

2007

Gibby v. Gibby : Brief of Respondent

Utah Court of Appeals

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PAMELA GIBBY,
Petitioner/Appellant,

-vs-

RICHARD GIBBY,
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Case No. 20070596-CA

APPEAL FROM AN ORDER GRANTING RESPONDENT'S MOTION
IN LIMINE, ISSUED BY JUDGE FRED D. HOWARD IN THE
FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH

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IN THE UTAH COURT OF APPEALS

PAMELA GIBBY,

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IN THE UTAH COURT OF APPEALS

PAMELA GIBBY,)	
)	
Petitioner/Appellant,)	
)	
vs.)	Case No. 20070596-CA
)	
RICHARD GIBBY,)	
)	
Respondent/Appellee.)	

BRIEF OF RESPONDENT/APPELLEE

JURISDICTION

This is an appeal from an Order of the Honorable Fred D. Howard of the Fourth Judicial District Court for Utah County, State of Utah. The Utah Court of Appeals has jurisdiction over this matter pursuant to the provisions of Utah Code Annotated 78A-4-103(h) and (j) (2008 as amended).

STATEMENT OF ISSUES

The only issue preserved by the parties on appeal is whether the trial court committed error in granting the Appellee's Motion in Limine. As it relates to a challenge of the trial court's factual findings, the appellate court will not disturb a trial court's factual findings unless they are clearly erroneous. *Hagan v. Hagan*, 810 P.2d 478, 481 (Utah App. 1991) (citing *Jense v. Jense*, 784 P.2d 1249, 1251 (Utah App. 1989)). In challenging factual findings, an appellant must first marshal all the evidence in support of the findings and then

demonstrate that the evidence is legally insufficient to support the findings even when viewing it in a light most favorable to the court below. *Chen v. Stewart*, 100 P.3d 1177 (Utah 2004) (internal quotation marks omitted); *see also* Utah R. App. P. 24(a)(9) ("A party challenging a fact finding must first marshal all record evidence that supports the challenged finding."). To fulfill the duty to marshal, the Appellant is required to "present . . . every scrap of competent evidence introduced at trial which supports the very findings [she] resists." *Chen, supra* at 1177. This Court reviews legal determinations made by the trial court for correctness. *See, Classic Cabinets, Inc. v. All Am. Life Ins. Co.*, 978 P.2d 465 (Utah App. 1999).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

The Appellee does not contend that there are any determinative constitutional provisions, statutes, ordinances or rules.

STATEMENT OF THE CASE

After the Corrected Findings of Fact, Conclusions of Law and Decree were entered in this matter on March 17, 2000, the Appellee, Richard Gibby, filed a petition to modify certain provisions of the Corrected Decree on August 25, 2004. On August 30, 2004, the Appellant, Pamela Gibby, filed and served an affidavit in support of an order to show. In the relevant portion of her affidavit, Pamela Gibby sought judgment against the Appellee, Richard Gibby, for certain obligations contained in trust deeds and notes that the Appellee,

Richard Gibby, never signed.

Both in a separate civil action and in this proceeding, the trial courts have determined that, as a matter of law, Richard Gibby has no obligation to Pamela Gibby under the terms of the trust deeds and notes outlined in Paragraph 14 of the Corrected Decree of Divorce that he did not sign. The only issue preserved on this appeal is the propriety of Judge Howard's ruling granting the Appellee's motion in limine precluding, as a matter of law, the Appellant, Pamela Gibby's claims related thereto.

STATEMENT OF FACTS

In order to provide a better presentation of the facts relevant to the adjudication of this appeal, the Appellee has divided the facts into three areas. First, the facts relating to how the parties chose to divide the real property during the course of the original divorce proceedings will be presented. Second, the attempt, by the Appellant, to seek judgment against the Appellee in a separate civil action, for obligations allegedly incurred in the divorce case, from the real property, will be traced. Third, the claims of the Appellant in her order to show cause in this proceeding will be outlined. Fourth and finally, the facts relevant to the Appellee's motion in limine seeking to preclude any further action against Appellee on the obligations relating to the real property, previously held by the parties, will be presented.

A. Division of the Real Property under the Terms of the Corrected Decree

1. The sole issue raised by the Appellant in her appeal stems from the division of

the real property of the parties when the Corrected Decree of Divorce was entered in this matter on March 17, 2000 (R. 102-112). A copy of the Corrected Decree of Divorce is attached hereto as Exhibit “A.”

2. It is undisputed that the Appellee, Richard Gibby, was unrepresented in the original divorce proceedings (R. 1-124). The Appellant, Pamela Gibby, on the other hand, has been represented by counsel throughout the proceedings. *Id.* It was counsel for the Appellant who prepared the Verified Amended Stipulation and Property Settlement Agreement upon which the Corrected Decree of Divorce was based (R. 29-41).

3. It was the Appellant and her counsel who chose and facilitated the method by which the real property of the parties was divided. The manner chosen is revealed by the terms of the Corrected Decree, attached hereto as Exhibit “A.” Paragraph 12 of the Corrected Decree awards the Appellant, Pamela Gibby, the marital home of the parties located at 49 North Country Lane, Orem, Utah and one-half of the net proceeds from the sale of the parties’ property located at 855 N. Freedom Blvd., Provo, Utah. The Appellee, Richard Gibby, was awarded, in Paragraph 12 of the Corrected Decree, the remaining six properties of the parties plus one-half of the net proceeds from the sale of the parties’ property located at 855 N. Freedom Blvd., Provo, Utah (R. 106-9).

4. Paragraph 12 of the Corrected Decree is clear that the value attributed to the real property awarded to the Appellant, Pamela Gibby, was \$355,000.00 and that the value

of the property awarded to the Appellee, Richard Gibby, was \$1,552,500.00. In subparagraph “C” of Paragraph 12, it states:

To equalize the distribution of marital property to the parties, the parties have agreed that Respondent will sign Promissory notes to Petitioner (see Equalizing Payment, below).

R. 106-9.

5. Paragraph 14 of the Corrected Decree then provided:

14. To equalize the marital real property settlement between the parties, the parties have agreed that:

A. Respondent [Appellee Richard Gibby] **or** the appropriate LLC, is hereby ordered to sign a Promissory note to Petitioner [Appellant Pamela Gibby] in the sum of \$390,000 secured by a trust deed in the same amount on the property at 363 N., (sic) University Avenue, Provo Utah 84601. The terms of the note will include a 7% interest rate on the principle amortized for 20 years. Payments on the note will be made to Petitioner on the 1st of each month beginning June 1, 1999 [eleven (11) months before the Court signed the Amended Decree of Divorce] (Emphasis added).

R. 106-9.

6. Subparagraphs “B” and “C” of Paragraph 14 of the Corrected Decree provide similarly that the Respondent, Richard Gibby or the appropriate LLC, should sign a promissory note in the amounts of \$50,000 and \$90,750 respectively, to be secured by trust deeds. *Id.*

7. As allowed by the Corrected Decree, Richard Gibby neither signed the Promissory Notes nor the Trust Deeds in a personal capacity. Rather, the parties opted to have the Defendant sign the documents in his representative capacity, as a managing partner, of a properly formed and functioning limited liability company, New West Properties, LLC. That procedure was not only contemplated, but explicitly allowed, by the language of the Amended Decree of Divorce (R. 106-9, 435).

8. The purpose of the arrangement was to provide the Appellant, Pamela Gibby, with the security of an established payment set by the terms of the trust deeds and notes on the properties and leave the Appellee, Richard Gibby, with the risks of the real estate market.

B. Appellant's Civil Action Against the Appellee to Procure a Deficiency Judgment

9. On November 19, 2004, the Appellant Pamela Gibby commenced a separate suit against the Appellee, Richard Gibby, in the Fourth Judicial District Court in and for Utah County, State of Utah, case no. 040403686 (R. 383-85). In her Complaint, Pamela Gibby claimed that Richard Gibby had signed a promissory note in her favor for \$390,000 secured by the property at 363 North University Avenue, Provo, Utah. The promissory note referred to was one of the trust deeds and notes included in the Corrected Decree of Divorce. Mrs. Gibby alleged that Richard Gibby had defaulted under the terms of the note and that she had then concluded a non-judicial foreclosure on August 26, 2004. Mrs. Gibby sought a deficiency judgment against Mr Gibby in accordance with the provisions of U.C.A. 57-1-32.

Id.

10. Mr. Gibby filed a motion for summary judgment which was granted on June 22, 2005. The judgment included an award of \$5,400 in attorney fees to Mr. Gibby. In relevant part, Judge Fred D. Howard ruled as follows:

1. The Motion for Summary Judgment is hereby granted and the case is dismissed against the Defendant with prejudice.
2. The Court finds that it is not disputed that the Defendant [Richard Gibby] signed all documents on behalf of the LLC and did not sign any documents in a personal capacity. . .
4. The Court finds that the Defendant signed all Notes and documents in this matter on behalf of the LLC and did not sign any documents in a personal capacity. The Court finds that it is unpersuaded that the Defendant bears any personal liability in this matter. . .
8. The Court finds that the Defendant is entitled to an award of attorney's fees in this matter and grants the Defendant a judgment as for his attorney's fees in the amount of \$5,400.00. . . .

R. 376-79, Exhibit "B" hereto

C. Appellant's Claims in her Order to Show Cause

11. In the affidavit filed in support of her order to show cause, the Appellant, Pamela Gibby, requested a wide range of relief under the terms of the Corrected Decree. As it relates to this appeal, she requested, once again as she had in the separate civil action, judgment against Mr. Gibby under Paragraph 14 of the Corrected Decree, alleging that Mr.

Gibby, personally, was ordered to pay her all of the equalizing payments identified in that paragraph and that he had failed to do so (R. 129-132, 349-351).

12. The Appellant, at no time in these proceedings, sought to amend the provisions of the Corrected Decree of Divorce. Mrs. Gibby never requested that Judge Howard modify the terms of the real property division or the provisions relating to alimony or child support (R. 129-132, 349-351 and 608-17).

D. The Disposition of Appellee's Motion in Limine

13. On April 21, 2006, the Appellee Richard Gibby, filed a motion in limine with supporting memorandum, seeking a determination that the Appellant had no legal claim against the Appellee based on Paragraph 14 of the Corrected Decree of Divorce as set out in Mrs. Gibby's affidavit (R. 374-400).

14. By Order entered on July 12, 2006, Judge Howard granted Mr. Gibby's Motion in Limine and in relevant part, held as follows:

2. Respondent [Richard Gibby] asserts that Petitioner's [Pamela Gibby] claim relating to the \$390,000.00 Trust deed note has been adjudicated to conclusion against Petitioner in a companion civil case and, based upon the principles of claim preclusion, Petitioner is barred from relitigating the claim in this action. Respondent argues that he has no underlying obligation to Petitioner upon which a judgment could be based because he fulfilled the obligations described in Paragraph 14 of the [Corrected] Decree by signing a promissory note and trust deed as a member and manager of New West Properties, LLC. Additionally, Respondent argues that Utah's One Action Rule prohibits any further action by Petitioner upon debts against the LLC and Respondent related to the property in question.

3. Petitioner responds that the terms of the Corrected Decree of Divorce create an obligation upon Respondent to assure that Petitioner is given her fair share of the marital estate. Petitioner argues that Respondent has a personal obligation that cannot be transferred to someone else to carry the terms of the Decree with respect to his obligation to give to Petitioner her fair share of the marital estate. Petitioner argues that Respondent's Motion in Limine fails because the issues in the divorce case are not the same issues raised and decided in the separate civil action between the parties. Petitioner argues that it would be a violation of the principles of equity and fairness to allow Respondent to liquidate a marital asset and keep for himself the equity which rightfully belongs to Petitioner.
4. The question before the Court is whether Respondent's action of signing a promissory note to Petitioner, on behalf of New West Properties, LLC, in the amount of \$390,000.00 secured by a trust deed in the same amount on the property at 363 N. University Avenue, discharged Respondent's obligation to Petitioner as a matter of law. It is clear from a review of this matter and the Corrected Divorce Decree that the parties were the owners of substantial properties at the time of their divorce. By all appearances, the parties intended to divide the properties with a fair and equalizing approach. The scheme the parties used to divide and equalize their properties included the execution and recording of a trust deed. Trust deeds are accompanied by a host of legal rights, including rights encompassed in the trust deed statute and other rights grounded in case precedent. **The Court finds that, by tender of the promissory note and trust deed from New West Properties, LLC, Petitioner's equitable remedies in the divorce action were reduced to legal remedies, many of which remedies are superior to other remedies available under the law.**
5. The Court noted that the Corrected Decree of Divorce was signed by the Court and entered on March 17, 2000. The next month, on April 24, 2000, the trust deed contemplated by Paragraph 14 of the Corrected Decree and executed on September 2, 1999 by Richard Gibby as Manager of New West Properties, LLC was recorded by the Utah County Recorder's office. The portion of Paragraph 14 of the Corrected Decree pertaining to Petitioner's claim in this matter reads as follows:

To equalize the marital real property settlement between the parties: a. Respondent or the appropriate LLC, is hereby ordered to sign a Promissory note to Petitioner in the sum of \$390,000 secured by a trust deed in the same amount on the property at 363 N., (sic) University Avenue, Provo Utah 84601. The terms of the note will include a 7% interest rate on the principle amortized for 20 years. Payments on the note will be made to Petitioner on the 1st of each month beginning June 1, 1999 (Emphasis in original).

6. **The Court finds that because the Corrected Decree gave Respondent the option of either personally signing the Promissory Note and trust deed or signing the instruments on behalf of the LLC, Respondent fulfilled his obligation to Petitioner when he complied with Paragraph 14. In effects [sic], Petitioner has already been “paid” her fair share of the marital estate because she elected to accept such form of payment which included valuable rights and remedies described in the Promissory Note and Trust Deed. Furthermore, not only did Petitioner accept the valuable rights when she accepted the Promissory Note and Trust Deed from New West Properties, LLC, but it is undisputed that she also recognized and exercised such rights when she chose to subordinate her interest in the University Avenue property and later foreclosure on the trust deed.**
7. In reviewing the Corrected Decree, the Court finds that nowhere in the decree is there language that suggests an additional personal guaranty from Mr. Gibby for the \$390,000.00 promissory note amount. The Court finds that equitable remedies are no longer available to Petitioner with regard to her claim for \$390,000.00 because she obtained bargained-for legal rights in connection with her claim as described, and pursued the legal remedies available to her when she foreclosed on the trust deed. (Emphasis added)

R. 452-56, Exhibit “C” hereto.

SUMMARY OF ARGUMENT

The Appellant was represented by counsel at all times in these proceedings. Counsel for the Appellant drafted the original stipulation, findings, conclusions and decree. Subsequently, a corrected version of the documents was drafted by Appellant's counsel, signed by the parties and filed with the Court.

The Corrected Decree explicitly gives the Appellee, Richard Gibby, the right to sign the \$390,000 promissory note and trust deed personally or in a representative capacity. Upon signing the note and trust deed as the managing member of an LLC, the Appellee discharged his obligation under Paragraph 14. There is no question in this case that the Appellant, Pamela Gibby, is savvy, informed and capable of handling real property issues. She navigated herself through a subordination process, a non-judicial foreclosure and a suit seeking a deficiency judgment. At no time has the Appellant claimed that the provisions in the Corrected Decree relating to the equalizing payment were forced on her, contained ambiguous language or were otherwise faulty.

Any and all rights of the Appellant to proceed under Paragraph 14 of the Corrected Decree have been lost based upon the clear wording of the Decree, principles of claim preclusion and Utah's one-action rule.

The Appellant never filed a petition requesting that the trial court amend the provisions of the Corrected Decree as it relates to any personal obligation of the Appellee, Richard Gibby.

Finally, there is no legal basis to challenge Judge Howard's ruling granting the motion

in limine and this Court should assess attorney fees against the Appellant.

ARGUMENT

POINT I: THE APPELLANT HAS UTTERLY FAILED TO MARSHALL THE EVIDENCE SUPPORTING THE ORDER GRANTING THE MOTION IN LIMINE

It is very difficult for the Appellee to understand the argument that the Appellant is attempting to make on appeal. However, it is clear that Appellant has not set forth a legally sufficient challenge to the facts relied upon by Judge Howard in granting the Appellee's Motion in Limine. The marshaling rule requires appellants to "marshal all the evidence in favor of the facts as found by the trial court and then demonstrate that even viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact." *Save Our Schools v. Board of Educ.*, 122 P.3d 611 (Utah 2005) (quoting *Chen v. Stewart*, 100 P.3d 1177 (Utah 2004)). If a party fails to marshal the evidence, the Court assumes the evidence supports the trial court's findings. *See Chen* at 1177.

Rule 24(a)(9) of the Utah Rules of Appellate Procedure outlines the requirements for arguments in briefs submitted to this court:

The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.

Utah R. App. P. 24(a)(9).

The Court dismisses arguments that do not meet these requirements. *See State v. Sloan*, 72 P.3d 138 (Utah App. 2003) (citing *Smith v. Smith*, 995 P.2d 14 (Utah App. 1999)). Particularly, "[b]riefs must contain reasoned analysis based upon relevant legal authority. An issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court." *Id.*

The Appellant, in her brief, does not attempt to even identify the factual findings that Judge Howard made in his ruling granting the Motion in Limine. Therefore, there is no attempt by the Appellant, after identifying the underlying pivotal facts, of arguing why the adoption of those facts was clearly erroneous or against the weight of the evidence. Further, the Appellant has failed to tie an argument to a finding or conclusion of the trial court.

Accordingly, Appellee respectfully submits that based upon the clear failure of the Appellant to marshal the evidence in this case, the Court must accept the underlying facts upon which Judge Howard's ruling and order are based. Further, Appellant respectfully requests that the Court determine that the Appellant's brief is legally insufficient under Rule 24(a)(9) of the Utah Rules of Appellate Procedure.

**POINT II: THE PORTIONS OF APPELLANT'S BRIEF REFERENCING
FACTS NOT IN EVIDENCE SHOULD BE STRICKEN.**

Utah R. App. P. 11 identifies the elements of the record on appeal. The Rule states:

(a) Composition of the record on appeal. The original papers and exhibits filed

in the trial court . . . the transcript of proceedings, if any, the index prepared by the clerk of the trial court, and the docket sheet, shall constitute the record on appeal in all cases . . .

In this case, the Appellant has not taken any action to augment the record on appeal or request the inclusion of matters not identified in Utah R. App. P. 11. However, throughout the Appellant's brief on appeal, she fails to cite to the record and/or seeks to include matters that are not of record in this case. As outlined above, Utah R. App. P.24(a)(9) requires that the argument contain the contentions and reasons of the appellant with respect to the issues presented, "with citations to the authorities, statutes, and parts of the record relied on."

On pages 7 and 8 of Appellant's brief, a litany of evidence and documents is listed that the Appellant contends that she was prepared to present by way of testimony and/or evidence. The Appellant filed only one response to the Motion in Limine in the trial court and not one of the listed items was included or referenced (R. 407-23). Because the referenced items are not part of the record on appeal and were never presented to the trial court, the Appellant requests that the designated copy of the settlement summary (Appellant's Brief, Addendum, Exhibit "B"), the copy of the Subordination Agreement (Appellant's Brief, Addendum, Exhibit "C"), the Amendment to the Articles of Organization (Appellant's Brief, Addendum, Exhibit "D"), and the deficiency spreadsheet (Appellant's Brief, Addendum, Exhibit "E"), be stricken and that all references to the material be excluded by the Court from Consideration.

Appellant, on page 8 of her brief, claims that Richard Gibby was the only member of

New West Properties, L.L.C., but the Appellant fails to cite to the record in this case. It is presumed that the Appellant is relying on the Amendment to the Articles of Organization of the LLC that is also not part of the record in this case but the Appellant does not even include a courtesy reference. Although Appellee does not see any relevance to the argument, the pattern of making assertions and either not documenting them or authenticating them with material that neither the Appellant nor the trial court have seen, constitutes a waste of everyone's time and effort.

Appellee submits that the material relied upon by Appellant that is not a part of the record in this case be stricken and that the arguments based thereon be rejected.

**POINT III: THE UNAMBIGUOUS TERMS OF THE CORRECTED
DECREE MUST BE ENFORCED AS IT IS WRITTEN.**

Appellee submits that the Appellant has simply failed to articulate any acceptable legal basis for overturning Judge Howard's ruling granting the motion in limine. The Appellant seems to be arguing that there is an underlying principle of fairness and equity that trumps the unambiguous terms of an order of the trial court that was engineered and approved by the parties (Appellants Brief at 11). If that, in fact, is the Appellant's argument, it is contrary to the law in Utah.

Utah law is clear that a judgment must be enforced as written if the language is clear and unambiguous. *Park City Utah Corp. v. Ensign Co.*, 586 P.2d 446, 450 (Utah 1978). However, ambiguous judgments are subject to the same rules of construction that apply to

all written instruments and "the entire record may be resorted to for the purpose of construing the judgment." *Id.* The determination of whether a contract is ambiguous is, at the outset, a question of law. *Regional Sales Agency Inc. v Reichert*, 784 P.2d 1210, 1213 (Utah Ct. App. 1989). Language is ambiguous if the words suggest two or more plausible meanings. *Crowther v. Carter*, 767 P.2d 129, 131 (Utah Ct. App. 1989).

The Appellant did not contend at trial and does not argue in her brief that Paragraph 14(a) of the Corrected Decree of Divorce is ambiguous. Therefore, the trial court did not specifically address ambiguity but Judge Howard did find that the relevant language was clear:

7. In reviewing the Corrected Decree, the Court finds that nowhere in the decree is there language that suggests an additional personal guaranty from Mr. Gibby for the \$390,000.00 promissory note amount. The Court finds that equitable remedies are no longer available to Petitioner with regard to her claim for \$390,000.00 because she obtained bargained-for legal rights in connection with her claim as described, and pursued the legal remedies available to her when she foreclosed on the trust deed.

R. 452-56, Exhibit "C" hereto.

Additionally, the language contained in not only Paragraph 14(a) of the Corrected Decree, but also subparagraphs "B," "C" and "D" of Paragraph 14, is absolutely clear:

Respondent [Appellee Richard Gibby] **or** the appropriate LLC, is hereby ordered to sign a Promissory note to Petitioner [Appellant Pamela Gibby] in the sum (Emphasis added)

R. 106-8.

There can be no question that the signing of the trust deed note in a representative capacity satisfied the clear language of the decree. Further, there is simply no factual basis for the argument that the parties or the trial court intended the obligations described in Paragraph 14 to be those of Mr. Gibby, if he signed the relevant documents as a representative of the relevant LLC.

Because the language in the Corrected Decree is clear and unambiguous, the law in Utah requires that the language be strictly enforced. As Judge Howard found, the formula used by the parties in this case constituted a fair and equitable division. This Court has held that it will not disturb property distributions on appeal unless they are unjust or constitute a clear abuse of discretion. *Turner v. Turner*, 649 P.2d 6, 8 (Utah 1982); *Rasband v. Rasband*, 752 P.2d 1331, 1335 (Utah Ct. App. 1988).

**POINT IV: THE APPELLANT'S ARGUMENT FOR MODIFICATION OF
THE CORRECTED DECREE BASED UPON A CHANGE IN
CIRCUMSTANCES IS A NEW ARGUMENT ON APPEAL.**

In Utah, matters not raised in the pleadings nor put in issue at the trial may not be raised for the first time on appeal. *Bundy v. Century Equip. Co.*, 692 P.2d 754, 758 (Utah 1984); *Franklin Fin. v. New Empire Dev. Co.*, 659 P.2d 1040, 1044 (Utah 1983). A matter is sufficiently raised if it has been submitted to the trial court and the trial court has had the opportunity to make findings of fact or law. See *Turtle Management, Inc. v. Haggis Management, Inc.*, 645 P.2d 667, 672 (Utah 1982). "Theories or issues which are not

apparent or reasonably discernible from the pleadings, affidavits and exhibits will not be considered." *Minnehoma Fin. Co. v. Pauli*, 565 P.2d 835, 838 (Wyo. 1977). In particular, even if pleadings are generously interpreted, if they are not supported by any factual showing or by the submission of legal authority, they are not presented for decision. *Int'l Business Mach. Corp v. Lawhorn*, 106 Idaho 194, 677 P.2d 507, 510 (1964). Further, the rule that a legal theory may not be raised for the first time on appeal is "to be stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial." *Bogacki v. Bd of Supervisors*, 5 Cal. 3d 771, 489 P.2d 537, 543-44, 97 Cal. Rptr. 657 (1971), *cert. denied*, 405 U.S. 1030, 31 L. Ed. 2d 488, 92 S. Ct. 1301 (1972).

The Appellant, after making the "fairness" argument proceeds to cite a child custody case where a petition to modify had been filed (Appellant's brief at 11-12). The Appellant seems to be arguing that the prior ruling in the "deficiency judgment" case has no effect in the divorce case because there has been a substantial change in the circumstances of the parties. The Appellant then argues on page 13 that since the trial court had continuing jurisdiction to address property divisions and because there had been a substantial change, the Appellant was entitled to prevail. *Id.*

The problem with the argument is that although Richard Gibby filed a Petition to Modify to lower his child support and alimony (R. 125-27), the Appellant simply filed an order to show cause (R. 128-132, 349-51). Further, there is not a single phrase in either of

the affidavits filed by the Appellant that requests a modification of the property division or awards of alimony and child support. The Appellant sought only the enforcement of the Corrected Decree.

There is no question that the argument of a modification of the Corrected Decree fails because it was not raised directly or indirectly in the pleadings or the hearing on this matter.

POINT V: APPELLEE HAS NO UNDERLYING OBLIGATION TO APPELLANT UPON WHICH A JUDGMENT COULD BE BASED.

The Appellant's argument is that the Corrected Decree created an explicit or implied personal obligation to pay the amounts detailed in Paragraph 14 of the decree. However, as repeatedly argued throughout, there is no language in the decree or legal theory to support the Appellant's argument.

The Appellee **did not sign the Promissory Note and the Trust Deed to the 363 North University Avenue Property in a personal capacity. All signatures on the document were those of a clearly designated managing partner of a validly formed and operating Limited Liability Company.**

The Corrected Decree of Divorce, drafted by Appellant's lawyer, in a proceeding where the Appellee was unrepresented by counsel, chose a strategy with regard to the division of the real property. Instead of seeking a method to divide the 363 North University property by some other means or require the Appellee to sign some note in a personal capacity or even sign a guaranty, the Corrected Decree of Divorce, Exhibit "A", gave Mr.

Gibby the option. Richard Gibby exercised the option of signing in a representative capacity for the LLC. Further from the time the Stipulation was in effect, **eleven (11) months before the** Court signed the Corrected Decree of Divorce to the present day, the Appellant has not sought to have the Corrected Decree modified or changed in any regard

The law relating to limited liability companies is statutory. U.C.A. 48-2c-104 (2001 as Amended) provides that “[a] **company formed under this chapter is a legal entity distinct from its members.**”(Emphasis added) U.C.A. 48-2c-601 (2001 as Amended) then explicitly then describes the liability of anyone associated with a limited liability company as follows:

Except as provided in Section 48-2c-602, no organizer, member, manager, or employee of a company is personally liable under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the company or for the acts or omissions of the company or of any other organizer, member, manager, or employee of the company.

The only exception to the general grant of immunity in the statute is contained in U.C.A. 48-2c-602 (2001 as Amended). The exception relates only **to obligations of a member of the LLC to the LLC.** The statute states in relevant part:

The following exception to limited liability under Section **48-2c-601** shall apply:
(1) All persons who assume to act as a company without complying with this chapter are jointly and severally liable for all debts and liabilities so incurred, except for debts **incurred in the course of prefiling activities** authorized under Section **48-2c-404.**

(2) **A member of a company is liable to the company:**(a) for the difference between the amount of the member's contributions to the company which have

been actually made and the amount which is stated in the operating agreement or other contract as having been made; and (b) for any unpaid contribution to the company which the member, in the operating agreement or other contract, agreed to make in the future at the time and on the conditions stated in the operating agreement or other contract.

(3) A member holds as trustee for the company: (a) specific property which is stated in the operating agreement or other contract as having been contributed by the member, if the property was not contributed or it has been wrongfully or erroneously returned; and (b) money or other property wrongfully or erroneously paid or conveyed to the member.

(4) Persons engaged in prefiling activities other than those authorized by Section 48-2c-404 shall be jointly and severally liable for any debts or liabilities incurred in the course of those activities.

(5) (a) This chapter does not alter any law applicable to the relationship between a person rendering professional services and a person receiving those services, including liability arising out of those professional services. (b) All persons rendering professional services shall remain personally liable for any results of that person's acts or omissions.

(6) When a member has rightfully received a distribution, in whole or in part, of the member's capital account, the member remains liable to the company for any sum, not in excess of the amount of distribution, with interest, necessary to discharge the company's obligations to all creditors of the company who extended credit in reliance on any representation as to the financial condition of the company that included the amount so distributed and whose claims arose prior to the distribution.

U.C.A. 2c-603 (2001 as Amended) provides that even the exceptions to the general liability can be waived by the other members of the LLC.

Dispositive of the issues in this case, U.C.A. 48-2c-116 (2001 as Amended) provides that “[a] member or manager of a company is not a proper party to proceedings by or

against a company, except when the object is to enforce a member's or manager's right against, or liability to, the company.”(emphasis added).

The statute was interpreted in *Dygert v Collier*, 2004 WL 253554 (Utah App 2004).

The Court relying on the statutes stated that,

. . . the general rule is that a corporation [using corporation law to interpret U.C.A. 48-2c-601, 104 and 116] is an entity separate and distinct from its officers, shareholders and directors and that they will not be held personally liable for the corporation’s debts and obligations. *Reedeker v. Salisbury*, 952 P.2d 577, 582 (Utah Ct. App. 1998) (citation omitted). Similarly, a director is not personally liable for his corporation’s contractual breaches unless he assumed personal liability, acted in bad faith or committed a tort in connection with performance of the contract . . . even where the director, while acting in his official capacity, took actions that resulted in the breach. . . .

Id.

In this case, the facts established that the Appellee clearly signed the Promissory Note and Trust Deed in a representative capacity, acting on behalf of the LLC. As such, he is protected from liability by the statute and the interpretive case law in the state of Utah. **Further the statutes give the Appellee the right to be insulated from being a party to an action to enforce a debt against the LLC.** U.C.A. 48-2c-116 (2001 as Amended).

Based thereon, it is respectfully submitted that there is simply no viable legal theory on which the Appellant would be entitled to recover and the trial court acted properly in granting the motion in limine.

**POINT VI: THE ONE ACTION RULE PROHIBITS ANY FURTHER ACTION
BY THE APPELLANT AGAINST THE LLC AND THE APPELLEE**

ON OBLIGATIONS RELATED TO THE PROPERTY IN QUESTION.

Because Mr. Gibby did not sign in a personal capacity and because there are no independent theories of liability, the Appellant is restricted to those pertaining to the non-judicial foreclosure of real property.

It is undisputed that a non-judicial foreclosure of the property was concluded (Plaintiff's Complaint, paras 7-11, R. 383-85). The allegations in the Complaint mirror Utah Code Annotated 57-1-32 (1953 as Amended, which provides in relevant part as follows:

At any time within three months after any sale of property under a trust deed as provided in Sections **57-1-23, 57-1-24, and 57-1-27, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security**, and in that action the complaint shall set forth the entire amount of the indebtedness that was secured by the trust deed, the amount for which the property was sold, and the fair market value of the property at the date of sale. Before rendering judgment, the court shall find the fair market value of the property at the date of sale. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale. In any action brought under this section, the prevailing party shall be entitled to collect its costs and reasonable attorney fees incurred. (Emphasis added).

However, the right to proceed against real property is limited by U.C.A. 78-37-1 (1953 as Amended), which provides,

There can be but one action for the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate which action must be in accordance with the provisions of this chapter. Judgment shall be given adjudging the amount due, with costs and disbursements, and the sale of mortgaged property, or some part thereof, to

satisfy said amount and accruing costs, and directing the sheriff to proceed and sell the same according to the provisions of law relating to sales on execution, and a special execution or order of sale shall be issued for that purpose. (Emphasis added).

The one-action rule has been extended by the Utah Appellate Courts to trust deeds. *Utah Mortgage & loan Co. v. Black*, 618 P.2d 43, 45 (Utah 1980). Of course, the function of the one-action rule is to,

eliminate harassment of debtors and multiple litigation which sometimes occurred under the common law rule which allowed a creditor to foreclose and sell the land and sue on the note. . . .

Lockhart v. Equitable Realty Inc, 657 P.2d 1333, 1335 (Utah 1983) (citing *Utah Mortgage & Loan, supra*, at 45.

Inasmuch as the Appellee has no independent liability to the Appellant in this matter and all responsibility for the debt alleged by the Plaintiff originated with the Promissory Note and Trust Deed, the Plaintiff is limited to the process described above, which by definition, includes only the parties to the Note and Trust Deed. That list of parties excludes categorically, Mr. Gibby. Based thereon, the trial court ruled properly in granting the Motion i8n Limine.

**POINT VII: THE APPELLEE IS ENTITLED TO THE BENEFIT OF
JUDGE HOWARD'S RULING IN THE CIVIL DEFICIENCY ACTION
BASED UPON PRINCIPLES OF CLAIM PRECLUSION.**

The Appellant does not dispute that Judge Howard, in his ruling and order in the

deficiency case, granted Mr. Gibby's motion for summary judgment (R. 376-79, Exhibit "B" hereto).

It is the Appellee's position that the ruling is binding on the determination of the issues in this case. Although the Court, in a divorce action, has equitable powers, it was the Appellant who engineered the divorce settlement to give Mr. Gibby the option of not becoming personally liable on the notes. As argued above, the Appellant is not seeking an amendment to the Corrected Decree; rather, she is seeking only enforcement of the terms thereof. Accordingly, the function of the Court in this proceeding is that of interpreting the language contained in the Corrected Decree and not rendering equitable relief.

The fact is that in every divorce action, the parties and the courts do their best to fashion an equitable property settlement. However, neither the courts nor the opposing parties are guarantors of that resolution. Real property can go down in value. People occupying real property can have situations arise that result in defaults under the terms of a trust deed or mortgage. Appellant was well aware of the risks that both parties faced under the model engineered by the Appellant. Mr. Gibby has also been severely affected by market values and the actions of others that have wreaked havoc with the value of properties he received in the Corrected Decree.

The basic principles of res judicata encompass both claim preclusion and issue preclusion. *Snyder v. Murray City Corp.*, 73 P.3d 325 (Utah 2003) (citing *Salt Lake City v. Silver Fork Pipeline Corp.*, 913 P.2d 731, 733 (Utah 1995)). Claim preclusion involves the

same parties or their privies and the same cause of action. It "precludes the relitigation of all issues that could have been litigated as well as those that were, in fact, litigated in the prior action." *Macris & Assocs. v. Neways, Inc.*, 16 P.3d 1214 (Utah 2000) (quoting *Schaer v. State*, 657 P.2d 1337, 1340 (Utah 1983) (citation omitted))(emphasis added). Issue preclusion or collateral estoppel, "arises from a different cause of action and prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit." *Id.* In effect, once a party has had his or her day in court and won or lost, it does not get a second chance to prevail on the same issues. *Berry v. Berry*, 738 P.2d 246, 249 (Utah App.1987).

The Utah Court of Appeals outlined the test to be applied in determining if claims of the parties are precluded in *Youren v Tintic School District*, 86 P.3d 771 (Utah App.,2004): First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits. *Macris & Assocs. v. Neways, Inc.*, 2000 UT 93, ¶ 20, 16 P.3d 1214 (quotations and citations omitted). "All three elements must be established for claim preclusion to apply." *Miller*, 2002 UT 6 at ¶ 58, 44 P.3d 663. Youren concedes that the first element is satisfied. **Under the second element, Youren's "claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action."** *Macris & Assocs.*, 2000 UT 93 at ¶ 20, 16 P.3d 1214 (emphasis added) (quotations and citations omitted). **In several portions of her brief, Youren admits that she "could have" brought her first cause of action in the prior suit. Further, she should have brought it in the prior suit because it is based upon the same set of operative facts alleged in that suit. Therefore, the second element is satisfied.** The third element, which requires that "the first suit must have resulted in a final judgment on the merits," is also satisfied. *Id.* (quotations and citations omitted). The fact that a portion of the final judgment in the prior suit is pending appeal does not affect the finality of the judgment for purposes of res judicata. *See Copper State Thrift & Loan v. Bruno*. 735 P.2d 387, 390 (Utah Ct.App.1987) ("A judgment or order, once rendered, is final for

purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition."'). **Because all three elements are satisfied, we conclude that the trial court properly dismissed Youren's first cause of action under the claim preclusion branch of res judicata.** (Emphasis added).

Id. at 771-72.

It is respectfully submitted that there is no distinguishable difference between the claims of the Appellant in the separate deficiency judgment case and the issues presented to the trial court in the Appellant's order to show cause and therefore claim preclusion should apply to bar the Appellant's attempt to re-litigate the matter in the order to show cause.

POINT VIII: THIS COURT SHOULD ASSESS ATTORNEY FEES IN THIS MATTER

Rule 33 of the Utah Rules of Appellate Procedure allows for the assessment of damages and attorney fees when the determination is made that the appeal is frivolous. The Rule, in relevant part, states:

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

(b) Definitions. For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. . . .

(c) Procedures. (1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper. (2)

If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument. . . .

With all due respect, the Appellee submits that the contents of the Appellant's appeal are legally insufficient on almost every level. There was no real attempt to accurately establish the ruling and methodology of Judge Howard. The Appellant did not marshal the underlying facts in this case. The Appellant blatantly included and argued from evidence that is not part of the record in this case. As to the Appellant's only viable argument, change of circumstances, the Appellant knew that no petition or even a request had been made in these proceedings to modify the Corrected Decree. The issue was not included in any pleadings or arguments.

Based upon the total absence of a viable theory to support an appeal and the direct violation the basic rules relating to the preparation of a brief, the Appellee should be entitled to reimbursement for his damages which include but are not limited to attorney fees and costs.

CONCLUSION

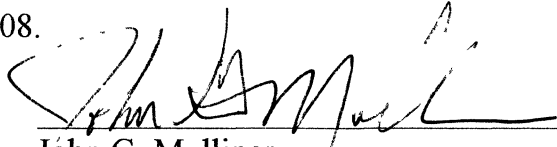
Preliminarily, this Court should hold that the Appellant had failed to marshal the evidence to adequately contest the factual findings of Judge Howard. Additionally, the Court should strike all evidence relied upon by the Appellant that has not been made part of the record on appeal. Further, the Court should not address the new issues raised by the Appellant

on appeal.

It is respectfully submitted that the Court should determine that the relevant language in the Corrected Decree of Divorce is clear and unambiguous and under the terms thereof, the Appellee has no underlying obligation to the Appellant, on the trust deed and notes incorporated into the Corrected Decree. The Court should adjudge that the Appellee's position is supported by the one action rule and claim preclusion.

Finally, Appellee requests that this Court uphold and sustain Judge Howard's ruling and order granting the Appellee's motion in limine and assess attorney fees against the Appellant in accordance with Rule 33 of the Utah Rules of Appellate Procedure.

Dated this 3rd day of ^{June}~~May~~, 2008.

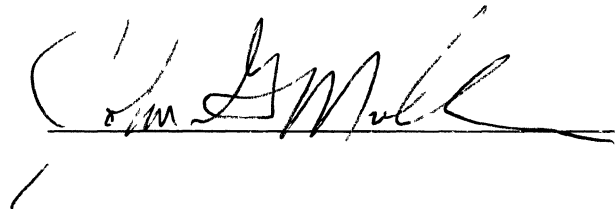


John G. Mulliner
Attorney for Appellee

CERTIFICATE OF MAILING

I certify that two (2) copies of the forgoing were mailed to the following on the 3rd
June
day of ~~May~~, 2008.

Gary H. Weight, Esq.
ALDRICH, NELSON, WEIGHT & NELSON
43 East 200 North
P.O. Box "L"
Provo, Utah 84603-0200.

A handwritten signature in black ink, appearing to read "Gary H. Weight", is written over a horizontal line. There is a small mark below the line to the left of the signature.

Addendum

EXHIBIT “A”

CORRECTED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
CORRECTED DECREE OF DIVORCE

ORIGINAL

CHARLES BRADFORD CARLSTON (6848)
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Provo, Utah 84601
(801) 374-6272

File No. 3581.02

**IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH**

PAMELA GIBBY,

Petitioner,

vs.

RICHARD GIBBY,

Respondent.

**CORRECTED
FINDINGS OF FACT &
CONCLUSIONS OF LAW**

Civil No. 994400490

Judge Fred D. Howard

DIVISION # 2

This matter came on regularly before the Honorable Fred D. Howard. The Court had before it a Stipulation executed by the parties and Petitioner's counsel, in which the Respondent consented that his default could be entered and that the matter may be heard on the basis of the Petitioner's Complaint and the terms of the parties' Stipulation. The Court, after reviewing the Stipulation and pleadings on file herein, entered its Findings of Fact and Conclusions of Law as well as a Decree of Divorce on June 23, 1999.

Shortly after that date, it came to the attention of the parties that the June 23, 1999 Decree did not accurately reflect the Stipulation of the parties. Therefore, the Court does now make and enter the following Corrected Findings of Fact and Conclusions of Law:

CORRECTED FINDINGS OF FACT

JURISDICTION

1. Petitioner was a resident of Utah County, State of Utah, for more than three (3)

months immediately preceding the filing of this action.

2. Petitioner and Defendant are husband and wife, having been married on February 28, 1976, in Utah.

3. During the course of the marriage, differences have arisen between the parties which differences are irreconcilable and have made the continuation of the marriage impossible.

CHILDREN

4. The parties have agreed that Petitioner shall have custody of the following two (2) minor children, subject to Respondent's visitation according to the statutory minimum guidelines:

A. JASON GIBBY (born December 29, 1987)

B. KYLE GIBBY (born November 18, 1992).

CHILD SUPPORT

5. The parties have agreed that, as and for child support, Respondent should be ordered to pay to Petitioner statutory child support until each child graduates from high school with his/her peers or reaches age 18, whichever later occurs. The parties agree that Respondent's initial obligation, as of June 1, 1999, will be \$1,400.00 based on his 1998 average monthly gross income of \$10,000.00 and hers of 0.00.

6. The parties have agreed that Respondent should be ordered to establish an interbank transfer or another type of direct deposit into a bank account of Petitioner's choice. Said transfer of funds shall occur on the 5th and 20th of each month.

7. Otherwise, if the parties agree, Respondent shall provide to Petitioner at the

signing of this stipulation, checks dated the 5th and 20th of the following three months. By the end of each month, thereafter, Respondent shall, by the end of each month deliver to Petitioner checks appropriately dated such that she would have in hand at any one time three (3) months of support checks.

PARENTING ISSUES

8. **Time-sharing Arrangement:** Petitioner, PAMELA GIBBY, is hereby granted the sole physical custody of the two (2) minor children subject to Respondent's spending time with the minors according to the statutory minimum guidelines. The parties are hereby ordered to work out between them a time-sharing calendar on a month-to-month basis using statutory guidelines.

9. **Decision-making:** Both parties are hereby granted joint legal custody of the children. This means that Petitioner and Respondent will make joint decisions regarding all major decisions that may arise regarding the minor children. Major decisions will include decisions regarding the children's education, religious training, medical and dental care, and counseling. If an impasse is encountered, the parties are ordered to seek the advice of a mutually-agreeable expert and allow him/her to be the final decision-maker.

10. **The children's post-high-school expenses:** In accordance with the stipulation of the parties, both parties shall use best efforts to share equally (50/50) the costs associated with the children's college tuition and expenses, missions, and weddings, except where Respondent has otherwise agreed to pay the full amount.

PERSONAL PROPERTY

11. The parties have agreed that each of the parties should be awarded the personal property now in his/her respective possession as a full and complete property settlement, subject to the following:

A. The Petitioner should be awarded the following specific personal property:

- i. 1995 Suburban automobile free of any encumbrances
- ii. ~~1/2 of the value (approximately \$1,632.00) of the approximately 2,000~~ shares of Cimetrics stock. Upon receipt of her share (approximately \$816.00) Petitioner should quit claim the shares to Respondent.

B. The Respondent should be awarded the following specific personal property:

- i. Approximately 2,000 shares of Cimetrics stock.:
- ii. 1996 Dodge Ram Truck 4x4:
- iii. 1996 Seadoo Boat and Trailer; :
- iv. 1998 Angler (Fleetwood) Camper.

C. Petitioner and Respondent have agreed that they should divide equally the net proceeds from the following when all encumbrances are resolved:

- 1. Hanks note (approx. \$28,000.00);
- 2. Camino Cielo Property (uncertain amount)

REAL PROPERTY

12. The parties have agreed that marital real property of the parties should be

awarded as follows:

A. To the Petitioner:

1. The home of the parties located at 49 North Country Lane (920 East), Orem, Utah 84057 (with a net equity of approximately \$355,000.00);
2. ½ of net from sale of 855 N. Freedom Blvd., Provo, UT.

B. To the Respondent:

- 410 Arenoso, San Clemente, California (Net equity: \$500,500.00);
- ~~424 Granada, San Clemente, California (Net equity: \$448,000.00)~~
- 527 So. State Street, Orem, Utah (Net equity: \$41,000.00)
- 241 East 2230 North, Provo, Utah (Net equity: 55,000.00);
- 363 N. University Avenue, Provo, Utah (Net equity: \$400,000.00);*
- 855 North Freedom Blvd., Provo, Utah (Net equity: 108,000.00);*
- ½ of net from sale of 855 N. Freedom Blvd., Provo, UT (net: ?).

Total net equity \$1,552,500.00**

Key:

* = Note that these three (3) properties are subject to the notes identified in "Equalizing Payment", below.

** Note that this total does not yet include ½ of the net from the sale of 855 Freedom Blvd., Provo,)

C. To equalize the distribution of marital property to the parties, the parties have agreed that Respondent will sign Promissory notes to Petitioner (see Equalizing Payment, below).

SPECIAL ARRANGEMENTS RE 557-559 E. 2000 SOUTH, OREM, PROPERTY.

13. Petitioner and Respondent have agreed that, in the event that Respondent dies

before the life estate has been terminated by the death of both of Petitioner's parents, the property at 557-559 East 2000 South, Orem, Utah shall be deeded to Petitioner.

EQUALIZING PAYMENT

14. To equalize the marital real property settlement between the parties, the parties have agreed that

A. Respondent, or the appropriate LLC, should be ordered to sign a Promissory note to Petitioner in the sum of \$390,000.00 secured by a trust deed in the same amount on the property at 363 N., University Avenue, Provo, Utah 84601. The terms of the note should include a 7% interest rate on the principle amortized for 20 years. Payments on the note should be made to Petitioner on the 1st of each month beginning June 1, 1999.

B. Respondent, or the appropriate LLC, should be ordered to sign a Promissory note to Petitioner in the sum of \$50,000.00 secured by a trust deed in the same amount on the property at 855 N. Freedom Blvd., Provo, Utah 84601. The terms of the note should include a 7.5% interest rate on the principle amortized for 20 years. Payments on the note should be made to Petitioner on the 1st of each month beginning June 1, 1999.

C. Respondent, or the appropriate LLC, should be ordered to sign a Promissory note to Petitioner in the sum of \$90,750.00 secured by a trust deed in the same amount on the property at 424 Granada, San Clemente, California 92672. The terms of the note should include a 9% interest rate on the principle amortized for 20 years. Payments on the note will be made to Petitioner on the 5th of each month beginning June 1, 1999.

Respondent agrees to a five (5) year call on the note.

D. Respondent, or the appropriate LLC, should be ordered to list the

property at 855 N. Freedom Blvd., Provo, Utah 84601 for sale no later than June 1, 2003 for a price not to exceed a then-current appraisal amount. The parties have agreed that the house should close no later than June 1, 2004. Respondent, or the appropriate LLC, should be ordered to continue to make regular and timely loan payments including principle and interest. The parties agreed that they should divide equally the net proceeds from the sale of said property. The parties have agreed that net proceeds is defined as any proceeds realized over the amounts owed on the first and second trust deeds, including any and all principle reduction, less selling expenses (i.e., closing costs, selling commission actually paid, etc.).

DEBTS AND OBLIGATIONS

15. Petitioner and Respondent have agreed that the debts of the parties should be allocated as follows:

A. The Petitioner shall pay, and hold Respondent harmless therefrom, the following debts:

1. Those incurred by Petitioner after May 12,

B. The Respondent should pay, and hold the Petitioner harmless therefrom, the following debts:

1. Bonneville - approximately \$50,000;

2. MBNA Platinum Plus credit card - approximately \$17,000.00

(this is to be paid off as soon as possible); MBNA credit card - approximately \$8,000.00; Dr. Wiest (dentist) - approximately \$1,300.00;

3. Dr. Aurthur (dentist) - approximately \$2,000.00;

4. American Express credit card - approximately \$5,000.00;

5. MT America loan (for Rick's truck) - approximately \$5,900.00;
6. SCI (burial plot for Rick's parents) - approximately \$3,900.00; and
7. Dr. Watson (counseling) - approximately \$2,150.00.
8. Each of the parties shall be responsible for any debts incurred by

him/her after May 12, 1999.

16. The parties have also agreed that Respondent may use the proceeds from a certain lawsuit (against the title company regarding a Universal Campus Credit Union loan) to pay off the following debts:

- A. Those debts enumerated in 18(b) above, incurred prior to May 12, 1999, including the costs of servicing the debts through May 12, 1999;
- B. Any other expenses on the leased Neon automobile currently used by the children other than gas, including the costs of terminating the lease when it is up;
- C. All of Petitioner's attorney fees and costs in completing her divorce action; and
- D. Remaining proceeds from the lawsuit will be divided equally between the parties.

17. The parties have agreed that they shall split 50/50 the lease and insurance on the Neon automobile currently used by the children.

SPOUSAL SUPPORT

18. The parties have agreed that Petitioner shall use her best efforts to rent the apartment above the garage at Petitioner's residence. Said rent will be used to pay part of the mortgage on Petitioner's home at 49 North Country Lane (920 East), Orem, Utah 84097. The

parties have agreed that Respondent shall reimburse Petitioner for one-half ($\frac{1}{2}$) (approximately \$1,355.54 currently) of the remaining monthly principle, interest, taxes, and insurance payments on the residence for the months of June, July and August 1999 or until the apartment is rented -- whichever occurs first.

19. Thereafter, Respondent shall reimburse Petitioner for one-half ($\frac{1}{2}$) (approximately \$1,058.04 currently) of the remaining monthly principle, interest, taxes, and insurance payments on the residence for three (3) years or until the house sells, whichever occurs first. ~~The parties have agreed that this shall be paid as additional alimony to Petitioner.~~

20. Petitioner and Respondent have agreed that the Respondent shall pay to Petitioner as Spousal Support the following amounts:

- a. \$2,150.00 each month for 10 years or until Petitioner's remarriage or death;
- b. \$1,355.54 for the months of June, July and August 1999 or until the apartment above Petitioner's garage is rented - whichever occurs first;
- c. \$1,058.04 per month until May 31, 2002 or until Petitioner's residence sells, whichever occurs first.

21. The parties have agreed that Respondent shall establish an interbank transfer or another type of direct deposit into a bank account of Petitioner's choice. Said transfer of funds shall occur on the 5th and 20th of each month.

22. Otherwise, if the parties agree, Respondent shall provide to Petitioner at the signing of this stipulation, checks dated the 5th and 20th of the following three months. By the end of each month, thereafter, Respondent shall, by the end of each month deliver to Petitioner checks appropriately dated such that she would have in hand at any one time three (3) months of support checks.

HEALTH INSURANCE AND UNINSURED EXPENSES

23. Petitioner and Respondent have agreed that Respondent shall provide health insurance coverage for the two (2) minor children at his sole expense. Both parties have agreed that they shall share equally (50/50) all uninsured medical expenses, including medical, dental, optical, and counseling.

24. The parties have agreed that Petitioner shall pay up front directly to the provider her one-half (1/2) of uninsured medical, dental, optical, and counseling expenses. The parties will arrange for the provider to bill Respondent for the remainder of uninsured medical, dental, optical, and counseling expenses.

LIFE INSURANCE

25. Both parties have agreed that Respondent will maintain term life insurance on his life in the amount of \$500,000.00 -- for as long as Respondent has an obligation to Petitioner for child support, spousal support and/or the promissory note -- with Petitioner as the sole beneficiary. Respondent shall, further, provide to Petitioner proof of payment of premiums and shall instruct the insurance carrier to immediately notify Petitioner prior to declaring the policy in default for any reason.

TAXES

26. Petitioner and Respondent have agreed that they should equally divide any tax refund forthcoming for the past tax year.

27. The parties have agreed that Petitioner as the home-based parent, will be awarded the tax exemptions for the eligible children. However, the parties have also agreed that Petitioner will sign over the exemptions to Respondent from tax year to tax year subject to the following

conditions:

- A. That Respondent is current in his child support and other obligations; and
- B. That Respondent pay to Petitioner the tax benefit she would have had had she claimed the exemptions on her tax returns.

ATTORNEY'S FEES

28. The parties have agreed that Respondent should pay all attorney's fees and costs associated with this divorce action.

MISCELLANEOUS

29. The parties have agreed that this Stipulation shall be a full and complete settlement of all claims running between the parties as of this date, subject to the express condition that the financial data that has been provided by Respondent to Petitioner and her attorney is both complete and accurate.

30. The parties have agreed that the Respondent has been informed that Charles Bradford Carlston, counsel for Petitioner, cannot and will not act as counsel for him in this matter.

31. That the Respondent does not desire to retain counsel to represent him in this matter and has agreed to all the items mentioned in the Stipulation of his own free will.

32. The parties have agreed that the provisions of this Agreement shall not be modified or changed except by mutual consent and agreement of the parties expressed in writing.

33. The parties have agreed that this Agreement shall be binding upon the parties and the respective heirs, executors, administrators and assigns.

34. Both the Petitioner and Respondent have acknowledged that they have read and

reviewed the Stipulation and have represent that the Agreement was entered into voluntarily and that the Stipulation should be a full and complete settlement of all claims running between the parties of this date.

Having entered its Findings of Fact, the Court hereby enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties in the above-captioned matter.
2. Petitioner is entitled to a Decree of Divorce divorcing her from the Respondent upon the grounds of irreconcilable differences.
3. Said Decree of Divorce should become final and absolute immediately upon its filing and entry in the office of the clerk of the court.
4. The parties are entitled to have the forgoing Findings of Fact incorporated into their Conclusions of Law.

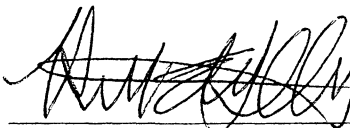
DATED this 17th day of March, 2000.

BY THE COURT:



DISTRICT COURT JUDGE



APPROVED AS TO FORM:


RICHARD GIBBY
Respondent Pro Se

ORIGINAL

Charles Bradford Carlston (6848)
BRADFORD & BRADY, P.C. 
Attorneys for Petitioner
389 North University Avenue
Provo, Utah 84601
(801) 374-6272

File No. 3581.02

**IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH**

CORRECTED DIVORCE DECREE	
PAMELA GIBBY,	Petitioner,
vs.	
RICHARD GIBBY,	
	Respondent.
Civil No. 994400490 Judge Fred Howard DIVISION # <u>2</u>	

This matter came on regularly before the Honorable Fred D. Howard. The Court had before it a Stipulation executed by the parties and Petitioner's counsel, in which the Respondent consented that his default could be entered and that the matter may be heard on the basis of the Petitioner's Complaint and the terms of the Stipulation. The Court, after reviewing the Stipulation and pleadings on file herein, entered its Findings of Fact and Conclusions of Law as well as a Decree of Divorce. Shortly after that time, it has come to the attention of the parties that the June 23, 1999 Decree of Divorce did not accurately reflect the Stipulation of the parties. Therefore, the Court now makes and enters the following:

CORRECTED DECREE OF DIVORCE

1. Petitioner, PAMELA GIBBY, is hereby granted a Decree of Divorce divorcing her from the Respondent, RICHARD GIBBY, upon the grounds that irreconcilable differences have arisen between the parties, making continuation of the marriage impossible.

2. Said Decree of Divorce shall become final and absolute immediately upon its filing and entry in the office of the clerk of the Court.

CHILDREN

3. The Court hereby orders that Petitioner shall have sole physical custody of the following two (2) minor children, subject to the statutory minimum guidelines:

- a. JASON GIBBY (born December 29, 1987)
- b. KYLE GIBBY (born November 18, 1997):

CHILD SUPPORT

4. As and for child support, Respondent is ordered to pay to Petitioner statutory child support until each child graduates from high school with his/her peers or reaches age 18, whichever later occurs. Respondent's initial obligation, as of June 1, 1999, will be \$1,400.00 based on his current monthly gross income of \$10,000.00 and hers of 0.00.

5. Respondent is ordered to establish an interbank transfer or another type of direct deposit into a bank account of Petitioner's choice. Said transfer of funds shall occur on the 5th and 20th of each month.

6. Otherwise, if the parties agree, Respondent shall provide to Petitioner at the signing of this stipulation, checks dated the 5th and 20th of the following three months. By the end of each month, thereafter, Respondent shall, by the end of each month deliver to Petitioner checks appropriately dated such that she would have in hand at any one time three (3) months of support checks

PARENTING ISSUES

7. **Time-sharing Arrangement:** Petitioner, PAMELA GIBBY, is hereby granted the sole physical custody of the two (2) minor children subject to Respondent's spending time with the minors according to the statutory minimum guidelines. The parties are hereby ordered to work out between them a time-sharing calendar on a month-to-month basis using statutory guidelines.

8. **Decision-making:** Both parties are hereby granted joint legal custody of the children. This means that Petitioner and Respondent will make joint decisions regarding all major decisions that may arise regarding the minor children. Major decisions will include decisions regarding the children's education, religious training, medical and dental care, and counseling. If an impasse is encountered, the parties are ordered to seek the advice of a mutually-agreeable expert and allow him/her to be the final decision-maker.

9. **The children's post-high-school expenses:** In accordance with the stipulation of the parties, both parties shall use best efforts to share equally (50/50) the costs associated with the children's college tuition and expenses, missions, and weddings, except where Respondent has otherwise agreed to pay the full amount.

PERSONAL PROPERTY

10. Each of the parties is awarded the personal property now in his/her respective possession as a full and complete property settlement, subject to the following:

- a. The Petitioner is awarded the following specific personal property:
 - (i) 1995 Suburban automobile free of any encumbrances

(ii) ½ of the value (approximately \$1,632.00) of the approximately 2,000 shares of Cimetrics stock. Upon receipt of her share (approximately \$816.00) Petitioner is ordered to quit claim the shares to Respondent.

b. The Respondent is awarded the following specific personal property:

(i) Approximately 2,000 shares of Cimetrics stock.:

(ii) 1996 Dodge Ram Truck 4x4:

(iii) 1996 Seadoo Boat and Trailer; :

~~(iv) 1998 Angler (Fleetwood) Camper.~~

11. Petitioner and Respondent are hereby ordered to divide equally the net proceeds from the following when all encumbrances are resolved:

a. Hanks note (approx \$28,000.00);

b. Camino Cielo Property (uncertain amount)

REAL PROPERTY

12. The Court hereby orders the marital real property of the parties distributed as follows:

a. To the Petitioner

1. The home of the parties located at 49 North Country Lane (920 East), Orem, Utah 84057 (with a net equity of approximately \$355,000.00);

2. ½ of net from sale of 855 N. Freedom Blvd., Provo, UT.

b. To the Respondent:

• 410 Arenoso, San Clemente, California (Net equity: \$500,500.00);

- 424 Granada, San Clemente, California (Net equity: \$448,000.00);*
- 527 So. State Street, Orem, Utah (Net equity: \$41,000.00)
- 241 East 2230 North, Provo, Utah (Net equity: 55,000.00);
- 363 N. University Avenue, Provo, Utah (Net equity: \$400,000.00);*
- 855 North Freedom Blvd., Provo, Utah (Net equity: 108,000.00);*
- ½ of net from sale of 855 N. Freedom Blvd., Provo, UT (net: ?).

Total net equity \$1,552,500.00**

Key.

* = Note that these three (3) properties are subject to the notes identified in "Equalizing Payment", below.

** Note that this total does not yet include ½ of the net from the sale of 855 Freedom Blvd., Provo,)

c. To equalize the distribution of marital property to the parties, Respondent will sign Promissory notes to Petitioner (see Equalizing Payment, below);

SPECIAL ARRANGEMENTS RE 557-559 E. 2000 SOUTH, OREM, PROPERTY

13. The Court hereby orders that, in the event that Respondent dies before the life estate has been terminated by the death of both of Petitioner's parents, the property at 557-559 East 2000 South, Orem, Utah shall be deeded to Petitioner.

EQUALIZING PAYMENT

14. To equalize the marital real property settlement between the parties:

a. Respondent, or the appropriate LLC, is hereby ordered to sign a Promissory note to Petitioner in the sum of \$390,000.00 secured by a trust deed in the same amount on the property at 363 N., University Avenue, Provo, Utah 84601. The

terms of the note will include a 7% interest rate on the principle amortized for 20 years. Payments on the note will be made to Petitioner on the 1st of each month beginning June 1, 1999.

b. Respondent, or the appropriate LLC, is hereby ordered to sign a Promissory note to Petitioner in the sum of \$50,000.00 secured by a trust deed in the same amount on the property at 855 N. Freedom Blvd., Provo, Utah 84601. The terms of the note will include a 7.5% interest rate on the principle amortized for 20 years. Payments on the note will be made to Petitioner on the 1st of each month beginning June 1, 1999.

c. Respondent, or the appropriate LLC, is hereby ordered to sign a Promissory note to Petitioner in the sum of \$90,750.00 secured by a trust deed in the same amount on the property at 424 Granada, San Clemente, California 92672. The terms of the note will include a 9% interest rate on the principle amortized for 20 years. Payments on the note will be made to Petitioner on the 5th of each month beginning June 1, 1999. Respondent agrees to a five (5) year call on the note.

d. Respondent, or the appropriate LLC, is hereby ordered to list the property at 855 N. Freedom Blvd., Provo, Utah 84601 for sale no later than June 1, 2003 for a price not to exceed a then-current appraisal amount. It shall close no later than June 1, 2004. Respondent, or the appropriate LLC, is hereby ordered to continue to make regular and timely loan payments including principle and interest. The parties are hereby ordered to divide equally the net proceeds from the sale of said property. Net proceeds is defined as any proceeds realized over the amounts owed on the first and

second trust deeds, including any and all principle reduction, less selling expenses (i.e., closing costs, selling commission actually paid, etc.).

DEBTS AND OBLIGATIONS

15. The Court hereby orders that the debts of the parties should be allocated as follows:

a. The Petitioner shall pay, and hold the Respondent harmless therefrom, the following debts:

(i) Those incurred by Petitioner after May 12, 1999.

b. The Respondent shall pay, and hold the Petitioner harmless therefrom, the following debts:

(i) Bonneville - approximately \$50,000;

(ii) MBNA Platinum Plus credit card - approximately \$17,000.00 (this is to be paid off as soon as possible);

(iii) MBNA credit card - approximately \$8,000.00;

(iv) Dr. Wiest (dentist) - approximately \$1,300.00;

(v) Dr. Aurthur (dentist) - approximately \$2,000.00;

(vi) American Express credit card - approximately \$5,000.00;

(vii) MT America loan (for Rick's truck) - approximately \$5,900.00;

(viii) SCI (burial plot for Rick's parents) - approximately \$3,900.00;

and

(ix) Dr. Watson (counseling) - approximately \$2,150.00.

(x) Each of the parties shall be responsible for any debts incurred by him/her after May 12, 1999.

16. The Court also orders that Respondent may use the proceeds from a certain lawsuit (against the title company regarding a Universal Campus Credit Union loan) to pay off the following debts:

a. Those debts enumerated in 18(b) above, incurred prior to May 12, 1999, including the costs of servicing the debts through May 12, 1999;

b. Any other expenses on the leased Neon automobile currently used by the children other than gas, including the costs of terminating the lease when it is up;

c. All of Petitioner's attorney fees and costs in completing her divorce action, and

d. Remaining proceeds from the lawsuit will be divided equally between the parties.

17. The parties are hereby ordered to split 50/50 the lease and insurance on the Neon automobile currently used by the children.

SPOUSAL SUPPORT

18. Petitioner is hereby ordered to use her best efforts to rent the apartment above the garage at Petitioner's residence. Said rent will be used to pay part of the mortgage on Petitioner's home at 49 North Country Lane (920 East), Orem, Utah 84097. Respondent is ordered to reimburse Petitioner for one-half (1/2) (approximately \$1,355.54 currently) of the remaining monthly principle, interest, taxes, and insurance payments on the residence for the months of June, July and August 1999 or until the apartment is rented -- whichever occurs

first. Thereafter, Respondent shall reimburse Petitioner for one-half ($\frac{1}{2}$) (approximately \$1,058.04 currently) of the remaining monthly principle, interest, taxes, and insurance payments on the residence for three (3) years or until the house sells, whichever occurs first. This shall be paid as additional alimony to Petitioner.

19. Respondent is hereby ordered to pay to Petitioner as Spousal Support the following amounts:

- a. \$2,150.00 each month for 10 years or until Petitioner's remarriage or death,
- b. \$1,355.54 for the months of June, July and August 1999 or until the apartment above Petitioner's garage is rented – whichever occurs first;
- c. \$1,058.04 per month until May 31, 2002 or until Petitioner's residence sells, whichever occurs first.

20. Respondent is ordered to establish an interbank transfer or another type of direct deposit into a bank account of Petitioner's choice. Said transfer of funds shall occur on the 5th and 20th of each month.

21. Otherwise, if the parties agree, Respondent shall provide to Petitioner at the signing of this stipulation, checks dated the 5th and 20th of the following three months. By the end of each month, thereafter, Respondent shall, by the end of each month deliver to Petitioner checks appropriately dated such that she would have in hand at any one time three (3) months of support checks.

HEALTH INSURANCE AND UNINSURED EXPENSES

22. Respondent is hereby ordered to provide health insurance coverage for the two (2) minor children at his sole expense. Both parties are ordered to share equally (50/50) all uninsured medical expenses, including medical, dental, optical, and counseling.

23. The Court further orders Petitioner to pay up front directly to the provider her one-half (½) of uninsured medical, dental, optical, and counseling expenses. The parties are ordered to arrange for the provider to bill Respondent for the remainder of uninsured medical, dental, optical, and counseling expenses.

LIFE INSURANCE

24. The Court further orders Respondent to maintain term life insurance on his life in the amount of \$500,000.00 -- for as long as Respondent has an obligation to Petitioner for child support, spousal support and/or the promissory note -- with Petitioner as the sole beneficiary. Respondent is further ordered to provide to Petitioner proof of payment of premiums and to instruct the insurance carrier to immediately notify Petitioner prior to declaring the policy in default for any reason.

TAXES

25. The parties are ordered to equally divide any tax refund forthcoming for the past (1998) tax year.

26. The Court further orders that Petitioner, as the home-based parent, be awarded the tax exemptions for the eligible children. However, Petitioner may sign over the exemptions to Respondent from tax year to tax year subject to the following conditions:

a. That Respondent is current in his child support and other obligations; and

b. That Respondent pay to Petitioner the tax benefit she would have had had she claimed the exemptions on her tax returns.

ATTORNEY'S FEES

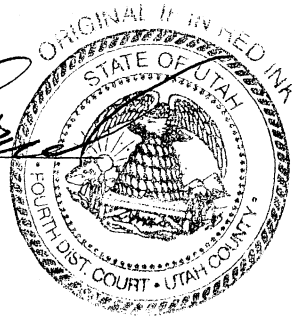
27. The Court further orders Respondent to pay all attorney's fees and costs associated with this divorce action.

28. The Court further orders both parties to cooperate fully in executing any and all documents required in order to fully implement this Decree of Divorce.

DATED this 17th day of March, 2000.

BY THE COURT:


DISTRICT COURT JUDGE



APPROVED AS TO FORM:

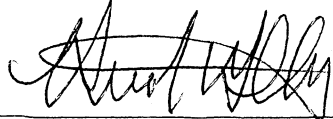

RICHARD GIBBY Respondent Pro Se

EXHIBIT “B”

ORDER GRANTING SUMMARY JUDGMENT IN THE DEFICIENCY ACTION

FILED
Fourth Judicial District Court
of Utah County, State of Utah

6/22/05 MB7 Deputy

2-05

B

Rosemond Blakelock #6
Attorney for Responde
75 South 300 West
Provo, Utah 84606
Telephone: (801) 375-7678

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

PAMELA GIBBY,

Plaintiff,

v.

RICHARD GIBBY,

Defendant.

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT

This matter came before the Court, as for oral arguments, following the Defendant's Motion for Summary Judgment. The Court having read Defendant's the Memorandum in Support of Motion for Summary Judgment, having read the Response of the Plaintiff, having heard oral arguments, having examined the file and the contents therein and deeming itself to be fully informed in the premises, orders and rules as follows;

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

1. The Motion for Summary Judgment is hereby granted and the case is hereby dismissed against the Defendant, with prejudice.

0374

2. The Court finds that is not disputed that the Defendant signed all documents on behalf of the LLC and did not sign any documents in a personal capacity.

3. The Court finds that the terms of the parties' Decree of Divorce is not a question before the Court.

4. The Court find that the Defendant signed all Notes and documents in this matter on behalf of the LLC and did not sign any documents in a personal capacity. The Court finds that it is unpersuaded that the Defendant bears any personal liability in this matter.

5. The Court finds that U.C.A. § 48-2c-104 is clear in that it provides that "[a] company formed under this chapter is a legal entity distinct from it's members".

6. The Court finds that because this is a deficiency action, that the Court can grant leave to allow the Plaintiff to bring a separate motion to bring an action against the LLC.

7. The Court is persuaded that this present action does not impose personal liability against Mr. Richard Gibby and further finds that Richard Gibby had no personal liability in this matter.

8. The Court finds that the Defendant is entitled to an award of attorney's fees in this matter and grants the Defendant

a judgment as for his attorney's fees in the amount of
\$ 5,400.00.

9. Because there does not appear to be any question that Mr. Gibby did not have any personal liability in this matter, the Court then considered and accepted the Defendant's arguments that this action was not made in good faith. However, in order to be fair to both parties, the court hereby grants Plaintiff's counsel two weeks to file a Memorandum, regarding any authority he may wish to cite, which support his contention that the action was filed in good faith. The Defendant shall then have five days to respond and the Court shall, at that time, issue the appropriate orders as to attorney's fees.

DATED this 22 day of June, 2005.

BY THE COURT:

/S/ FRED D. HOWARD


Judge Fred Howard
District Court Judge

NOTICE TO COUNSEL, Gary Weight

TO: Gary Weight
43 East 200 North
P.O. Box "L"
Provo, Utah 84603-0200

You will please take notice that the undersigned attorney for Respondent will submit the above and foregoing Order to the Court for signature. Pursuant to Rule 1 (b)(2) of the Utah Rules of Civil Procedure any objection as to the form of the order should be filed with the Court, within five days after service upon you of this notice.

DATED this 29 day of March, 2004.



ROSEMOND G. BLAKELOCK
Attorney for Defendant

CERTIFICATE OF MAILING

On this 29th day of March 2005, I mailed a copy of the Order to Gary Weight at the above listed address, via first class mail.

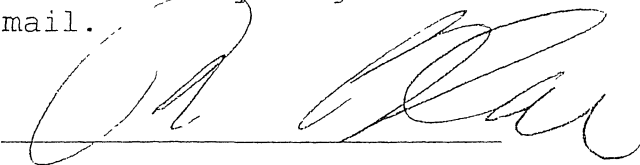



EXHIBIT “C”

JUDGE HOWARD’S ORDER
GRANTING APPELLEE’S MOTION
IN LIMINE

District Court
JUL 13 2006
State of Utah
FILED Clerk 

Rosemond G. Blakelock #6183
Attorney for Defendant
75 South 300 West
Provo, Utah 84601
Telephone: (801) 379-0700

**IN THE FOURTH DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH**

125 North 100 West, Provo, Utah 84601

PAMELA GIBBY,	:	ORDER GRANTING MOTION IN
	:	LIMINE
Plaintiff,	:	
	:	
v.	:	
	:	
RICHARD GIBBY,	:	
	:	Case No. 040403686
Defendant.	:	Judge Fred D. Howard

This matter comes before the Court on Respondent's Motion in Limine. The Court, having reviewed the file and being fully advised in the premises, hereby issues the following:

RULING

1. The Court notes that Respondent filed a Motion in Limine to Preclude the Introduction of Evidence with an accompanying memorandum on April 21, 2006. Petitioner filed a Response

on May 30, 2006. Respondent filed a Reply Memorandum on June 14, 2006. On June 21, 2006, a hearing on Respondent's Motion in Limine was held before the Court.

2. Respondent asserts that Petitioner's claim relating to the \$390,000.00 trust deed note has been adjudicated to conclusion against Petitioner in a companion civil case and, based upon the principles of claim preclusion, Petitioner is barred from relitigating the claim in this action. Respondent argues that he has no underlying obligation to Petitioner upon which a judgment could be based because he fulfilled the obligations described in Paragraph 14 of the Amended Decree by signing a promissory note and trust deed as a member and manager of New West Properties, LLC. Additionally, Respondent argues that Utah's One Action Rule prohibits any further action by Petitioner upon debts against the LLC and Respondent related to the property in question.

3. Petitioner responds that the terms of the Corrected Decree of Divorce create an obligation upon Respondent to assure that Petitioner is given her fair share of the marital estate. Petitioner argues that Respondent has a personal obligation that cannot be transferred to someone else to carry the terms of the Decree with respect to his obligation to give to Petitioner her fair share of the marital estate. Petitioner argues that Respondent's Motion in Limine fails because the issues in the divorce case are not the same as the issues raised and decided in the separate civil action between the parties. Petitioner argues that it would be a violation of the principles of equity and fairness to allow Respondent to liquidate a marital asset and keep for himself the equity which rightfully belongs to Petitioner.

4. The question before the Court is whether Respondent's action of signing a promissory note to Petitioner, on behalf of New West Properties, LLC, in the sum of \$390,000.00 secured by a trust deed in the same amount on the property at 363 N. University Avenue, discharged Respondent's obligation to Petitioner as a matter of law. It is clear from a review of this matter and the Corrected Divorce Decree that the parties were the owners of substantial properties at the time of their divorce. By all appearances, the parties intended to divide the properties with a fair and equalizing approach. The scheme the parties used to divide and equalize their properties included the execution and recording of a trust deed. Trust deeds are accompanied by a host of legal rights, including rights encompassed in the trust deed statute and other rights grounded in case precedent. The Court finds that, by tender of the promissory note and trust deed from New West Properties, LLC, Petitioner's equitable remedies in the divorce action were reduced to legal remedies, many of which legal remedies are superior to other remedies available under the law.

5. The Court notes that the Corrected Decree of Divorce was signed by the Court and entered on March 17, 2000. The next month, on April 24, 2000, the trust deed contemplated by Paragraph 14 of the Corrected Decree and executed on September 2, 1999 by Richard Gibby as Manager of New West Properties, LLC was recorded by the Utah County Recorder's Office. The portion of Paragraph 14 of the Corrected Decree pertaining to Petitioner's claim in this matter reads as follows:

To equalize the marital real property settlement between the parties:
a. Respondent, or the appropriate LLC, is hereby ordered to sign a

Promissory note to Petitioner in the sum of \$390,000.00 secured by a trust deed in the same amount on the property at 363 N., [sic] University Avenue, Provo, Utah 84601. The terms of the note will include a 7% interest rate on the principle [sic] amortized for 20 years. Payments on the note will be made to Petitioner on the 1st of each month beginning June 1, 1999 (emphasis added).

6. The Court finds that because the Corrected Decree gave Respondent the option of either personally signing the Promissory note and trust deed or signing the instruments on behalf of the LLC, Respondent fulfilled his obligation to Petitioner when he complied with Paragraph 14. In effects, Petitioner has already been “paid” her fair share of the marital estate because she elected to accept such form of payment which included valuable rights and remedies described in the Promissory Note and Trust Deed. Furthermore, not only did Petitioner accept the valuable rights when she accepted the Promissory Note and Trust Deed from New West Properties, LLC, but it is undisputed that she also recognized and exercised such rights when she chose to subordinate her interest in the University Avenue property and later foreclosure on the trust deed.

7. In reviewing the Corrected Decree, the Court finds that nowhere in the decree is there language that suggests an additional personal guaranty from Mr. Gibby for the \$390,000.00 promissory note amount. The Court finds that equitable remedies are no longer available to Petitioner with regard to her claim for \$390,000.00 because she obtained bargained-for legal rights in connection with her claim as described, and pursued the legal remedies available to her when she foreclosed on the trust deed.

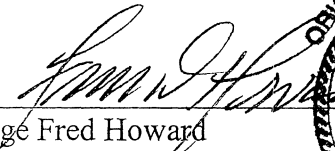
ORDER GRANTING MOTION

Based on the above analysis, and for the reasons set forth by Respondent, the Court grants


Respondent's Motion in Limine and orders that the Petitioner's claims relating to the \$390,000.00 trust Deed Note have been adjudicated and are hereby barred from being brought before the Court for any additional requests for relief.

Signed and Dated this 12 day of July 2006.

BY THE COURT:



Judge Fred Howard



APPROVED AS TO FORM:

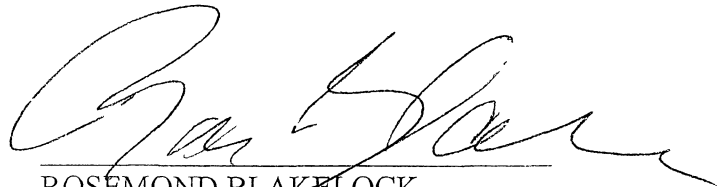
GARY WEIGHT

Gary Weight
290 West Center Street
P.O. Box "L"
Provo, Utah 84603

RULE 7 NOTICE

You will please take notice that the undersigned attorney for Petitioner has submitted the above and foregoing Order to the Court, for signature. Pursuant to Rule 7 (f)(2) of the Utah Rules of Civil Procedure, any objection to the form of the Order should be filed with the Court, within five days after service upon you of this notice.

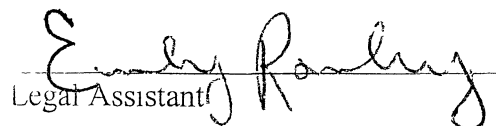
DATED this 10th day of July, 2006.



ROSEMOND BLAKELOCK
Attorney for Respondent

MAILING CERTIFICATE

I hereby certify that on the 10th day of July, 2006, I mailed a true and correct copy of the foregoing documents to the person(s) addressed above



Legal Assistant