# IN THE COURT OF APPEALS OF IOWA

No. 6-202 / 95-1297

**IN RE MARRIAGE OF RYAN LANE FIELDS AND KELLY JO FIELDS**

Upon the Petition of
**RYAN LANE FIELDS,**

Petitioner-Appellee,

And Concerning
**KELLY JO FIELDS,**

Respondent-Appellant.

FILED
MAY 31 1996
CLERK SUPREME COURT

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Appeal from the Iowa District Court for Lucas County, William H. Joy, Judge.

Kelly Jo Fields appeals from the provisions of the parties' dissolution decree.

**AFFIRMED.**

Trevor T. Hook of Brewer & Sinclair, P.C., West Des Moines, for appellant.

No appearance by appellee.

Considered by Sackett, P.J., and Habhab and Huitink, JJ. Vogel, J., takes no part.

**HABHAB, J.**

Ryan and Kelly Fields' three-year marriage was dissolved in June 1995. The parties have one child together, Brennan, born May 4, 1993. Among other things, the district court awarded primary care of Brennan to Ryan.

Kelly appeals.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact finder of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

The court in its dissolution decree found the parties were married on October 9, 1992. It further found it had jurisdiction over the parties and the subject matter of the action. From the decree and the appendix, it does not appear the court's jurisdiction was ever challenged.

Kelly now asserts for the first time on appeal her marriage to Ryan was a "void marriage" for, at the time of that marriage, her divorce from William Albright had not yet been finalized. She then argues, again for the first time on appeal, "[t]he trial court lacked subject matter and personal jurisdiction because there was not a legal marriage."

Kelly is correct in her claim that subject matter jurisdiction can be raised at any time, but the assertion of lack of jurisdiction only raises that issue. There must

still be evidence in the record to support this allegation. It is here where appellant fails.

Appellant has failed to direct us to any provision in the appendix to substantiate her claim. Our examination of the appendix reveals it includes only the petition for dissolution of the marriage (no answer appears in the appendix), a page of testimony that relates to Kelly's diary, excerpts from the diary, and the court's dissolution decree. There is what purports to be an affidavit signed by a Kelly Maassen that mentions a marriage to a William Franklin Albright, Jr. and also a certificate of marriage between Kelly Jo Maassen and William Albright, Jr.

We are unable to consider either the affidavit or the marriage certificate for neither were part of the record when this cause was submitted to the trial court. Factually, it appears the affidavit, which carries the date of August 14, 1995, was prepared more than two months after the trial, which occurred on June 8, 1995.

Under the circumstances here, we conclude appellant's claim of lack of jurisdiction is without merit. But even assuming arguendo that appellant somehow carried her burden and established the marriage was void, the trial court did have jurisdiction to determine the custody issue.

As an aside, we direct to the attention of the parties the following statement taken from our case of *Miller v. AMF Harley-Davidson Motor Co.*, 328 N.W.2d 348 (Iowa App. 1982):

> It is generally accepted by the court that a marriage in fact is presumed to be valid. Although this presumption is rebuttable, it is one of the strongest known to the law. *Eygabrood v. Gruis*, 247 Iowa 1346, 1348, 79 N.W.2d 215, 217 (1956). The rule in Iowa is that where there are supposedly conflicting marriages of the same spouse, "the presumption of validity operates in favor of the second marriage, and the party attacking the second marriage has the burden of proving its invalidity and of showing a valid prior marriage; and where a valid prior marriage is shown, it is presumed to have been dissolved by divorce or death so that the attacking party has the burden of adducing evidence to the contrary." *In re Estate of Weems*, 258 Iowa 711, 715, 139 N.W.2d 922, 924 (1966). This is so whenever there are facts consisting of acts or conduct of both parties upon which the presumption can be legitimately founded. Although the presumption is rebuttable, "the evidence to overcome that presumption must be strong and persuasive." *Id.*

*Miller*, 328 N.W.2d at 351-52.

Kelly also contends the district court erred in admitting the contents of her diary into evidence. Kelly argues the diary was inadmissible under the hearsay rule. As our review is de novo, we need not make a finding regarding the admissibility of this evidence. There is other testimony set forth in the appendix which Kelly gave independent of her writings in the diary.

From our de novo review, we conclude there is sufficient evidence to support the district court's ruling without relying on excerpts from the diary.

Upon consideration of all arguments raised on appeal, we conclude the ruling of the district court must be affirmed.

**AFFIRMED.**

Huitink, J., concurs; Sackett, P.J., specially concurs.

**SACKETT, P.J.** (specially concurring)

I concur specially without opinion.