision handed down in this appeal that the matter be remanded back to the lower court for further proceedings. Mr. Tulee cited Dave v Kuneki (A-82-10-) wherein the appeal judges ruled that the lower court judge did not have the responsability to call in traditional experts to testify but that it was up to the appellant to carry his case. In Dave v Kuneki there was no outside jurisdiction involved but one tribal member against another.

In reviewing the Motion for Reconsideration this appellate panel finds that Section 2.02.07 (2)(E) still applys as there is no statute of limitations in the Tribal Code and because this matter involves outside jurisdiction.

THEREFORE the decision of the appellate court that this matter be remanded to the lower court for further proceedings stands.

DATED this 6th day of October, 1986.

Esther T. Bill
Chief Judge

Judge

Judge

IN THE YAKIMA TRIBAL COURT

FOR THE CONFEDERATED TRIBES AND BANDS OF

THE YAKIMA INDIAN NATION

IN RE:

YAKIMA INDIAN NATION,

Appellant,

vs

DAVID SOHAPPY SR., et al,

Defendants.

Court No. A-86-14

DECISION

The Court of Appeals of the Yakima Nation convened on the 1st day of October, 1986 to hear oral arguments on the Errors of Law filed by the Appellant, the Yakima Nation.

The Appellant argued that the lower court judge erred in not considering tribal customs in Section 2.02.07 (2)(E) in granting the Motion to Dismiss; Statute of Limitations. The Appellant also argued that the Tribe was denied the full interpretation of Indian Customs in the decision.

FINDINGS

Appellant's appeal was perfected by filing the Notice of Appeal and paying the required filing fee within the ten (10) day time period allowed. Errors of Law were also filed prior to appellate proceedings according to the Court of Appeals Procedures.

Under Section 2.02.07(2)(E), to retain jurisdiction over the subject matter for a period of two (2) years, EXCEPT as it applies to Indian Customs.

The Court of Appeals finds that the lower court failed to consider the Yakima Tribal Customs and Traditions in ruling under Section 2.02.07(2)(E).

From time immemorial there was not any written laws for the Yakima Tribal Customs and Traditions for a time limit for any offense.

IT IS HEREBY ORDERED that this case shall be remanded to the trial court for further proceedings consistent with this decision.

DONE AND DATED this 2 day of October, 1986.

Esther T. Bell
Chief Judge

Lauretta Ortloff
Judge

Julia Dean Nolte
Judge

U.S. Code collection

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

United States Code

Title 42 - The Public Health and Welfare
Chapter 21 - Civil Rights
SubChapter I - Generally

American Indian Religious Freedom Act of 1978

§ 1996. Protection and preservation of traditional religions of Native Americans

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

KJM

Neutral Citation Number: [1863] EWHC QB J1
122 ER 309;3 B. & S. 826

QUEENS'S BENCH

6 May 1863

B e f o r e :

BLACKBURN J.

Between:

TAYLOR

v

CALDWELL

The declaration alleged that by an agreement, bearing date the 27th May, 1861, the defendants agreed to let, and the plaintiffs agreed to take, on the terms therein stated, The Surrey Gardens and Music Hall, Newington, Surrey, for the following days, that is to say, Monday the 17th June, 1861, Monday the 15th July, 1861, Monday the 5th August, 1861, and Monday the 19th August, 1861, for the purpose of giving a series of four grand concerts and day and night fetes, at the Gardens and Hall on those days respectively, at the rent or sum of 100l. for each of those days. It then averred the fulfilment of conditions etc., on the part of the plaintiffs; and breach by the defendants, that they did not nor would allow the plaintiffs to have the use of The Surrey Music Hall and Gardens according to the agreement, but wholly made default therein, etc.; whereby the plaintiffs lost divers moneys paid by them for printing advertisements of and in advertising the concerts, and also lost divers sums expended and expenses

incurred by them in preparing for the concerts and otherwise in relation thereto, and on the faith of the performance by the defendants of the agreement on their part, and had been otherwise injured, etc.

Pleas. First. Traverse of the agreement.

Second. That the defendants did allow the plaintiffs to have the use of The Surrey Music Hall and Gardens according to the agreement, and did not make any default therein, etc.

Third. That the plaintiffs were not ready or willing to take The Surrey Music Hall and Gardens.

Fourth. Exoneration before breach.

Fifth. That at the time of the agreement there was a general custom of the trade and business of the plaintiffs and the defendants, with respect to which the agreement was made, known to the plaintiffs and the defendants, and with reference to which they agreed, and which was part of the agreement, that in the event of the Gardens and Music Hall being destroyed or so far damaged by accidental fire as to prevent the entertainments being given according to the intent of the agreement, between the time of making the agreement and the time appointed for the performance of the same, the agreement should be rescinded and at an end; and that the Gardens and Music Hall were destroyed and so far damaged by accidental fire as to prevent the entertainments, or any of them, being given, according to the intent of the agreement, between the time of making the agreement and the first of the times appointed for the performance of the same, and continued so destroyed and damaged until after the times appointed for the performance of the agreement had elapsed, without the default of the defendants or either of them.

Issue on all the pleas. On the trial, before Blackburn J., at the London Sittings after Michaelmas Term, 1861, it appeared that the action was brought on the following agreement:

"Royal Surrey Gardens,

" 27th May, 1861.

"Agreement between Messrs. Caldwell & Bishop, of the one part, and Messrs. Taylor & Lewis of the other part, whereby the said Caldwell & Bishop agree to let, and the said Taylor & Lewis agree to take, on the terms hereinafter stated, The Surrey Gardens and Music Hall, Newington, Surrey, for the following days, viz.:

"Monday, the 17th June, 1861,

Monday the 15th July, 1861,

Monday the 5th August, 1861,

Monday the 19th August, 1861,

for the purpose of giving a series of four grand concerts and day and night fetes at the said Gardens and Hall on those days respectively at the rent or sum of 1001. for each of the said days. The said Caldwell & Bishop agree to find and provide at their own sole expense, on each of the aforesaid days, for the

amusement of the public and persons then in the said Gardens and Hall, an efficient and organised military and quadrille band, the united bands to consist of from thirty-five to forty members; al fresco entertainments of various descriptions; coloured minstrels, fireworks and full illuminations; a ballet or divertissement, if permitted; a wizard and Grecian statues; tight rope performances; rifle galleries; air gun shooting; Chinese and Parisian games; boats on the lake, and (weather permitting) aquatic sports, and all and every other entertainment as given nightly during the months and times above mentioned. And the said Caldwell & Bishop also agree that the before mentioned united bands shall be present and assist at each of the said concerts, from its commencement until 9 o'clock at night; that they will, one week at least previous to the above mentioned dates, underline in bold type in all their bills and advertisements that Mr. Sims Reeves and other artistes will sing at the said gardens on those dates respectively, and that the said Taylor & Lewis shall have the right of placing their boards, bills and placards in such number and manner (but subject to the approval of the said Caldwell & Bishop) in and about the entrance to the said gardens, and in the said grounds, one week at least previous to each of the above mentioned days respectively, all bills so displayed being affixed on boards. And the said Caldwell & Bishop also agree to allow dancing on the new circular platform after 9 o'clock at night, but not before. And the said Caldwell & Bishop also agree not to allow the firework display to take place till a J past 11 o'clock at night. And, lastly, the said Caldwell & Bishop agree that the said Taylor & Lewis shall be entitled to and shall be at liberty to take and receive, as and for the sole use and property of them the said Taylor & Lewis, all moneys paid for entrance to the Gardens, Galleries and Music Hall and firework galleries, and that the said Taylor & Lewis may in their own discretion secure the patronage of any charitable institution in connection with the said concerts. And the said Taylor & Lewis agree to pay the aforesaid respective sum of 100l. in the evening of the said respective days by a crossed cheque, and also to find and provide, at their own sole cost, all the necessary artistes for the said concerts, including Mr. Sims Reeves, God's will permitting. (Signed)

"J. CALDWELL."

Witness "CHAS. BISHOP.

(Signed) "S. Denis."

On the 11th June the Music Hall was destroyed by an accidental fire, so that it became impossible to give the concerts. Under these circumstances a verdict was returned for the plaintiff, with leave reserved to enter a verdict for the defendants on the second and third issues.

Petersdorff Serjt., in Hilary Term, 1862, obtained a rule to enter a verdict for the defendants generally.

The rule was argued, in Hilary Term, 1863 (January 28th); before Cockburn C.J., Wightman, Crompton and Blackburn JJ.

H. Tindal Atkinson shewed cause. First. The agreement sued on does not shew a "letting" by the defendants to the plaintiffs of the Hall and Gardens, although it uses the word "let," and contains a stipulation that the plaintiffs are to be empowered to receive the money at the doors, and to have the use of the Hall, for which they are to pay 100l., and pocket the surplus; for the possession is to remain in the defendants, and the whole tenor of the instrument is against the notion of a letting. Whether an instrument shall be construed as a lease or only an agreement for a lease, even though it contains words of present demise, depends on the intention of the parties to be collected from the instrument;

Morgan d. Dowding v. Bissell (3 Taunt. 65). *Christie v. Lewis* (2 B. & B. 410) is the nearest case to the present, where it was held that, although a charter party between the owner of a ship and its freighter contains words of grant of the ship, the possession of it may not pass to the freighter, but remain in the owner, if the general provisions in the instrument qualify the words of grant.

Secondly. The destruction of the premises by fire will not exonerate the defendants from performing their part of the agreement. In *Paradine v. Jane* (Al. 26) it is laid down that, where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And there accordingly it was held no plea to an action for rent reserved by lease that the defendant was kept out of possession by an alien enemy whereby he could not take the profits.

Pearce, in support of the rule. First. This instrument amounts to a demise. It uses the legal words for that purpose, and is treated in the declaration as a demise.

Secondly. The words "God's will permitting" override the whole agreement.

Cur. adv. vult.

The judgment of the Court was now delivered by

Blackburn J. In this case the plaintiffs and defendants had, on the 27th May, 1861, entered into a contract by which the defendants agreed to let the plaintiffs have the use of The Surrey Gardens and Music Hall on four days then to come, viz., the 17th June, 15th July, 5th August and 19th August, for the purpose of giving a series of four grand concerts, and day and night fetes at the Gardens and Hall on those days respectively; and the plaintiffs agreed to take the Gardens and Hall on those days, and pay 100l. for each day. The parties inaccurately call this a "letting," and the money to be paid a "rent;" but the whole agreement is such as to shew that the defendants were to retain the possession of the Hall and Gardens so that there was to be no demise of them, and that the contract was merely to give the plaintiffs the use of them on those days. Nothing however, in our opinion, depends on this. The agreement then proceeds to set out various stipulations between the parties as to what each was to supply for these concerts and entertainments, and as to the manner in which they should be carried on. The effect of the whole is to shew that the existence of the Music Hall in the Surrey Gardens in a state fit for a concert was essential for the fulfilment of the contract,-such entertainments as the parties contemplated in their agreement could not be given without it. After the making of the agreement, and before the first day on which a concert was to be given, the Hall was destroyed by fire. This destruction, we must take it on the evidence, was without the fault of either party, and was so complete that in consequence the concerts could not be given as intended. And the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants. The parties when framing their agreement evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend upon the general rules of law applicable to such a contract. There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible. The law is so laid down in 1 Roll. Abr. 450,

Condition (G), and in the note (2) to Walton v. Waterhouse (2 Wms. Saund. 421 a. 6th ed.), and is recognised as the general rule by all the Judges in the much discussed case of Hall v. Wright (E. B. & E. 746). But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied: and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor. There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition. Accordingly, in the Civil law, such an exception is implied in every obligation of the class which they call obligatio de certo corpore. The rule is laid down in the Digest, lib. xLv., tit. l, de verborum obligationibus, 1. 33. "Si Stichus certo die dari promissus, ante diem moriatur: non tenetur promissor." The principle is more fully developed in l. 23. "Si ex legati causa, aut ex stipulatii hominem certum mihi debeas: non aliter post mortem ejus tenearis mihi, quam si per te steterit, quominus vivo eo eum mihi dares: quod ita fit, si aut interpellatus non dedisti, aut occidisti eum." The examples are of contracts respecting a slave, which was the common illustration of a certain subject used by the Roman lawyers, just as we are apt to take a horse; and no doubt the propriety, one might almost say necessity, of the implied condition is more obvious when the contract relates to a living animal, whether man or brute, than when it relates to some inanimate thing (such as in the present case a theatre) the existence of which is not so obviously precarious as that of the live animal, but the principle is adopted in the Civil law as applicable to every obligation of which the subject is a certain thing. The general subject is treated of by Pothier, who in his Traite des Obligations, partie 3, chap. 6, art. 3, § 668 states the result to be that the debtor corporis certi is freed from his obligation when the thing has perished, neither by his act, nor his neglect, and before he is in default, unless by some stipulation he has taken on himself the risk of the particular misfortune which has occurred.

Although the Civil law is not of itself authority in an English Court, it affords great assistance in investigating the principles on which the law is grounded. And it seems to us that the common law authorities establish that in such a contract the same condition of the continued existence of the thing is implied by English law.

There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person; and such promises, e.g. promises to marry, or promises to serve for a certain time, are never in practice qualified by an express exception of the death of the party; and therefore in such cases the contract is in terms broken if the promisor dies before fulfilment. Yet it was very early determined that, if the performance is personal, the executors are not liable; *Hyde v. The Dean of Windsor* (Cro. Eliz. 552, 553). See 2 Wms. Exors. 1560, 5th ed., where a very apt illustration is given. "Thus," says the learned author, "if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract: for the undertaking is merely personal in its nature, and, by the intervention of the contractor's death, has become impossible to be performed."For this he cites a dictum of Lord Lyndhurst in *Marshall v. Broadhurst* (1 Tyr. 348, 349), and a case mentioned by Patteson J. in Wentworth v. Cock (10 A. & E. 42, 45-46). In

Hall v. Wright (E. B. & E. 746, 749), Crompton J., in his judgment, puts another case. "Where a contract depends upon personal skill, and the act of God renders it impossible, as, for instance, in the case of a painter employed to paint a picture who is struck blind, it may be that the performance might be excused."

It seems that in those cases the only ground on which the parties or their executors, can be excused from the consequences of the breach of the contract is, that from the nature of the contract there is an implied condition of the continued existence of the life of the contractor, and, perhaps in the case of the painter of his eyesight. In the instances just given, the person, the continued existence of whose life is necessary to the fulfilment of the contract, is himself the contractor, but that does not seem in itself to be necessary to the application of the principle; as is illustrated by the following example. In the ordinary form of an apprentice deed the apprentice binds himself in unqualified terms to "serve until the full end and term of seven years to be fully complete and ended," during which term it is covenanted that the apprentice his master "faithfully shall serve," and the father of the apprentice in equally unqualified terms binds himself for the performance by the apprentice of all and every covenant on his part. (See the form, 2 Chitty on Pleading, 370, 7th ed. by Greening.) It is undeniable that if the apprentice dies within the seven years, the covenant of the father that he shall perform his covenant to serve for seven years is not fulfilled, yet surely it cannot be that an action would lie against the father? Yet the only reason why it would not is that he is excused because of the apprentice's death.

These are instances where the implied condition is of the life of a human being, but there are others in which the same implication is made as to the continued existence of a thing. For example, where a contract of sale is made amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day; there, if the chattels, without the fault of the vendor, perish in the interval, the purchaser must pay the price and the vendor is excused from performing his contract to deliver, which has thus become impossible.

That this is the rule of the English law is established by the case of *Rugg v. Minett* (11 East, 210), where the article that perished before delivery was turpentine, and it was decided that the vendor was bound to refund the price of all those lots in which the property had not passed; but was entitled to retain without deduction the price of those lots in which the property had passed, though they were not delivered, and though in the conditions of sale, which are set out in the report, there was no express qualification of the promise to deliver on payment. It seems in that case rather to have been taken for granted than decided that the destruction of the thing sold before delivery excused the vendor from fulfilling his contract to deliver on payment.

This also is the rule in the Civil law, and it is worth noticing that Pothier, in his celebrated Traite du Contrat de Vente (see Part. 4, § 307, etc.; and Part. 2, ch. 1, sect. 1, art. 4, § 1), treats this as merely an example of the more general rule that every obligation de certo corpore is extinguished when the thing ceases to exist. See Blackburn on the Contract of Sale, p. 173.

The same principle seems to be involved in the decision of *Sparrow v. Sowyate* (W. Jones, 29), where, to an action of debt on an obligation by bail, conditioned for the payment of the debt or the render of the debtor, it was held a good plea that before any default in rendering him the principal debtor died. It is true that was the case of a bond with a condition, and a distinction is sometimes made in this respect between a condition and a contract. But this observation does not apply to *Williams v. Lloyd* (W. Jones, 179). In that case the count, which was in assumpsit, alleged that the plaintiff had delivered a horse to the defendant, who

promised to redeliver it on request. Breach, that though requested to redeliver the horse he refused. Plea, that the horse was sick and died, and the plaintiff made the request after its death; and on demurrer it was held a good plea, as the bailee was discharged from his promise by the death of the horse without default or negligence on the part of the defendant. "Let it be admitted," say the Court, "that he promised to deliver it on request, if the horse die before, that is become impossible by the act of God, so the party shall be discharged, as much as if an obligation were made conditioned to deliver the horse on request, and he died before it." And Jones, adds the report, cited 22 Ass. 41, in which it was held that a ferryman who had promised to carry a horse safe across the ferry was held chargeable for the drowning of the animal only because he had overloaded the boat, and it was agreed, that notwithstanding the promise no action would have lain had there been no neglect or default on his part. It may, we think, be safely asserted to be now English law, that in all contracts of loan of chattels or bailments if the performance of the promise of the borrower or bailee to return the things lent or bailed, becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel. The great case of *Coggs v. Bernard* (1 Smith's L. C. 171, 5th ed.; 2 L. Raym. 909) is now the leading case on the law of bailments, and Lord Holt, in that case, referred so much to the Civil law that it might perhaps be thought that this principle was there derived direct from the civilians, and was not generally applicable in English law except in the ease of bailments; but the case of *Williams v. Lloyd* (W. Jones, 179), above cited, shews that the same law had been already adopted by the English law as early as The Book of Assizes. The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given; that being essential to their performance.

We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and other things. Consequently the rule must be absolute to enter the verdict for the defendants. Rule absolute.

« up

409 F.3d 1221

UNITED STATES of America, Plaintiff-Appellant,
v.
Ben JARVISON, Defendant-Appellee.

No. 04-2093.

United States Court of Appeals, Tenth Circuit.

May 23, 2005.

Marron Lee, Assistant United States Attorney (David C. Iglesias, United States Attorney with her on the brief), Albuquerque, NM, for the Plaintiff–Appellant.

Robert J. Gorence, Robert J. Gorence & Associates, P.C., Albuquerque, NM, for the Defendant–Appellee.

Before KELLY, ANDERSON, and LUCERO, Circuit Judges.

LUCERO, Circuit Judge.

1 In this interlocutory appeal involving a claim that the defendant, Ben Jarvison, is not validly married, the United States contests the district court's exclusion of testimony on the basis of the spousal testimonial privilege. As part of the underlying child sexual abuse prosecution, the United States sought to compel the testimony of Esther Jarvison who they contend observed the abuse and could testify as to statements concerning the abuse made to her by both the defendant Ben Jarvison and the alleged victim. After determining that the Jarvisons had a valid marriage, the district court denied the government's motion to compel Esther's testimony. On appeal, the government argues that the district court erred in refusing to compel Esther's testimony on the basis of the spousal testimonial privilege, and in the alternative invites us to create a new exception to the spousal testimonial privilege for child abuse cases. Exercising jurisdiction under 18 U.S.C. § 3731, we AFFIRM the district court's order denying the government's motion to compel Esther Jarvison's testimony and decline the government's invitation to create a new exception allowing courts to compel adverse spousal testimony in cases involving allegations of child abuse.

2 * This appeal centers around Esther Jarvison's ("Esther") refusal to testify against Ben Jarvison ("Jarvison") in a criminal case in which Jarvison is accused of sexually abusing their granddaughter, Jane Doe. After the government indicted Jarvison for aggravated sexual abuse of a minor child in Indian Country, it attempted to compel Esther to testify against Jarvison. Esther, an 85-year-old Navajo woman who speaks quite limited English, and Jarvison, who is 77 years old, are residents of the Navajo Indian Reservation and enrolled members of the Navajo Tribe. Jarvison also speaks only limited English, and communicates mostly in Navajo. The testimony proffered by the government involves statements allegedly made by Esther to Federal Bureau of Investigation ("FBI") and Navajo Police investigators in an untaped, English-language interview. The government contends that Esther stated that she observed the child touch Jarvison's penis "over his pants," that Jane Doe allegedly told Esther that Jarvison had touched her private parts, and that Jarvison told Esther that the

« up

child had touched him over the crotch of his pants and he had told her not to do so.[1] Esther denies that she made such statements.

As part of its pretrial preparations, the government served Esther with a subpoena to compel testimony two days before a pretrial hearing in this case. During the hearing, Esther emphatically stated that she did not want to testify against her husband and that she and Jarvison had married in a traditional Navajo ceremony in Coyote Canyon within the Navajo Reservation on June 25, 1953. The district court found that the Jarvisons had a valid marriage based on this 1953 traditional Navajo ceremony, and concluded that the spousal testimonial privilege applied under *Trammel v. United States,* 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980).

4 Before the district court, the government argued that the marriage was not valid because: (1) Esther had not testified to every element of a "traditional ceremony" under the Navajo Code; (2) the Jarvisons had not recorded the traditional marriage with the Navajo tribal government; and (3) an intervening relationship with Esther's daughter had extinguished any marriage. The government's proffer included proposed evidence that the Jarvisons lived together from 1953 until 1965, at which point Esther moved out upon Jarvison's commencement of a sexual relationship with Esther's daughter from a prior marriage. Jarvison had two children with Esther prior to 1965, and four children with the daughter over the next fifteen years. In 1980, the relationship with the daughter ended, and Esther moved back in with Jarvison. Over the ensuing years, Esther and Jarvison separated and reconciled multiple times, and in 2000 began to live together again on a full-time basis. The documents submitted by the government reflect that in 2002, when the alleged sexual abuse occurred, Esther was living with Jarvison and was still cohabiting with him in 2003 when interviewed by the FBI and Navajo Police about the alleged abuse. These FBI statements relied upon by the government state that "[Esther] JARVISON and BEN have been married for over 50 years."

5 The court allowed the government to present a witness from the Navajo Vital Records Office to testify to certain records on Jarvison maintained by the Navajo Nation that stated "no" in the block marked "married," but did list Esther as Jarvison's "wife." These documents also listed all of Jarvison's children as Esther and Jarvison's. After the court denied its motion to compel Esther's testimony on the basis of the existence of a valid marriage and the spousal testimonial privilege under *Trammel,* the government requested reconsideration and moved to supplement the record with additional documentary evidence to show that no valid marriage had ever occurred. These two exhibits consisted of the two investigatory reports made in 2003. The court admitted the documents but found they contained nothing that
3 would cause it to reexamine its conclusion that the Jarvisons were married and that spousal testimonial privilege applied.[2] This interlocutory appeal by the government followed.

II

6 When reviewing a district court decision to exclude evidence, we review the district court's decision for an abuse of discretion. *United States v. Wittgenstein,* 163 F.3d 1164, 1172 (10th Cir.1998). Although we review legal issues de novo, *United States v. Kirk,* 894 F.2d 1162, 1163 (10th Cir.1990), we must accept the court's factual findings unless we conclude they were clearly erroneous. *Manning v. United States,* 146 F.3d 808, 812 (10th Cir.1998). A finding of fact is not clearly erroneous unless "it is without factual support in the record," or unless the court "after reviewing all the evidence, is left with a definite and firm conviction that the district court erred." *Id.* We view the evidence on appeal in the light most favorable to the district court's

« up

ruling, giving due regard to the district court's opportunity to judge witness credibility, and must uphold any district court finding that is permissible in light of the evidence. *Id.* at 813.

The United States contends that the district court erred in determining that the Jarvisons were married under traditional Navajo law, and that even if married, the marriage was a sham or moribund and was created solely to avoid testifying. The second argument—that the marriage was a sham or moribund and was created solely to avoid testifying—was not raised or argued below before the district court in either the government's original motion or motion to reconsider. Accordingly, we decline to address it for the first time on appeal. *See Singleton v. Wulff,* 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976); *In re Walker,* 959 F.2d 894, 896 (10th Cir.1992).[3]

* Our analysis of the district court's conclusion that the Jarvisons had a valid marriage requires us first to examine what law would apply to the question of a marriage between two Navajo tribal members who live completely within the boundaries of the Navajo Reservation. The district court implicitly evaluated the marriage under Navajo law stating that: "The Court is of the opinion that a marriage legal in the Navajo Nation 50 years ago is still legal." It is often assumed without discussion by courts that, in cases arising on an Indian Reservation within a State, the substantive law of the State is controlling in such situations. *Louis v. United States,* 54 F.Supp.2d 1207, 1209-10 (D.N.M.1999). However, because the Navajo Nation retains sovereign authority to regulate domestic relations laws, including marriage of its Indian subjects, Navajo law is dispositive as to the validity of the marriage in question. *See Montana v. United States,* 450 U.S. 544, 564, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) ("Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members"); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55-56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) ("Although no longer possessed of the full attributes of sovereignty, they remain a separate people, with the power of regulating their internal and social relations."); *Cheromiah v. United States,* 55 F.Supp.2d 1295, 1305 (D.N.M.1999) (examining the sovereignty retained by Indian tribes and law of the place in Federal Torts Claims Act case); *Jim v. CIT Financial Services Corp.,* 87 N.M. 362, 533 P.2d 751, 752 (N.M.1975) (recognizing that laws of the Navajo Tribe are entitled by Federal law to full faith and credit in the courts of New Mexico because the Navajo Nation is a "territory" within the meaning of 28 U.S.C. § 1738); *Halwood v. Cowboy Auto Sales, Inc.,* 124 N.M. 77, 946 P.2d 1088, 1090 (1997) (same). The government assumes that New Mexico law is the applicable law by which to measure the validity of the marriage, but discusses Navajo law because New Mexico recognizes valid common law marriages from other jurisdictions.

Both Esther and Ben Jarvison are subject to Navajo Nation laws regarding marriage and domestic relations. Because domestic relations are considered by the Tribe as being at the core of Navajo sovereignty, *In re Francisco,* 16 Indian L. Rep. 6113 (Navajo 1989),[4] we conclude that Navajo law is the appropriate law under which to evaluate the validity of the marriage. *See Montana,* 450 U.S. at 565, 101 S.Ct. 1245; *Marris v. Sockey,* 170 F.2d 599 (10th Cir.1948) (holding that tribal Indians domiciled within the territorial limits of an Indian nation in Indian Territory and who consummated a marriage or divorce in accordance with recognized tribal custom before such customs had been superceded by other law, were bound by the legal effect given to such customs); *see also Beller v. United States,* 221 F.R.D. 679 (D.N.M.2003) (determining validity of a Navajo couple's marriage by examining required elements of common law marriage under Navajo law).

10

B

« up

Navajo law currently recognizes multiple ways to establish a valid marriage. It recognizes both those marriages contracted outside the Navajo Reservation (if valid by the laws of the place where contracted), and those within the Reservation under the requirements of Title 9 of the Navajo Nation Code. Navajo Code recognizes both traditional and common law marriage. Navajo Code tit. 9, §§ 3 and 4 (1993).[5] Because the alleged marriage in this case spans more than a fifty-year period, a proper understanding of the evolution of Navajo law on traditional and common-law marriage is required to resolve the validity of the Jarvisons' marriage.

11

Under Navajo tradition, celebration of a traditional marriage ceremony and the knowledge thereof by the community were sufficient to create a valid marriage. A marriage license or other documentation was unnecessary. *See In re Francisco,* 16 Indian L. Rep. 6113 ("After [participating] in the traditional Navajo wedding ceremony, some couples do not obtain marriage licenses because, traditionally, the performance of the ceremony completely validates the union."); *see also* Antoinette Sedillo Lopez, *Evolving Indigenous Law: Navajo Marriage-Cultural Traditions and Modern Challenges,* 17 Ariz. J. Int'l & Comp. L. 283, 292 (2000). Navajo marriages have been governed by tribal statute since 1940 when the Tribal Council passed a Resolution requiring Navajo couples desiring to marry in a traditional ceremony to obtain a marriage license. *See* Lopez, *supra* at 293; Navajo Tribal Council Res. CJ-2-40 (June 3, 1940) (recognizing that the overwhelming number of Navajo who have not been to school are married by tribal custom). Despite the seemingly clear language in this Resolution, subsequent Navajo court decisions interpreted the Resolution as making the license requirement "directory" rather than mandatory, and court decisions and subsequent Tribal Council Resolutions recognized the validity of both unlicensed traditional and common law marriages. This apparent conflict between the desire to formalize marriage by requiring a license and the desire to respect tribal custom and belief concerning traditional marriage[6] reflects the tension between the necessity of proving marriage in the modern bureaucratic state,[7] and Navajo law's commitment to incorporate Navajo tradition as a source of law. *See Bennett v. Navajo Board of Election Supervisors,* No. A-CV-26-90 (Navajo 1990) (holding that fundamental Navajo customs and traditions are part of "higher law");[8] Navajo Tribal Council Res. CAP-36-80 (Apr. 30, 1980) (recognizing difficulty in obtaining government benefits caused by inability to validate traditional marriages).

In 1944 the Tribal Council validated preexisting marriages recognized by the community even though not accompanied by church, state, or Tribal custom ceremony. *See* Unnumbered Navajo Tribal Council Res. amending CJ-2-40 (July 18, 1944); *In re Francisco,* 16 Indian Law Rep. 6113; *see also* Navajo Code, tit. 9 § 8 (the 1944 amendment was the precursor to the current § 8). Recognizing that Navajo couples had continued to marry through unlicensed traditional ceremonies, in 1954 the Tribal Council adopted a resolution validating all pre-January 31, 1954 Navajo marriages that were out of compliance with earlier Navajo Tribal Council resolutions requiring a license. David L. Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992,* 18 Am. Indian L.Rev. 379, 405 (1993); *In re Francisco,* 16 Indian L. Rep. 6113; Navajo Tribal Council Res. CF-2-54 (Feb. 11, 1954) ((codified at Navajo Code tit. 9, § 61, (1977)), amended by Navajo Tribal Council Res. CAP-36-80 (Apr. 30, 1980)). In 1957, the Tribal Council, recognizing the frequent necessity of documentary proof of marriage, established a procedure allowing those whose prior marriages were validated by the 1954 resolution, to petition for a formal recognition of marriage through the Navajo

13

« up courts. Navajo Tribal Council Res. CF-14-57 (Feb. 4, 1957). Although the 1954 resolution requiring marriage licenses was passed to avoid problems in obtaining government benefits for dependents by encouraging tribal members to obtain marriage licenses, Navajo courts subsequently validated "customary" marriages that occurred after the January 31, 1954 date as "common law" marriages, thus achieving the same result. *See* Lowery, *supra* at 405; *In re Marriage of Daw,* 1 Navajo Rptr. 1, 3 (Navajo Ct.App.1969).[9] Ten years later, the Navajo courts acknowledging the language of the 1954 Tribal Council Resolution again held that "any marriage contracted by tribal custom after January 31, 1954, may not be validated by the tribal court, but is recognized as a common law marriage." *In re Marriage of Ketchum,* 2 Navajo Rptr. 102, 105 (Navajo Ct.App.1979).[10] The court's *In re Ketchum* opinion listed the requirements of a common law marriage as: (1) present consent to be husband and wife; (2) actual cohabitation; and (3) actual holding out to the community to be married. Lowery, *supra* at 405-06; *In re Ketchum,* 2 Navajo Rptr. 102, 104-105 *citing Kelly v. Metropolitan Life Ins. Co.,* 352 F.Supp. 270 (S.D.N.Y.1972) (listing essential features of common law marriage), and *Meister v. Moore,* 96 U.S. (6 Otto) 76, 24 L.Ed. 826 (1878) (deciding that common law marriage exists absent a statute to the contrary).

In 1980, the Tribal Council eliminated the January 31, 1954 cutoff date for the validation of traditional Navajo marriages that had been entered into without licenses, recognizing both that the Navajo people had continued to marry in traditional ceremonies since 1954 and that the "law of validated marriages has created problems and hardships for numerous married Navajo people." Lopez, *supra* at 296; Navajo Tribal Res. CAP-36-80 (Apr. 30, 1980). However, in an effort to encourage the move toward formalization and to ease the problem of accurate record keeping, the Tribal Council urged the Navajo people to obtain Navajo Tribal marriage licenses prior to marriage and record them within three months. By eliminating the cutoff date, the Council allowed all traditional marriages to be validated, extending federal benefits normally afforded to married couples to those Navajo couples "who were recognized in the community as being married and who considered themselves spiritually united in accordance with Navajo cultural and religious tradition." Lopez, *supra* at 296 (citing Navajo Tribal Council Res. CAP 36-80 (Apr. 30, 1980)).

14 Although the Supreme Court of the Navajo Nation confirmed the institution of common law marriage in a 1988 decision, *Navajo Nation v. Murphy,* 6 Navajo Rptr. 10,[11] in 1989 it ruled that "Navajo tradition and culture do not recognize common-law marriage," and overruled all prior rulings permitting Navajo courts to validate unlicensed marriages in which a Navajo traditional ceremony had not occurred. Lowery, *supra* at 406; *In re Marriage of Francisco,* 16 Indian L. Rep. 6113 (Navajo 1989). While declaring "Anglo-style" common law marriages invalid as contrary to Navajo tradition in *In re Francisco,* the Navajo Supreme Court reaffirmed its responsibility under CAP 36-80 to validate unlicensed marriages consecrated with a traditional ceremony. Lowery, *supra* at 406; *In re Francisco,* 16 Indian L. Rep. 6113; Lopez, *supra* at 299. In 1993, the Tribal Council rejected the Navajo Supreme Court's holding in *In re Francisco* invalidating common law marriages and explicitly included common law marriages in the Navajo Code. Navajo Nation Code, tit. 9, sec. 3 (1993); Lopez, *supra* at 299.

15 Current Navajo law allows parties to contract marriage through a traditional ceremony or by common-law marriage within the Navajo Nation as follows:

16 D. The contracting parties engage in a traditional Navajo wedding ceremony which

« up

shall have substantially the following features:

1. The parties to the proposed marriage shall have met and agreed to marry;

2. The parents of the man shall ask the parents of the woman for her hand in marriage;

3. The bride and bridegroom eat cornmeal mush out of a sacred basket;

4. Those assembled at the ceremony give advice for a happy marriage to the bride and groom;

5. Gifts may or may not be exchanged;

6. The person officiating or conducting the traditional wedding ceremony shall be authorized to sign the marriage license, or

E. The contracting parties establish a common-law marriage, having the following features:

1. Present intention of the parties to be husband and wife;

2. Present consent between the parties to be husband and wife;

3. Actual cohabitation;

4. Actual holding out of the parties within their community to be married.

Navajo Code, tit. 9 § 3. Against this checkered statutory and historical background we assess the district court's determination in this case.

C

Although later conceding that New Mexico recognizes valid common law marriages from other jurisdictions, the government initially contends that the district court erred when it determined that a valid marriage existed between the Jarvisons because New Mexico law does not recognize common law marriage. We reject the government's first argument for the reasons stated above. Additionally, the government contends that there was insufficient evidence to support the district court's conclusion that the Jarvisons had a traditional ceremonial marriage under the Navajo Code. Moreover, because the Jarvisons had not completed the procedure under Navajo law to validate a traditional or common law marriage, the government argues that their marriage was invalid.

In evaluating the government's contentions, we observe that the district court could have produced a more robust order detailing its findings of fact and evidentiary basis similar to the detailed findings of fact and conclusions of law in *Beller v. United States,* 221 F.R.D. 679 (D.N.M.2003). Nonetheless, on our review of the record, we conclude that the evidence in the record is sufficient to establish a valid marriage between the Jarvisons. *See United States v. Taylor,* 97 F.3d 1360, 1364 (10th Cir.1996) (holding that despite a trial court's failure to make specific factual findings, an appellate court is free to affirm on any grounds for which there is sufficient record to permit conclusions of law).

In this case, Esther testified to having married Jarvison in a traditional Navajo ceremony on June 25, 1953 at Coyote Canyon within the Navajo Reservation. She identified the particular Navajo medicine man who performed the ceremony. She

37

« up

answered yes when the court asked her "[is] that a traditional marriage under Navajo law?" Although the government makes much of the fact that Esther did not testify to the exact requirements outlined in the Navajo Code provision, the statute itself requires only that the couple "engage in a traditional Navajo wedding ceremony which shall have *substantially* the following features...." Navajo Code, tit. 9 § 3D (emphasis added). Esther's testimony and the inferences arising therefrom support the district court's conclusion that a valid traditional Navajo marriage ceremony occurred in 1953, crediting "due regard to the district court's opportunity to judge witness credibility." *Manning,* 146 F.3d at 813. Under Navajo law, such an unlicensed traditional marriage occurring prior to 1954 was valid. *See* Navajo Tribal Council Res. CF-2-54, Feb. 11, 1954; *see also* Navajo Code, tit. 9 § 3D.

Review of the government's evidence of record further supports the conclusion that the Jarvisons' ceremony would be considered valid under Navajo law. In explaining the Navajo Nation records concerning the Jarvisons, Ms. Gertrude Peshlakai, a statistics technician from the Navajo Nation, testified that the Tribe recognized the marriages of many of the elderly Navajos who were married in traditional ceremonies in the forties and fifties who often did not have their marriages validated by the Tribe either as a traditional ceremony or as a common-law marriage. Although recognizing the internal inconsistencies on the Navajo Records,[12] Peshlakai testified that the census records indicated to her that "the individual might have had a traditional wedding." Her answers to somewhat tortured questions by counsel are relevant to our evaluation:

33 *Question by defense counsel:* "Okay, And what would that mean, then, in terms at least the tribe recognizing that term of wife in the context of whether or not there's a real marriage, in a traditional sense? What does that mean to me?"

34 *Peshlakai:* "That means they had a traditional wedding."

Defense Counsel: "And does—you used the term `elderlies' before. But was it prevalent in the forties and fifties that on occasion people who were married in a traditional sense on the Navajo Reservation did not obtain what you call the paperwork to actually get a marriage license like it's done now?"

36 *Peshlakai:* "Yes."

Defense Counsel: "The tribe, I take it, recognizes those, quote, elderlies as married, don't they?"

38 *Peshlakai:* "Yes."

39 Thus, testimony from the government's witness establishes that the Tribe does recognize "elderlies," such as Esther and Ben Jarvison, as married even if the marriage is not validated or licensed.

40 The Jarvisons' failure to license or validate their 1953 traditional marriage does not result in their marriage being invalid under Navajo law. As noted above, the 1954 Navajo Tribal Council Resolution explicitly validated unlicensed traditional marriages performed prior to 1954. Navajo Tribal Council Res. CF-2-54, Feb. 11, 1954.

41 Additionally, Navajo law requires that a traditional tribal marriage must be terminated by formal divorce even if the marriage is not recorded or validated. *See In the Matter of Validation of Marriage of Slowman,* 1 Navajo Rptr. 142 (Navajo Ct. App.1977);[13] *In the Matter of Documenting the Marriage of Slim,* 3 Navajo Rptr.

42

« up

218 (Crownpoint D. Ct.1982);[14] *see also* Navajo Code, tit. 9 § 407 (1993) ("No person, married by Tribal custom, who claims to have been divorced shall be free to remarry until a certificate of divorce as been issued by the Courts of the Navajo Nation."); Tribal Council Resolution CJ-3-40, July 18, 1944. To the extent that the government claims that the relationship with Esther's daughter constituted a common-law marriage extinguishing Ben and Esther's traditional marriage, the lack of a divorce ending the original 1953 marriage defeats this argument.

Taken as a whole, the Navajo Domestic Code takes care to maintain the validity of prior marriages that would not necessarily meet current code requirements for marriage.[15] In addition to longstanding Navajo common law and current Navajo Code recognizing unlicensed or unvalidated traditional marriages performed at times when licenses were ostensibly required,[16] current Navajo law does not necessarily require a license.[17] Thus, the government's contention that the Jarvisons' marriage is invalid because they did not have their marriage validated or licensed fails under Navajo law. Despite the district court's failure to make specific findings of fact underpinning its determination of a valid marriage, sufficient evidence is in the record validating the Jarvisons' marriage for the purposes of the spousal testimonial privilege.

43 The government also conceded at oral argument, to our mind, properly so, that if the case were remanded to the district court, the Jarvisons could establish the elements of common law marriage. The government's own proffer in its motion for reconsideration establishes that Esther and Jarvison were cohabiting from 1953 to 1980, and again from 2000 onwards, including the date of the alleged abuse in 2002 and the criminal investigation in 2003. The vital records and investigative reports produced by the government show that Esther and Jarvison held themselves out as husband and wife, and Esther Jarvison testified under oath that she was Jarvison's wife. Although it is true that the burden of establishing the applicability of a privilege is on the party seeking to assert it, *Motley v. Marathon Oil Co.,* 71 F.3d 1547, 1550 (10th Cir.1995), we conclude that standard was met here.

III

44 The government invites us to create a new exception to the spousal testimonial privilege akin to that we recognized in *United States v. Bahe,* 128 F.3d 1440 (10th Cir.1997). In *Bahe,* we recognized an exception to the marital communications privilege for voluntary spousal testimony relating to child abuse within the household. Federal courts recognize two marital privileges: the first is the testimonial privilege which permits one spouse to decline to testify against the other during marriage; the second is the marital confidential communications privilege, which either spouse may assert to prevent the other from testifying to confidential communications made during marriage. *See Trammel,* 445 U.S. at 44-46, 100 S.Ct. 906; *Bahe,* 128 F.3d at 1442; *see also Jaffee v. Redmond,* 518 U.S. 1, 11, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) (recognizing justification of marital testimonial privilege as modified by *Trammel* because it "furthers the important public interest in marital harmony). In order to accept the government's invitation, we would be required not only to create an exception to the spousal testimonial privilege in cases of child abuse, but also to create an exception—not currently recognized by any federal court—allowing a court to compel adverse spousal testimony."

45 The district court in this case held that Esther and Ben Jarvison "have a valid marriage and that Esther Jarvison wishes to invoke the privilege against adverse spousal testimony, pursuant to *Trammel v. United States,* 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980)." The Court in *Trammel* specifically held that "the

« up witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying." *Trammel,* 445 U.S. at 53, 100 S.Ct. 906; *Bahe,* 128 F.3d at 1442. Although the "Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges in federal criminal trials governed by the principles of the common law as they may be interpreted ... in the light of reason and experience," *Trammel,* 445 U.S. at 47, 100 S.Ct. 906(internal citations and quotations omitted), we do not consider this to be the appropriate case to examine whether the holding in *Trammel* can or should be reexamined. Accordingly, we reject the government's request to create an new exception, and AFFIRM.

Notes:

1

At the time of the hearing, Jane Doe's father was also being investigated for raping Jane Doe. This alleged crime, however, occurred outside the jurisdiction of the United States and was pending prosecutorial decision in the Eleventh Judicial District Attorney's Office in Gallup, New Mexico. The existence of this additional abuse allegation is relevant, however, in the current prosecution as it could potentially provide Jarvison's defense with an explanation for the sexual knowledge of the minor victim

2

The government contends that the district court's denial of the opportunity to cross examine Esther on her marriage was prejudicial. Unless we are convinced that the ruling of the court was prejudicial, the trial court is the governor of the trial with the duty to assure its proper conduct and the limits of cross-examination necessarily lie within its discretion*See United States v. Begay,* 144 F.3d 1336, 1339 (10th Cir.1998) (review of limitations on cross-examination of witnesses for abuse of discretion); *United States v. Jackson,* 482 F.2d 1167 (10th Cir.1973) (exercise of discretion on extent of cross-examination should not be overruled unless we are convinced the court's ruling is prejudicial). Although the district court should have allowed the Government to cross-examine Esther on her claim of marriage, its failure to do so must be evaluated for prejudice after considering the totality of the evidence presented on the marriage. In addition to allowing the government to present a witness and records from the Navajo Vital Records Office, the district court allowed the government to present a proffer of what they believed the evidence would show, as well as allowing the government to supplement the record in its motion for reconsideration. Although the court itself conducted the examination of Esther and limited the cross examination due to the witness's age and frailty, it provided the government with a full opportunity to call other witnesses and to present a proffer of what they believed Esther's testimony would establish. After evaluating the record, we are not convinced that the court's ruling under these circumstances was prejudicial.

3

The government's own evidence directly contradicts this argument. In the government's supplement to the record on its motion to reconsider, allowed by the district court, the FBI statement concerning Esther's interview on April 25, 2003 reflects that long before any indication of a criminal prosecution, Esther told the investigating agent that she and the defendant had been "married for over 50 years" and further in its motion for reconsideration, the government stated that Esther had been living with Jarvison since 2000. Even presuming the facts adduced by the government as true, the government makes no showing that would support a conclusion that the marriage was either a sham or moribund

4

Available at:*http:// www.tribalresourcecenter.org/opinions/opfolder/1989. NANN.*

0000013.htm (as visited on May 3, 2005, and available in the Clerk of Court's case file).

« up

5

Navaho Code (NNC) tit. 9, § 1, provides: "Validity generally. A. Marriages contracted outside of Navajo Indian Country are valid within Navajo Indian Country if valid by the laws of the place where contracted. B. Marriages may be contracted within Navajo Indian Country by meeting the requirements of 9 NNC §§ 3 and 4."

6

"Traditional Navajo society places great importance upon the institution of marriage. A traditional Navajo marriage, when consummated according to a prescribed elaborate ritual, is believed to be blessed by the `Holy People.' This blessing ensures that the marriage will be stable, in harmony, and perpetual."*Navajo Nation v. Murphy,* 6 Navajo Rptr. 10, 13 (Navajo 1988). Also available at: *http:// www.tribalresourcecenter.org/opinions/opfolder/1988. NANN.0000001.htm* (as visited on May 3, 2005, and available in the Clerk of Court's case file).

7

The Navajo inclusion of a license requirement was established in response to difficulties experienced by tribal members attempting to establish rights to government pensions and survivor's benefits under Social Security and other compensation programs*See* Navajo Tribal Council Res. CAP-36-80 (Apr. 30, 1980).

8

Available at:*http:// www.tribalresourcecenter.org/opinions/opfolder/1990. NANN.0000016.htm* (as visited on May 3, 2005, and available in the Clerk of Court's case file).

9

Also available at:*http:// www.tribalresourcecenter.org/opinions/opfolder/1969. NANN.0000001.htm* (as visited on May 3, 2005, and available in the Clerk of Court's case file).

10

Also available at:*http:// www.tribalresourcecenter.org/opinions/opfolder/1979. NANN.0000007.htm* (as visited on May 3, 2005, and available in the Clerk of Court's case file).

11

In*Murphy,* the court recognized that marriage was an important aspect of Navajo culture and that the legal doctrine of spousal privilege was justified by Navajo society's interest in preserving the harmony and sanctity of marriage. *Murphy,* 6 Navajo Rptr. at 13. Also available at: http://www.tribalresourcecenter.org/opinions/opfolder/1988. NANN.0000001.htm (as visited on May 3, 2005, and available in the Clerk of Court's case file).

12

The record listed "Esther Jarvison" as "Jarvison's wife" but did not list any information as to the date or type of marriage. Although the court recognized that other inaccuracies existed on the record, such as listing all of Jarvison's children as those of Esther and Jarvison when some were those of Jarvison and Esther's daughter, it held that merely because an official record did not conclusively establish their "marriage," it did not mean that they were not married under Navajo tradition and law. Because Navajo society is matrilocal and matrilineal, traditionally, the father and children live with the mother's family, children are said to "belong" to the mother's clan*See Apache v. Republic National Life Insurance Co.,* 3 Nav. Rptr. 250, 252 (1982). Also available at: *http://www.tribalresourcecenter.org/opinions/opfolder/1982. NANN.0000059.htm* (as

visited on May 3, 2005, and available in the Clerk of Court's case file).

« up

13 Also available at:*http:// www.tribal-institute.org/opinions/1977.NANN.0000008. htm* (as visited on May 3, 2005, and available in the Clerk of Court's case file).

14 Also available at:*http:// www.tribal-institute.org/opinions/1982.NANN.0000060.htm* (as visited on May 3, 2005, and available in the Clerk of Court's case file).

15 For example, in § 4 of the NNC, which detail the requirements to marry generally, both portion of the Navajo Code requiring that Navajo Nation members who wish to marry may not be from the same maternal clan or biological paternal clan, or may not be related within the third degree of affinity within certain clans specifically state that "the provisions of this subsection shall not affect the validity of any marriages legally contracted and validated under prior law." Navajo Code, tit. 9, § 4(D) and (E)

16 Even within the portion of the Navajo Nation Code dealing with validation of marriages and granting jurisdiction to the Family Courts of the Navajo Nation and to the Peacemaker Courts, upon referral from the Family Courts, states that "[m]arriages need not be solemnized by church, state, or Navajo custom ceremony to be recognized as valid under § 3(D) of this part." Navajo Code, tit. 9, § 8 (§ 3(D) deals with traditional Navajo marriage)

17 "Licenses are not required in order to establish a marriage under the provisions of this part," Navajo Code, tit. 9, § 5(A), and failure to return the license to the Navajo Office of Vital Records within 30 days "shall not affect the validity of any marriage." Navajo Code, tit. 9, § 7B

ANDERSON, Circuit Judge, dissenting.

The majority opinion holds that the district court correctly found that Esther had met her burden to prove entitlement to the spousal testimony privilege. Because I believe that the majority fails to actually put Esther to that burden, fails to acknowledge that the district court crippled the government in its effort to counter that burden by refusing to permit the government to cross-examine Esther, and minimizes the significance of Jarvison's lengthy relationship with Esther's daughter, I respectfully dissent.

The majority acknowledges that the person seeking to assert an evidentiary privilege bears the burden of establishing its applicability. *Motley v. Marathon Oil Co.,* 71 F.3d 1547, 1550 (10th Cir.1995). However, the sum total of the relevant testimony presented by Esther, the person invoking the spousal testimony privilege in the face of the government's motion to compel that testimony, was as follows:

THE COURT: Okay. When were you married?

50 THE WITNESS: June 25 — where?

51 THE COURT: No. When?

THE WITNESS: June 25, 1953.

THE COURT: Okay. And where were you married?

64
65
« up

THE WITNESS: Coyote Canyon.

THE COURT: Is that on the Navajo Reservation?

THE WITNESS: Navajo Reservation.

THE COURT: By whom were you married?

THE WITNESS: Oh, a person, John Venson.

59 THE COURT: Is he a Navajo medicine man?

60 THE WITNESS: Yes.

THE COURT: Okay. Is that a traditional marriage under Navajo law?

THE WITNESS: Yes.

63 Appellant's App. at 87-90. The court then declared "Okay. That's good enough for me." *Id.* at 90. When the government sought to cross-examine Esther, the court responded, "No, I've heard enough. I'm not going to intrude any further on her marriage." *Id.* The one witness the government was permitted to introduce was unable to confirm the Navajo Tribe's view of the existence and validity of the purported marriage of Esther and Jarvison, although the district court essentially disregarded the witness's view in any event:

> [I]t doesn't make any difference, in my judgment, under this kind of procedure whether the tribe thinks they're married or not. If they think they are married, and they thought they were married by a tribal medicine man, and nobody made a record of it, that doesn't mean that they're not married.
>
> *Id.* at 95.

Thus, the district court held that Esther had carried her burden of proving entitlement to the spousal privilege because she simply stated she had been married in a Navajo traditional ceremony, although no documentary evidence clearly supported the existence and validity of that marriage. The majority attempts to bolster Esther's otherwise bare-bones testimony by claiming that the evidence need only show "substantial" compliance with the requirements under the Navajo Code for a valid traditional marriage. But Esther's testimony hardly shows even a substantial compliance—all she stated was that she had been married by a man she said was a Navajo medicine man and that she believed it was a traditional ceremony. Not a shred of evidence was presented with respect to the remaining requirements of Navajo Code, tit. 9, § 3 for establishing the performance of a traditional Navajo wedding ceremony.

67 Furthermore, the district court severely handicapped the government in its effort to rebut her assertion of the existence of a valid marriage when it refused to let the government cross-examine Esther. The majority concedes that "the district court should have allowed the Government to cross-examine Esther on her claim of marriage" but then states that "its failure to do so must be evaluated for prejudice after considering the totality of the evidence presented on the marriage." Maj. Op. at 1224, n. 2. While the majority notes that the government was afforded the opportunity to present a witness whose testimony was, quite simply, inconclusive on whether there was a valid marriage between Esther and Jarvison, and to present a proffer of what they believed Esther's testimony would establish, the government

68

« up

was not afforded the opportunity to test Esther's credibility. Since the district court had already put everyone on notice that Esther's testimony would be crucial, it was clearly prejudicial to prohibit the government from cross-examining her in order to probe her credibility.

Finally, I disagree with the majority's conclusion that the totality of the evidence presented concerning the existence of a valid marriage suffices to establish that the marriage existed. The majority summarily dismisses the fact that, after cohabiting with Esther for some twelve years, Jarvison then left Esther, began cohabiting with Esther's daughter from a previous marriage, and had four children with the daughter over a fifteen-year span of cohabitation. Esther and Jarvison's "reunion" following that lengthy relationship between Jarvison and Esther's daughter has been sporadic, at best. The majority concludes that "the lack of a divorce ending the original 1953 marriage defeats th[e] argument" that the relationship with Esther's daughter constituted a common-law marriage which extinguished any prior marriage. Maj. Op. at 20. This could lead to absurd results — an allegedly valid marriage of short duration could be followed by a thirty-year common law marriage, yet the spouse from the first marriage could claim a spousal testimonial privilege while the common-law spouse from the second relationship could not. The majority is willing to overlook the need for formalities, records, and documents when it comes to determining the creation of a marriage but strictly enforces such requirements when it comes to terminating a marriage. That fails to take account of the realities of this case. I therefore respectfully dissent.

116 Wn.2d 13
CLIFFORD W. DAVIDSON v. THE STATE OF WASHINGTON
802 P.2d 1374

[Cite as 116 Wn.2d 13, CLIFFORD W. DAVIDSON v. THE STATE OF WASHINGTON]

[No. 55965-1. En Banc. Supreme Court January 10, 1991.]

CLIFFORD W. DAVIDSON, ET AL, Appellants, v. THE STATE OF WASHINGTON, ET AL, Respondents.

[1] State - Deeds - Construction - In Favor of State. When a deed or grant from the State fails to define or limit the boundary of the grant, the boundary will be interpreted most strongly against the grantee.

[2] Waters - Boundaries - Harbor Lines - Inner Harbor Line - Establishment by State - Line of Navigability - Relationship. In exercising its power under Laws of 1913, ch. 153, § 1, p. 667 to establish definite boundaries to second class shorelands by fixing the inner harbor line, the State is not required to fix the inner harbor line coincident with an objectively defined line of navigability.

[3] Waters - Boundaries - Harbor Lines - Inner Harbor Line - Establishment by State - Line of Navigability - Review. A court will review the State's establishment of an inner harbor line fixing the waterward boundary of previously sold shorelands to determine whether the State acted in arbitrary and fraudulent disregard of the line of navigability.

[4] Waters - Boundaries - Harbor Lines - Inner Harbor Line - Establishment by State - Standard of Review. A party challenging the State's establishment of an inner harbor line has the burden of showing an abuse of discretion by clear and convincing evidence.

[5] Equity - Laches - Elements - In General. The doctrine of laches applies as a defense if the plaintiff's unreasonable delay in

---

commencing the action, despite knowing facts constituting the cause of action or having a reasonable opportunity to discover such facts, resulted in damage to the defendant.

[6] Equity - Laches - Elements - Delay - Laws Affecting Property Rights. For purposes of unreasonable delay causing property owners to lose their right of action under the doctrine of laches, public laws provide an adequate basis for property owners to know of an invasion of their property rights.

[7] Equity - Laches - Elements - Prejudice - Loss of Evidence. For purposes of the doctrine of laches, a defendant is prejudiced by an unavoidable loss of evidence caused by the plaintiffs delay in initiating an action.

[8] Waters - Boundaries - Harbor Lines - Challenge - Nature of Action. An action challenging a harbor line established by the Harbor Line Commission is not in the nature of a quiet title or ejectment action since, if successful, it results in the invalidation of the harbor line, not a grant of title to a specific line to the plaintiff.

[9] Evidence - Review - Harmless Error - Outcome of Trial. The exclusion of a witness's testimony constitutes reversible error only if the admission of such testimony, construed most favorably toward the appellant, reasonably might have changed the outcome of the case.

[10] Trial - Speculative Issue - In General. An issue involving purely speculative matters is not ripe for judicial resolution.

DORE and DURHAM, JJ., did not participate in the disposition of this case.

Nature of Action: Owners of a marina on Lake Washington claimed that the State had erred in 1921 when it

established the location of the inner harbor line closer to shore than the line of navigability.

Superior Court: The Superior Court for King County, No. 83-2-02711-0, James J. Dore, J., on December 12, 1988, granted a summary judgment upholding the location of the inner harbor line and granting the marina owners a navigational easement across the State-owned harbor area.

Supreme Court: Holding that the State had not arbitrarily and fraudulently disregarded the line of navigability

---

15

when it fixed the inner harbor line, that the plaintiffs' claims were barred by laches, and that the trial court had properly denied a jury trial and excluded a witness's testimony, but that the issue of a navigational easement was not ripe for judicial resolution, the court affirms that portion of the judgment establishing the location of the inner harbor line and vacates that portion of the judgment granting a navigational easement.

David Joseph Smith (of Livengood, Silvernale, Carter & Tjossem), for appellants.

Kenneth O. Eikenberry, Attorney General, and Jay D. Geck and Mark S. Green, Assistants, for respondents.

DOLLIVER, J. -

Plaintiffs Clifford, Dorothy, and Edwin Davidson seek direct review of the trial court's decision rejecting their challenge to the location of the inner harbor line defining the waterward boundary of their shorelands. Plaintiffs assert the inner harbor line was improperly drawn in 1913 so as to deprive them of access to navigable water. Defendant State of Washington cross-appeals the trial court's declaration of a navigational easement across the State-owned harbor area in favor of plaintiffs. We hold for the State.

Plaintiffs own and operate a marina in the Kenmore area of Lake Washington. When plaintiffs purchased their property in 1961, they believed they were purchasing all of the uplands (dry land bordering the lake) and abutting shorelands (submerged land out to the State-owned harbor area) encompassing the marina improvements. However, in the mid-1960's, the Port of Seattle informed plaintiffs their docks extended beyond the inner harbor line into the State-owned harbor area and that consequently a lease from the State was required. Plaintiffs challenged the location of the inner harbor line and refused to enter a lease. In 1982, the Port of Seattle announced its intention to lease the disputed harbor area to the neighboring marina. In February 1983, plaintiffs commenced this quiet title action.

16

In the Washington State Constitution, adopted in 1889, the State claimed ownership over all submerged lands in navigable waters up to and including the line of ordinary high water. Const. art. 17, § 1. The declaration of State ownership divested upland owners of all riparian rights, including the right of access to deep water. Eisenbach v. Hatfield, 2 Wash. 236, 26 P. 539 (1891). The constitution did not, however, prohibit the State from subsequently selling such submerged lands and rights. The first Legislature authorized the sale of tideland and shoreland and provided a purchase preference to the abutting upland owners. Laws of 1889-90, ch. 14, p. 431.

Under the constitutional scheme, three distinct zones were to be created in navigable waters. Article 15 directed the Legislature to appoint a Harbor Line Commission which would, at its discretion, establish two harbor lines in navigable waters. The Commission was empowered to establish an "outer harbor line" beyond which the State would be forever prohibited from granting private rights. Within the outer harbor line the Commission was to designate an "inner harbor line". The area between these two lines was designated as the "harbor area" and was originally required to be between 50 and 600 feet in width. Ownership of the harbor area was also reserved for the State and "forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce." Const. art. 15, § 1. Although prohibited from permanently granting rights in the harbor area, the State was empowered to lease the harbor area to private persons for periods up to 30 years. Finally, the area inside the inner harbor line was designated as either shorelands (water not subject to tidal flow) or tidelands (water subject to tidal flow) and was the area subject to sale to private parties. Shorelands and tidelands are designated as first or second class with first class properties originally being those located within the corporate limits of any city or 1 mile thereof. See Const. arts. 15, 17; RCW 79.90.030-.050; RCW

79.90.090; Johnson & Cooney, Harbor Lines and the Public Trust Doctrine in

17

Washington Navigable Waters, 54 Wash. L. Rev. 275, 290 (1979).

In 1905, the State sold the shorelands here in question to plaintiffs' remote predecessor in interest. The deed described the conveyed property simply as "[a]ll shore lands of the second class . . . in front of, [or] adjacent to" lots 1 and 2 of section 11. As with most second class shorelands sold during that time, the deed left the waterward boundary of the shorelands undefined.

In 1911, construction began on a set of locks (the Chittenden Locks) and a canal to connect Puget Sound to Lake Washington. As a result, the water level in Lake Washington was to be lowered approximately 8 feet. Before the lake was lowered, the State brought suit to determine ownership of the new shorelands to be created. State v. Sturtevant, 76 Wash. 158, 135 P. 1035 (1913). After trial, but before the appeal was decided by the Supreme Court, the Legislature passed a statute establishing the waterward boundary for previously sold second class shorelands in Lake Washington at the line of navigability "as the same shall be found in such waters after such lowering". However, the act was expressly inapplicable to portions of second class shorelands subsequently selected by the Commissioner of Public Lands for harbor areas, docks, wharves, or other public purposes. Laws of 1913, ch. 183, § 1, p. 667.

The 1913 statute directed the Commissioner of Public Lands to survey Lake Washington and designate suitable areas for harbor areas, slips, wharves, warehouses, and other public purposes. Laws of 1913, ch. 183, § 2, p. 668. In 1914, the Harbor Line Commission approved the harbor areas and harbor lines selected by the Commissioner. The 1914 plat established only a "pier head line" in front of plaintiffs' property. However, the 1914 plat was immediately challenged, and this court voided all reservations within previously sold shorelands as an impermissible intrusion into the owners' fee simple title and voided all pierhead lines as being without authority. Puget Mill Co. v.

18

State, 93 Wash. 128, 160 P. 310 (1916). See also Puget Mill Co. v. State, supra at 141-42 (Chadwick, J., concurring).

The Legislature responded in 1917 by directing the Commissioner of Public Lands to prepare two new plats of Lake Washington. The first plat was to establish harbor lines in front of such previously sold second class shorelands as deemed necessary for the use of the public as harbor areas. Laws of 1917, ch. 150, § 1, p. 612. The harbor lines in question here were established pursuant to section 1 of the 1917 statute and adopted by the Public Lands Commission in 1921.

Kenmore is located at the extreme northeast end of Lake Washington on a generally shallow portion of the lake. Plaintiffs' property is located adjacent to the mouth of the Sammamish River. The inner harbor line segment bordering this section of the lake ranges from a depth of 10 feet at its western edge and 6 feet at its eastern edge to a minimum of 2 1/2 feet near a bulge in the shoreline. Where the line fronts plaintiffs' property, the depth ranges from approximately 4 to 6 feet. As drawn, the harbor lines help preserve access to the mouth of the Sammamish River.

Following initiation of this quiet title action, both parties sought partial summary judgment. The State's motion was granted. The court held plaintiffs' predecessor in interest took subject to the power of the State to set harbor lines in front of their shorelands. The court further held that the State is not required to establish the inner harbor line coincident with the line of navigability, and the standard of review for Harbor Line Commission action is arbitrary or fraudulent. At trial, the court determined that the Harbor Line Commission had not acted arbitrarily or fraudulently in establishing the inner harbor line. The trial court further held that plaintiffs' challenge was barred by the doctrine of laches. Finally, the trial court declared a navigational easement benefiting plaintiffs for access to deep water across the State-owned harbor area. This appeal followed.

19

The primary issue before us is whether the Harbor Line Commission was required to establish the inner harbor line coincident with an objectively defined line of navigability. Plaintiffs characterize the case as one of contractual intent.

They contend the overwhelming evidence shows the parties intended the shorelands' waterward boundary to be the line of navigability, which would be determined objectively based on the depth practicably necessary to reach deep water. The State responds by arguing the controlling legislative intent was to convey shorelands with a presently undefined boundary subject to the State's power subsequently to establish an inner harbor line as the boundary.

Plaintiffs' interpretation of contractual intent relies primarily on excerpts from this court's decision in State v. Sturtevant, 76 Wash. 158, 135 P. 1035 (1913). In quieting title to shorelands created by the lowering of Lake Washington, the court found "[t]he value of shore lands in most instances lies in the fact that ownership gives access to deep or navigable water. The state has sold, and the purchaser has bought, believing this to be true." Sturtevant, 76 Wash. at 165. Accordingly, the court confirmed the existing shoreland owners' title to the uncovered shorelands as well as their right to improve and build docks up to the line of navigation as it would exist in the lowered lake. Although the court recognized shorelands were subject, under the 1913 statute, to the right of the State to establish a harbor line fixing the waterward boundary, the court viewed the shoreland owners' rights as remaining relatively unaffected. The court explained,

Now, theoretically, that [boundary] line is already fixed. It is the line of navigability. Although not surveyed and put on paper, the officers of the state are presumed to find that line and define it when establishing the inner harbor line.

Sturtevant, 76 Wash. at 166. Plaintiffs interpret the court's language in Sturtevant to establish a mutual intent recognizing an objectively determinable waterward boundary providing access to deep water.

20

[1] Unfortunately, plaintiffs' interpretation of contractual intent relies on only a few isolated excerpts from the Sturtevant opinion. It fails to take into account the Sturtevant opinion as a whole, subsequent cases, and the statutes. Furthermore, ordinary rules of contract interpretation do not apply here. Where a deed or grant from the State fails to define or limit the boundary of the grant, the boundary will be interpreted most strongly against the grantee rather than the grantor state. Pearl Oyster Co. v. Heuston, 57 Wash. 533, 538, 107 P. 349 (1910).

Article 17, section 1 undeniably "destroyed all riparian right in tide and shore lands, and affirmed the right of the state to absolutely control and dispose of these lands in any way . . . the legislature might ordain." Sturtevant, 76 Wash. at 163. The State acquired complete discretion to declare what portions of navigable lake beds would constitute shorelands and be subject to sale to private parties. Sturtevant, 76 Wash. at 167.

[2] Pursuant to this broad power, the Legislature elected to sell second class shorelands, including those in question here, without a definite waterward boundary. This approach allowed the State to fix the waterward boundary at a later date by establishing an inner harbor line. This court has consistently recognized the State's undeniable power to establish definite boundaries to second class shorelands by setting the inner harbor line. Sturtevant, 76 Wash. at 166; Puget Mill, 93 Wash. at 136. The Legislature expressly reserved this right in the 1913 statute extending shorelands to the line of navigation in the lowered lake. Laws of 1913, ch. 183, § 1, p. 667.

Plaintiffs do not challenge the authority of the State to establish harbor lines, but rather argue the line must coincide with an objectively fixed line of navigation. On rehearing, the Sturtevant court clarified its earlier ruling to make clear that the harbor line need not always coincide with an objective line of navigability. The court held:

21

Inasmuch as this court has held that harbor lines do not necessarily have to be laid in deep water; and the further fact that harbor lines cannot always be made to follow the sinuosities of the line of navigability, as that term is defined at common law, that the inner harbor line may at times be in deep water and at other times in shallow water, but wherever fixed, that which is within it is land, and that without it is water.

(Citation omitted.) Sturtevant, 76 Wash. at 178-79. The court clarified its holding in order to avoid the literalist interpretation urged by plaintiffs. The waterward boundary to second class shorelands did not exist on the ground until the State established the inner harbor line. In fact, the original Sturtevant opinion makes clear the court did not conceive of the ordinary line of navigation as an objectively fixed line. The court believed it was the placement of the inner harbor

line which fixed the line of navigability, not vice versa. Sturtevant, 76 Wash. at 173 ("the line of navigability as it may be finally fixed by or through or in consequence of the act of its grantor, the state). Once the harbor line was established, "the water boundary theretofore open would be forever settled." Sturtevant, 76 Wash. at 168.

The establishment of harbor lines was again considered in Puget Mill Co. v. State, supra, where the court held that shoreland owners hold title inside the harbor line in fee simple absolute. Puget Mill, 93 Wash. at 134-35. The court, however, expressly distinguished the question of absolute title from establishment of the boundary to that title. Definition of the outer boundary was to be accomplished solely by establishment of harbor lines by the proper state authority. The court expressly held the State's broad discretion to limit the shoreland subject to sale by establishing harbor lines in unsold shorelands in advance of the sale was equally applicable to previously sold shorelands. Puget Mill, 93 Wash. at 135-36. Therefore, the State was not bound by any preexisting objective boundary in setting the inner harbor line.

22

Our most recent consideration of the proper shoreland boundaries on Lake Washington involved competing private shoreland interests within a narrow bay. Grill v. Meydenbauer Bay Yacht Club, 61 Wn.2d 432, 378 P.2d 423 (1963). In setting that boundary in shallow water, we rejected a "standardized" harbor line formula as leading to unconscionable results. Grill, 61 Wn.2d at 436. The court stated:

[P]hysical characteristics of the bays, coves, and inlets present so many peculiarities that a formula which works well in one situation may be inequitable in another. It is not a matter of applying a particular formula and letting the chips fall where they may.

Grill, 61 Wn.2d at 437-38. The harbor line adjacent to plaintiffs' property here must deal with several such "peculiarities". Plaintiffs' shorelands are in a generally shallow portion of the lake, near the mouth of the Sammamish River, and adjacent to a significant bulge in the shoreline.

This court's flexible approach in Sturtevant, Puget Mill, and Grill and our outright rejection of a standardized formula establishes that the Harbor Line Commission is not bound by a neatly defined definition of an objective line of navigability. Pursuant to the State's complete discretion to determine the extent of shorelands subject to sale to private parties, second class shorelands were sold with the waterward boundary undefined, but subject to the power and discretion of the State to subsequently fix that boundary by establishing the inner harbor line.

[3] While the inner harbor line need not coincide with some objectively defined line of navigability, however, the State's discretion in establishing harbor lines in previously sold shorelands is not absolute. In Puget Mill, the possibility of judicial review for abuse of discretion was expressly left open. The court held:

What the remedy of the owner of the shore lands might be in case of the establishment of harbor areas in front of such shore lands in arbitrary and fraudulent disregard of the line of navigability is not involved in this controversy. We do not want to

---

23

be understood as holding that there would be no remedy in such a case.

Puget Mill, 93 Wash. at 136-37. We now expressly adopt the standard which prohibits the State from establishing the inner harbor line in previously sold shorelands in arbitrary and fraudulent disregard of the line of navigability.

While not absolutely controlling, access to deep or navigable water was an integral part of the original grant of shorelands.

The value of shore lands in most instances lies in the fact that ownership gives access to deep or navigable water. The state has sold, and the purchaser has bought, believing this to be true.

Sturtevant, 76 Wash. at 165. The thrust of our holdings, cited above, is that the line of navigability is only one

factor, albeit an important one, to be considered by the Harbor Line Commission in setting harbor lines. The arbitrary and fraudulent disregard for the line of navigability standard establishes a harmonious balance between the Commission's discretion established in Sturtevant, Puget Mill, and Grill to deviate from the line of navigability in order to compensate for geographic peculiarities and the legislative purpose in granting second class shorelands to provide access to navigable water as recognized in Grill, 61 Wn.2d at 435, and Sturtevant, 76 Wash. at 165. By specifically adopting the line of navigability as a reference point, this standard of review overcomes plaintiffs' objections that the asserted State power to establish harbor lines is without limit and authorizes the State to totally divest shoreland owners of their property.

[4] Despite plaintiffs' arguments, we cannot say the Harbor Line Commission abused its discretion and established the inner harbor line fronting plaintiffs' shorelands in arbitrary and fraudulent disregard of the line of navigability. The placement of harbor lines is a discretionary act committed to the Harbor Line Commission; the challenging party has the burden of showing an abuse of discretion by

---

24

clear and convincing evidence. Schuh v. Department of Ecology, 100 Wn.2d 180, 186, 667 P.2d 64 (1983).

Plaintiffs' challenge to the arbitrariness of the inner harbor line relies primarily on the Puget Mill and Grill testimony of Chief Engineer Edward C. Dohm and General H.M. Chittenden, who both testified the line of navigation in Lake Washington was 18 feet. Dohm further testified in Grill:

In a few instances in Lake Washington where the inner harbor line was established in shallow water for an extended distance, such as appears in the Kenmore Section and Mercer Slough Section, I consider said line was subject to correction and relocation in waters of greater depth by the owners of said shorelands if they desired to do so.

We are unconvinced this testimony establishes an arbitrary and fraudulent disregard for the line of navigability. In fact, the placement of these lines appears to correspond to the variety of geographic peculiarities and administrative efficiencies emphasized by this court in both Sturtevant and Grill. The Kenmore section is located in the shallow and narrow north end of Lake Washington. Plaintiffs' shorelands are flanked to the south by a bulge in the shoreline and to the north by the mouth of the Sammamish River. In Grill, we dealt with a similar narrow, shallow cove. In that case, this court expressly found "physical characteristics of the bays, coves, and inlets present so many peculiarities that a formula which works well in one situation may be inequitable in another." Grill, 61 Wn.2d at 437. We refused to adopt an inner harbor line tied to a specified depth and instead adopted a much shallower boundary which best afforded all shoreland owners fair access to the navigable channel. Grill, 61 Wn.2d at 438. The inner harbor line here appears to represent a similarly reasonable accommodation of geographic peculiarities. In Sturtevant, we recognized the efficiency of fixing straight harbor lines may lead to lines which sometimes rest in shallow waters and other times in deep waters. Sturtevant, 76 Wash. at 179. The shallowness of plaintiffs' shorelands is

---

25

in part due to a significant bulge in the shoreline. Furthermore, Dohm was only the engineer, not the authority charged with adoption of the lines, and his testimony is inconsistent with evidence demonstrating that, of the 36 harbor line segments established in the 1921 plat, 19 went below 8 feet.

Finally, plaintiffs' allegation of arbitrary and fraudulent disregard of the line of navigability is barred by the doctrine of laches. The trial court found the doctrine of laches to bar both substantive and procedural review of the 1921 administrative actions of the Harbor Line Commission. We find it necessary to address only the applicability of the laches doctrine to plaintiffs' procedural challenges.

[5] Laches is an equitable defense based on estoppel. A defendant asserting the doctrine of laches must affirmatively establish: (1) knowledge by plaintiff of facts constituting a cause of action or a reasonable opportunity to discover such facts; (2) unreasonable delay by plaintiff in commencing an action; and (3) damage to defendant resulting from the delay in bringing the action. Hayden v. Port Townsend, 93 Wn.2d 870, 874-75, 613 P.2d 1164 (1980).

Plaintiffs argue the State's action in drawing and adopting the 1921 harbor lines was not a sufficiently overt invasion

of their rights to initiate a delay for purposes of laches. Plaintiffs rely on Snively v. State, 167 Wash. 385, 9 P.2d 773 (1932). Snively involved a successful action by owners of property bordering Angle Lake to declare the lake nonnavigable and thereby invalidate the State's article 17 claim to the beds of the lake. The State responded by asserting title to the lake bed by adverse possession by virtue of the fact shorelands around the lake had been sold and thereby State title asserted in the beds. The court rejected the State's claim, holding "[m]ere declarations are not sufficient. The mere intent to hold adversely is of no consequence." Snively, 167 Wash. at 390-91. Plaintiffs' reliance on Snively is misplaced. Snively dealt expressly with a

---

26

claim for adverse possession which requires actual possession as an element. This court found the sale of shorelands to be an insufficient act to establish actual possession over the lake bed. Snively did not relate to the validity of harbor lines, boundaries to shorelands, or harbor areas.

[6] We have expressly recognized the duty of property owners to take notice of public laws affecting the control or disposition of their property. Martin v. Seattle, 111 Wn.2d 727, 735, 765 P.2d 257 (1988). In Martin, the plaintiffs held a right of reentry to shorelands previously quitclaimed to the City of Seattle. The 1913 shoreland statute breached that right of reentry by placing use restrictions on the uncovered shorelands deeded to the City under the statute. When plaintiffs finally sought to exercise their right of reentry in 1983, this court held the right had expired.

[T]he 1913 breach was or should have been apparent to the grantor because the newly uncovered shorelands were given by the State to the City by public law. . . .

All persons are charged with knowledge of the provisions of statutes and must take notice thereof.

Martin, 111 Wn.2d at 735 (quoting 58 Am. Jur. 2d Notice § 21 (1971)). Here, that same 1913 statute plainly established the State's power to draw harbor lines in front of previously sold shorelands. Similarly, the 1921 plat establishing the inner harbor line in question was adopted as public law by the Public Lands Commission after extensive public hearings. Plaintiffs and their predecessors had a more than adequate basis to know their asserted rights had been invaded and therefore should be compelled to act.

[7] Plaintiffs also argue the State failed to meet its burden of proof as to material prejudice from the delay. The doctrine of laches commonly recognizes the unavoidable loss of defense evidence as establishing material prejudice. Hinchman v. Kelley, 54 F. 63 (9th Cir. 1893); Anderson v. Anderson, 59 Hawaii 575, 590, 585 P.2d 938 (1978). The 62-year delay in challenging the 1921 harbor lines deprived the State of substantial evidence. All those who surveyed, drew, and established the harbor area are now deceased. Expert

---

27

witnesses for both sides were unable to discover any firsthand documents settings forth the basis for the placement of the lines. The best remaining evidence relative to the establishment of the harbor lines in Kenmore is past deposition and trial testimony of Chief Engineer Dohm taken in the course of Puget Mill Co. v. State, 93 Wash. 128, 160 P. 310 (1916) and Grill v. Meydenbauer Bay Yacht Club, 61 Wn.2d 432, 378 P.2d 423 (1963). However, neither Puget Mill nor Grill involved the validity or arbitrariness of the harbor lines themselves, the State was denied the opportunity to cross-examine Dohm on those issues, and Dohm's testimony is marked by internal inconsistencies on key points. Accordingly, we find the State's ability to defend against this cause of action to have been significantly prejudiced by the lapse of more than 60 years. Therefore, we find the doctrine of laches to bar plaintiffs' claim that the inner harbor line bordering their shorelands was drawn in arbitrary and fraudulent disregard of the line of navigability.

Plaintiffs raise two additional procedural challenges which are also barred by the laches doctrine.

Plaintiffs challenge the validity of the 1921 harbor lines for procedural compliance with the statute of 1917. Plaintiffs contend the Commissioner of Public Lands failed adequately to distinguish between sold and unsold shorelands in compiling the two required plats. The record before us indicates the Commissioner compiled two plats of Lake Washington shorelands which differed only in that the second plat marked the unsold shorelands with ink. Arguably, this approach failed to satisfy the strict letter of the statute. However, the plats substantially complied with the statutory

requirements, and those who actually drafted the plats are no longer available to verify whether the process met the statutory purposes. Furthermore, any procedural imperfections could have been easily perfected in 1921 by the same people who drew the original plats. To redraw the plats at this late date would involve substantial effort and

---

28

would prejudice the State and the numerous Lake Washington shoreland owners who have acted in reliance on the plat since 1921. Therefore, plaintiffs' claim is barred by laches.

Plaintiffs also argue the harbor lines should be voided because plaintiffs' remote predecessors in interest received no contested case hearing when the lines were adopted and therefore were denied due process. Even if a contested case hearing was clearly required in this case, the evidence at trial showed Dohm held public informational meetings throughout the area, took votes, heard comments, and even changed the plat in response to comments. Unfortunately, much of the evidence which might reveal whether or not these meetings satisfied the contested case hearing requirement has been lost through the years. Accordingly, the State's ability to defend this challenge has been prejudiced by plaintiffs' delay and application of the laches doctrine is appropriate.

Plaintiffs also allege the trial court committed reversible error in striking plaintiffs' jury demand. Plaintiffs rely on RCW 4.40.060, which provides that issues of fact in an action for recovery of specific real property shall be tried by a jury, and RCW 7.28.140, which provides for a special jury verdict in an ejectment action.

[8] We find both of plaintiffs' claims to be without merit. RCW 4.40.060 plainly ties the right to a jury trial to the presence of issues of fact. However, plaintiffs' argument fails to identify a single issue of fact which could be tried to a jury. Furthermore, plaintiffs' action is not properly characterized as either a quiet title or ejectment action. This court has held the establishment of shoreland boundaries to be the exclusive dominion of the Harbor Line Commission. Grill, 61 Wn.2d at 438. Therefore, if successful, plaintiffs are limited to a ruling invalidating the existing harbor line and may not recover title to a specific line. The trial court did not abuse its discretion in denying plaintiffs' jury demand.

29

Plaintiffs finally argue the trial court's refusal to hear the testimony of John DeMeyer constitutes reversible error. DeMeyer is the head of the aquatic lands division for the Department of Natural Resources (DNR). DeMeyer would have allegedly testified that in placing the harbor line around Mercer Island in 1980, DNR believed the inner harbor line was unascertainable without the line of navigability and the line of navigability was a question of fact.

[9] The exclusion of oral testimony constitutes reversible error only if, by giving the excluded testimony the construction most favorable to the appellant, it can be reasonably said the testimony's admission may have changed the outcome of the case. In re Estate of Ward, 159 Wash. 252, 257, 292 P. 737 (1930). While DeMeyer's testimony was excluded, the court did admit testimony related to recent DNR harbor line policies from two other witnesses. DeMeyer's immediate predecessor, William Johnson, testified extensively as to the formulation of DNR's proposed harbor lines for Diamond Lake. Similarly, Harold Hartinger, an assistant attorney general from 1957 to 1968, testified as to his role in shaping DNR policy with respect to harbor lines. Therefore, the court was presented with substantial evidence as to DNR policies. DNR policy in the 1950's, 1960's, and 1970's is only remotely relevant to the validity of the Harbor Line Commission policy in 1921. In its oral opinion, the trial court expressly found that DNR policy has not been consistent in theory or application during the various administrations. Given the admission of relatively comparable evidence and the remoteness of the evidence from the 1921 Harbor Line Commission action, admission of DeMeyer's testimony would be unlikely to affect the outcome. Therefore, exclusion of the testimony does not constitute reversible error.

[10] The State cross-appeals the trial court's declaration of a navigational easement benefiting plaintiffs for access to deep water across the State-owned harbor area. The trial court entered conclusion of law 17 providing:

30

Plaintiffs have a navigational easement across the harbor area for reasonable access to deep water by virtue of their shoreland purchase. The State may not by leasing the harbor area in front of plaintiffs' shorelands deprive plaintiffs of such reasonable access to deep water.

The question of a navigational easement was neither briefed nor argued before the trial court and is unprecedented in this state's case law. Furthermore, the actual impact of a harbor area lease to plaintiffs' neighbors, and in fact the lease itself, is entirely speculative at this time. Accordingly, the question of a navigational easement to protect plaintiffs' access to deep water is not ripe for judicial resolution at this time. Thayer v. Thompson, 36 Wn. App. 794, 797, 677 P.2d 787 (1984). Therefore, we vacate the trial court's declaration of a navigational easement and reserve final consideration of the issue for another day.

We affirm the trial court's resolution of the harbor line, jury demand, and evidentiary issues and vacate the trial court's declaration of a navigational easement.

WA

Wn.2d

197 P.2d 356
ESTHER HENSGEN, AS SPECIAL ADMINISTRATRIX, ETC., ET AL., APPELLANTS, v. ROSE SILBERMAN ET AL., RESPONDENTS
1948.CA.40246; 197 P.2d 356; 87 Cal.App.2d 668

Hensgen v. Silberman, 87 Cal.App.2d 668, 197 P.2d 356 (Cal.App.Dist.2 09/21/1948)

[1] DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

[2] Civ. No. 16321

[3] 1948.CA.40246; 197 P.2d 356; 87 Cal.App.2d 668

[4] September 21, 1948

[5] ESTHER HENSGEN, AS SPECIAL ADMINISTRATRIX, ETC., ET AL., APPELLANTS, v. ROSE SILBERMAN ET AL., RESPONDENTS

[6] APPEAL from a judgment of the Superior Court of Los Angeles County. Wilbur C. Curtis, Judge.

[7] A. W. Brunton for Appellants.

[8] Newton E. Anderson and Eldon V. McPharlin for Respondents.

[9] York, P. J. Doran, J., and White, J., concurred.

[10] York

669

[11] The instant action was instituted by Esther Hensgen, as special administratrix of the estate of Nicholas Carl Hensgen, deceased; Thelma Hensgen Neal, widow of decedent, and the two minor daughters of decedent and said widow, against Rose Silberman, the alleged second wife of decedent, to recover the proceeds of a life insurance policy, certain cash, bonds and other personal property acquired during the marriage of decedent and said Rose Silberman.

[12] This appeal has been perfected by plaintiffs from a judgment in favor of defendant Rose Silberman, based upon findings of fact of the trial court to the following effect:

[13] That Nicholas Carl Hensgen and plaintiff Thelma Hensgen Neal were married in 1928, in the State of Texas and separated in August, 1940, while residing in this state; that on December 12, 1940, said parties went to Tijuana, Mexico, where they conferred with an attorney and made the necessary arrangements to obtain a Mexican mail order divorce; that "thereafter the said Thelma Hensgen Neal was granted a purported final decree of divorce from Nicholas C. Hensgen, on December 17, 1940, by the Civil Court of First Instance, Bravos District, Chihuahua, Mexico." That on December 25, 1940, Nicholas C. Hensgen and Rose Silberman Hensgen were married in the State of Nevada and at all times thereafter until the death of Nicholas on December 24, 1945, they lived together as husband and wife. "That said Rose Hensgen entered into said marriage and thereafter lived with Nicholas C. Hensgen as husband and wife in good faith and under the bona fide belief that said marriage was valid."

670

[14] That on April 11, 1941, said Thelma Hensgen Neal married Walter A. Smith in the State of Nevada, "with whom she thereafter continued to live as husband and wife for not less than two years and four months; that on February 1, 1946, she obtained a decree of divorce in Nevada from said Walter A. Smith; that on the same date, February 1, 1946, said Thelma Hensgen Neal married a Mr. Neal to whom she is now married. . . .

[15] "That the said Thelma Hensgen Neal had full knowledge of the marriage of Nicholas C. Hensgen and Rose Hensgen and that they were living together as husband and wife and were generally reputed to have been legally married; that the said Thelma Hensgen Neal, together with Walter A. Smith, visited the home of Nicholas C. Hensgen and Rose Hensgen on several occasions and that at no time prior to the death of Nicholas C. Hensgen did Thelma Hensgen Neal claim or inform Rose Hensgen of any alleged invalidity of said marriage; that the said Thelma Hensgen Neal at no time prior to the death of Nicholas C. Hensgen took any steps to have her own remarriage to Walter A. Smith set aside as unlawful; that the said Thelma Hensgen Neal at no time protested against the said marriage of Nicholas C. Hensgen and Rose Hensgen or their relationship as husband and wife; that over five years have elapsed since the granting of the Mexican decree of divorce and the remarriage of the parties until the commencement of this action. All of which was to the prejudice of defendant Rose Hensgen."

[16] In accordance with such findings, the court decreed that Rose Silberman, also known as Rose Hensgen, is entitled to the proceeds of a certain life insurance policy in the sum of $6,993.50, now on deposit in the registry of the court; and that the following described personal property is the sole and separate property of defendant Rose Silberman, and that none of the plaintiffs has any right, title or interest therein:

[17] (a) Joint savings account in name of Nicholas C. Hensgen or Rose Hensgen, at Bank of America, 7th & Spring Streets, Los Angeles, in the sum of $451.21;

[18] (b) Joint savings account in name of Nicholas C. Hensgen at Metropolitan Federal Savings and Loan Association, Los Angeles, in the sum of $1,462.12;

[19] (c) War bonds in name of Nicholas C. Hensgen or Rose Hensgen of the value of $1,668.75;

671

[20] (d) Household furniture and furnishings, except for one Crosley Shelvador electric refrigerator, located at 2445 Corinth Avenue, West Los Angeles, California.

[21] It was also decreed that plaintiff Esther Hensgen, as special administratrix with general powers of the estate of Nicholas Carl Hensgen, deceased, is entitled (1) to possession of that certain Crosley Shelvador electric refrigerator now in custody of Rose Hensgen; (2) to judgment against Rose Hensgen for the sum of $100 in lieu of the mechanics' tools disposed of by the latter, delivery of possession thereof being impossible; further, that plaintiff Esther Hensgen, as special administratrix, and defendant Rose Hensgen are each entitled to an undivided one-half interest as tenants in common in and to a 1939 Lincoln Zephyr automobile.

[22] It is here asserted by appellants that, since the Mexican decree of divorce is illegal and ineffective, no estoppel arises against the first wife by reason of her subsequent remarriage under the circumstances here presented, and that estoppel as a defense to an action to recover community property is not available to the purported second wife, who had knowledge of the Mexican divorce.

[23] In Estate of Hensgen, 80 Cal.App.2d 78 [181 P.2d 69], the same parties, Rose Silberman Hensgen and Thelma Hensgen Neal, each asserting to be the widow of Nicholas Carl Hensgen, claimed the right to administer his estate. In that case, this court held that the Mexican decree of divorce was a nullity; therefore, no rights could accrue to Rose Hensgen as widow, and that Thelma Hensgen Neal was not estopped to attack such void decree by reason of her acquiescence therein.

[24] It was there stated at page 80: "Appellant, however, contends that respondent Thelma Hensgen is estopped from attacking the validity of the former's marriage to decedent. We are not unmindful of the cases holding that a party may be estopped to assert the invalidity of a divorce decree secured by or acquiesced in by him (at least where he seeks by such assertion to secure property rights, as distinguished from a determination of marital status), even though such decree be void for want of jurisdiction. (Harlan v. Harlan, supra

---

672

[25] 1916F 528]; Querze v. Querze, 290 N.Y. 13 [47 N.E.2d 423]; n. 122 A.L.R. 1321; 153 A.L.R. 941 (n); 17 Am.Jur.

575.) Neither are we unmindful of the rule that where the question in controversy relates to the property rights or pecuniary interest of the parties as distinguished from their marital status, the doctrine of estoppel is applicable under circumstances properly calling for its application. But the instant proceeding is not of the character first above mentioned. This is not a proceeding to determine heirship. It involves the appointment of an administratrix. The filing of a contest squarely presented to the court the question of determining the marital status of the parties claiming the right of appointment as administratrix, viz., who was the legal wife of decedent at the time of his death? Any estoppel imposed upon respondent Thelma Hensgen would not make valid appellant's marriage to the decedent, and it was the validity of that marriage that was before the court for determination. . . . Furthermore, it might here be pointed out that respondent Thelma Hensgen is not seeking through this proceeding to gain any pecuniary benefit, as is evidenced by the fact that she has nominated Esther Hensgen for appointment as administratrix, and Esther Hensgen has pending in the probate court her petition for appointment as guardian of the estates of the minor children of the decedent and respondent Thelma Hensgen."

[26] In Estate of Davis, 38 Cal.App.2d 579, 584 [101 P.2d 761, 102 P.2d 545], the decedent urged respondent to go to Nevada, establish a residence for the sole purpose of securing a divorce, and then to marry him. He paid the costs and expenses of the divorce and went to Reno and took an active part in the preparation of the case, and married respondent on the day the divorce was granted. Upon the death of Mr. Davis his heir attacked the validity of respondent's divorce and subsequent marriage to Mr. Davis. The court held that because of Mr. Davis' part in procuring the Nevada divorce decree for respondent he would have been foreclosed from denying the validity thereof or the subsequent marriage under the doctrine of quasi estoppel, and that his heir was in no better position. In the cited case, the court stated: "The accepted rule, free from emotionalism, is found in 'Restatement of the Law of Conflict of Laws,' sec. 112, as follows: 'The validity of a divorce decree cannot be questioned in a proceeding concerning any right or other interest arising out of the marital

---

673

[27] relation, either by a spouse who has obtained such decree of divorce from a court which had no jurisdiction, or by a spouse who takes advantage of such decree by remarrying.'

[28] "The California doctrine is based upon subdivision 3 of section 1962 of the Code of Civil Procedure, which prohibits a party from denying an act which he has deliberately led another to believe and act upon as true. Though ignorance of the truth is a primary essential on the part of one pleading an estoppel in pais, our courts have recognized another species of estoppel, called ' quasi estoppel,' which is based upon the principle that one cannot blow both hot and cold, or that one 'with full knowledge of the facts shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another.' (10 Cal.Jur., p. 645; McDanels v. General Ins. Co., 1 Cal.App.2d 454, 459 [(35 P.2d 394), 36 P.2d 829].) Another way of stating the same general principle (applicable directly to the instant case) is that one who has invoked the exercise of a jurisdiction within the general powers of the court cannot seek to reverse its orders upon the ground of lack of jurisdiction. 'The principle opposing such action is one of estoppel in the interest of a sound administration of the laws whereby the regularity or even validity of an act procured by one himself cannot be raised -- not that the act is valid, for it may not be, and estoppel does not make valid the thing complained of, but merely closes the mouth of the complainant. (Spence v. State Nat. Bank, (Tex.Com.App.) 5 S.W.2d 754.) The principle is known as the doctrine of acquiescence, often referred to as quasi estoppel.' (Spohn Co. v. Bender, 18 Cal.App.2d 447, 451 [64 P.2d 152].)"

[29] While much of the testimony of the two wives is contradictory in many respects, nevertheless, it clearly establishes, as the trial court found, that at no time subsequent to the date of the Mexican decree, i.e., December, 1940, and prior to decedent's death on December 24, 1945, did appellant Thelma Hensgen Neal question or take any action to assert the invalidity of the Mexican divorce. She permitted respondent Rose Silberman to hold herself out as the lawful wife of decedent and to incur the benefits and obligations incident to a valid marriage. If, as testified by said appellant, decedent told her in 1943, that she was not legally married to Walter A. Smith because of the invalidity of the Mexican divorce, it was incumbent upon her to disclose such fact to Rose Silberman so that the [ILLEGIBLE WORD] could have taken steps to legalize her marriage

---

674

[30] to decedent. Instead, said appellant Thelma Hensgen Neal failed to act and respondent Rose Silberman continued to live with her purported husband, caring for him as a dutiful spouse under the belief that she was validly married to him, working and pooling her earnings with his in order to contribute to their joint savings and to enhance what she was

led to believe was their community property.

[31] In view of the foregoing, upon the simplest principles of equitable estoppel, appellants cannot now be heard to question the validity of the Mexican divorce decree for the sole purpose of sharing in the property accumulated by decedent and respondent Rose Silberman during the years they lived together as husband and wife.

[32] For the reasons stated, the judgment appealed from is affirmed.

[33] Disposition

[34] Affirmed. Judgment for alleged second wife, affirmed.

September 21, 1948

CA

P.2d