

1997

Julia V. Whetman v. John D. Whetman : Brief of Appellant

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 970642CA

IN THE UTAH COURT OF APPEALS

JULIA V. WHETMAN,

Plaintiff/Appellee,

vs.

JOHN D. WHETMAN,

Defendant/Appellant.

Case No. 970642CA

Priority No. 15

BRIEF OF APPELLANT

On appeal from a bench trial in the Second
Judicial District Court for the State of
Utah, Davis County, the HONORABLE GLEN R.
DAWSON, presiding.

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FILED

JUN - 9 1998

COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

JULIA V. WHETMAN,

Plaintiff/Appellee,

vs.

JOHN D. WHETMAN,

Defendant/Appellant.

Case No. 970642CA

JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Annotated § 78-2a-3(2)(h). This is an appeal from a final judgment of the Second Judicial District Court over which the Court of Appeals has original appellate jurisdiction.

STATEMENT OF THE CASE, NATURE OF THE PROCEEDING

This is an appeal from a final Judgment and Decree of Divorce from the Second Judicial District Court for the State of Utah, Davis County, Farmington Department.

On May 6, 1997, a bench trial was held before JUDGE GLEN R. DAWSON upon a Complaint for divorce. A follow-up hearing on Defendant's objection to the Decree was held on July 31, 1997, and a subsequent hearing was held on October 1, 1997, regarding the Defendant's objection to the form of the Decree.

The Decree of Divorce became final on October 1, 1997, in spite of the fact that the trial was concluded on May 6, 1997,

due to the fact that the parties had discrepancies as to the form of the final order. JUDGE DAWSON stated that for purpose of appeal, the Decree of Divorce would become final on October 1, 1997.

The Defendant, JOHN D. WHETMAN, mailed a notice of appeal on October 30, 1997, and filed with the Court on October 31, 1997.

On November 6, 1997, the Defendant mailed a motion to stay the lower court order to sell the subject marital residence. The Plaintiff objected to the Defendant's motion to stay the proceedings and a hearing was held on the Defendant's motion on Monday, December 22, 1997. Pursuant to the hearing, the Defendant's motion to stay the sale of the home was granted by the trial court. On December 31, 1997, Plaintiff filed a motion for summary disposition with the Utah Court of Appeals. On April 13, 1998, the Court of Appeals denied the Plaintiff's motion for summary disposition. On May 12, 1998, the Defendant filed a motion for extension of time to file the appellant's brief which was granted on May 14, 1998. This case now comes before the Utah Court of Appeals on the Appellant's brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Appellant, Mr. WHETMAN, contends that the trial court abused its discretion in its division of the marital assets. In this case, the Defendant came into the marriage with \$97,000.00 in pre-marital assets compared to \$35,000.00 in pre-marital assets brought into the marriage by the Plaintiff. It is

undisputed that the Defendant had \$62,000.00 more of contributions to the marriage than did the Plaintiff. The issue in the case at hand is whether or not the Defendant's Quit Claim Deed to the Plaintiff of his pre-marital estate was given undue weight by the trial court and whether the trial court adequately considered the circumstances surrounding the transfer of Mr. WHETMAN's pre-marital equity in his home by the Quit Claim Deed.

The parties' marriage lasted a total of three years, and the parties lived together only 20 of the 36 months of marriage. Also, whether the Court adequately considered the fact that by dividing the assets as it did, Mr. WHETMAN's children from his deceased wife, effectually lost their inheritance.

A. The Standard of Appellate Review:

The trial court's decision concerning the division of marital assets is reviewed under the abuse of discretion standard. Endrody v. Endrody, 914 P.2d 1166 (Utah App. 1996), Shepherd v. Shepherd, 876 P.2d 429 (Utah App. 1994).

Pursuant to the case of Berger v. Berger, 713 P.2d 695 (Utah 1985), the Supreme Court stated that:

"although this case is equity and we are free to review both the law and the facts, we place the presumption of validity upon the trial court's actions in divorce cases. Thus, the burden is on the appellant to show error, and we will overturn the trial court's findings of fact only if they are contrary to the clear preponderance of the evidence." Berger at 697.

The Supreme Court in Berger further stated that:

"We will overturn the trial court's judgment where there has been a misunderstanding or

misapplication of the law resulting in substantial and prejudicial error or where there has been such an abuse of discretion that an inequity or injustice has resulted. Berger at 697, citing Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980).

B. Citation to the record showing that the issue was preserved in the trial court:

All of the issues presented in this appeal were argued in the trial court. The closing statement by Mr. WHETMAN's attorney setting forth the issues discussed in this brief are set forth at page 271 through page 279 of the transcript.

The Appellant contends that the trial court's decision to divide the equity in the marital home equally, did not adequately consider the factors relating to distribution of pre-marital property, recently considered in the case of Cox v. Cox, 877 P.2d 1262, 1269 (Utah App. 1994). Those factors are: (1) the duration of the parties marriage; (2) the amount of contribution made by the Appellee to the marital asset; (3) the intent of the parties in signing the Quit Claim Deed; (4) whether the property was acquired before or during the marriage; (5) what the parties gave up by the marriage; (6) whether the assets were accumulated or enhanced by the joint efforts of the parties.

DETERMINATIVE CONSTITUTIONAL PROVISIONS

Article IV, Section 1. [Equal political rights] The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on the count of sex. Both male

and female citizens of this state shall enjoy equally all civil, political, and religious rights and privileges. (Emphasis added).

The above constitutional right becomes applicable in this case in light of § 30-2-1 of the Utah Code which states:

Wife's rights in property.

Real and personal estate of every female acquired before marriage, and all property to which she may afterwards become entitled by purchase, gift, grant, inheritance, bequest or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements or her husband, and may be conveyed, devised, or bequeathed by her as if she were unmarried.

The Appellant would argue that under Article IV, Section 1 of the Utah Constitution, § 30-2-1 applies to males as well. Therefore, the Appellant will argue that the inheritance which he and his daughters received from the estate of his deceased wife, and the mother of this two daughters, should be kept within his family and should not be diverted because of divorce. See, Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988); Izatt v. Izatt, 627 P.2d 49, 51-52 (Utah 1981).

STATEMENT OF FACTS

On May 6, 1997, a trial was held before JUDGE GLEN R. DAWSON upon a Complaint for divorce. A follow up hearing on Defendant's Objection to the Decree was held on July 31, 1997, and a subsequent hearing was held on October 1, 1997. At trial, the Plaintiff was represented by Attorney TOM D. BRANCH, and the Defendant was represented by Attorney DOUGLAS B. THOMAS. The

Appellant, JOHN D. WHETMAN, was not represented by counsel at the hearings on July 31, 1997 or on October 1, 1997, as his counsel, DOUGLAS B. THOMAS, had withdrawn.

Pursuant to the trial, the Court granted the Appellee, Mrs. WHETMAN, a Decree of Divorce based upon irreconcilable differences. The Plaintiff was awarded a judgment in the amount of \$53,235.50 as her share of the equity in the marital residence. See Findings of fact at page 6. Mr. WHETMAN was awarded the residence subject to Plaintiff's judgment. Mr. WHETMAN was ordered to make immediate good faith efforts to refinance the home and pay the judgment in a lump sum payment payable to the Plaintiff and her attorney, TOM D. BRANCH, in the amount of \$20,000.00, due on or before the 1st day of September, 1997. The balance of the judgment was to be paid on a monthly basis for five years, with the first payment due October 1, 1997, and the full balance of the judgment, together with interest at the now present judgment interest rate to be paid in full, on or before September 1, 2002.

A telephone conference was conducted by JUDGE DAWSON on October 1, 1997. Present by telephone were the Plaintiff, by and through her attorney, TOM D. BRANCH, and Mr. WHETMAN appearing pro se, his counsel DOUGLAS B. THOMAS having withdrawn. Pursuant to the telephone conference, the original Order of the Court was amended, and the parties were ordered to make immediate and good faith efforts to sell the subject marital residence, using a listing agent selected by Mrs. WHETMAN.

Mr. WHETMAN was ordered to provide the real estate agent with a key to the home and to allow the agent to have access to the home in completion of the agent's duties. He was ordered to keep the home in show condition and to maintain the outside and inside of the home and to have the home available for showing at any time during reasonable hours. Mr. WHETMAN was allowed to stay in the home during its listing and was ordered to keep the home obligations paid in full and timely.

The Court ordered that when the home sold, the parties were to divide equally the equity received from the sale of the home after payment of the first mortgage, the line of credit, and all real estate commissions and other costs associated with the sale of the home.

In its Findings of Fact, page 3 at paragraph 7, the trial court found that Mrs. WHETMAN had pre-marital assets in the approximate amount of \$35,000.00, and Mr. WHETMAN had pre-marital assets in the approximate amount of \$97,000.00.

The Court found that the Plaintiff and Defendant were husband and wife having been married on February 18, 1994.

The Court found that in June of 1995, Mr. WHETMAN signed a Quit Claim Deed on the home from himself to the parties equally as joint owners. Findings of Fact, page 4.

The Court further found in paragraph 7 of the Findings of Fact that the parties mutually agreed to join together their respective assets and to share those assets jointly and equally.

Mr. WHETMAN is appealing the Judge's division of the equity in the marital home.

SUMMARY OF THE ARGUMENT

At the time the parties married, Mr. WHETMAN had a home valued at \$290,000.00 with \$97,000.00 of equity. Mr. WHETMAN built the home using proceeds he had inherited for himself and for the benefit of his two daughters, from his deceased's wife's insurance policy. His first wife died from cancer on December 19, 1989. Mr. WHETMAN testified that after being harassed, and badgered for many months, and at a time when the parties had separated several times, he succumbed to the pressure of his second wife to Quit Claim the Deed from his name alone to the parties as joint tenants with full rights of survivorship to the Appellee, JULIA WHETMAN.

At trial, both of the parties stated that their intent in the transfer by Quit Claim Deed was not a gift, but was for the benefit of Mr. WHETMAN's children from a prior marriage, and the Appellee and her children, in the event that Mr. WHETMAN died.

Since the marriage dissolved with Mr. WHETMAN very much alive, the Appellant would argue that the anticipated purpose of the Quit Claim Deed, as insurance for the children in the event of his death, never occurred, therefore Mr. WHETMAN's pre-marital inheritance for the benefit of himself and his children should have been returned to him by the trial court rather than divided as marital property.

ARGUMENT

POINT I

THE TRIAL COURT'S RECORD SHOWS THAT IT WAS NOT THE INTENT OF EITHER PARTY TO GIFT THE PRE-MARITAL EQUITY IN THE PLAINTIFF'S HOME TO MRS. WHETMAN BY THE QUIT CLAIM DEED.

The parties were married on February 18, 1994. In June of 1995, approximately 16 months after parties' marriage, Mr. WHETMAN signed a Quit Claim Deed to the home from himself as sole owner to the parties as joint tenants, with full rights of survivorship to Mrs. WHETMAN.

The Quit Claim Deed was signed on the 16th month of the marriage, and the parties separated permanently four months later.

At trial, Mr. WHETMAN, testified that there had been substantial strain on the marriage, and the parties had already separated at least two times before the Quit Claim Deed was signed. Mr. WHETMAN testified regarding the reason why he signed the Quit Claim Deed:

It was just at her request to make her feel more secure. She kept telling me that I'd had so much death in my family that Leishman luck said that something would probably happen to me. Her father had bankrupted or something a couple of times, her brother had died, my mother had died, my wife had died, and that was her reasoning, and I believed her. Transcript at 188.

Mr. WHETMAN further stated at trial:

She lead me to believe that she was having that done so that a home would be provided for her and my children in the event of my death. Transcript at 188.

At trial, when asked if he had prepared the Quit Claim Deed with the intent of gifting one-half interest in the property to Mrs. WHETMAN, Mr. WHETMAN stated "I did not". Transcript at 186.

Mr. WHETMAN did not consult an attorney prior to executing the Quit Claim Deed. Transcript at 189. and Mrs. WHETMAN never denied that she had in fact spoken with an attorney prior to the time that she signed the Quit Claim Deed. Mr. WHETMAN stated at trial:

She told me after I had signed this, she blurted out that her father, on the advise of her father and an attorney, she was advised to get herself on the Deed. Transcript at 190.

The tenor of Mrs. WHETMAN's argument at trial was that Mr. WHETMAN had gifted her by Quit Claim Deed, a full right of survivorship in the home which he had prior to the marriage, including \$97,000.00 worth of equity. However, Mrs. WHETMAN and her attorney were quick to deny that the Quit Claim Deed was characterized as a gift. During the trial, the following dialog took place regarding the Quit Claim Deed;

Mr. Thomas: Mr. Whetman, coming back to the gift, the nature of the gift that was taken place, at least their claiming a gift, deed is what I want to refer to.

Mr. Branch: Objection, your honor, we have not made that claim.

The Court: I think their position has been that the preparation of the Deed, the recording of the Deed was part of an agreement entered into during the marriage to join all property (inaudible) person. I'm

probably the one that used the word "gift" and I apologize.

Mr. Branch: And that could be a finding in this Court, but I'm just saying that he is mischaracterizing her testimony, she did not call it a gift. Transcript at 221.

Mrs, WHETMAN, stated at trial that:

I figured I would be in charge of his girls if something was to happen to him and I wanted them to have a home, I didn't want anybody out on the street. Transcript at 143.

Mr. WHETMAN stated at trial:

She lead me to believe that she was having that done so that a home would be provided for her and my children in the event of my death. Transcript at 188.

It is clear from the testimony of both parties that the intent of Mr. WHETMAN's Quit Claim Deed was to provide for his children and, if he were still married at the time of his death, for Mrs. WHETMAN and her children. Since the parties divorced and it did not become necessary for Mrs. WHETMAN to care for Mr. WHETMAN's children, the original purpose for signing the Quit Claim Deed never occurred.

Although Mr. BRANCH, Mrs. WHETMAN's attorney, was quick to point out at the trial that Mrs. WHETMAN never claimed that the Quit Claim Deed was a gift, the trial court's ruling in effect gave the Quit Claim Deed the legal characterization of a gift. The evidence indicates that the parties' intent was to provide for their children in the event of Mr. WHETMAN's death. Because Mr. WHETMAN's death did not occur prior to the parties'

divorce, the court, in equity, should have returned Mr. WHETMAN'S pre-marital equity to him as part of the divorce settlement.

POINT II

THE TRIAL COURT SHOULD HAVE ATTEMPTED TO RESTORE THE PARTIES TO THEIR PRE-MARITAL STATUS.

This case is similar to the case of Cox v. Cox, 877 P.2d 1262. In the Cox case, the Utah Court of Appeals held that where the husband had owned the house for many years before the marriage, and he had raised his nine children in the house, a distribution to the wife of one-half its value would not be equitable.

This court in Cox indicated that under certain circumstances, the Court may properly attempt to restore the parties to their pre-marital status. The decision reads;

Where the marriage is of short duration, where no children were born, and where the couple was married later in life, a trial court may properly attempt to restore the parties to their pre-marital status. Cox at 1269.

The trial court in the case at hand did not attempt to restore the parties to their pre-marital status in spite of the fact that the factors set forth in Cox were present in this case. Those factors are: (a) this was not a first marriage for either party; (b) the marriage was of short duration; (c) Mr. WHETMAN and his two children from a previous marriage had lived in the house prior to his second marriage, and substantial equity existed in the home prior to the marriage; (d) a distribution to

the wife of one-half the value would require him to sell the home; and (e) an equal division of the home's equity would give the wife a disproportionate return considering her lack of contribution to the equity in the home.

POINT III

AS A GENERAL RULE, PRE-MARITAL PROPERTY, INCLUDING GIFTS AND INHERITANCES, IS VIEWED AS SEPARATE PROPERTY.

Generally, real and personal property owned by either party prior to the marriage or acquired by a party by gift or inheritance, as well as the increase on the property after marriage remains the separate property of the party. Utah Const. art. IV, § 1, See also § 30-2-1 of the Utah Code.

In the case of Mortensen v. Mortensen, 760 P.2d 304, the Supreme Court of Utah stated:

We conclude that in Utah, trial courts making "equitable" property division pursuant to § 30-3-5 should in accordance with the rule prevailing in most other jurisdictions and with the division made in many of our own cases, generally award property acquired by one spouse by gift and inheritance during the marriage (or property acquired in exchange thereof) to that spouse, together with any appreciation or enhancement of its value, unless (1) the other spouse of his or her efforts or expense, contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it, Dubois v. Dubois, 504 P.2d 1380 (1973), *supra*, or (2) the property has been consumed or its identity lost through commingling or exchanges or where the acquiring spouse has made a gift of the interest therein to the other spouse. Cf. Jespersen v. Jespersen, 610 P.2d 326 (Utah 1980).

The court in Mortensen further elaborated;

However, in making that division, the donee and their spouse should not lose the benefit of his or her gift or inheritance by the trial courts automatically or arbitrarily awarding the other spouse an equal amount of the remaining property which was acquired by their joint efforts to off-set the gifts or inheritance.... These rules will preserve and give effect to the right that married persons have always had in this state to separately own and enjoy property. It also accords with the normal intent of donors or deceased persons that their gifts and inheritances should be kept within their family and succession should not be diverted because of divorce. (Emphasis added). Mortensen at 308-309. See also Burke v. Burke, 733 P.2d 133 (Utah 1987); Naranjo v. Naranjo, 751 P.2d 1144 (Utah App. 1988).

POINT IV

MRS. WHETMAN'S CONTRIBUTION TO THE MARRIAGE DID NOT JUSTIFY THE TRIAL COURT'S EQUAL DIVISION OF THE EQUITY IN MR. WHETMAN'S HOME.

In the case of Jespersion v. Jespersen, 610 P.2d 326 (Utah, 1980), the Utah Supreme Court stated:

In making a property division, a court may properly consider such things as the length of the marriage and parties' respective contributions of the marriage. This marriage lasted less than six years, and no children issued therefrom.... It was not unreasonable for the court to permit plaintiff to withdraw from the marital property the equivalent of those assets plaintiff brought into the marriage. Jespersion at 328.

In the case at hand, the marriage was of short duration, a total of 36 months, of which, the parties lived together for only 20 months. No children were born as issue of this marriage, and this was the second marriage for each of the

parties, both parties having children from prior marriages. When the parties married, Mr. WHETMAN had a home valued by the trial court at \$290,000.00. (Findings of Fact and Conclusions of Law at page 5, paragraph 14). The trial court found that when the parties married, the Plaintiff had pre-marital assets in the approximate amount of \$35,000.00 and the Defendant had pre-marital assets in the approximate amount of \$97,000.00.

In its findings, the trial court stated:

...the Defendant intended the Quit Claim Deed to have legal consequences in that he expressed that he wanted to make sure that his wife and all of the children were taken care of at his death. (Findings of Fact at page 4).

It is clear from the Findings of Fact and Conclusions of Law that the trial court recognized that the Quit Claim Deed was not meant as an out-right gift from Mr. WHETMAN to Mrs. WHETMAN. However, by dividing the equity in the home on an equal basis, the court treated the Quit Claim Deed as if it were a gift.

All of the evidence presented by both parties supports the conclusion that the Quit Claim Deed was essentially made as a "poor man's will" which would have the effect that, in the event of Mr. WHETMAN's death, his children would have a place to live, assuming that at the time of his death, he were still married, and that Mrs. WHETMAN would also take care of Mr. WHETMAN's children from his previous marriage. However, Mr. WHETMAN did not die, and it never became necessary for Mrs. WHETMAN to care for Mr. WHETMAN's children from his previous marriage.

Therefore, the original intent of the Quit Claim Deed was never realized prior to the parties' divorce. In light of the fact that Mrs. WHETMAN never claimed that this was a gift, equity mandates that the trial court to the extent possible, return the parties to their pre-marital status.

Regarding the contribution of Mrs. WHETMAN aside from the property which she brought into the marriage, Mrs. WHETMAN did not work during the parties marriage to any significant degree and in fact, when asked by the Defendant to possibly obtain employment to help the parties due to some financial setbacks, Mr. WHETMAN testified that Mrs. WHETMAN stated many times "If I have to go back to work, there is no reason to be married." Transcript at 222-223.

Apparently, the trial court placed an inordinate amount of weight on the Quit Claim Deed in light of the fact that neither of the parties ever alleged that the Quit Claim Deed was a gift. The trial court had ample opportunity to award the parties their pre-marital assets and divide any remaining property on an equitable basis. The court even acknowledged that the Quit Claim Deed was "strange", and further that "the evidence appears to show me that there was an agreement to work together, to join forces." Transcript at 273. By the court's own statement, it has recognized that the purpose of the Quit Claim Deed was to join forces to make a stronger marriage. However, when the marriage was terminated, the purpose of "joining forces" was no longer necessary and the court should have un-done the

effect of the Quit Claim Deed and returned the parties to their pre-marital status.

In the case of Hogue v. Hogue, 831 P.2d 120 (Utah App. 1992), this court upheld a trial court's ruling that awarded Mr. Hogue an undivided one-half interest in Mrs. Hogue's pre-marital property in spite of the fact that "in July of 1982, Mr. and Mrs. Hogue jointly agreed that Mr. Hogue would convey by Quit Claim Deed, sole ownership of the ranch to Mrs. Hogue as a means of protecting the property from Mr. Hogue's judgment creditors." Hogue at 121.

It is clear that the trial court in this case was not compelled to honor the Quit Claim Deed, but had the equitable power to return the home to Mr. WHETMAN.

The Supreme Court of Utah in the case of Georgedes v. Georgedes, 627 P.2d 44, the court held that there was no abuse of discretion in returning title to the home and business to the husband where, shortly after the inception of the parties' seven year marriage, the husband had put title in the home and business in joint tenancy with his wife. The effect of the decision in Georgedes was to restore each party the property he or she had brought into the marriage, which gave the Plaintiff, Mr. Georgedes, the home and business.

In the case of Newmeyer v. Newmeyer, 745 P.2d 1276 (Utah 1987), the Utah Supreme Court held that it was not an abuse of discretion for the trial court to credit the wife with inheritances she used to purchase homes early in the parties

twenty year marriage. The case at hand is much more clear. The equity was present in the home prior to the parties' marriage, and the marriage was of very short duration.

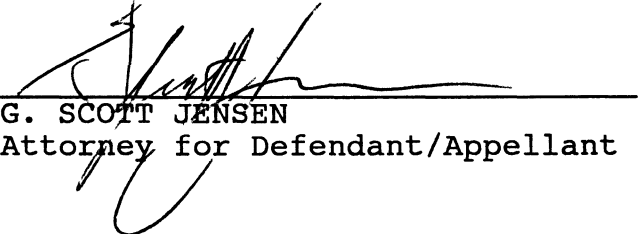
CONCLUSION

There is ample evidence to suggest that the Quit Claim Deed from Mr. WHETMAN to Mrs. WHETMAN was not intended as a gift, but was an effort by the parties to make sure that Mr. WHETMAN's two girls from his previous wife were taken care of in the event of his death. The parties divorce terminated the need for the Quit Claim Deed, and the trial court should have, to the extent possible, returned the parties to their pre-marital status. in light of the fact that this was a marriage of short duration, the parties had no children between them, it was a second marriage for each of the parties, and there was no intent by Mr. WHETMAN to gift his inheritance and the inheritance of his two girls to Mrs. WHETMAN.

ADDENDUM

Attached.


DATED this 10th day of June, 1998.

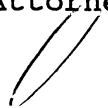

G. SCOTT JENSEN
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Brief of Appellant to the following, postage prepaid this _____ day of June, 1998:

Tom D. Branch
Attorney for Plaintiff/Appellee
5300 South 360 West, Suite 360
Salt Lake City, UT 84123



G. SCOTT JENSEN
Attorney for Defendant/Appellant


ADDENDUM

Addendum A

Findings of Fact and Conclusions of Law

TOM D. BRANCH (3997)
Attorney for Plaintiff
5300 South 360 West, Suite 360
Salt Lake City, Utah 84123
Telephone: (801) 262-1500

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
IN AND FOR DAVIS COUNTY, STATE OF UTAH

JULIA L. WHETMAN)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
Plaintiff,)	
)	
vs.)	Civil No. 964701115
)	
JOHN D. WHETMAN,)	JUDGE MICHAEL G. ALLPHIN
)	
Defendant.)	

This matter came on for Evidentiary Trial before Judge Dawson on May 6, 1997. A follow up hearing on Defendant's Objections to the Decree was held on July 13, 1997. Both parties appeared in person together with their respective counsel, Tom D. Branch for the Plaintiff and Douglas B. Thomas for the Defendant. Following the trial in the matter, the Court made the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The parties, in January of 1997, entered into a Stipulation which was memorialized in a Pre-Trial Order signed and entered by this Court on January 16, 1997 by Judge Allphin. The terms of that Pre-Trial Order are incorporated herein and are effective as of the date of that Order and are binding on the parties.

2. Plaintiff was a bona fide resident of Davis County, State of Utah, for more than three months preceding the commencement of this action. This Court has jurisdiction and venue is proper.

3. Plaintiff and Defendant are husband and wife having been married on February 18, 1994.

4. The Plaintiff has four children from a prior marriage, ages 18, 17, 15 and 9. The Defendant has two children from a prior marriage, ages 12 and 8. There are no children born as issue of this marriage.

5. The parties separated, following marital disputes that culminated and became more severe, on June 23, 1996, and have remained separated since that time. During the course of the marriage, the parties developed irreconcilable differences making the continuation of their marriage impractical and against both their desires. The Court finds reasonable grounds for granting the

Plaintiff a divorce based upon those irreconcilable differences. A Decree of Divorce should be granted to the Plaintiff on the grounds of irreconcilable differences.

6. A Decree of Divorce should become final upon entry.

7. At the time the parties married, the Plaintiff had pre-marital assets in the approximate amount of \$35,000.00, and the Defendant had pre-marital assets in the approximate amount of \$97,000.00. The parties mutually agreed to join together their respective assets and to share those assets jointly and equally. Both parties agreed to provide all of their energies, assets, and efforts to join their two families together as one and to raise the children.

8. Consistent with that agreement, the parties did join their assets together. The Plaintiff gave all she had to this marriage. The Plaintiff left her home, job, and much of her furnishings to enter into this marriage, joined all of her pre-marital property into the joint benefit of the parties, and became the primary care taker of all of the children, as was consistent with the desire of both parties.

9. The Defendant also joined his assets into this marriage with the intent to share them equally with the Plaintiff.

10. The parties took up residence in the Defendants pre-marital home which had substantial pre-marital equity at the time.

However, in June of 1995, and consistent with the parties agreement to join assets, the Defendant signed a Quit Claim Deed on the home from himself to the parties equally, as joint owners. This action by the Defendant was consistent with the parties actions in joining all of their assets into marital property, and this action transferred the home into marital property.

11. The Defendant signed the Quit Claim Deed without coercion, force, fraud, mistake, nor under any circumstance or for any reason that would make it void, voidable or unenforceable. No public policy was violated by the Defendant signing the Deed. The Court finds the Defendant could have refused to sign the Quit Claim Deed but did not. The Court finds that the Defendant executed the Deed to further the parties agreement as indicated herein and for no other reason that would cause this Court under case law to not enforce the legal impact of the Deed.

12. The Court finds that the Defendant intended the Quit Claim Deed to have legal consequence and that he expressed that he wanted to make sure that his wife and all of the children were taken care of at his death. The Defendant signed the Deed knowingly and intelligently. The Defendant intentionally signed the Deed after having read it, requested it be prepared, and knowing full well its legal consequences. There was adequate

consideration for the Deed. The Defendant asked that the Deed be recorded and the Deed was recorded.

13. The Court is not convinced that there are any facts in this case that would justify a division of the equity in the marital residence in any other percentage than equally. The Court reviewed case law submitted by the parties, conducted its own research, and is aware of the Court's discretion to award an unequal division of property or to disregard legal title of a marital asset, but finds no facts consistent with the case law that would justify anything other than an equal split of the marital residence equity.

14. The Court finds that the fair market value of the residence is \$290,000.00. The Court reviewed the testimony of the expert appraisers and all other persons testifying concerning the value and finds that equity requires that the value be set as indicated.

15. The Court finds there is a first mortgage in the amount of \$162,574.00 and a line of credit in a second secured position against the home in the amount of \$20,955.00. The Court has deducted and not given credit for the \$1,000.00 on the line of credit taken out by the Defendant after separation.

16. The Court finds that the equity to be divided in the home is \$106,471.00 and that the equity should be divided equally

and that the Plaintiff should therefore be entitled to payment from the Defendant for her share of the equity in the martial residence the amount of \$53,235.50. The Defendant should be awarded the home subject to this obligation.

17. The Plaintiff should be awarded a Judgment in the amount of the equity in the marital residence. The Defendant is awarded the residence subject to Plaintiff's judgment. The Defendant should make immediate good faith effort to refinance and should pay the Judgment as follows: A lump sum payment payable to Plaintiff and her attorney, Tom D. Branch, in the amount of \$20,000.00 due on or before the 1st day September, 1997. The balance of the Judgment should be paid on a monthly basis, for the first five (5) years with the first payment due October 1, 1997, and the full balance of the Judgment, together with interest at the now present Judgment interest rate, to be paid in full on or before September 1, 2002. The monthly payments between September 1, 1997 and September 1, 2002 should be calculated using the balance of the judgment owed after the down payment of \$20,000.00 amortized over 10 years. The Court will hold a telephone conference on September 2, 1997 at 8:30 a.m. to discuss the status of the refinance efforts.

18. The Court further finds that the Corolla automobile in question herein should be awarded to the Defendant who will be

responsible for all costs and debt related to that vehicle. The Defendant should hold harmless the Plaintiff on the Corolla debt. The Plaintiff should have deducted \$1,500.00 from her judgment on the home equity as set forth above as a contribution for her share of the Corolla debt. If there have been any double payments as the parties testified to concerning the Corolla lease payments, the Defendant shall be entitled to the credit for those overpayments.

19. Each party will be responsible to cooperate in the effectuation of this Courts ruling and in signing any and all documents necessary to put into place the effect of the Court's ruling.

20. Concerning the parties dispute on personal property, the parties are awarded the following:

TO THE PLAINTIFF

- a. All items in paragraph 2 of Plaintiff's Exhibit 4 including subparagraphs a through t.
- b. All items in Defendant's Exhibit 8 under title "Items to Julia" numbers 1 through 10

TO THE DEFENDANT

- a. All items set forth in Defendant's Exhibit 8 under "Items to John" numbers 1 through 7.

b. All other items currently in the home not otherwise specifically awarded to the Plaintiff herein.

21. The Court finds that the Defendant should immediately make available the personal property awarded to Plaintiff for her pick up. The Plaintiff should be allowed to package and remove her own property items.

22. Neither party is awarded attorney's fees and each are responsible to pay their own fees and costs in this matter. The Court finds that both of the attorney's fees were reasonable and necessarily incurred, but in light of equitable discretion, the Court finds considering the division of property set forth herein that each party should pay their own attorney's fees.

23. The Court finds that the Plaintiff has a gross income of \$1,300.00 per month and the Defendant has a gross income of \$3,300.00 per month. The Court reviewed the expenses of both parties and took those into consideration in its ruling on attorney's fees.

24. The Plaintiff should be awarded one half of the stock account in the amount \$1,150.00. If the account was in existence on November 19, 1996, Defendant should pay immediately the \$1,150.00 to Plaintiff. If the account was sold prior to November 19, 1996 as represented by Defendant the Plaintiff should

be entitled to a Judgment for the \$1,150.00 payable as an addition to the Judgment previously granted for Plaintiff's share of the home equity, and on the same terms.

25. On the foregoing Findings of Fact, the Court now makes and enters the following:

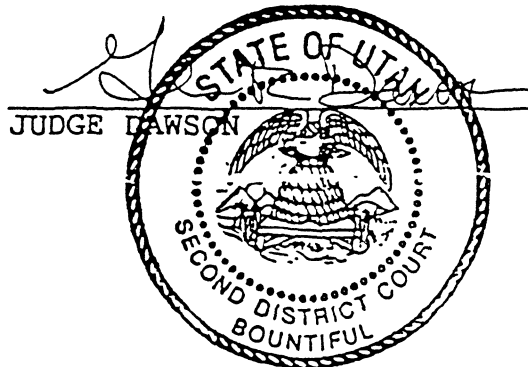
CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and this action.
2. The Plaintiff should be awarded a Decree of Divorce to become final upon entry.
3. The Decree of Divorce should conform to these Findings and to the parties Pre-Trial Order which the Court specifically approves and incorporates herein as of its own date.

Dated this 1st day of October, 1997.

BY THE COURT:

APPROVED AS TO FORM:




DOUGLAS B. THOMAS
Attorney for Defendant

CERTIFICATE OF MAILING

Rule 4-504 Notice

You and each of you, please take notice that pursuant to Rule 4-504, Code Judicial Administration, a copy of the foregoing document has been mailed to each of you in accordance with the Certificate of Mailing. This proposed FINDINGS OF FACT AND CONCLUSIONS OF LAW will be signed and entered by the Court unless objected to within five (5) days of service of this document upon you. Any objections must be filed prior to that time.

Dated this 4th day of August, 1997.

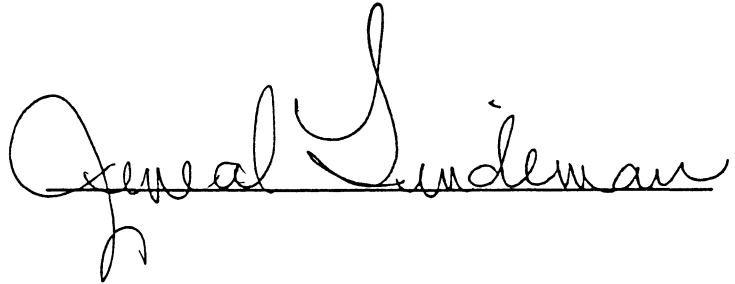


TOM D. BRANCH
Attorney for Plaintiff

CERTIFICATE OF MAILING

I, hereby certify that I mailed the foregoing document on
this 4th day of August, 1997 to:

Douglas B. Thomas
GRIDLEY, WARD, HAVAS, SHAW & THOMAS
635 25th Street
Ogden, Utah 84401

A handwritten signature in cursive script, reading "Gerald Lindeman", written over a horizontal line.

Addendum B

Trial Transcript - Cover page, index - pages 1 through 3

CERTIFIED COPY

1

IN THE SECOND DISTRICT COURT IN AND FOR THE
STATE OF UTAH, DAVIS COUNTY

-o0o-

JULIA A. WHETMAN)	
)	
vs.)	Case No. 964701115
)	
JOHN WHETMAN)	<u>Trial</u>
)	

-o0o-

BE IT REMEMBERED that on the 6th day of May, 1997,
the above-entitled matter came on for hearing before the
Honorable Jon M. Memmott, sitting as Judge in the above-
named Court for the purpose of this cause, and that the
following proceedings were had.

-o0o-



ASSOCIATED PROFESSIONAL REPORTERS, L.C.

A P P E A R A N C E S

For Julia A. Whetman

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5300 So. 360 W. #360
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For John D. Whetman

DOUGLAS B. THOMAS
Attorney at Law
635 25th Street
Ogden, UT 84401

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Addendum C

Trial Transcript page 143 through 145

1 put my name on the quitclaim it", or something.

2 Q What would he say when you would ask him those
3 questions?

4 A He'd say we'd get to it, that he intended to do it,
5 always did intend to do it, that it was my house and there
6 was no problem. And I did voice the concern of death because
7 I figured I would be in charge of his girls if something was
8 to happen to him and I wanted them to have a home, I didn't
9 want anybody out on the street.

10 Q Okay. And I assume he wanted the same thing?

11 A I'm assuming, yeah. He said that it would be taken
12 care of and that everything would be taken care of, to trust
13 him.

14 Q All right. He never said anything to the effect
15 that, "No, I'm not going to deed this house to you, that's
16 not the understanding?"

17 A No, no, never.

18 Q He always gave you affirmative responses?

19 A Yes, I always had the impression that he was more
20 than happy to include me in sharing his home.

21 Q In June of 1995, there was a quitclaim deed signed
22 by Mr. Whetman, recorded by Mr. Whetman's request, that
23 deeded the legal ownership of that home from him to both of
24 you, do you remember that?

25 A Yes, I do.

1 Q And I don't know if you have that exhibit in front
2 of you or not.

3 A I don't.

4 Q Let me show you just a copy of the quitclaim deed.

5 A Okay.

6 Q Until we can put our finger on the original, is
7 that a copy of the quitclaim deed that you understood was
8 signed in June of 1995?

9 A Yes.

10 Q Tell us why we finally got to the point that a deed
11 was signed, what happened?

12 A We were discussing turning the Questar stock over
13 into the Charles Schwab account because it was a joint
14 account and the certificate thus far was in my name. And I
15 said, "Well, when we turn this over to the joint account, why
16 don't we take care of everything at once at get the home
17 deeded to both of us and put this in the Charles Schwab
18 account and that way everything will be jointly owned."

19 Q Everything would be done--

20 A Everything would be done and basically everything
21 would be taken care of that we'd discussed previously.

22 Q All right, and did, what did John say when you said
23 that?

24 A He said, "Fine, call Gretchen and let's get it
25 done."

1 Q Now, who's Gretchen?

2 A Gretchen is somebody that I now of through the
3 mortgage company, she's a title officer and John also knows
4 her and so we felt comfortable going to her because we knew
5 her.

6 Q So you instructed her to prepare that deed?

7 A Uh-huh, yes.

8 Q And did John talk to her?

9 A John talked to her the day we went in to sign it.

10 Q Do you remember what was discussed when you went in
11 to sign it?

12 A There was really no discussion, it was a lot of
13 just, "Hi, how are you, and here's the deed", and she
14 explained it to both of us.

15 Q What did she say?

16 A She said that if either one of us was to die that
17 the house would go into that, it's a joint ownership so if
18 somebody dies then the house turns over to that one person.

19 Q As a survivor?

20 A As a survivor. The survivorship is typed right in
21 there.

22 Q Did she describe anything about the present
23 ownership of the home once that was recorded?

24 A Yeah, she said that both of us would jointly own
25 it.

Addendum D

Trial Transcript page 186 through 190

1 A That is.

2 Q Okay.

3 MR. THOMAS: We'd move for the admission of Exhibit
4 No. 2 as illustrative of testimony.

5 MR. BRANCH: Same objections, Your Honor.

6 THE COURT: All right, and I'll note the objection
7 and receive Exhibit, Defendant's Exhibit 2.

8 Q BY MR. THOMAS: All right. Now, there's been
9 substantial discussion that has taken place thus far with
10 respect to the deed whereby the property was transferred in
11 your name solely into the name of you and your wife, and
12 you've had a chance to review that deed today in your prior
13 testimony, is that correct?

14 A That's correct.

15 Q All right. Now, prior to signing that deed, I
16 believe your testimony earlier was that your wife hounded you
17 to sign the deed. Could you please describe exactly what you
18 meant by that?

19 A She just continually was after me to add her to the
20 deed and in the interest of marital peace I finally did.

21 Q When you added her to the deed did you intend to
22 gift to her half of the interest of your property in the
23 home?

24 A I did not.

25 Q Where had you, that equity figure that we had

1 described at the time you went into the marriage from your
2 marital home, where had the proceeds come to get into that
3 first home?

4 A All of that came from the proceeds of life
5 insurance from my wife's death.

6 Q When your wife passed away, how much did she leave
7 in life insurance?

8 A 96,000.

9 Q And what did you do with that \$96,000?

10 A It went into the bank until the new home was built.

11 Q And from the bank where did it go?

12 A Into the construction of the new home, the lot.

13 Q But essentially it was all--

14 A Everything went into this new home.

15 Q All right. At the time you got married to the
16 plaintiff, did you have discussions as to whether or not that
17 home would become part of her property?

18 A No, we did not.

19 Q Did she ever indicate to you that she expected that
20 she would be an owner of that property and be entitled to a
21 half interest?

22 A No, she did not.

23 Q Did you ever have any discussions regarding any
24 intent that she would be a half owner in the property?

25 A No.

1 Q Okay, or a partial owner of the property for that
2 matter?

3 A No.

4 Q Why did you, other than the hounding, were there
5 any other reasons that influenced you to sign the quitclaim
6 deed?

7 A It was just at her request to make her feel more
8 secure. She kept telling me that I'd had so much death in my
9 family that Lieshman Luck said that something would probably
10 happen to me, her father had bankrupted or something a couple
11 of times, her brother had died, my mother had died, my wife
12 had died, and so that was her reasoning and I believed her.

13 Q Was the--

14 A She always told me that it's anything, everything
15 bad will happen from marrying her.

16 Q And so specifically what was she trying to protect
17 against with respect to having the property transferred into
18 her name?

19 A She led me to believe that she was having that done
20 so that a home would be provided for her and my children in
21 the event of my death.

22 Q At the time you transferred that deed, did you
23 intend to give her a half interest in the property that had
24 been purchased with your wife's insurance proceeds?

25 MR. BRANCH: Objection, Your Honor, under the

1 statute of frauds, (inaudible) evidence rule as well. I
2 mean, the deed is unambiguous so testifying that it meant
3 something other than it does it against the rules of evidence
4 unless you can prove some ambiguity.

5 MR. THOMAS: Your Honor, with respect, and I refer
6 you to the two cases that I cited to you this morning, the
7 ^{63 P2d 370} Jespersen case and the ^{325 P.2d 441} Georgettes, whatever it is case, both
8 of those cases clearly made it very clear that simply the
9 deed itself, a mere transfer itself, is not conclusive
10 evidence that there was intent of a gift to take place. It
11 doesn't necessarily mean that a gift has taken place.

12 MR. BRANCH: That's not the issue that he's trying
13 to put in. He's trying to change the legal effect or the
14 intent of a document that is clear and the four corners of
15 that document unambiguous, there is no reason under Pearl
16 Evidence Rule that he should be able to any way set aside any
17 of that document.

18 THE COURT: Well, you've already asked him whether
19 or not it was, he intended to make a gift, and he answered
20 that no.

21 Q BY MR. THOMAS: Prior to transferring the gift, did
22 you speak with an attorney?

23 A No, I did not.

24 Q Did you know the legal consequences or have any
25 idea of what the legal consequences would be of signing that?

1 A I had not ever considered them.

2 Q When you--did there come a time when your wife
3 admitted that she had, in fact, spoken with an attorney prior
4 to the time of your signing of the deed?

5 A Yes, she did.

6 Q And what did she say to you?

7 A She told me after I had signed this she blurted out
8 that her father, on the advice of her father and an attorney,
9 she was advised to get herself on the deed.

10 Q Now, earlier your testimony was that, I want to
11 make sure I characterize this correct, but this morning you
12 testified, I believe, that it wasn't necessarily intended as
13 estate planning. What did you mean by that?

14 A Well, when Branch asked me about estate planning I
15 assumed he was talking about a life insurance salesman coming
16 to my house and selling me some kind of a plan.

17 Q So if we were to rephrase the question and state,
18 by deeding the property to your wife, did you intend to
19 provide for her and your children in the event of your death,
20 what would your answer be?

21 A That was my intent.

22 Q Now, Mr. Whetman, with respect to your current
23 position, I hand you what has been marked Exhibit 3. What is
24 the first mortgage balance on your home?

25 A As of this month it's 162,574.

Addendum E

Trial Transcript page 221 through 223

1 THE COURT: Any redirect?

2 REDIRECT EXAMINATION

3 BY MR. THOMAS:

4 Q Mr. Whetman, coming back to the gift, the nature of
5 the gift that was taken place, at least they're claiming a
6 gift, deed is what I want to refer to.

7 MR. BRANCH: Objection, Your Honor, we have not
8 made that claim.

9 THE COURT: I think their position has been that
10 the preparation of the deed, the recording of the deed was
11 part of an agreement entered into during the marriage to join
12 all property (inaudible) person. I'm probably the one who
13 used the word gift and I apologize.

14 MR. BRANCH: And that could be a finding in this
15 Court, but I'm just saying that he's mischaracterizing her
16 testimony, she did not call it a gift.

17 THE COURT: It was probably my fault.

18 MR. THOMAS: That's fine, I'll just simply restate
19 it.

20 Q BY MR. THOMAS: With respect to the deed that had
21 taken place, after you signed that in June of 1995, did there
22 come a time when marital relations broke down?

23 A Yes.

24 Q And when did that take place?

25 A Well, vocally things that she stated no later than

1 November '95, is my recollection.

2 Q And in November of 1995, what did she state to you
3 with respect to having to go back to work?

4 A She stated many times over and over, and I can
5 quote her, "If I have to go back to work there's no reason to
6 be married." And her explanation of that was marriage--

7 MR. BRANCH: Objection, relevance, Your Honor.
8 None of this is relevant to the issues at hand.

9 THE COURT: I'll allow it, go ahead.

10 THE WITNESS: She implied that she married me as a
11 means of support, that the only reason to be married is so
12 you don't have to go to work.

13 Q BY MR. THOMAS: And between February of 1994 and
14 November of 1995, did she in fact work at all during the
15 marriage?

16 A No.

17 Q Did she state anything to you at that time that she
18 was considering a divorce?

19 A At what time are we talking about?

20 Q November of 1995.

21 A Yes.

22 Q What did she say to you regarding that?

23 A What I just stated that, "If I have to go to work
24 there's no reason to be married."

25 Q But did she specifically state, "I'm considering

1 filing for divorce," or anything along those lines?

2 A Yes.

3 Q And this divorce complaint didn't actually get
4 filed until I believe June of 1996, what took place in those
5 intervening months between November of 1995 and June of 1996?

6 MR. BRANCH: Objection, relevance.

7 THE COURT: And I'll note your objection. You go
8 ahead.

9 Q BY MR. THOMAS: What actually took place during
10 those months, was it a smooth?

11 A It was a very rocky time financially for us. I was
12 trying to get employment and was dissatisfied with where I
13 was working. We were strapped financially, it caused a lot
14 of stress, particularly when I asked her to participate in
15 going back to work, and every time I did she would respond
16 with, if she had to work there was no reason to be married,
17 which added to my stress and pressure. And then she's also
18 telling me that she doesn't love me anymore and that her, in
19 her words, she's closed herself off.

20 MR. THOMAS: I have no further questions, Your
21 Honor.

22 THE COURT: Mr. Branch?

23 RE CROSS EXAMINATION

24 BY MR. BRANCH:

25 Q Was there a period of time, Mr. Whetman, when Mrs.

Addendum F

Trial Transcript page 271 through 282

1 MR. THOMAS: That's correct.

2 THE COURT: So to take Cox on its face it doesn't
3 help you.

4 MR. THOMAS: I understand--

5 THE COURT: Any of these cases on their face, you
6 don't have a 73 and 68-year-old party here like you did in
7 the Jespersen case.

8 MR. THOMAS: No, Your Honor, but let's take a look
9 at the equities because those are important. Is all that
10 we're wanting is to have equity done here. We've got Mr.
11 Whetman who comes into this marriage with a home that was
12 built with the insurance proceeds from his former wife's
13 passing, and that was her legacy to Mr. Whetman and her
14 children, that is the amount that they received, okay, that's
15 what they get from their mother in terms of an inheritance,
16 that's it, that's what's there and that goes to Mr. Whetman.
17 So he comes in with that figure, all right?

18 Now, I think it's important to look at the duration
19 of the marriage in this case. We're talking about a time
20 period in February of 1994 and then admittedly they
21 acknowledge she, in fact she's the one who raised the issue,
22 that by October of that year, you know, seven, eight months
23 after the marriage they're having marital problems, okay?
24 This isn't the kind of relationship you think of as having
25 everything going, you know, just fine.

1 I'd like to point out that initially Mr. Whetman
2 was also contributing things that he had, he had the travel
3 that he took the kids on, he had the tax refunds, he had his
4 checking account, all of that came in as well. I think it's
5 important to note that they didn't get together and just say,
6 "All right, we're going to make everything joined together
7 here at once." They didn't do that, that never happened.
8 There's no evidence that they ever got together and said,
9 "All right, we're going to get everything together at the
10 same time and we're going to take care of all of these
11 things." She kept the stock in her own name for a year and a
12 half.

13 THE COURT: Well, there is evidence from
14 plaintiff's testimony that their agreement was that they
15 would join assets, forces, and energies to make a good home
16 for six children and a happy marriage for two people.

17 MR. THOMAS: But Mr. Whetman--

18 THE COURT: That's fairly credible evidence to me,
19 I have to tell you that.

20 MR. THOMAS: I understand.

21 THE COURT: I mean it's common, it's not an
22 unnatural thing when two people get together to have that as
23 a common goal.

24 MR. THOMAS: But I think it is an unnatural thing
25 for someone to say, "All right, you can have in this very

1 short term relationship one half of this \$80,000 that has
2 come from my wife's passing, that is my pre-marital
3 property." That is something that would be very unnatural to
4 take place. It was interesting to note from her testimony as
5 well, she was talking about--

6 THE COURT: Love causes one to do strange things.

7 MR. THOMAS: But that shouldn't be fair, Your
8 Honor, it should not be equitable to allow her to get this
9 huge windfall because that's all it is. She coming into this
10 marriage with very few funds and she's going out with just
11 about the same. Now, he comes in and he's got, you know, a
12 position of about \$98,000 and he's leaving with 70 even under
13 his proposal, okay? If you are to switch the tables and buy
14 into their proposal he leaves with a substantially smaller
15 amount, and that's not fair, it's not just, it's not
16 equitable particularly when he brought all of that in.
17 Suddenly all his children's inheritance basically from their
18 mother is gone, it's vanished.

19 THE COURT: I hear what you're saying. Let me tell
20 you what I'm having trouble with. As I view the evidence my
21 best view is the most logical view, and I understand again,
22 love is strange and it's not always logical, is that the
23 evidence appears to show me that there was an agreement to
24 work together, to join forces. The signature on the deed,
25 the preparation of the deed was part of that plan. Part of

1 the reason I'm feeling that way is because I've not been
2 given a good reason by the defendant as to why he signed that
3 otherwise. To say someone hounded you would not cause
4 someone it seems to me reasonably to sign away something he
5 did not want to sign away.

6 MR. THOMAS: There was more than that with respect
7 to his testimony. I think he testified that he felt it would
8 be appropriate in case something were to happen to him to
9 make sure that his children were taken care of.

10 THE COURT: Okay, and I think he said his wife and
11 his children.

12 MR. BRANCH: That's right.

13 MR. THOMAS: So--

14 THE COURT: And if that's the case isn't that
15 further evidence of an intent to transfer? His testimony was
16 his wife and his children in case he died.

17 MR. THOMAS: I don't believe so because I think
18 that that is simply, you know, if you will, almost a form of
19 a poor man's will, if you will, where he's thinking in the
20 event something happens to me during the marriage and we're
21 doing well then I would want them to have this. But it
22 certainly wasn't his intent to convey to her his pre-marital
23 interest in the property and there is a distinction between
24 that, and I think it's a critical distinction.

25 It's also noteworthy, just a couple of real

1 important things on this, Your Honor.

2 THE COURT: Go ahead.

3 MR. THOMAS: And that has to do with the statements
4 that were made, that he talked about the fact that she'd gone
5 to an attorney before this.

6 MR. BRANCH: No, his testimony was after.

7 MR. THOMAS: No, his testimony was--

8 THE COURT: Go ahead and give me your best view.
9 I'm the ultimate fact finder.

10 MR. THOMAS: His testimony was that prior, she told
11 him this afterwards, that she told him that prior to the time
12 that she had had the deed done her father and her attorney
13 had advised her to get the deed in her name. He didn't have
14 the benefit of legal counsel. He didn't know exactly what
15 was taking place with respect to that and he thought he was
16 simply providing a means for his children to be looked out
17 after if he died, but he wasn't intending to transfer the
18 interest so that she would then get his pre-marital property.
19 And that's a real important distinction.

20 The equities of this case are so far out of whack
21 where in essence these kid's marital, the home they lived in
22 during the parties, during the parties marriage, but after
23 their mother died, basically their legacy from their mother
24 is suddenly going to be gone and it's going to be given to a
25 person who's come in, the parties were together for a period

1 of 20 months total before things got really rocky. As of 20
2 months into this marriage she was stating such things as, you
3 know, "If I've got to work I might as well, I don't want to
4 be in this marriage. I might as well be out of here." So
5 she clearly did not want to work. She tried to claim, "Oh, I
6 had to sacrifice by not working." Well, the fact is the
7 evidence before the Court is that she didn't want to work.
8 She liked that lifestyle and when it came time to change she
9 said that "I'm out of here if I'm going to have to work. I
10 might as well not be here."

11 THE COURT: Mr. Thomas, let me ask you your
12 position with regard to the appraisals.

13 MR. THOMAS: Well, I think clearly Mr. Johnson's
14 appraisal was the better appraisal for a couple of reasons.
15 Number one, he looked at far more comparables than Mr. Reeder
16 did and he had comparables that focused in a fairly close
17 range, in other words, he was looking for that, you know,
18 that cluster of comparables that would come out, and I
19 believe he called it the mode. And he was looking for that
20 (inaudible) of comparables and then based on that he used
21 five different comparables. Most significant he even used
22 one of the comparables of the home that's on that very
23 street, okay? And he knocked that down because it's a
24 smaller square footage and he knocked that down by a couple.
25 But he pointed out how that had been on the market for over a

1 year and that in fact that had not been able to sell.

2 THE COURT: For Sale by Owner?

3 MR. THOMAS: Correct, For Sale by Owner. I also
4 think it's important that Mr. Jones, the builder, Mr. Jones
5 indicated he'd been building his homes for a long period of
6 time and he essentially came in and said, "If I had to build
7 that home and sell it today I would sell it for," and then he
8 stated the figures, if the lot was \$40,000 I'd sell it for
9 approximately--

10 THE COURT: I think he said it would cost this much
11 to build.

12 MR. THOMAS: 239 to build, and he said the lot
13 was--

14 THE COURT: He gave a lot price. I don't think he
15 said what he would sell it for, he said what it would cost
16 him to build it. That's what I understood from his
17 testimony.

18 MR. THOMAS: I had asked him what he would sell
19 that for. Those are the questions I believe that I was
20 asking right around that was, "What would you sell it for
21 today?" And he said, "239.7, that would be the sales price."

22 THE COURT: Now, if--depending on what I do there
23 is going to be an amount due your client to the plaintiff of
24 somewhere between 25,000 approximately, 23,000, and could be
25 75,000 or 80,000. They want 70, they want 5,000 attorney's

1 fees, they want 3,000, there's this 3,000 on a Toyota loss
2 that someone has to pay there. They want credit I think on a
3 couple of assets.

4 MR. THOMAS: It's my understanding with respect to
5 the Toyota, just so we're clear on that, it's my
6 understanding that the parties agreed that that would be
7 turned back to Mr. Whetman at the conclusion of these
8 proceedings today and that he would then be responsible for
9 that lease payment.

10 THE COURT: But don't I have to determine who eats
11 the \$3,000 current loss?

12 MR. THOMAS: Yes.

13 THE COURT: I'm just adding these different things
14 up and we're between 75 and 80,000 on this end and about
15 23,000 on this end. How would he pay that?

16 MR. THOMAS: At 70,000 he can't, Your Honor.

17 THE COURT: The house would have to be sold?

18 MR. THOMAS: The house is going to have to be sold.
19 There absolutely no way that he could pay \$70,000
20 particularly when, you know, the evidence, we believe the
21 better evidence shows the value of the home at 290, I mean
22 there's absolutely no way that he'd be able to come up with
23 \$70,000 to be able to pay her anything. The only solution at
24 that juncture is the home would have to be sold. That's all
25 that could take place and the kid would have to be uprooted

1 from the home that they've been in for about five years.

2 THE COURT: And were it something less than that?

3 MR. THOMAS: Well, you know, he stated that--

4 THE COURT: You wanted a payment plan over five
5 years?

6 MR. THOMAS: That's right, and he's gone through--

7 THE COURT: At 10 percent just amortizing that
8 amount five years at 10 percent?

9 MR. THOMAS: That's what he's requesting from the
10 Court. I suppose if he has the ability, he certainly would
11 of the \$23,000 figure, he would go out and attempt to
12 refinance the home in order to get the \$23,000.

13 THE COURT: Two mortgages are 183,000, if you add
14 some amount onto that the value is even in the range you
15 suggest you're still going to be around 80 percent at worst.

16 MR. THOMAS: Correct, so if that's available to him
17 he would be willing to do that in an attempt to cash her out.

18 THE COURT: Is his testimony he now makes 3,300 a
19 month?

20 MR. THOMAS: 3,300 a month gross.

21 THE COURT: Gross?

22 MR. THOMAS: Yeah, gross.

23 THE COURT: And expenses of about 4,500?

24 MR. THOMAS: About 45. I think he also testified
25 that he receives \$1,280--

1 and then I'll come back out and enter a decision.

2 (Proceedings concluded)

C E R T I F I C A T E


STATE OF UTAH)
) ss.
 COUNTY OF SALT LAKE)

I, JULIE LAY, do hereby certify that the foregoing pages, numbered 1 through 281, contain a true and accurate transcript of the electronically recorded proceedings and was transcribed by me to the best of my ability from the cassette tapes furnished to me.

DATED: December 31, 1997


 JULIE LAY, Transcriber

I, KELLY THACKER, Certified Court Transcriber, and Notary Public for the State of Utah, do hereby certify that the foregoing transcript prepared by Julie Lay was transcribed under my supervision and direction.


 KELLY THACKER

My Commission Expires:

11-5-2000

