

1997

# John Clinton Smith v. Maurine Smith, nka Maurine Adamson : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JOHN CLINTON SMITH,  
Plaintiff/Appellant

**APPEAL NO. 970619-CA**

vs.

Civil No. 834904283 DA

MAURINE SMITH, nka MAURINE  
ADAMSON, Defendant/Appellee

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Utah R. App. P. 29 Argument Priority #15

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APPEAL FROM THE ORDER  
OF THE THIRD JUDICIAL DISTRICT COURT,  
SALT LAKE COUNTY, HONORABLE WILLIAM B. BOHLING

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**BRIEF OF APPELLEE**  
**MAURINE SMITH, nka MAURINE ADAMSON**

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UTAH COURT OF APPEALS  
BRIEF

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### **STATEMENT OF JURISDICTION**

This is an appeal from an order issued by the Third Judicial District Court, in and for Salt Lake County, Utah entered on the 20th of August, 1997. (Record at 362-363 (Notice of Appeal) and 359-361 (Findings and Order)). The Utah Court of Appeals possesses original jurisdiction under Utah Code Ann. § 78-2a-3(2)(h).

### **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

1. Whether the District Court properly considered extrinsic evidence to interpret an ambiguous term used in the Decree of Divorce with respect to awarding Mrs. Smith one-half of the IBEW pension when there are two plausible meanings to the term “IBEW” in light of the following facts:
  - a. The parties were married for over thirty years (R. at 373 and 383);
  - b. That during the course of the marriage, plaintiff acquired all of his retirement interests through his affiliation with the IBEW Local 57 (R. at 373-374);
  - c. At the time of the divorce, Plaintiff held interests three (3) retirement plans through his membership of one (1) labor union, IBEW Local 57 (R. at 373-374); and,
  - d. The Decree of Divorce does not differentiate among any of the plans but, instead, appears to use the term “IBEW” as a blanket term referencing all retirement interests held at the time of the divorce (R. at 383-391 and 413-415 (District Court’s examination of the Appellant)).

Standard of Review. The appellate review is limited to determining whether the findings, after hearing extrinsic evidence to interpret an ambiguous term in a decree of divorce, was

“based on substantial, competent admissible evidence.” (Bettinger v. Bettinger, 793 P.2d 389 (Utah App. 1990)).

Citation to Record. Appellee filed a motion seeking to access the one-half share of Appellant’s retirement benefits which had been previously awarded to Appellee by the stipulated Decree of Divorce. (R. at 92-100, 214-230, 238-264).

2. Whether the District Court abused its discretion when it considered Appellee’s pleadings as a motion to enforce the decree of divorce and not as a petition to modify or a motion to set aside the decree of divorce?

Standard of Review. The appellate review is abuse of discretion. Kunzler v. O’Dell, 855 P.2d 270 (Utah App. 1993).

Citation of Record. Findings of Fact and Order (R. at 359-361).

## **STATEMENT OF THE CASE**

### **NATURE OF THE CASE**

The parties, John Clinton Smith, Plaintiff/ Appellant herein, and Maurine Smith, nka Maurine Adamson, aka Maurine Christensen, Defendant/ Appellee, were married in 1953. For simplicity, Appellant is hereinafter referred to as “Mr. Smith” and Appellee is hereinafter referred to as “Mrs. Smith”. During the course of the marriage, Mr. Smith derived his employment through his affiliation with the International Brotherhood of Electrical Workers (“IBEW”).

In 1984, the parties were divorced by decree which was based upon the stipulation of the parties. Pursuant to the Decree of Divorce, Appellee, Mrs. Smith, was awarded one-half interest in “IBEW pension.” (R. at 100). In 1994, Mrs. Smith filed motions to obtain access to her share of

the retirement funds.(R. at 214-228, 229-230, 238-244, and 247-264). Mr. Smith opposed her motions by claiming that the term “IBEW” as used in the Decree only refers to a small retirement plan derived from paying his retirement dues to IBEW and that the term does not refer to his retirements from NEBF or Eighth District. Mrs. Smith argues that NEBF and Eighth District were both derived from Mr. Smith membership with IBEW and that the term “IBEW”, used in the Decree, is an umbrella term referring to all retirements derived during the course of the marriage and through IBEW.

Mr. Smith argued that Mrs. Smith was attempting to modify the decree; while Mrs. Smith maintains that she only seeks to obtain that which was awarded to her in the original decree (Id.) The motions came before the Third District Court on June 4, 1997, and after hearing extrinsic evidence, the District Court found in favor of Mrs. Smith concluding, inter alia, that the original decree is silent as to NEBF and Eighth District, that all retirement interests were derived through Mr. Smith’s affiliation with IBEW and that the term “IBEW” refers to all retirements. (R. at 359-361). Thereafter, Mr. Smith filed the present appeal.

#### THE COURSE OF THE PROCEEDINGS AND DISPOSITION

This Appeal arises from an evidentiary hearing held on the 4th of June, 1997 pursuant to the post-divorce pleadings filed by the Appellee.

Mrs. Smith’s purpose in bring the post-divorce action was to gain access to the retirement interests which had been awarded to her pursuant to the Decree of Divorce. (R. at 100 at ¶2(i), 214-218, 229-230, 238-244, and 247-264). However, Mr. Smith opposed Mrs. Smith’s action by claiming that the Decree of Divorce only entitled Mrs. Smith to a portion of his retirement which

was no longer in existence and that she was not entitled to any other portions of his retirement which he had been and is receiving. Mr. Smith also argued that Mrs. Smith's pleadings, filed post divorce, were essentially a petition to modify the decree, violated UCSA Rule 6-404(1), and/or a UCRP Rule 60(b) motion to set aside the Decree of Divorce. (R. at 369).

However, the District Court rejected Mr. Smith's arguments that Mrs. Smith's pleadings were tantamount to a UCRP Rule 60(b) motion to set aside the Decree of Divorce and should be treated as a petition to modify. (R. at 370-371).

#### STATEMENT OF FACTS:

The following is a chronological list of the material facts which relate to this appeal:

1. On the 10th of December, 1984, the District Court, based primarily upon the stipulation of the parties, entered its Findings of Fact and Conclusions of Law and the Decree of Divorce dissolving the parties' marriage which began in the spring of 1953. (R. at 1, 92-102).
2. During the course of the marriage and at the time of the Decree of Divorce, Mr. Smith had been, and was, employed through IBEW ("International Brotherhood of Electrical Workers"). (R. 373-374, 381-382, and 404).
3. The Decree of Divorce provides at paragraph 2(i):
  - i. The defendant is awarded one-half of the present value of the plaintiff's IBEW pension. This shall be paid to her when and if the plaintiff receives such benefits. She shall be (sic) [entitled to] that proportion of each payment that the plaintiff receives as her present share of the (sic)[that the] pension bears to the total accrued value on the date payments commence. (R. at 100).
4. On the 19th of May, 1994, Mrs. Smith seeks, by way of motion, to clarify the Decree of Divorce concerning the award of one-half of Mr. Smith's retirements in the Decree. (R. at 214-230).



However, It appears from the record that the hearing was postponed at the request of the Defendant to allow the parties to negotiate a settlement. (R. at 232-234).

5. On the 7th of August, 1995, Mrs. Smith filed a Motion requesting that an order to show cause issue seeking a hearing to determine: (1) clarification of the Decree of Divorce with respect to the award of retirement interests to Mrs. Smith, (2) a judgment against Mr. Smith for the amount of retirement which he had collected to which Mrs. Smith was entitled under the Decree, (3) an award of statutory interest her retirement interest received by Mr. Smith, and (4) an award of attorney's fees and costs. (R. at 247-249).

6. On the 7th of August, 1995, Mrs. Smith files an affidavit<sup>1</sup> in support of her Motion for an Order to Show Cause stating, inter alia, that she is "not aware when and if the IBEW pension changed its name . . .", that she seeks "to have access to the [retirement] funds rightfully ordered by the Court in 1984", and that without a post-divorce order that she believes that "she will not receive the funds that were contemplated at the time the parties entered into a Stipulation and Property Settlement Agreement which is a document precedent to the divorce decree entered on December 10, 1984." (R. at 251 ¶¶ 4 and 5, and at 252 ¶ 7).

7. On the 7th of August, 1995, Mrs. Smith filed a motion entitled "Motion to Amend Divorce Decree for Inclusion of QDRO Language."<sup>2</sup> (R. at 263-264).

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<sup>1</sup> This affidavit is substantially equivalent to the affidavit filed by Mrs. Smith on the 19th of May, 1994. (Cf. R. at 214-217 with R. at 250-254).

<sup>2</sup> This Motion seeking a qualified domestic relations order is substantively similar to the Motion filed by Mrs. Smith on the 19th of May, 1994. (Cf. R. at 218-221 with R. at 255-262).

8. On the 6th of September, 1995, both Mr. Smith and Mrs. Smith appear before a Commissioner. The Commissioner recommends that a qualified domestic relations order be entered consistent with Decree in order to clarify the Divorce Decree, along with a money judgment against Mr. Smith in the amount equal to Mrs. Smith's retirement interests which he has received but failed to remit to her. (R. at 265, 295-296).

9. On the 13th of September, 1995, Mr. Smith, through his present counsel, files an Objection to Commissioner's Recommendation and requests a hearing. (R. at 272-293).

10. On the 1st of April, 1996, a hearing is held before the District Court and the District Court orders an evidentiary hearing to be set on the 19th of July, 1996 on the "interpretation of the Decree of Divorce." (R. at 306, 311-313). However, said hearing was continued to the 4th of June, 1997.

11. On the 4th of June, 1997, an evidentiary hearing was held on the interpretation of the Decree of Divorce. (R. at 342). After hearing the testimony and reviewing the evidence, the District Court found that the Decree is ambiguous, that all of Mr. Smith's retirements are based upon his affiliation and membership with IBEW, that the term "IBEW" as used in the Decree refers to all retirement plans in which Mr. Smith participated during the marriage, and that Mrs. Smith is entitled to one-half of all retirement plans. (R. at 359-361).

### **SUMMARY OF ARGUMENTS**

1. The District Court properly admitted extrinsic evidence to interpret the ambiguous term used in the Decree of Divorce with respect to awarding Mrs. Smith one-half of the IBEW pension when there is two plausible meanings to that term. Subsequently, after hearing competent and admissible evidence, the District Court determined that the parties, at the time of the

divorce, intended to divide all retirement interests which were acquired through Mr. Smith's employments through IBEW.

2. That Appellant's second issue incorrectly assumes that the District Court modified the Decree of Divorce. In fact, the District Court did not modify the Decree but, instead, treated Mrs. Smith's pleadings as her attempt to clarify and enforce the Decree.
3. That Appellant's "equity issue" is irrelevant because Mrs. Smith was not seeking equity or to "realign rights", that Appellant alleges that she "contracted away." Appellant makes the unsupportive claim that Mrs. Smith sought some equitable modification of the Decree and that she "contracted away" her rights. However, the record supports the conclusion that she did not seek a modification or readjustment of the property division. Moreover, the Decree is silent as to the NEBF and Eighth District plans and there is competent evidence that the term "IBEW" refers to all retirement plans acquired during the parties' marriage.

NOTE: The relevant pleadings and the case authorities cited herein have been attached in the Appenix.

***ARGUMENT***  
**ISSUE I:**

**Whether the District Court properly considered extrinsic evidence to interpret an ambiguous term used in the Decree of Divorce with respect to awarding Mrs. Smith one-half of the IBEW pension when there are two plausible meanings to the term "IBEW" under the facts of this case.**

In 1984, after over thirty years of marriage, the parties entered into a stipulation which resulted in the entry of the Decree of Divorce on the 10th of December, 1984. (R. at 98-102).

Paragraph 2(i) of the Decree of Divorce provides as follows:

i. The defendant is awarded one-half of the present value of the plaintiff's IBEW pension. This shall be paid to her when and if the plaintiff receives such benefits. She shall be (sic) [entitled to] that proportion of each payment that the plaintiff receives as her present share of the (sic)[that the] pension bears to the total accrued value on the date payments commence. (R. at 100).

The problem arises when the term "IBEW" as used in the Decree of Divorce is unclear as to when the term "IBEW" could refer to one specific portion of Mr. Smith's retirement or, alternatively, could be interpreted to mean all of his retirement benefits derived from his membership with IBEW. This confusion arises from the fact that during the parties' thirty-plus year marriage, Mr. Smith was affiliated with and gained employments through the Local Union 57 of the International Brotherhood of Electrical Workers. (R. at 373-374, 383<sup>3</sup>). The International Brotherhood of Electrical Workers is also known by the acronym "IBEW". (R. at 374).

Through Mr. Smith's affiliation and membership with IBEW, he earned retirement which could be identified by three plans; namely, NEBF<sup>4</sup>, Eighth District<sup>5</sup>, and IBEW union dues. (R. at 359-360, 381-382<sup>6</sup>). At the time of the hearing, Mr. Smith was receiving retirement benefits from NEBF and Eighth District. However, Mr. Smith did not receive any benefits from what he termed as his "IBEW plan" because he quit that particular aspect of his retirement. (R. at 375-376).

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<sup>3</sup> Testimony that Mr. Smith had worked quite a few jobs during the thirty years of marriage but, that he had only belonged to one union; namely, IBEW.

<sup>4</sup> NEBF is an acronym for National Electrical Worker's Association. (R. at 414).

<sup>5</sup> The term "Eighth District" refers to Eighth District Electrical Pension Fund. (R. at 413)

<sup>6</sup> Plaintiff and Defendant stipulated on the record that eligibility to all retirement plans were by virtue of Mr. Smith's union membership with IBEW.

The interpretation and clarity problem arises because the Decree of Divorce is completely silent and does not mention either NEBF or Eighth District. (R. at 98-102). As a result, the term “IBEW” as used in the Decree could mean either that the term refers to all retirement interests which were earned by reason of Mr. Smith’s affiliation and membership with IBEW, or, alternatively, that the term “IBEW” only refers to a specific portion of Mr. Smith’s retirement.

Mrs. Smith argues that the term “IBEW”, at the time of the divorce, referred to all retirement benefits acquired by Mr. Smith during his employments acquired through his affiliation with IBEW Local 57. (R. at 383-384, 404-405). Mrs. Smith argues that at the time of the divorce both parties understood that the term “IBEW” used in the Decree referred to all retirement benefits derived from Mr. Smith’s employments through IBEW Local Union 52. (R. at 383). Mrs. Smith believes that at the time of the divorce that the term IBEW was meant as a generic, umbrella-type terminology which encompassed all retirement interests earned over the course of the thirty-year marriage (Id.)

On the other hand, Mr. Smith argues that, although the Decree is completely silent as to NEBF and Eighth District, the Decree only awarded Mrs. Smith one-half of a plan known as “IBEW” which is no longer in existence. (R. at 375-376). At the June 4, 1998, hearing, Mr. Smith initially testified that the term “IBEW” is entirely unrelated to NEBF and Eighth District. (R. at 373-374). However, later he testified, at the same hearing, that his interests in NEBF and Eighth District resulted from his affiliation with IBEW. (R. at 413-414). Moreover, the documentary evidence demonstrated that IBEW was directly affiliated and connected with NEBF and Eighth District. (R. at 386 (letterhead of Eighth District bearing the IBEW symbol) and 387-88 (letterhead of NEBF bearing the IBEW symbol)).

The District Court, after hearing the testimony and evidence, found in favor of Mrs. Smith by finding that the term “IBEW” as used in the Decree referred to all retirements of Mr. Smith derived through his employments through IBEW. (R. at 422-423). The District Court determined that the parties, at the time of the divorce, made no distinction among the retirement plans but looked to the term “IBEW” as a single benefit, encompassing all retirement benefits earned during the course of the marriage through Mr. Smith’s affiliation with IBEW. (R. at 423).

The case of Property Assistance Corporation v. Roberts, 768 P.2d 976 (Utah App. 1989) is helpful. In this case, this Court defined when an agreement is ambiguous. While addressing the issue of whether the terms of the contract at issue created a true option contract or rather the equivalent of an earnest money receipt and offer to purchase this Court stated:

The threshold question of whether or not a contract is ambiguous is a question of law for the court. (citations omitted). Language may be ambiguous if “the words used to express the meaning and intention of the parties are insufficient in a sense that the contract may be understood to reach two or more plausible meanings.” (citations omitted). Once the court makes the determination that a contract is ambiguous, “because of the uncertain meaning of terms, missing terms, or other facial deficiencies, parol evidence is admissible to explain the parties’ intent.” (citations omitted). (*Id.*, at 977-978).

In the present appeal, the parties interpret the term “IBEW”, as used in the Decree, with two plausible meanings. The Appellant relies upon cases which provide that the general rule to contract interpretation focuses on the plain and ordinary meaning of the word. However, the present appeal is distinguishable from those cases because the term we are dealing with, “IBEW”, has no common usage, plain meaning or interpretation.

The District Court heard testimony and evidence to determine whether the term “IBEW” includes all retirements earned through IBEW (Eighth District, IBEW, and NEBF) or, “IBEW” only referred to a portion of Mr. Smith’s retirements labeled as IBEW.

The Property Assistance Court makes a presumption that “since the trial court heard the parol evidence of William Oelerich regarding the parties’ intentions, the court necessarily made the initial determination that the agreement was ambiguous.” (Id. at 978). In the present action, the District Court heard extrinsic evidence, including parol evidence, to aid in its interpretation of the term “IBEW”. (R. at 368-426). Thus, by presumption, the District Court heard extrinsic evidence after viewing the term used in the Decree as ambiguous. Therefore, since the District Court resorted to extrinsic evidence with respect to the intention of the parties at the time of the divorce, the appellate review of such findings is “strictly limited” and “the findings and judgment based on extrinsic evidence will not be disturbed unless “clearly erroneous.” (Property Assistance at 978).

The case of Bettinger v. Bettinger, 793 P.2d 389 (Utah App. 1990) also renders assistance. The Bettinger Court, in stating the standard of review, provided that “if the trial court determines the language is ambiguous and finds facts based upon extrinsic evidence, appellate review of such findings is limited to determining whether they are based on substantial, competent, admissible evidence. (Id. at 391-392).

In Bettinger, the trial court did not indicate whether it found the language of the divorce decree ambiguous; instead, the trial court simply interpreted the language of the decree. (Id. at 392). However, despite the absence of a specific finding, the Bettinger Court found that the paragraph in question was ambiguous because the language had two or more plausible meanings. (Id.) With that

finding, the Bettinger Court looked to the record for the intent of the parties. (Id.) Finding nothing there, this Court examined other extrinsic sources to interpret the language of the decree. (Id.)

In the present case, Mrs. Smith sought a clarification of the term “IBEW” so that she could gain access to the retirement interests awarded to her by the Decree. (R. at 214-230, 247-249). The District Court determined that the term “IBEW” could have differing meanings and, after hearing the extrinsic evidence, determined that the term “IBEW” did in fact mean all retirement benefits acquired during the marriage by reason of Mr. Smith’s affiliation with IBEW. (R. at 422-424). The District Court stated at pages 422-423, in material part:

The Court, having reviewed the record and heard testimony, finds that the plaintiff did not in its financial declaration make any distinction of the three different plans that seem to be based on his membership in the International Brotherhood of Electrical Workers . . . It would appear to the Court that that was not-- that the plaintiff nor the defendant had a clear differential understanding of these individual plans, but rather looked upon the pension relating to the International Brotherhood of Electrical Workers as a single benefit that was to be divided equally by the parties as reflected in the divorce decree. There is certainly no written or other disclosures in the record to indicate anything different was the position of the plaintiff.

The Court would find that all three of the plans were the result of a membership in International Brotherhood of Electrical Workers and they all stemmed from that relationship. And as the defendant repeatedly testified to, certainly all three plans were based on the membership in the IBEW.

There is no suggestion in the decree that any reservation was made by the plaintiff to enjoy all of the benefits from those retirement programs and only allow the one which seemed to be the most at risk to be pension plan enjoyed by the-- to be participated in by the defendant. That is not in the record here and again supports the conclusion that the Court has drawn that the intent of the parties wasn’t to differentiate and to disallocate an interest in one of the plans but not the other two.

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Based on all that, it is my view that the decree reference to IBEW is a reference to all three of the plans that were based on that that membership. I think



it would be appropriate to award judgment for one half interest in the amount that has already been paid. There would be a QDRO entered, future payments.

## **ISSUE II**

**Whether the District Court was properly considered Appellee's pleadings as a motion to enforce the decree of divorce and did not consider Appellee's pleadings as a petition to modify or a motion to set aside the decree of divorce?**

According to Appellant's second and third issues on appeal, Appellant asserts that the District Court modified the Decree of Divorce without the filing of "a petition for modification and a showing of a substantial and material change of circumstances not contemplated since entry of the Decree" and Appellee's motion was really a motion to set aside brought under UCRP Rule 60(b). (See, Appellant's Brief at 2, 8-10). However, that Appellant's issues incorrectly assume, or imply, that the District Court actually modified, or set aside, the Decree of Divorce; this was not done. (R. At 369-371) In fact, the District Court did not modify, or set aside, the Decree but, instead, appropriately treated Mrs. Smith's pleadings as her attempt to enforce the Decree. (Id.)

In the pleadings subject to this appeal, Mrs. Smith alleges that pursuant to the Decree of Divorce she was awarded of one-half of Mr. Smith's retirements. (R. at 214-230). Mrs. Smith's Motion requested a hearing to: (1) clarify of the Decree of Divorce with respect to the award of retirement interests to her, (2) award a judgment against Mr. Smith for the amount of retirement which he had collected to which Mrs. Smith was entitled, (3) award of statutory interest her retirement interest received by Mr. Smith, and (4) award of attorney's fees and costs. (R. at 247-

249). Mrs. Smith's affidavit<sup>7</sup> filed in support of her Motion stated, inter alia, that she is "not aware when and if the IBEW pension changed its name . . .", that she seeks "to have access to the [retirement] funds rightfully ordered by the Court in 1984", and that without a post-divorce order that she believes that "she will not receive the funds that were contemplated at the time the parties entered into a Stipulation and Property Settlement Agreement which is a document precedent to the divorce decree entered on December 10, 1984." (R. at 251 ¶¶ 4 and 5, and at 252 ¶ 7).

Appellant argues that Mrs. Smith's motions were, in fact, a petition to modify or a 60(b) motion. However, that is incorrect. Her motions do bear unique titles.<sup>8</sup> However, it is a well-established principle that the courts look to the substance of the motion and not exclusively to the name or form of the motion. (Kunzler v. O'Dell, 855 P.2d 270 (Utah App. 1993); Watkiss & Campbell v. Foa & Son, 808 P.2d 1061, 1064 (Utah 1991), Darrington v. Wade, 812 P.2d 452, 457 (Utah App. 1991); Records v. Briggs, 887 P.2d 864, 868 (Utah App. 1994); Lord v. Shaw, 665 P.2d 1288, 1290 (Utah 1983); and, Wells v. Wells, 272 P.2d 167, 170 (Utah 1954)).

The case of Kunzler v. O'Dell, 855 P.2d 270 (Utah App. 1993) addressed the issue of whether the substance of a motion controlled over the name of the motion. In Kunzler, the motion was labeled "Request of Clarification" of the judgment. The Kunzler court held that motion was sufficient to invoke Rule 60(b) relief. (Id. at 274 (citing Watkiss & Campbell v. Foa & Son, 808

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<sup>7</sup> This affidavit is identical to the affidavit filed by Mrs. Smith on the 19th of May, 1994. (Cf. R. at 214-217 with R. at 250-254).

<sup>8</sup> Mrs. Smith's Motions are entitled as: Motion to Amend Divorce Decree for Inclusion of QDRO language, Motion for Order to Show Cause, and Motion for Amended Entry of Decree of Divorce.

P.2d 1061, 1064 (Utah 1991), and Darrington v. Wade, 812 P.2d 452, 457 (Utah App. 1991)). The Kunzler Court stated that “the title of a motion is not dispositive as to whether a court can grant relief under the motion.” (Id. at 273; see also, Records v. Briggs, 887 P.2d 864, 868 (Utah App. 1994); Lord v. Shaw, 665 P.2d 1288, 1290 (Utah 1983); and, Wells v. Wells, 272 P.2d 167, 170 (Utah 1954)). Similarly, the present appeal does not deal with a petition to modify or 60(b) motion but, instead, the enforcement of the original decree.

The Appellant further argues, though incorrectly, that UCJA Rule 6-404(1) was violated because the District Court allegedly modified the Decree based upon an order to show cause. (Appellant’s Brief at 8-9). Once again, the Appellant incorrectly posits the Findings and Order (the judgment on appeal) as a modification of the decree which it is not. (R. at 359-361).

Moreover, Rule 6-404(1) clearly disallows the use of the order to show cause in order to obtain a modification of a decree of divorce. (UCJA 6-404). A party seeking a modification of a decree, which was based upon a stipulation, must show a substantial and material change of circumstances which merit modification; however, such a showing is under the relaxed “changed-circumstances test.” (See, Elmer v. Elmer, 776 P.2d 599 (Utah 1989); see also, Naylor v. Naylor, 700 P.2d 707 (Utah 1985) and Porco v. Porco, 752 P.2d 365 (Utah App. 1988)).

However, Appellant’s reliance on Naylor and Porco is misplaced by reason of the fact that both cases are cited supporting the “substantial change of circumstances” test in a modification proceeding case. Upon a cursory examination of the substance of Mrs. Smith’s motions and affidavits, it is clear that Mrs. Smith was only attempting to enforce the original terms of the decree

and not seeking a modification. (R. at 247-249). Therefore, no violation of UCJA Rule 6-404(1) has occurred.

In the present appeal, the language of the Decree did not provide a clear indication of the division of the retirement interests. (R. at 100). The Decree was silent as to the divisibility of the retirement interests by using the broad term of one-half of the “IBEW pension” with no mention of NEBF or Eighth District. (R. at 422-424). As supported above, Appellant’s argument that the title of the motions is dispositive while the substance of the motions is not, lacks support and contradicts authority. (Kunzler).

Even if a petition for modification would have been required, the inclusion of an award of a qualified domestic relations order would not substantively modify the Decree or the intent of the parties at the time of the divorce and, thus, would not have changed the findings of the District Court that the term “IBEW” as used in the Decree means all retirements derived from Mr. Smith’s affiliation with IBEW.

### **ISSUE III:**

**Appellant’s Equity Issue is Irrelevant in that Mrs. Smith was not seeking equity or to “realign rights” that Appellant alleges that she “contracted away.”**

Appellant argues that the District Court realigned the “rights and privileges” of Mrs. Smith and that the District Court modified the Decree. However, in fact, the District Court did not modify the Decree but instead, clarified the meaning of the term “IBEW”. (R. at 369-370, 422-424).

Moreover, the reliance placed upon Land v. Land, 605 P.2d 1248 (Utah 1980), Lea v. Bowers, 658 P.2d 1213 (Utah 1983), and Whitehouse v. Whitehouse, 790 P.2d 57 (Utah App. 1990)

is misplaced. Appellant relies heavily upon *Land* for the proposition that a decree cannot be modified to include rights that have been contracted away. In *Land*, a stipulation and property settlement agreement failed to adequately describe the term ‘equity’ of the parties’ house to be divided. (*Id.*, at 1249.) Appellant relies heavily upon *Land* for the proposition that a decree cannot be modified to include rights that have been contracted away. But this rule and analysis does not apply to this appeal.

In *Land*, the parties stipulated that Plaintiff and Defendant would each receive a 50% interest in the equity of their home. (*Id.* at 1249.) Plaintiff’s motion sought to compel defendant to quit-claim to her all of his interest in the subject real property. (*Id.* at 1250.) The trial court ordered that appraisal be made, and that defendant convey to plaintiff (upon payment to him of the value, if any, of the interest granted him by the stipulation), all interest in the property. (*Id.*) The court determined that the “equity” in the property was to be calculated as the market value less any liens, mortgages, obligations or other encumbrances as of that date. (*Id.*) Defendant appealed the order, with the sole contention that the trial court failed “to do equity” in interpreting the stipulation, and more specifically, the meaning of “equity” which the parties chose to use without equivocation or elaboration. (*Id.* at 1250-1251.) Defendant asserted that the trial court should have calculated the equity as the appraised value, less the amount of the first and second mortgages only. (*Id.*) The *Land* Court affirmed the judgment, stating the rule that “equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made.” (*Id.* at 1251-1252)

The situation in *Land* is clearly distinguishable from the present appeal. The *Land* Court found that the trial court's decision was appropriate because the trial court applied "a common usage meaning upon the term ["equity"] . . ." But this appeal addresses the issue of what the term "IBEW" meant at the time the parties entered into their stipulation, not a common term such as "equity," which may be defined by a dictionary. There is no common usage for "IBEW". There is no way of knowing, without more evidence being presented, what the parties in this case intended by "IBEW", especially when the decree is silent as to NEBF and Eighth District.—It is the District Court's interpretation that Mrs. Smith seeks to have affirmed.

Also, no ambiguity of the term "equity" was present in *Land*, nor was it asserted. (*Id.* at 1251). But there is ambiguity in the present decree, and that ambiguity is asserted. It is due to the ambiguity of "IBEW" that Mrs. Smith thought she was agreeing to receive retirement benefits from all Appellant's retirement plans. There is no support for the argument that Mrs. Smith bargained away her rights according to her interpretation of "IBEW," and therefore, the rule stated in *Land* does not apply.

*Lea* is also distinguishable because the Defendant's motion in *Lea* was to amend the Decree of Divorce, and the trial court actually rewrote the terms of the decree. (*Id.* at 1214.) Appellee here is simply asking the court to interpret the language as used in the original decree, and not modify the terms of the decree. Also, *Lea* turned on the fact that the Defendant had not showed a substantial change in the circumstances of the parties to support his petition for modification of the divorce decree. (*Id.* at 1215.)

The argument of the Appellant that Mrs. Smith voluntarily contracted away her interests in the retirement interests in NEBF and Eighth District is not supported and contradicts the record. The District Court specifically found:

The Court would find that all three of the plans were the result of a membership in International Brotherhood of Electrical Workers and they all stemmed from that relationship. And as the defendant repeatedly testified to, certainly all three plans were based on the membership in the IBEW.

There is no suggestion in the decree that any reservation was made by the plaintiff to enjoy all of the benefits from those retirement programs and only allow the one which seemed to be the most at risk to be pension plan enjoyed by the-- to be participated in by the defendant. That is not in the record here and again supports the conclusion that the Court has drawn that the intent of the parties wasn't to differentiate and to disallocate an interest in one of the plans but not the other two.

In looking at the division of property in the decree, there is nothing to suggest that the defendant was awarded more property in exchange for receiving claim to only one of the three discrete plans that were participated in by the plaintiff by virtue of his membership in IBEW, but it would appear to the Court that the property was intended to recognize that he had a business that he was going to maintain in its entirety and the parties were working around dividing up the property that recognized his interest in the business and the other real property that was there.  
(R. at 423-424).

The Record does support the findings and conclusions that the parties, at the time of the divorce, intended the term "IBEW", as used in the Decree, to encompass all the retirement interests derived from Mr. Smith's affiliation with IBEW. (R. at 422-424).

### **CONCLUSION**

The parties were married for thirty years. During the marriage, Mr. Smith acquired interests in retirement plans through his affiliation and membership with IBEW. At the time of the divorce, Mr. Smith was still employed through IBEW. The decree only refers to the retirement plans as

“IBEW pension” and does not differentiate or distinguish between any type of retirement plan. There is neither any evidence that Mrs. Smith contracted her rights away in any of the retirements nor any indication that there was a disproportionate allocation of properties which would indicate that she should not be entitled to an interest in all retirement plans.

Years subsequent to the divorce, Mr. Smith retires and begins receiving his retirements. Mrs. Smith sought to gain access to her interest in the retirements and filed motions to achieve that purpose. Those pleadings were not intended to seek any modification, show change of circumstances or redistribute the property division. When Mr. Smith opposed her actions and argued that the term “IBEW” only referred to a small retirement plan which is no longer in existence, it was necessary to present extrinsic evidence to determine what, at the time of the divorce, the parties intended by using the term “IBEW.”

The District Court rejected Appellant’s arguments that Mrs. Smith’s motions were improperly raised and looked to the substance of those motions. The District Court, after hearing the extrinsic evidence, found that NEBF and Eighth District were obtained through Mr. Smith’s affiliation with IBEW and that the parties intended that the term “IBEW”, as used in the Decree, referred to all retirement plans. Therefore, based upon the foregoing, Appellee respectfully requests



that the District Court's order be affirmed on appeal and that she be awarded costs and attorney's fees.

DATED this 13 day of May, 1998.

CHRISTOPHERSON, THOMAS, WHITE & FARRIS, LLC

By: \_\_\_\_\_

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**CERTIFICATE OF SERVICE BY MAIL**

I hereby certify that on the 13 day of May, 1998, a true and correct copy of the foregoing Brief of the Appellee was duly served upon Appellant by depositing a copy of the same in the U.S. Mails, postage prepaid, and addressed as follows:

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