

2008

Veronica Jacobsen v. Guenther Jacobsen : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

VERONICA JACOBSEN,

Appellant,

v.

GUENTHER JACOBSEN,

Appellee.

Appeal No. 20080802-CA

BRIEF OF APPELLANT

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ORAL ARGUMENT/PUBLISHED OPINION REQUESTED

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UTAH APPELLATE COURTS

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VERONICA LEE JACOBSEN,
Appellant.

GUENTHER JACOBSEN
Appellee.

JURISDICTION

CONSTITUTIONAL AND STATUTORY PROVISIONS, STATEMENT OF ISSUES PRESENTED ON APPEAL, AND STANDARD OF REVIEW

STANDARD OF REVIEW: “We determine the existence of a contract . . . by resorting to principles of law; therefore, we grant no deference to the trial court that originally decided the matter.” Carter v. Sorenson, 2004 UT 33, ¶6, 90 P.3d 637; *see*, Nunley v. Westates Casing Servs., Inc., 1999 UT 100, ¶17, 989 P.2d 1077. “Whether a contract exists between parties is a question of law; therefore, we review the trial court’s conclusion of law under a

correction of error standard.” Herm Hughes & Sons, Inc. v. Quintek, 834 P.2d 582, 583 (Utah App. 1992), *citing* Bailey v. Call, 767 P.2d 138, 139 (Utah App), *cert denied*, 773 P.2d 45 (Utah 1989); *accord*, Scarf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985). “In determining the sufficiency of the evidence supporting the district court’s findings, [w]e review the evidence in a light most favorable to the trial court’s findings and affirm if there is a reasonable basis for doing so.” Ockey v. Lehmer, 2008 UT 37, ¶34, 189 P.3d 51, *citing* Reinbold v. Utah Fun Shares, 850 P.2d 487, 489 (Utah App 1993); *see also*, Grayson Roper Ltd. P’ship v. Finlinson, 782 P.2d 467, 470 (Utah 1989).

ISSUE II: *Alternatively, if the Divorce Agreement is enforceable, did the trial court err in offsetting the proceeds for the sale of the Terra Vista home, under what it found to be an enforceable agreement, with monies paid for the purpose of retiring the mortgage when (a) the agreement had been in effect for 2 years prior to such payments being made; (b) the plain language of the agreement indicated that, absent a pay-out in September of 2004, the equity would be divided equally among the parties upon property sale closure and (c) did it err in determining that Appellee’s prior inheritance monies which he paid into the Terra Vista home be returned to him in full?*

STANDARD OF REVIEW: “Interpretation of contract terms is a question of law.” Holladay Duplex Management Co., L.L.C. v. Howells, 2002 UT App 125, ¶2, 47 P.3d 104, *citing* Canyon Meadows, 2001 UT App 414, ¶7, 40 P.3d 1148; *see also*, Dixon v. Pro Image, Inc., 1999 UT 89, ¶14, 987 P.2d 48. “We review the trial court’s rulings on questions of law for correctness.” *Id.*, *see*, Canyon Meadows at ¶7. “[T]he trial court has wide discretion in property division, and its judgment will not be disturbed on appeal unless an abuse of discretion can be demonstrated.” Mortensen v. Mortensen, 760 P.2d 304, 305-306 (Utah 1988).

ISSUE III: *Did the trial court err in awarding Appellee equity in house for payments made pursuant to the Divorce Agreement following signing of agreement up to and including the sale of the Terra Vista property; awarding Appellee all interest accrued on the escrow containing the proceeds from the sale of the*

Terra Vista property; and did the trial court enter conflicting findings in determining that the parties separated their financial accounts in May 2001?

STANDARD OF REVIEW: “[T]he trial court has wide discretion in property division, and its judgment will not be disturbed on appeal unless an abuse of discretion can be demonstrated.” Mortensen v. Mortensen, 760 P.2d 304, 305-306 (Utah 1988).

ISSUE IV: *Did the trial court err in using the new values (instead of depreciated values) for major household items and the 2002 VW Golf in ordering Veronica to pay Guenther one half the value of those items?*

STANDARD OF REVIEW: “[T]he trial court has wide discretion in property division, and its judgment will not be disturbed on appeal unless an abuse of discretion can be demonstrated.” Mortensen v. Mortensen, 760 P.2d 304, 305-306 (Utah 1988).

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

A. U.C.A. § 30-3-3(1)

STATEMENT OF THE CASE

The parties met in Decatur, Alabama, on December 12, 2006, while both were working for Hexcel Corporation, and were married on April 18, 1997. R0393 at pp. 7-8. On June 2, 1997, appellant Veronica Jacobsen (“**Veronica**”) moved to Kearns, Utah (hereinafter, the “**Gingerwood Home**”), to live with appellee Guenther Jacobsen (“**Guenther**”). *Id.* The Gingerwood Home in Kearns, Utah, was owned by Guenther at that time. *Id.* at p. 44. Veronica resigned her position in Alabama making approximately \$46,000 per year, and sold her home for a profit of \$6,000, which was placed in a joint account. *Id.* at pp. 10-11.

In 1999, the couple began construction on a home in Sandy (hereinafter, the “**Terra Vista Home**”), mortgaging the Gingerwood Home for approximately \$60,000 to purchase

the lot in Sandy, which cost approximately \$81,000. R0393 at pp. 43-44, 48. The remaining \$21,000 came from the couple's joint account. *Id.* at 45. Veronica's name was placed on the Gingerwood Home on or about June 18th or 19th, 1999, so the parties could purchase the lot for the Terra Vista Home. *Id.* at 45-46. In October of 1999, the couple fired their contractor and Veronica managed the remainder of the construction until its completion in April of 2000. *Id.* at 48. The sale of the Gingerwood Home reflects both Veronica and Guenther as owners and sellers. *Id.* at p. 47.

On May 14, 2001, the parties signed and notarized a one page document titled *Divorce Agreement* (the “**Divorce Agreement**”), which reflected the parties' agreements to distribution of some property. R0077. The Divorce Agreement is attached hereto as Exhibit “B” and incorporated herein by this reference. Approximately three and one half years later, on October 13, 2005, Veronica, filed a *Petition for Divorce* (the “**Petition**”), requesting the termination of her marriage to Guenther. R0001. Concerning the Terra Vista Home, Veronica requested that (a) Guenther be awarded the Terra Vista Home; (b) Veronica be entitled to one-half the value of the equity in the Terra Vista home valued at the time of the Decree of Divorce by a certified appraiser of Veronica's choosing, and; (c) Veronica be ordered to sign a Quit Claim Deed for the Terra Vista Home within ten (10) days of entry of the Decree of Divorce and (d) Guenther be ordered to pay Veronica one-half of the equity within thirty (30) days of the entry of the Decree of Divorce. R0003. The Petition did not seek alimony from Guenther conditioned on Guenther performing certain requests. On October 26, 2005, Guenther filed his *Answer and Counterclaim*. R0011. Concerning the Terra Vista Home, Guenther requested that, based on the parties' separation in January 2003, it

was just for the parties to be awarded equity based upon the value of the equity accrued from the time they moved into the residence until their separation on or about January 1, 2003. R0015. Guenther requested the value be determined by a mutually agreed upon appraiser. *Id.*

On October 3, 2006, the parties came before Commissioner Patrick T. Casey for a pretrial settlement conference. R0218. The commissioner determined mediation had failed, the parties were unable to resolve the issues, and certified the matter for trial. *Id.* The commissioner determined the following issues for trial: (1) Veronica's claim for one-half the equity in the Terra Vista Home and how the Divorce Agreement applies thereto, which was further complicated by other factors; (2) the parties' vehicles and Veronica's request for balancing of the values in the vehicles; (3) the financial accounts and their valuation dates to be divided equally; (4) Veronica's request for alimony, particularly since she experiences a shortfall every month; (5) the issue of the repayment of monies taken from the financial account; and (6) attorney's fees. R0218-0220, 0223.

On January 31, 2007, the Petition came for trial (the "**Trial**"). R0393 - Tr. at p. 3. On February 2, 2007, the trial court rendered its oral findings. R0277. The trial court concluded that the Divorce Agreement was an enforceable agreement and determined to enforce it. R0394 at p. 3. The trial court based this conclusion on its findings that (a) Veronica testified that the Divorce Agreement was her idea, she drafted it, and both parties appeared before a notary to sign it; (b) Veronica testified she had no specific immediate intent to implement the Divorce Agreement, but previously attempted to fill out paperwork for divorce; (c) Veronica's child Isaac required a secure place to live until he completed High School; and, (d) while the Divorce Agreement did not address all of the parties' financial assets, it did

address a substantial number of assets and how they should be distributed. *Id.* at pp. 4-5.

The trial court found that there was performance on the Divorce Agreement by the parties. R0394 at p. 5. Veronica's name was removed from the Terra Vista Home's mortgage, Guenther continued to make monthly mortgage payments and, while Veronica temporarily moved to Hong Kong, Isaac remained in the Terra Vista Home until August 2004. *Id.* at pp. 5-6. Hence, the trial court concluded elements of the contract had been met in that both parties participated in the drafting and revision of the Divorce Agreement and had reached a meeting of the minds. *Id.* at p. 6. The trial court found that the lack of an actual filing of a divorce action did not take away from the enforceability of the contract and, since the Divorce Agreement did not provide a precise date by which the Terra Vista Home was to be sold, that there would be equal division of equity whenever the sale occurred. *Id.* at pp. 6-8.

The trial court found that the way in which the parties filed their tax returns after signing the Divorce Agreement demonstrated the parties' intent to keep their finances separate. *Id.* at p. 9. The trial court found that the distribution of the 401-K and pension plans was contemplated by the Divorce Agreement, which indicates that they would be divided equally. *Id.* Furthermore, the Divorce Agreement disclaimed Veronica's right to seek alimony. *Id.* While the trial court noted the Divorce Agreement does not make provisions concerning the distribution of personal property, including stock options, this failure did not take away from the Divorce Agreement's enforceability, since it in large measure addressed the distribution of assets. *Id.*

The trial court determined that Veronica was effectively gifted with one-half the value of the Gingerwood Home, irrespective of the fact that Guenther had paid for it in full before

the marriage. R0394 at p. 10. Hence, the trial court found that the Gingerwood Home was marital property and thus went into the interest of the Terra Vista Home. *Id.* at pp. 10-11.

The trial court concluded that the joint accounts became separate after May 2001, when Veronica began depositing her paychecks into a different account. R0394 at pp. 11-12. The trial court found that the parties remained signatories on each other's accounts as a convenience to Veronica. *Id.* The trial court concluded that the parties intended to retain their funds as separate assets after May 25, 2001, and that Veronica acted improperly by withdrawing money from the joint account. *Id.* at p. 15. Thus, the trial court held that Guenther was entitled to deduct the money taken from the account from the equity in the Terra Vista Home. *Id.* The trial court found that Guenther was entitled to the fix-up expenses he incurred when selling the Terra Vista Home, and that Guenther was entitled to reimbursement for paying off Veronica's debt when the parties married. *Id.* at p. 15-16. Therefore, the trial court concluded that different dates needed to be attached to the valuing of different assets. R0394 at p. 18. The trial court found that the checking and savings accounts were separated on May 25, 2001, and monies held in the respective accounts were separate property of the parties thereafter. *Id.* at p. 18. The trial court found the valuation of the Terra Vista Home as of the date of its sale, which was contemplated by the Divorce Agreement. *Id.*

The trial court determined that the income tax filings and refunds had already been divided between the parties equitably. R0394 at p. 20. The trial court determined the value of stock options and pension as of the date of divorce and awarded each party half interest in the other's pension and stock options. *Id.* The trial court found that Veronica needed

minor assistance with her attorney fees and awarded Veronica \$2,500 in attorney's fees. *Id.* at pp. 20-21.

On June 19, 2008, the trial court entered its *Findings of Fact, Conclusions of Law and Order* (the "**FOF/COL**"). R0367. On August 25, 2008, the Decree was entered. R0401. The Decree granted the parties divorce on grounds of irreconcilable differences. R0402. Veronica's claim to Guenther's inheritance was categorically rejected, including the portion of inheritance Guenther used to retire the mortgage on the Terra Vista Home. *Id.* The Divorce Agreement was deemed valid and enforceable, with any ambiguity resolved against Veronica as the drafter thereof. Veronica was determined to have waived claim to alimony and denied such request. *Id.* The date of May 25, 2001, was utilized for the purpose of separating the joint financial accounts, with Guenther awarded \$29,777.20, an amount that Veronica removed from Guenther's account in . *Id.* This amount was deducted from Veronica's share of the sales proceeds of the Terra Vista Home. *Id.* The date of January 31, 2007, was utilized for the date of valuation for Guenther's stock options accumulated during the marriage, and each party was awarded one-half the value of the stock as of that date. The date of January 31, 2007, was also utilized as the date of valuation of the parties' pension plans, 401ks, and any other retirements. *Id.* Thus, Veronica was awarded \$68,829.64 withdrawn from Guenther's 401k plan and Guenther was ordered to receive one-half of \$12,000 cashed out from Veronica's retirement. *Id.* The trial court determined Veronica would receive an offset of \$28,414.82 from the monies she was ordered to pay to Guenther from her share of the sales proceeds of the Terra Vista Home. R0402-0403. The proceeds of

the Terra Vista Home sale had been placed in escrow when it sold and amounted to \$488,949.11. R0393 at p. 51.

The date of August 17, 2006, which was the Terra Vista Home's date of sale, was utilized for the division of equity. R0403. The trial court first determined Guenther would receive \$241,465.52 outright from the proceeds, which represented the extra payments he made to retire the mortgage and one-half the cost of repairs to the home prior to the division of the sales proceeds. *Id.* The trial court rewarded the remaining sales proceeds of \$247,483.50 to be divided equally between the parties. *Id.* However, out of the remaining sales proceeds, Veronica was ordered to pay Guenther (a) \$29,777.29 for the wrongfully taken money from his account; (b) \$4,134.25 as Guenther's one-half interest in the major personal property retained by Veronica; (c) \$5,137.50 as Guenther's one-half interest in the value of the Vehicle; (d) attorney's fees in the amount of \$2,117.50, due to Veronica removing money as indicated from Guenther's account; and (e) \$14,417.21 to reimburse Guenther for paying her pre-marital debt. Guenther was ordered to pay Veronica \$47,417 for her one-half interest in the parties' retirement accounts and stock options, and attorney's fees in the amount of \$2,500. R0403-0404. Hence, the trial court ordered the distribution of the Terra Vista Home escrow in the amount of \$117,914.38 to Veronica and \$371,034.72 to Guenther. R0404. On September 22, 2008, Veronica filed her *Notice of Appeal*. R0445.

STATEMENT OF FACTS

Material facts relative to each issue are contained in the argument section for each argument *post* so as to avoid repetition.

SUMMARY OF THE ARGUMENT

In its analysis of contracts between spouses, this Court has determined the following:

In addressing the stipulated divorce decree between Wife and Husband, we first “acknowledge[] the general authority of spouses ... to arrange property rights by a contract that is recognized and enforced by a court in the event of a divorce.” *Reese v. Reese*, 1999 UT 75, ¶24, 984 P.2d 987. And although the Utah Supreme Court has held that “contracts between spouses ... are not necessarily judged on the same terms as contracts executed by persons operating at ‘arm’s length,’” we note that the court never set forth a different test or standard of review for such contracts. *Id.* Instead, the court has stated the general principle that “spouses ... may make binding contracts with each other and arrange their affairs as they see fit, insofar as the negotiations are conducted in good faith ... and do not unreasonably constrain the court’s equitable and statutory duties.” *Id.* at ¶25. In effect, the parties “are held to the highest degree of good faith, honesty, and candor,” and “agreements concerning the disposition of property owned by the parties at the time of their marriage are valid, so long as there is no fraud, coercion, or material nondisclosure.” *Id.* at ¶24 (quotations and citation omitted).

Sweet v. Sweet, 2006 UT App. 216, ¶3, 138 P.3d 63.

The Utah Supreme Court has held, “[a] binding contract can exist only where there has been mutual assent by the parties manifesting their intention to be bound by its terms.”

Bunnell v. Bills, 13 Utah 2d 83, 368 P.2d 597, 600 (Utah 1962) *citing* Allen v. Bissinger and Co., 62 Utah 226, 219 P. 539, 31 A.L.R. 376.

In May of 2001, the parties signed the document titled “Divorce Agreement.” However, the parties did not end their relationship, and Veronica did not actually file for divorce until October of 2005. When this matter came before the trial court, the Divorce Agreement was held to be a binding and enforceable contract, and the division of the marital

property was made accordingly. However, the trial court's reliance upon the Divorce Agreement was in error as the Divorce Agreement was not entered into in contemplation of divorce as is evidenced throughout the brief, and was not made in good faith by the parties.

However, should this Court determine that the Divorce Agreement is enforceable, then the trial court erred in offsetting the proceeds from the sale of the Terra Vista Home. This Court has held, "[i]t is [a] court's duty to enforce the intentions of the parties as expressed in the plain language of the covenants." Holladay Duplex Management Co., L.L.C. v. Howells, 2002 UT App 125, ¶7, 47 P.3d 104, *citing* Swenson v. Erickson, 2000 UT 16, ¶11, 998 P.2d 807. "Furthermore, [s]uch language is to be taken in its ordinary and generally understood and popular sense, and is not to be subjected to technical refinement nor the words torn from their association and their separate meanings sought in a lexicon." *Id.*, *citing* Freeman v. Gee, 18 Utah 2d 339, 423 P.2d 155, 163 (1967).

Under the Divorce Agreement, Veronica's name was to be kept on the Terra Vista property, her name was to be removed from the mortgage, Guenther was to make all payments on the mortgage at least through August 2004, and (under 3.1) the equity was to be split "equally" when the Terra Vista house was sold. Under the plain language of the Divorce Agreement, any payment made by Guenther to the Terra Vista property was a gift to the marriage. The trial court decided, however, to award Guenther an offset for paying off the mortgage, and for improvements and maintenance he claimed on the home. Veronica was given no offset for her maintenance and improvements on the home, and the Divorce Agreement had no provision for giving credit for payments made on the property. The trial court's decision to give Guenther equity credit for additional payments he made to the Terra

Vista home ignored the plain language of the Divorce Agreement, and ignored the fact of Veronica and he holding the title jointly as husband and wife. The trial court's decision denied Veronica the benefit of the bargain she made with the Divorce Agreement.

This Court has stated that, “. . .the doctrine of construing ambiguities in a contract against the drafter functions as a kind of tie-breaker, used as a last resort by the fact-finder after the receipt and consideration of all pertinent extrinsic evidence has left unresolved what the parties actually intended.” Wilburn v. Interstate Elec., 748 P.2d 582, 585 (Utah App. 1988). In the instant matter, the fact that Veronica was the drafter of the Divorce Agreement has been construed against her, even though the parties agreed to an agreement in the form later changed and countered by Guenther. The mere fact that Veronica drafted the initial agreement—later countered when Guenther made changes to such agreement—should not be held against her.

This Court has held that, “Utah law provides that a spouse may transfer his or her interest in separately acquired property into the marital estate.” Bradford v. Bradford, 1999 UT App. 373, ¶22, 993 P.2d 887 *citing* UT. CODE ANN. §30-2-3. Bradford continues, “[a] transfer of otherwise separate property to a joint tenancy with the grantor's spouse is generally presumed to be a gift, *see* 41 C.J.S. *Husband and Wife* § 103(a), at 397 (1991) (*citing Kramer v. Kramer*, 709 S.W.2d 157, 159 (Mo.Ct.App.1986)), and, when coupled with an evident intent to do so, effectively changes the nature of that property to marital property.” *Id.*, *citing Mortensen v. Mortensen*, 760 P.2d 304, 307-08 (Utah 1988). In the instant matter, the trial court erred in giving Guenther the amount of all payments he made to the Terra Vista property, including those stemming from his inheritance, as an offset on the marital property

because any payments made to the marital property changed the nature of those payments into marital property.

“Generally, in a divorce proceeding ‘[e]ach party is presumed to be entitled to all of his or her separate property and fifty percent of the marital property.’” Bradford v. Bradford, 1999 UT App. 373, ¶26, 993 P.2d 887 *citing* Thomas v. Thomas, 375 Utah Adv. Rep. 23, 25, 987 P.2d 603, 609 (Utah Ct.App.1999). Hence, “[a]n unequal division of marital property, however, is only justified when the trial court ‘memorialize[s] in commendably detailed findings’ the exceptional circumstances supporting the distribution.” *Id.* at ¶ 27. In the instant matter, the Divorce Agreement contemplated for the equity in the Terra Vista Home to be split equally, with Guenther paying the mortgage through at least August of 2004. Therefore, it was an error for the trial court to determine that the Divorce Agreement was enforceable, but that Guenther should be awarded the payments he made on the mortgage when the Divorce Agreement anticipated such payments. The trial court also erred in its division of the interest on the proceeds from the Terra Vista Home and the division of the parties financial accounts, since such division was also inequitable and not in accordance with the one-half split as set forth in the Divorce Agreement.

The Trial Court also failed to take into account the evidence actually presented to it and admitted concerning the current values of marital property and Veronica’s car, instead deciding unilaterally to use 7 year old and 2 year old values, respectively, and forcing Veronica to pay half those inflated values instead of those current values actually submitted as evidence. This was an abuse of discretion.

Veronica should also be awarded her attorney fees and costs on appeal, as a prevailing party on appeal who was awarded her attorney fees by the trial court.

ARGUMENT

I. THE TRIAL COURT ERRED IN DETERMINING THE DIVORCE AGREEMENT WAS VALID AND BINDING ON THE PARTIES, AND CLAIMING THAT THE AGREEMENT SHOULD BE CONSTRUED AGAINST VERONICA.

A. The Divorce Agreement is Not Enforceable.

In its analysis of contracts between spouses, this Court has determined the following:

In addressing the stipulated divorce decree between Wife and Husband, we first “acknowledge[] the general authority of spouses ... to arrange property rights by a contract that is recognized and enforced by a court in the event of a divorce.” *Reese v. Reese*, 1999 UT 75, ¶24, 984 P.2d 987. And although the Utah Supreme Court has held that “contracts between spouses ... are not necessarily judged on the same terms as contracts executed by persons operating at ‘arm’s length,’” we note that the court never set forth a different test or standard of review for such contracts. *Id.* Instead, the court has stated the general principle that “spouses ... may make binding contracts with each other and arrange their affairs as they see fit, insofar as the negotiations are conducted in good faith ... and do not unreasonably constrain the court’s equitable and statutory duties.” *Id.* at ¶25. In effect, the parties “are held to the highest degree of good faith, honesty, and candor,” and “agreements concerning the disposition of property owned by the parties at the time of their marriage are valid, so long as there is no fraud, coercion, or material nondisclosure.” *Id.* at ¶24 (quotations and citation omitted).

Sweet v. Sweet, 2006 UT App. 216, ¶3, 138 P.3d 63.

The Utah Supreme Court has held, “[a] binding contract can exist only where there has been mutual assent by the parties manifesting their intention to be bound by its terms.”

Bunnell v. Bills, 13 Utah 2d 83, 368 P.2d 597, 600 (Utah 1962) *citing* Allen v. Bissinger and

Co., 62 Utah 226, 219 P. 539, 31 A.L.R. 376. In Asael Farr & Sons Co. v. Truck Ins. Exchange, the Utah Court of Appeals determined that, depending on the facts of the case, a failure of a condition precedent to contract formation necessitates the conclusion that no contract was ever formed. *Ibid.*, 2008 UT App 315, ¶40, 193 P.3d 650; *see, generally*, McBride-Williams v. Huard, 2004 UT 21, ¶13, 94 P.3d 175 (“ ‘Condition precedent’ is defined as an act or event, other than a lapse of time, *that must exist or occur* before a duty to perform something promised arises.” (emphasis added)(additional internal quotation marks omitted)); *see, e.g.*, Bilanzich v. Lonetti, 2007 UT 26, ¶11 n. 4, 160 P.3d 1041 (noting that, under the facts of that case, “the failure of the condition precedent invalidated the entire [contract]”).

In the instant case, the trial court determined to enforce the Divorce Agreement in determining the distribution of property. The trial court based this determination on the evidence presented at trial as follows: Veronica testified she left her copy of the Divorce Agreement with Guenther when she left the Terra Vista Home to reside in Hong Kong. R0393 at p. 28. Veronica testified that she initiated the draft, but Guenther finalized it. *Id.* at p. 30. Veronica testified she wanted the Divorce Agreement because in December of 2000, Guenther brought home another woman. *Id.*

A few months later, Veronica asked Guenther to leave, and he moved out in April 2001. R0393 at p. 28. On May 14, 2001, the parties signed the Divorce Agreement. Guenther was not a citizen of the United States but had applied for a green card at the time of the Divorce Agreement. R0393 at p. 28. Veronica had participated with Guenther in applying for the green card. *Id.* However, Veronica became worried about Guenther’s ex-girlfriend in Germany. *Id.* at pp. 30-31. Veronica did not see a divorce lawyer after signing

the Divorce Agreement and was unaware whether Guenther had seen a lawyer. *Id.* at p. 31. Veronica did not intend to divorce Guenther at the time she signed the Divorce Agreement. *Id.* Veronica testified that, after signing the Divorce Agreement, Guenther was nicer to her than before. *Id.* at p. 32. Veronica testified she was worried Guenther had used her to obtain a green card. *Id.*

Veronica testified that Guenther removed her name from the first mortgage on the Terra Vista Home, which is in accordance with the Divorce Agreement. R0393 at pp. 32-33. Veronica testified that Guenther moved back into the Terra Vista Home when she moved to Hong Kong in January of 2003. *Id.* p. 34. Prior to moving to Hong Kong, Veronica paid the utility bills and maintenance concerning the Terra Vista Home. *Id.* Veronica and Guenther shared the costs of any damage to the Terra Vista Home. *Id.* at pp. 34-35. Terra Vista was not placed for sale until November 2005, a month after Veronica filed for divorce. *Id.*

At the time the parties signed the Divorce Agreement, there was no discussion between the parties concerning a reduction of what Veronica received by an amount of Guenther's inheritance. R0393 at pp. 35-36. The parties did not discuss any reduction in what Veronica would receive from the sale of Terra Vista based on use of premarital or separate funds. *Id.* at p. 36. Veronica testified that, after Guenther moved out in April 2001, she saw him at the Terra Vista Home once every weekend or more. *Id.*

Veronica gave Guenther her copy of the Divorce Agreement when she left for Hong King because she considered it "meaningless." *Id.* at pp. 36-37. Veronica testified that, although they were separated, she and Guenther had relations, continued to present themselves as husband and wife, and took vacations together. *Id.* at p. 37. Veronica testified

that, when Guenther traveled with Veronica on her business trip to Korea in February 2004, she introduced him as her husband to her family. *Id.* at p. 39. Upon Guenther's request, Veronica took vacation time in October 2004 for thirty-six (36) days to take care of Guenther when he had open heart surgery. *Id.* at pp. 40-41.

Veronica testified she did not intend to divorce Guenther. R0393 at p. 83. Veronica did not file a motion with the trial court to void the Divorce Agreement. *Id.* Veronica entered into the Divorce Agreement voluntarily. *Id.* Prior to signing the Divorce Agreement, Veronica had prepared some divorce documents online in February 2001 which were never filed or finalized, and the Divorce Agreement was in contemplation of that potential filing. *Id.* Veronica and Guenther did not divide their financial accounts upon signing the Divorce Agreement. *Id.* at p. 84. After signing the Divorce Agreement, Guenther paid the taxes, insurance, and mortgage payment on the Terra Vista Home, even while Veronica lived there and he did not. *Id.* at p. 97. Veronica testified that the reason for this was because Guenther earned more money than Veronica, and she could not afford the mortgage. *Id.* The Divorce Agreement reflects that Guenther would pay the mortgage of the Terra Vista Home. *Id.* at pp. 97-98.

In June, 2005, Guenther paid the mortgage on the Terra Vista Home in full. R0393 at p. 141. Guenther testified his name was the only one on the mortgage for the Terra Vista Home. *Id.* In 2002, Guenther testified that the parties filed joint tax returns and split the return equally. *Id.* at p. 156. Guenther testified that, before moving to Hong Kong, Veronica returned her copy of the Divorce Agreement to him and said it was a useless paper. *Id.* Guenther testified that Veronica made a draft and they made adjustments, keeping the scope

of the Divorce Agreement the same. *Id.* at p. 191. Guenther acknowledged that the Divorce Agreement did not address personal property, such as the washer, dryer, and vehicles. *Id.* at pp. 191-192.

Guenther testified that his understanding of equity took into consideration “contributions, premarital, inheritance and so on.” *Id.* at pp. 194-195. However, Guenther did not discuss this with Veronica before signing the Divorce Agreement and believed there was no need to discuss that.” *Id.* at p. 195. Guenther testified that when he signed the “divorce agreement,” he was not contemplating a divorce. *Id.* at p. 198, ll. 6-10. Upon signing the Divorce Agreement, Guenther was not contemplating divorce and did not move in that direction. *Id.* at p. 198. Guenther testified that there was nothing in the Divorce Agreement that indicated the money earned by the parties after May 2001 was not separate property. *Id.* at pp. 215-216. Guenther testified that, although the parties had separated their financial accounts upon entering the Divorce Agreement, both parties had access to the other’s accounts. *Id.* at pp. 216-217.

In its oral findings, the trial court based its conclusion to enforce the Divorce Agreement upon its findings that (a) Veronica testified that the Divorce Agreement was her idea, she drafted it, and both parties appeared before a notary to sign it; (b) Veronica testified she had no specific immediate intent to implement the Divorce Agreement, but previously attempted to fill out paperwork for divorce; (c) Isaac required a secure place to live until he completed High School; and, (d) while the Divorce Agreement did not address all of the parties’ financial assets, it did address a substantial number of assets and how they should be distributed. R0394 at pp. 4-5.

The trial court found that there was performance on the Divorce Agreement by the parties. *Id.* at p. 5. Veronica's name was removed from the Terra Vista Home's mortgage, Guenther continued to make monthly mortgage payments, and, while Veronica temporarily moved to Hong Kong, Isaac remained in the Terra Vista Home until August of 2004. *Id.* at pp. 5-6.

Hence, the trial court concluded that partial performance of the contract had been undertaken in that both parties participated in the drafting and revision of the Divorce Agreement and had reached a meeting of the minds. *Id.* at p. 6. The trial court found that the parties accepted certain legal detriments: Guenther accepted responsibility for the mortgage, and Veronica remained on the title of the Terra Vista Home. *Id.* The trial court found that the actual filing of divorce did not take away from the enforceability of the contract. *Id.*

The trial court found that, since the Divorce Agreement did not provide a precise date by which the Terra Vista Home was to be sold, it did state the sale would occur after August 31, 2004, and that there would be equal division of equity whenever the sale occurred. R0394 at pp. 7-8. The trial court further found that, based upon the way in which the parties filed their tax returns after signing the Divorce Agreement, this demonstrated the parties' intent to keep their finances separate. *Id.* at p. 9. The trial court found that the distribution of the 401-K and pension plans was contemplated by the Divorce Agreement, which indicates that they would be divided equally. *Id.* Furthermore, the Divorce Agreement disclaimed Veronica's right to seek alimony. *Id.* While the trial court noted that, while the Divorce Agreement did not make provisions concerning the distribution of personal property, including stock options, this failure did not take away from the Divorce

Agreement's enforceability, since it in large measure addressed the distribution of assets. *Id.*

The trial court erred in its determination that the Divorce Agreement was a valid and binding contract between parties. The Divorce Agreement was either negotiated in bad faith or unreasonably constrained the trial court's equitable and statutory duties. Sweet at ¶3. The parties, particularly Guenther, did not exercise good faith, honesty, and candor in negotiating the Divorce Agreement. Neither party was actually contemplating divorce when the Divorce Agreement was signed, which is evidenced by the record. Veronica did not see a divorce lawyer after signing the Divorce Agreement and was unaware whether Guenther had seen a lawyer. R0393 at p. 31. Veronica did not intend to divorce Guenther at the time she signed the Divorce Agreement. *Id.* Upon signing the Divorce Agreement, Guenther was not contemplating divorce and did not move in that direction. R0393 at p. 198. In fact, Veronica's testimony that her underlying reason for the Divorce Agreement was to simply threaten divorce and, after doing so, Guenther treated her better. *See*, R0393 at p. 32. Since the parties, upon signing the Divorce Agreement, did not intend to divorce, the parties did not mutually assent their intent to be bound by the terms of the Divorce Agreement. Bunnell at 600.

Furthermore, the failure of the parties to complete certain conditions precedent of the Divorce Agreement points to the Divorce Agreement's invalidity. Asael at ¶40. The Terra Vista Home was not placed for sale until after Veronica filed the Petition. *See*, Exhibit "B." Veronica detrimentally relied on one-half the equity as provided by the Divorce Agreement pursuant to 3.1 when the Terra Vista Home was sold.

Guenther then determined to retire the Terra Vista mortgage. His actions in failing to pay Veronica necessarily led to implication of paragraph 3.1 in the divorce proceedings, with a variable as to the amount of equity existing in the house and no provision for where the money originated with which the equity resulted. Guenther was not required to pay off the mortgage and did so of his own volition.

Additionally, Guenther did not negotiate the Divorce Agreement in good faith. Sweet at ¶3. Guenther testified that his understanding of equity included what he considered to be premarital money, such as contributions and his inheritance. R0393 at pp. 194-195. However, he also testified that he did not discuss this with Veronica before signing the Divorce Agreement. *Id.* at p. 195. This omission in the negotiation of the Divorce Agreement should have compelled the trial court to decline to enforce it. Therefore, based upon the foregoing, the trial court erred in determining the Divorce Agreement as valid and binding on the parties.

If the Divorce Agreement is not valid, then the trial court must determine division of marital assets based solely on the parties filing for divorce and subsequent separation, which would require a remand for findings consistent with this opinion.

B. The Trial Court Erred by Construing the Divorce Agreement Against Veronica

The trial court made a finding that any ambiguity in the Divorce Agreement would be construed against Veronica as the drafter. R0402. It is unclear whether this finding had any effect as the court did not note any ambiguity in its interpretation of the contract. Making this finding is counter to the court's statement "the Agreement drafted by Petitioner, with modifications provided by Respondent, is an enforceable contract . . ." R0385. The Court

also states that “because Petitioner essentially drafted the Agreement, any ambiguity should be resolved against her . . .” R0386. This ruling is error because A) the court’s findings indicate that the document was mutually prepared, and B) this finding can only be made if a contract demonstrates an ambiguity which no other means can resolve, and no ambiguity was found by the court within this context.

“[I]f a contract is ambiguous, it will be construed against the drafter *only if extrinsic evidence fails to clarify the intent of the parties.*” Cherry v. Utah State University, 966 P.2d 866, 869 (Utah App 1998) (emphasis added). This Court has stated, “[i]n other words, the doctrine of construing ambiguities in a contract against the drafter functions as a kind of tie-breaker, used as a last resort by the fact-finder after the receipt and consideration of all pertinent extrinsic evidence has left unresolved what the parties actually intended.” Wilburn v. Interstate Elec., 748 P.2d 582, 585 (Utah App. 1988).

However, the Utah Supreme Court has determined, “[u]nder Utah law, an implied covenant of good faith and fair dealing generally inheres [in] all contractual relationships.” Asael Farr & Sons Co. v. Truck Ins. Exchange, 2008 UT App 315, ¶36, 193 P.3d 650 *citing* Prince v. Bear River Mut. Ins. Co., 2002 UT 68, ¶27, 56 P.3d 524 (alteration in original) *quoting* Rawson v. Conover, 2001 UT 24, ¶44, 20 P.3d 876 (internal quotations omitted).

This Court has clarified as follows:

In *Daines v. Vincent*, 2008 UT 51, 190 P.3d 1269, the Utah Supreme Court recently clarified the proper approach to determining the issue of contractual ambiguity. The Supreme Court first noted that “contractual ambiguity can occur in two different contexts: (1) facial ambiguity with regard to the language of the contract and (2) ambiguity with regard to the intent of the contracting parties.” *Id.* ¶25. A judge must first

determine that a contract is ambiguous on its face before it considers the second question of ambiguity regarding intent. *See id.* “[A] judge [may] ... review relevant and credible extrinsic evidence offered to demonstrate that there is in fact an ambiguity” on the face of the contract. *Id.* ¶31. Once the judge reviews this evidence, “a finding of ambiguity [is justified] only if the competing interpretations are ‘reasonably supported by the language of the contract.’ *Id.* (quoting *Ward v. Intermountain Farmers Ass’n*, 907 P.2d 264, 268 (Utah 1995)).

Moss v. Parr Waddoups Brown Gee & Loveless, 2008 UT App. 405, ¶ 12, 197 P.3d 659.

“Importantly, the supreme court ‘did not intend that a judge allow surrounding circumstances to create ambiguity where the language of a contract would not otherwise permit.’” *Id.* at ¶13, citing Daines at ¶27.

The rule that language is presumptively within control of the party drafting the agreement and that ambiguities thereby are interpreted against the drafter is frequently described under the Latin term of *contra proferentem*, which literally means “against the offeror, he who puts forth, or proffers or offers the language.” *See*, 11 Williston on Contracts §32:12 (4th ed.). Because this doctrine presumes one offeror and an offeree and construes the language against the one who had the choice of words, it has long been held that “[c]ontracts. . .in which the parties thereto make *mutual* promises do not ordinarily come within this rule.” Caine v. Hagenbarth, 37 Utah 69, 106 P. 945 (Utah 1910)(emphasis added), citing 2 Page on Contracts, § 1122.

In the instant case, the trial court erred by construing the Divorce Agreement against Veronica. Exhibit “A” at p. 2. The trial court based this determination on the following findings: Veronica downloaded certain *pro se* online forms to petition for divorce but said forms were never filed. R0381. The Decree specifically states that, “Petitioner initially drafted

the Agreement and provided it to Respondent. He, in turn, proposed certain changes. After further negotiations Petitioner produced a final version, which the parties signed on May 14, 2001 before a notary public.” Id.

The trial court erred by determining the Divorce Agreement should be construed against Veronica in any ambiguity because, while Veronica drafted the initial version, the contract's terms were unambiguous and the parties made adjustments to Veronica's version and mutually promised to undertake actions thereunder. *See*, Tr. at p. 191. In fact, Veronica's testimony was, “I initiated the draft, and Guenther finalized it.” Tr. at p. 30. Therefore, the trial court's determination that any ambiguity should be construed against Veronica is erroneous due to the negotiation that took place before the Divorce Agreement was signed and notarized. Furthermore, the intent of the parties was made clear to the trial court: neither party intended to divorce at the time of signing the Divorce Agreement. Tr. at pp. 31 and 198. Veronica's intent to sign the Divorce Agreement reflected that, after signing the Divorce Agreement, Guenther was nicer to her than before. Tr. at p. 32. The Divorce Agreement was mutually drafted and not ambiguous.

II. EVEN IF THE DIVORCE AGREEMENT IS VALID AND BINDING, THE LANGUAGE OF THE AGREEMENT MAKE IT ERROR TO GIVE GUENTHER CREDIT FOR ADDITIONAL PAYMENTS MADE TO THE PROPERTY FROM WHATEVER SOURCE.

A. The Trial Court Erred in Offsetting the Proceeds

The Divorce Agreement provided at its core that Veronica's name was to be taken off the loans for the Terra Vista property, but that her name would remain on the title. Then at some point in the future (after August 31, 2004), the property would be sold and Veronica

would receive the equity “divided equally,” or in any event no less than \$70,000.00. (Exhibit B, Trial Exhibit P-4). Under this contract, any payments made by Guenther to the loans on the property prior to its sale involving making payments to Veronica without regard to offset. Any other interpretation renders the Veronica’s benefits under the contract illusory—she bargained for a situation where she would have no responsibility for any debt payments on the property, but she would still have full ownership in the property.

What does she gain by keeping her name on the property, if payments made to the property are not treated as a gift to the marriage? What rationale can Guenther present for making additional payments on a house owned jointly by he and his wife, (to which she has a contract stating that she has no responsibility for the debt payments), with the Equity to be “divided equally upon property sale closure,” and then claiming that he was not making a gift payments to a marital property? 3.1 says “Equity will be divided **equally** . . .” (Exhibit B, emphasis added). She waived her right to alimony under the Divorce Agreement—for what? For an equal share of any equity which accrued in the Terra Vista property, including an equal share of any payments Guenther made to the Terra Vista property. She is entitled to the benefit of her bargain.

This Court has held, “[i]t is [a] court’s duty to enforce the intentions of the parties as expressed in the plain language of the covenants.” Holladay Duplex Management Co., L.L.C. v. Howells, 2002 UT App 125, ¶7, 47 P.3d 104, *citing* Swenson v. Erickson, 2000 UT 16, ¶11, 998 P.2d 807. Furthermore, [s]uch language is to be taken in its ordinary and generally understood and popular sense, and is not to be subjected to technical refinement

nor the words torn from their association and their separate meanings sought in a lexicon.” *Id.*, *citing Freeman v. Gee*, 18 Utah 2d 339, 423 P.2d 155, 163 (1967).

This Court has found, “[i]f the language within the four corners of the contract is unambiguous, then a court does not resort to extrinsic evidence of the contract's meaning, and a court determines the parties' intentions from the plain meaning of the contractual language as a matter of law.” *Young v. Wardley Corp.*, 2008 UT App. 104, ¶9, 182 P.3d *citing Bakowski v. Mountain States Steel, Inc.*, 2002 UT 62, ¶16, 52 P.3d 1179. The parties’ intentions are controlling. *State v. Ison*, 2006 UT 26, ¶46, 135 P.3d 864 *citing Bakowski* at ¶16. Thus, “[t]he trial court is to consider “[e]ach contract provision ... in relation to all of the others, with a view to giving effect to all and ignoring none.” *Young* at ¶10 *citing Plateau Mining Co. v. Utah Div. of State Lands & Forestry*, 802 P.2d 720, 725 (Utah 1990).

This Court has previously determined, “[t]he rule is well settled that a person cannot recover back money which he has voluntarily paid with full knowledge of all of the facts, without fraud, duress, or extortion in some form.” *Southern Title Guar. Co., Inc. v. Bethers*, 761 P.2d 951, 955 (Utah App 1988), *citing* 66 AmJur.2d *Restitution and Implied Contracts* § 93 (1973). The Utah Supreme Court has found as follows:

We have previously held that a trial court must consider many factors in making a property settlement in a divorce proceeding, but that the purpose of the settlement should not be to impose punishment on either party. Although the court ruled that “marital misconduct . . . should be considered in making an equitable division of property,” it does not necessarily follow that the defendant was in fact in any way punished by the ultimate division made of the property.

Jespersion v. Jespersen, 610 P.2d 326, 328 (Utah, 1980) *citing Read v. Read*, 594

P.2d 871 (1979).

Therefore, “[i]n making a property division, a court may properly consider such things as the length of the marriage and parties’ respective contributions to the marriage.” *Id. citing English v. English*, 565 P.2d 409 (1977).

In the instant case, the trial court determined the Divorce Agreement was valid and binding upon the parties. Should this Court determine likewise, the trial court erred in offsetting the Proceeds resulting from the sale of the Terra Vista Home. Guenther testified that, between 2003 and June of 2005, he paid the mortgage on the Terra Vista Home in full. Tr. at p. 141. The trial court determined Guenther used money from his inheritance, bonuses, and incentives pay to retire the mortgage. R0337.

The Divorce Agreement indicates the Terra Vista Home was required to be placed on the market and the sale was to take place after August 31, 2004. *See*, Exhibit “B”. The equity was divided in one (1) of two (2) ways: “3.1 In the case of sale of the property: Equity will be divided equally upon property sale closure. 3.2 In the case of pay-out on September 1, 2004: Equity will be calculated based on property sale listing price (minus closing cost) at that time or \$70K, whichever the greater amount will be paid out to Veronica by Guenther.” Exhibit “B”.

Instead of opting to payout Veronica on September 1, 2004, Guenther instead made additional principal payments from 2003 to June 2005 to completely retire the mortgage. The trial court proceeded to enforce the Divorce Agreement and divided the Proceeds in accordance to 3.1 but offset the Proceeds in the process. The Trial Court did not divide the equity “equally upon property sale closure.” The trial court neglected to consider Veronica’s

contribution to the improvement, operation, preservation, and care of the property when she lived there in 2005-2006, after Guenther paid off the mortgage, another issue the Divorce Agreement does not contemplate. The trial court further erred by also neglecting to consider that Veronica's name was on the Terra Vista title. Veronica reasonably believed that she was getting half of all equity and contracted her right to alimony against this sum. *See Mortensen* at 307. Therefore, considering the factors the trial court did not undertake concerning the offset, the trial court erred and prejudiced Veronica.

Isaac who was seventeen (17) remained with Guenther in the Terra Vista Home while Veronica resided in Hong Kong, so as to finish high school. *Id.* The paperwork concerning Veronica's apartment in Hong Kong reflected she rented the unit from March 24, 2003, through August 1, 2005. Tr. at p. 24. Guenther visited Veronica in Hong Kong, staying with Veronica in the apartment. Tr. at p. 25. Veronica considered them to be husband and wife in the apartment. *Id.* Veronica also visited the states while residing in Hong Kong. *Id.* Veronica also provided the trial court with email correspondence exchanged between the parties while she was in Hong Kong. Tr. at p. 26. Veronica worked for the Asia division for two (2) years and seven (7) months. Tr. at p. 26. Veronica visited the states six (6) times during that time. Tr. at p. 27. Veronica decided to come back to Utah because she was lonely and wanted to be close to family. Tr. at pp. 27-28. Guenther expressed his concern that she would not have a job if she returned. Tr. at p. 28.

Veronica testified that Guenther removed her name from the first mortgage, which is in accordance to the Divorce Agreement. Tr. at pp. 32-33. Veronica testified that Guenther moved back into the Terra Vista Home when she moved to Hong Kong in January of 2003.

Tr. at p. 34. Prior to moving to Hong Kong and Guenther moving back into the home, Veronica paid the utility bills and maintenance concerning the Terra Vista Home. *Id.* Veronica and Guenther shared the costs of any damage to the Terra Vista Home. Tr. at pp. 34-35. Terra Vista was not put up for sale in 2004. Tr. at p. 35. The Terra Vista Home was put up for sale in November 2005, a month after Veronica filed for divorce. *Id.* Veronica testified that, since she had come back to the Terra Vista House without a job, Guenther told her to buy her own groceries and that he would not support her. Tr. at p. 42. The Terra Vista Home was sold on August 17, 2006, pursuant to an agreement between Veronica and Guenther. Tr. at p. 50. When the Terra Vista Home was placed for sale, both parties were living there. *Id.*

After signing the Divorce Agreement, Guenther paid the taxes, insurance, and mortgage payment on the Terra Vista Home, even while Veronica lived there because she could not afford the mortgage. Tr. at p. 97. The Divorce Agreement reflects that Guenther would pay the mortgage of the Terra Vista Home. Tr. at pp. 97-98. Guenther testified that, in June, 2005, he paid in full the mortgage on the Terra Vista Home. Tr. at p. 141. Accordingly as the trial court failed to take into consideration Veronica's improvement, operation, preservation, and care of the property while she resided there, the fact her name was on the title, and the fact that the Divorce Agreement did not contemplate Guenther's retiring of the mortgage, the trial court erred in offsetting the proceeds of the Terra Vista home.

B. The Trial Court Erred in Awarding Guenther the Inheritance Monies he had Paid into the Terra Vista Home

This Court has found, “[g]enerally, in a divorce proceeding “[e]ach party is presumed to be entitled to all of his or her separate property and fifty percent of the marital property.” Bradford v. Bradford, 1999 UT App. 373, ¶22, 993 P.2d 887 *citing* Thomas v. Thomas, 375 Utah Adv. Rep. 23, 25, 987 P.2d 603, 609 (Utah Ct.App.1999). Yet, “[t]his presumptive rule of thumb, however, does not supersede the trial court’s broad equitable power to distribute marital property, regardless of who holds title.” *Id.* (citations omitted). Hence, “[a]n unequal division of marital property, however, is only justified when the trial court “memorialize[s] in commendably detailed findings” the exceptional circumstances supporting the distribution.” *Id.* at ¶27 (citations omitted).

The Utah Supreme Court has determined as follows concerning inheritance and divorce:

We conclude that in Utah, trial courts making “equitable” property division pursuant to [UT. CODE ANN. §] 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 has by 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, 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 an interest therein to the other spouse. *Cf. Jespersen v. Jespersen*, 610 P.2d 326 (Utah 1980).

Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988) (alteration to original).

Thus, “[t]he remaining property should be divided equitably between the parties as in other divorce cases, but not necessarily with strict mathematical equality.” *Id.*

This Court has held, “Utah law provides that a spouse may transfer his or her interest in separately acquired property into the marital estate.” Bradford v. Bradford, 1999 UT App. 373, ¶22, 993 P.2d 887 *citing* UT. CODE ANN. §30-2-3. Bradford continues, “[a] transfer of otherwise separate property to a joint tenancy with the grantor's spouse is generally presumed to be a gift, *see* 41 C.J.S. *Husband and Wife* § 103(a), at 397 (1991) (*citing Kramer v. Kramer*, 709 S.W.2d 157, 159 (Mo.Ct.App.1986)), and, when coupled with an evident intent to do so, effectively changes the nature of that property to marital property.” *Id.*, *citing* Mortensen v. Mortensen, 760 P.2d 304, 307-08 (Utah 1988). Mortensen continues:

The rule that property acquired by gift or inheritance by one spouse should be awarded to that spouse on divorce unless the other spouse has, by his or her efforts with regard to the property, acquired an equity in it does not apply when the property thus acquired is consumed, such as when a gift or an inheritance of money is used for family purposes, *In re Marriage of Metcalf*, 183 Mont. 266, 598 P.2d 1140 (1979); when the property completely loses its identity and is not traceable because it is commingled with other property (sometimes called transmuted), *Wierman v. Wierman*, [130 Wis.2d 425, 387 N.W.2d 744 (Wis.,1986)]; *Klingberg v. Klingberg*, [68 Ill.App.3d 513, 386 N.E.2d 517 (Ill.App. 1 Dist., 1979)]; *Agent v. Agent*, 604 P.2d 862 (Okla.Ct.App.1979); or when the acquiring spouse places title in their joint names in such a manner as to evidence an intent to make it marital property. *Hussey v. Hussey*, [280 S.C. 418, 312 S.E.2d 267 (S.C.App.,1984)].”

Mortensen at 307.

This Court has stated that, when a spouse fails to meet the requirement for finding “that the other spouse's separate property has become part of the marital estate, an interest in a

spouse's separate property nonetheless may be awarded to the other spouse under an equitable division of property and in lieu of alimony, or in other extraordinary situations where equity so demands.” Child v. Child, 2008 UT App 338, ¶100, 194 P.3d 205.

In the instant case, the trial court awarded Guenther \$241,465.52 from the Proceeds before attempting to equitably distribute the Proceeds between the parties. Exhibit “A” at p. 3. The Court states, “Respondent will receive the first \$241,465.52 from the proceeds, representing the extra payments made by Respondent to retire the mortgage on the residence after the parties separated their finances in May 2001, and one-half of the cost of repairs to the Residence, prior to the division of the sales proceeds.” *Id.* The trial court found, “[a]fter the parties separated their financial accounts in May 2001, Respondent made extra payments on the Residence. Those payments were made from moneys received by Respondent as bonuses, incentive pay, and/or an inheritance. Through those payments (made by Respondent between June 2003 and June 2005), Respondent was able to retire the mortgage on the Residence (approximately \$230,000).” R0377. Hence, “[h]e should be credited with the full value of those extra payments before equity in the Residence is allocated to the parties.” *Id.* Guenther’s Inheritance totaled approximately \$45,000.

The trial court erred by awarding the Inheritance used by Guenther to retire the mortgage back to Guenther. While parties are entitled to all of his/her separate property and fifty percent of the marital property in a divorce proceeding, the Inheritance became marital property when Guenther paid it into the Terra Vista mortgage. Bradford at ¶122. The trial court erred in its determination. *Id.*

The findings concerning the Gingerwood Home state, “[f]or her part Petitioner argues that once Respondent placed her name on the title to the Kearns house he effectively “gifted” her with one-half interest in the property. Moreover, Veronica argues that since the money from the sale of the Kearns house was used to purchase their new Residence, those funds have been so co-mingled as to lose any separate status as a premarital asset.” R0370.

Hence the trial court concluded as follows:

When Respondent placed Petitioner’s name on the title to the Kearns house, he effectively gifted Petitioner with one-half the value of that home, irrespective of the fact that he had paid for it in full before the marriage. No evidence was presented identifying exactly when Respondent took this action, or the reasons for why he did so. No evidence was presented to suggest that Petitioner’s name on the title to the Kearns house was a necessary prerequisite for securing the mortgage to purchase another building lot. After the mortgage on the Kearns house was secured, the evidence indicates that the parties paid that obligation with funds from the joint account into which both of their salaries were deposited. When the Kearns house was sold the proceeds were used by the parties to build their new marital Residence. The court concludes that through gifting and co-mingling of funds used to pay the mortgage, the Kearns house lost its character as Respondent’s premarital property. Therefore, the Court concludes that the proceeds realized from the sale of the Kearns house became a marital asset which was subsequently reinvested in the Residence – another marital asset.

R0385.

Concerning the Inheritance, the trial court concluded that, even though Veronica claimed signing authority on the “joint account” into which Guenther deposited the Inheritance, the Inheritance was Guenther’s sole and separate property. R0390. Thus, the

trial court determined he should receive full credit for using the Inheritance towards payments the mortgage on the Terra Vista Home. *Id.*

The trial court neglected to realize the Inheritance became co-mingled and marital property by its being paid into the mortgage. Guenther used the Inheritance to contribute to the enhancement and maintenance of the Terra Vista Home and, by paying the Inheritance into the mortgage, the Inheritance lost its identity because it was “gifted” to Veronica in the same way as the Kearns property. *See, Mortensen* at 308. Guenther testified that as of June, 2005, he paid in full the mortgage on the Terra Vista Home. R393 -Tr. at p. 141.

Guenther essentially transferred his interest in the Inheritance into the Terra Vista Home, the marital estate. *Bradford* at ¶22. This “transfer” *was* separate property until Guenther paid the Inheritance into the Terra Vista Home, wherein the resulting equity was to be divided equally between the parties. *Id.* Hence, the Inheritance became marital property. *Id.* Veronica obtained an interest in the Inheritance when it was paid into the mortgage because the equity resulting therefrom was to be divided equally between the parties. *Id.* at 307. The Terra Vista Home was clearly marital property (Veronica was still on the title at the time of the sale of the Terra Vista Home) and Guenther’s intent to keep the Inheritance separate is moot when the Inheritance was co-mingled with equity resulting from the sale of the Terra Vista Home. *Id.* Furthermore, the Divorce Agreement was intended to award Veronica a substantial sum so as to negate the need for alimony. Veronica was found to have given up claim for alimony pursuant to the Divorce Agreement; however, she detrimentally relied upon the Proceeds to obviate the need for alimony. Therefore, as the Divorce Agreement expressly provides for the Proceeds to be equally divided, the trial court

erred by awarding Guenther back the Inheritance, particularly when the Inheritance was gifted to Veronica and co-mingled among funds that were intended to be divided equally between the parties.

III. THE TRIAL COURT ERRED IN AWARDING GUENTHER EQUITY IN THE TERRA VISTA HOME MADE PURSUANT TO THE DIVORCE AGREEMENT FOLLOWING ITS SIGNING UP TO AND INCLUDING THE SALE OF SAID PROPERTY; IN AWARDING HIM INTEREST ON THE PROCEEDS HELD IN ESCROW OF THE TERRA VISTA PROPERTY; and IN ENTERING CONFLICTING FINDINGS REGARDING THE SEPARATION OF THEIR FINANCIAL ACCOUNTS

A. The Trial Court Erred in Awarding Guenther the Equity Up to and Including the Sale of the Terra Vista Home

“In all actions tried upon the facts without a jury ... the court shall find the facts specially and state separately its conclusions of law thereon . . .” UT. R. CIV. P. 52(a). The findings of fact must show that the court’s judgment or decree ‘follows logically from, and is supported by, the evidence.’” Bailey v. Bayles, 2001 UT App 34, ¶24, 18 P.3d 1129, *citing* Butler, Crockett & Walsh Dev. Corp. v. Pincrest Pipeline Operating Co., 909 P.2d 225, 231 (Utah 1995)(citations omitted).

This Court has determined, “[a] trial court's findings should fit ‘within the framework of the petition as originally drawn, or as amended’ and should be supported by the evidence presented.” Lee v. Sanders, 2002 UT App. 281, ¶7, 55 P.3d 1127 *citing* In re Behm's Estate, 117 Utah 151, 213 P.2d 657, 663 (1950). The Utah Supreme Court has found as follows:

In regard to the matter of the sufficiency of findings of fact, a substantial compliance with Rule 52, Utah Rules of Civil Procedure, is sufficient, and findings of fact and conclusions of law will support a judgment, though they are very general, where they in most respects follow the allegation of the pleadings. Findings should be limited to the ultimate facts and if they

ascertain ultimate facts, and sufficiently conform to the pleadings and the evidence to support the judgment, they will be regarded as sufficient, though not as full and as complete as might be desired.

Pearson v. Pearson, 561 P.2d 1080, 1082 (Utah 1977) (footnotes omitted).

The Utah Supreme Court has long held, “[t]he trial court, in an equity, as well as in a law, case, should itself assume the labor of making specific findings of fact which respond to and dispose of the material issues; and in an equity case, where that has not been done, we may reverse and remand[.]” Munsee v. McKellar, 39 Utah 282, 116 P. 1024, 1027 (Utah 1911).

“Generally, in a divorce proceeding ‘[e]ach party is presumed to be entitled to all of his or her separate property and fifty percent of the marital property.’” Bradford v. Bradford, 1999 UT App. 373, ¶26, 993 P.2d 887 *citing* Thomas v. Thomas, 375 Utah Adv. Rep. 23, 25, 987 P.2d 603, 609 (Utah Ct.App.1999). Hence, “[a]n unequal division of marital property, however, is only justified when the trial court ‘memorialize[s] in commendably detailed findings’ the exceptional circumstances supporting the distribution.” *Id.* at ¶ 27. “[A]lthough the trial court could make an award of marital property that was weighted in favor of the spouse that did not also have separate property, such a division should be based on an ‘equitable rationale’ set forth in the findings of fact and conclusions of law.” Stonehocker v. Stonehocker, 2008 UT App 11, ¶21, 176 P.3d 476.

In the instant case, the trial court determined the Divorce Agreement was a valid and binding contract. The trial court awarded Guenther equity in the Terra Vista Home made

pursuant to the Divorce Agreement following its signing up to and including the sale of the Terra Vista Home. The Judgment awards \$241,465.52 to Guenther, which includes the extra payments made to retire the mortgage and one-half the cost to repair the Terra Vista Home for its sale, after the separation of the parties' financial accounts in May 2001. Exhibit "A" at p. 3. Veronica raises the issue of the Inheritance being awarded back to Guenther herein and further raises issue with Guenther being awarded back monthly mortgage payments following the signing of the Divorce Agreement up to and including the sale of the Terra Vista Home, particularly when the Divorce Agreement plainly states, "Guenther will be responsible for the mortgage and equity loan payments on the Terra Vista property through the end of August 2004." Exhibit "B". The trial court's award of monthly mortgage payments to Guenther directly contradicts its determination that the Divorce Agreement is enforceable, notably since the Divorce Agreement does not provide for such an award. *See*, Exhibit "B".

The trial court found, "Respondent assumed full responsibility for the mortgage and Petitioner's name was removed from that obligation. Respondent continued to pay the mortgage on the Residence from the time the parties entered into the Agreement until the mortgage on the Residence was paid off by Respondent in June 2005. Nevertheless, Petitioner's name remained on the title to the Residence until it was sold on or about the Summer, 2006." R0383.

The Terra Vista Home was sold on August 17, 2006, pursuant to an agreement between Veronica and Guenther. Tr. at p. 50. When the Terra Vista Home was placed for sale, both parties were living there. *Id.*

Veronica is presumed to be entitled to fifty percent of the marital property without the Divorce Agreement in place. Bradford at ¶26. However, the Divorce Agreement provides she is entitled to half the equity in the Proceeds and Guenther was to pay the monthly mortgage on the Terra Vista Home. The trial court determined the Divorce Agreement to be enforceable and then entered an unequal division of the Proceeds without sufficient findings in support thereof. *Id.* at ¶27. Furthermore, the FOF/COL do not set forth an equitable rationale to support such a Judgment on this issue.

B. The Trial Court Erred in Awarding Guenther the Interest Accrued on the Proceeds of the Terra Vista Home while in Escrow.

In addition, the trial court awarded Guenther all of the interest accrued on the Proceeds throughout the pendency of the action. Exhibit “A” at p. 3. The trial court states, “[f]urther the party claiming the interest on the escrow account shall be awarded any interest which accrued on the escrowed sales proceeds.” *Id.* At trial, Guenther did not calculate interest accumulating on the Proceeds since it had been placed in escrow but acknowledged Veronica was entitled to her portion of it. Tr. at p. 147. The trial court’s FOF/COL do not set forth findings or conclusions concerning the interest accruing on the Proceeds. Little evidence was introduced at trial concerning it, except for Guenther’s testimony that, while he had not calculated the interest, Veronica was entitled to her portion of it. Tr. at p. 147. However, the Judgment awards all of the interest to the party claiming it, which was Guenther. Exhibit “A” at p. 3. This award of the interest evidences the trial court was not acting according to its equitable duties.

The FOF/COL do not set forth an equitable rationale concerning the interest on the Proceeds. Stonehocker at ¶21. The FOF/COL do not comply with the standard set forth by UT. R. CIV. P. 52(a). The Judgment awards the interest to Guenther without support in the FOF/COL, as this award does not follow logically from and is not supported by the evidence, particularly when Guenther testified Veronica was entitled to her portion of the interest. Bailey at ¶24; *see*, Tr. at p. 147. The Judgment simply states, “[f]urther the party claiming the interest on the escrow account shall be awarded any interest which accrued on the escrowed sales proceeds.” Exhibit “A” at p. 3. Thus, since the Judgment does not rest upon adequate findings and conclusions concerning this issue, the FOF/COL in this case are insufficient and warrant remand for further findings thereon. Pearson at 1082 and Munsee at 1027.

Furthermore, as the Proceeds were marital property, Veronica is presumed to be entitled to fifty percent of the proceeds, which was set forth by the Divorce Agreement. Bradford at ¶26. Interest was not contemplated by the Divorce Agreement; however, as the interest would be included in the Proceeds, Veronica was entitled to half the Proceeds, which would include interest thereon. However, since Veronica was not awarded accordingly, the trial court was required to memorialize in detailed findings the exceptional circumstances supporting such a distribution to Guenther. *Id.* at ¶27. Such findings are not found in this case with regards to this issue. Furthermore, the equitable rationale which are presumed to be found within the findings are also absent in this case. Stonehocker at ¶21. Therefore, remand is appropriate for further findings on this issue which are supported by the evidence given at Trial.

C. The Trial Court Entered Conflicting Findings Concerning the Separation of the Parties' Financial Accounts

Veronica clearly testified that the financial accounts were not “divided” in May 2001, but that they were “separated,” so they each had their own accounts. R0393 - tr. p. 84, ll. 1-3, 15-17. Aside from her testimony, Veronica submitted the actual bank account statements in her post-trial motions to demonstrate that the money in the accounts was never divided, but just that each party began using one account as a primary account. R0412-16; 0426-44. She also submitted this evidence in an objection to Proposed Findings of Fact prior to the court’s entry of the same. R305-306. No allocation of the parties’ funds never actually occurred in 2001.

The trial court determined the parties separated their financial accounts as of May 25, 2001. Exhibit “A” at p. 2. In its findings, the trial court found the following:

The parties initially separated on or about May 2001. Between May 2001 and March 2006 the parties spent extended periods of time in separate households, but have also spent some together. For example, Petitioner relocated to Hong Kong in January 2003, but her son remained at the house with Respondent pursuant to the terms of a “Divorce Agreement” the parties negotiated in February 2001. Moreover, during the Petitioner’s time in Hong Kong the parties continued to put themselves forward as husband wife, they traveled and vacationed together, visited each other periodically, and Petitioner returned to Utah to care for Respondent when he underwent surgery; she remained here for a substantial period of time providing for his care. After Petitioner returned to the United States from Hong Kong she lived at the Residence until it was sold in August, 2006. It is not clear from the evidence at trial exactly when Respondent left the Residence permanently after Petitioner returned from Hong Kong.

R0371-0372.

However, this finding conflicts with the evidence produced at trial.

Veronica received approximately \$6,000 from the sale of her home in Alabama. R0393 - Tr. at p. 10. Veronica placed the funds in a joint account she had begun to share with Guenther. Tr. at p. 11. Veronica and Guenther had joint checking and savings accounts, which Guenther controlled. Tr. at p. 20.

Veronica testified that, after Guenther moved out in April 2001, she saw him at the Terra Vista Home once every weekend or more. Tr. at p. 36. Guenther visited Veronica in Hong Kong, staying with Veronica in the apartment. Tr. at p. 25. Veronica considered them to be husband and wife in the apartment. *Id.* Veronica also visited the states while residing in Hong Kong. *Id.* Veronica also provided the trial court with email correspondence exchanged between the parties while she was in Hong Kong. Tr. at p. 26. Veronica visited the states six (6) times while living in Hong Kong. Tr. at p. 27. Veronica decided to come back to Utah because she was lonely and wanted to be close to family. Tr. at pp. 27-28. Veronica testified that, although they were separated, she and Guenther had relations; whenever they went out they presented themselves as husband and wife, and took vacations together. Tr. at p. 37. Veronica testified that, when Guenther traveled with Veronica on her business trip to Korea in February 2004, she introduced him as her husband to her family. Tr. at p. 39. Veronica took vacation time in October 2004 to assist Guenther when he had open heart surgery. Tr. at pp. 40-41.

Veronica ceased depositing her paychecks into the joint accounts on May 25, 2001. *Id.* However, both parties had access to the other's accounts. *Id.* Guenther would withdraw from Veronica's account and reimburse her for it. Tr. at pp. 84-85. Veronica was not placing

money into the joint account after moving to Hong Kong although her name remained on the accounts. Tr. at p. 86. Veronica acknowledged she did not deposit money into the joint accounts before withdrawing \$29,000 and did not seek permission from Guenther before doing so. Tr. at pp. 86-87. Veronica testified her reason for withdrawing from the \$29,000 was to pay debts. Tr. at p. 87. Veronica testified it would be appropriate for Guenther to withdraw a similar sum from her bank account because the parties' names were on their bank accounts, joint and individual. *Id.* Veronica considered the money she earned after May 25, 2001 to be marital money. Tr. at pp. 88-89. While Veronica was living in Hong Kong, Guenther would withdraw money from her individual account to pay for expenses incurred by Isaac. Tr. at p. 93. Guenther had no access to Veronica's account in Hong Kong. Tr. at p. 101.

In April 2001, Guenther testified that the parties split their marital monies 50% to each party by transferring funds from accounts. Tr. at pp. 139-140. Guenther testified that, after this time, Veronica's last paycheck deposited to the joint account was then transferred to her individual checking account. Tr. at p. 140. After signing the Divorce Agreement, Veronica took care of her obligations. *Id.* Guenther testified he gave Veronica notice when he was transferring monies from her account to his. Tr. at pp. 140-141. Guenther testified that, although the parties had separated their financial accounts upon entering the Divorce Agreement, both parties had access to the other's accounts. Tr. at pp. 216-217. Guenther testified he believed their personal property was split by splitting bank accounts on April 14, 2001. *Id.* No documentation was presented that indicated the parties had separated their accounts in May 2001.

Veronica filed post-judgment motions requesting the Judgment be altered. Veronica pointed out therein that the trial court did not indicate how the interest would be divided on the Proceeds in its FOF/COL. R0478. In response to Veronica's post-judgment motions, Guenther requested the interest be awarded solely to him, which it had been in the Judgment. *Id.* Guenther produced an email from Veronica to him, which indicated he was to have the interest on the Proceeds; however, this document was not produced until after Trial. R0511.

The FOF/COL does not show that the Judgment follows logically from and is supported by the evidence concerning the division of the parties' financial accounts. Bailey at ¶24. Both parties retained signing rights on the other's accounts. Furthermore, this issue was disagreed upon at Trial and neither party could produce evidence that such division actually took place on May 25, 2001. Therefore, as the Judgment does not follow logically from and is not supported by the evidence, the FOF/COL are insufficient on this issue. *Id.* Furthermore, the parties' disagreement at trial concerning the date of financial separation without evidence to support their individual contention is not sufficient evidence to support findings and consequently a Judgment the date of financial separation occurred on May 25, 2001. Lee at ¶7. Since the evidence does not support the FOF/COL, the trial court's specific findings thereon cannot dispose of material issues. Munsee at 1027. Therefore, remand is also appropriate on this issue to determine the evidence to support its findings. The trial court made an unequal division of marital property and relied on its erroneous date to determine the division of financial accounts. Braford at ¶26. Furthermore, the detailed FOF/COL on this issue relied on erroneous evidence which cannot support exceptional

circumstances to support the unequal division of property. *Id.* at ¶ 27.

IV. THE TRIAL COURT ERRED IN USING THE NEW VALUES (INSTEAD OF DEPRECIATED VALUES) FOR MAJOR HOUSEHOLD ITEMS and THE 2002 VW GOLF IN ORDERING VERONICA TO PAY GUENTHER ONE HALF THE VALUE OF THOSE ITEMS.

A. Major Household Items.

Guenther at trial testified that he considered the current value of the washer and Dryer to be \$824, (half of purchase price); the TV \$1,010, (half of purchase price); and the current value of the Dining Set \$3,450.00, 75% of purchase price, based on his experience with depreciation. (Tr. P159-161). These values and Guenther's estimates were stated in Respondent's Exhibits 1C, 1K, 2W, 3B, and 3I (all duplicates), and total \$5,284.00, of which Veronica should pay half, or \$2,642.00. Guenther also included the original receipts for the washer/dryer, TV, and Dining set as exhibit 1K and 3I (attached), which showed original purchase prices of the washer and dryer for \$1,648.32 on 4/19/00, Sony TV receipt for \$2,020.54 on 4/24/00, and the Dining Set for \$4,599.64 on 4/24/00.

The trial court rejected the current values (for January 2007) testified to and submitted by Guenther, and instead chose to simply use the year 2000 purchase price of a nearly 7-year-old TV, washer/dryer, and dining room set, with a total of \$8,268.50, ordering that Veronica should pay half, or \$4,134.25. R377-78; R403; R407. This was an abuse of discretion; the Decree should be directly modified to reflect the only current value testified to for these items (\$5,284.00), with Veronica being ordered to pay \$2,642.00 for her share.

B. The 2002 VW Golf

The Trial Court found that "as to the value of the 2002 VW Golf, the only evidence

presented to the Court was the value listed by [Veronica] in her 2005 financial declaration. At trial [Guenther] also adopted the value reported by Petitioner as an appropriate measure of the vehicle's value." R378. This 2005 Value was \$10,275.00, of which Veronica was ordered to pay half, or \$5,137.50. R. 404, 407.

The only trial testimony concerning the value of the 2002 Golf was the following statement by Guenther:

Then the Golf 2002 which is a little bit – it's not – I took 50% of the estimates submitted by the petitioner. The petitioner claimed for and got the right to use the Golf since hr return in August 2005 from Hong Kong. Then I think it's fair to use the value we have closest to this date, and not of today.

R0393 - tr. P.160, ll. 5-10.

The court's statement concerning the only submitted value of the 2002 Golf being Veronica's 2005 Financial Declaration is simply a case of Guenther substituting his judgment for the Court's in a proposed order which the court adopted. Veronica submitted an updated sworn Financial Declaration for Pretrial dated September 29, 2006, which listed the current value of the Golf as \$6,588, which was marked as Petitioner's Exhibit 26. While 26 was apparently not admitted as evidence, Petitioner's Exhibit 13 (attached) was admitted as evidence, which also listed the current value of the Golf as \$6,588.00. Guenther included a note in his Exhibits 1K and 3I that he believed the \$10,250.00 value from Veronica's 2005 Financial Declaration should be used. Interestingly Guenther also admitted his own sworn Financial Declaration as evidence, dated September 22, 2006, in which Guenther swore under oath that the value of the 2002 Golf was \$8,950.00. (Respondent's Exhibit 8, attached)

Since the Trial Court's findings indicated that it had no evidence of the Golf's value other than Veronica's 2005 Financial Declaration (which was not admitted), the trial court clearly disregarded the evidence presented by Guenther that he valued the Golf at \$8950, and Veronica's evidence that she valued it at \$6588.00. Again it would be an abuse of discretion to use a two-year-old value not submitted as evidence, instead of using either of two values submitted within four months of the trial date. This issue should be remanded to the trial court to enter a value of the 2002 Golf conforming to the evidence actually submitted by the parties as to its current value.

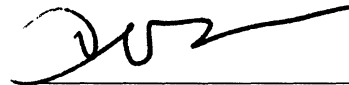
V. ATTORNEY FEES ON APPEAL

"A party seeking to recover attorney fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award." Strauss v. Tuschman, 2009 UT App 215, ¶12, 216 P.3d 370; UTAH R. APP. P. 24(a)(9). Veronica was awarded partial attorney fees by the trial court pursuant to U.C.A. § 30-3-3(1), based upon the fact that Guenther was in a better position financially to assist with her attorney's fees, and that she was partially successful in her claims. R0278. "Ordinarily, when fees in a divorce were awarded below to the party who then prevails on appeal, fees will also be awarded to that party on appeal." *Burt v. Burt*, 799 P.2d 1166, 1171 (Utah Ct. App. 1990). Veronica accordingly requests an order for costs and attorney fees reasonably incurred on appeal, pursuant to U.C.A. § 30-3-3(1), as the prevailing party on this appeal. In addition, the trial court should reassess the amount of its fee award in light of additional areas of success as a result of this appeal.

CONCLUSION

WHEREFORE, based upon the foregoing, Appellant respectfully requests this Court reverse the trial court in this matter, remand for further findings consistent with this opinion, enter orders for property division where the evidence is uncontroverted, and award attorney fees and costs on appeal.

DATED this 15 day of Dec, 2009.



David S. Pace
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy, postage pre-paid, of the foregoing *Brief of Appellant* on this 15 day of Dec, 2009 to the following:

Mr. Terry R. Spencer
Attorney for Respondent/Appellee
140 West 9000 South, Suite 9
Sandy Utah 84070



David S. Pace
Attorney for Appellant

Exhibit ~A~

IMAGED

FILED

AUG 2 2008

THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, UTAH

OPW

TERRY R. SPENCER, Ph.D., P.C.. #6335
A Professional Corporation
Attorney for Respondent
140 West 9000 South, Suite 9
Sandy, Utah 84070
Telephone: (801) 566-1884
Fax: (801) 562-5151

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 08/26/08

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH.

VERONICA LEE JACOBSEN,

DECREE OF DIVORCE

Petitioner,

-vs-

Case No. 054905684

GUENTHER JACOBSEN,

Judge: Lindberg

Respondent.

Commissioner Casey

THE ABOVE CAPTIONED MATTER came before the Court on the 31st day of January 2007, for trial, before the Honorable Denise Lindberg, District Court Judge, and the Court having heard the testimony of the parties, and having received into evidence documents from both parties, and having heard the proffers of counsel and based thereon, and having reviewed the written arguments of both parties and having previously entered its Findings of Fact and Conclusions of Law and based thereon and for good cause appearing therefore;

Decree of Divorce @J



IT IS HEREBY ORDERED, ADJUDGED AND DECREED.

1. The parties are hereby awarded a Decree of Divorce, on the grounds of irreconcilable differences, dissolving the bonds of matrimony previously existing between the parties, the same to become final upon signing by the court and entry by the clerk.

2. Petitioner's claim to Respondent's inheritance is categorically rejected and Petitioner shall have no claim to Respondent's inherited monies, including those monies used to retire the mortgage on the former marital residence (the "Residence.")

3. The Divorce Agreement is hereby deemed to be a valid and enforceable contract and any ambiguity shall be resolved against Petitioner, as the drafter. Petitioner has waived any claim to alimony, now or in the future, and no alimony shall be awarded to Petitioner.

4. May 25, 2001, shall be the date used for the purpose of separating the joint financial accounts previously held by the parties. Respondent is hereby awarded the \$29,777.29 wrongfully removed from Respondent's account. This sum shall be drawn from Petitioner's share of the sales proceeds from the Residence.

5. January 31, 2007 shall be used as the date of valuation for Respondent's stock options accumulated during the marriage and each party shall receive one-half of the value of the stock options as of that date.

6. January 31, 2007 shall be used as the date of valuation for the parties' pensions plans, 401(k) plans and/or other retirements. Petitioner shall be awarded one-half of the \$68,829.64 withdrawn from Respondent's 401(k) plan and Respondent shall receive one-half of the \$12,000.00 cashed out of Petitioner's retirement. Petitioner shall receive an offset of \$28,414.82 from the

monies she is ordered to pay Respondent from her share of the sales proceeds of the Residence.

7. The balances of the parties' defined contribution retirement accounts, and Respondent's defined benefit account shall be divided equally pursuant to property prepared QDROs.

8. The date of sale (August 2006) shall be used for the date of division of equity in the Residence. The sales proceeds were placed in escrow and shall be paid to the parties upon presentation of a signed copy of this Decree of Divorce as follows:

a. Respondent will receive the first \$241,465.52 from the proceeds, representing the extra payments made by Respondent to retire the mortgage on the residence after the parties separated their finances in May 2001, and one-half of the cost of repairs to the Residence, prior to the division of the sales proceeds. Further, the party claiming the interest on the escrow account shall be awarded any interest which accrued on the escrowed sales proceeds.

b. The remaining sales proceeds (\$247,483.59) shall be divided between the parties, equally, and, prior to the distribution of those funds, the following amounts shall be transferred to the respective party's balance as follows:

i. Petitioner shall pay Respondent the sum of \$29,777.29, from her one-half of the sales proceeds, representing the monies Petitioner wrongfully removed from a joint account used solely by Respondent;

ii. Petitioner shall pay Respondent the sum of \$4,134.25, from her one-half of the sales proceeds, representing Respondent's one-half interest in the major personal property retained by Petitioner;

iv. Petitioner shall pay Respondent the sum of \$5,137.5, from her one-half of the sales proceeds, representing Respondent's one-half interest in the value of the VW Golf vehicle (as reported by Petitioner in her December 2005 financial declaration);

v. Petitioner shall pay Respondent the sum of \$2,117.50, as set forth on the affidavit of fees filed by Respondent's counsel, representing the attorney's fees incurred by Respondent in bringing to the court's attention Petitioner's wrongful removal of monies from Respondent's account.

vi. Petitioner shall pay Respondent the sum of \$14,417.21, from her one-half share of the sales proceeds, representing Petitioner's pre-marital debt paid by Respondent as set forth in footnote 2 of the Court's Findings of Fact;

vii. Respondent shall pay Petitioner the sum of \$47,256.35, from his one-half share of the sales proceeds, representing Petitioner's one-half interest in the parties' retirement accounts and stock options; and

viii. Respondent shall pay Petitioner the sum of \$2,500.00, from his one-half share of the sales proceeds, representing a contribution to Petitioner's attorney's fees.

c. The escrow agent is hereby ordered to disburse the escrowed sales proceeds by issuing a check to Petitioner in the amount of \$117,914.38 and a check to Respondent in the amount of \$371,034.72, plus any interest remaining in the account as of the date of disbursement, as more specifically set forth on Exhibit A attached hereto.


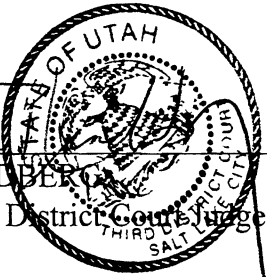
9. Each party shall be awarded any and all other assets or debts in his or her individual name free and clear of any claim or responsibility of the other party.

10. Each party should be ordered to execute and deliver any necessary documents to transfer or affirm the title and ownership of the personal property of the parties, including automobiles, pursuant to the Decree entered in this matter.

11. Petitioner is awarded her name change to Veronica HyunJoo Lee.

DATED this 25 day of August, 2008.

BY THE COURT


DENISE LINDBERG
Third Judicial District Court Judge


APPROVED AS TO FORM:

JOHN GREEN
Attorney for Petitioner

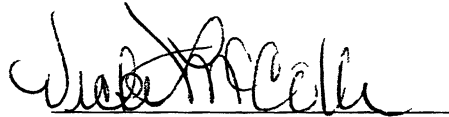
DATED: _____

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be served on Petitioner by faxing and mailing a true and correct copy to:

John Green
Attorney at Law
39 Exchange Place, Suite 60
Salt Lake City, Utah 84111

on the 31 day of July, 2008.

A handwritten signature in black ink, appearing to read "John Green", written over a horizontal line.

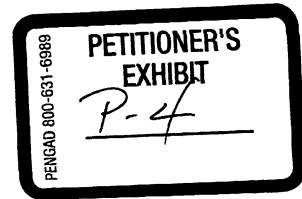
**Civil No.
054905684**

Table of Contents

Exhibit A

	Amount	To Petitioner	Respondent	FF/CL
Terra Vista Home Proceeds	\$ 488,949.11			
County Tax (R's Duty)	NOT IN FF/CL	\$ 0.00		
Less 1/2 Repairs	\$ (3,808.04)	\$ 0.00	\$ 3,808.04	27
Extra Principal Payments	\$ (237,657.48)	\$ 0.00	\$ 237,657.48	# 12 B
Respondent's Pre-Marital Funds	NOT IN FF/CL			
A) Subtotal Escrow Allocation		\$ 0.00	\$ 241,465.52	
To be Divided Equally	\$ 247,483.59	\$ 123,741.79	\$ 123,741.80	
Dining Table Set	\$ 4,599.64	\$ (2,299.83)	\$ 2,299.82	# 12 C
Sony TV	\$ 2,020.54	\$ (1,010.27)	\$ 1,010.27	# 12 C
Washer & Dryer	\$ 1,648.32	\$ (824.16)	\$ 824.16	# 12 C
Subtotal Furnishings	\$ 8,268.50	\$ (4,134.26)	\$ 4,134.25	# 12 C
2002 VW Golf	\$ 10,275.00	\$ (5,137.50)	\$ 5,137.50	# 12 C
Petitioner's Premarital Debts		\$ (14,417.21)	\$ 14,417.21	# 10
Petitioner's Withdrawals		\$ (29,777.29)	\$ 29,777.29	24
Attorney Fees (to P)	\$ 2,500.00	\$ 2,500.00	\$ (2,500.00)	30
Attorney Fees (to R)		\$ (2,117.50)	\$ 2,117.50	31
B) Subtotal Reimbursements		\$ (53,083.76)	\$ 53,083.75	
R's Stock Options	\$ 37,692.05	\$ 18,846.03	\$ (18,846.03)	# 12 D
R's After-Tax 401k	\$ 68,820.64	\$ 34,410.32	\$ (34,410.32)	# 12 E
P's FMC A/P (AIA Plan)	\$ 12,000.00	\$ (6,000.00)	\$ 6,000.00	# 12 E
C) Subtotal Stock Options & 401(k) Pay-outs		\$ 47,256.35	\$ (47,256.35)	
	\$ 488,949.10	\$ 117,914.38	\$ 371,034.72	

Exhibit ~B~



Divorce Agreement


Between

Guenther and Veronica Jacobsen

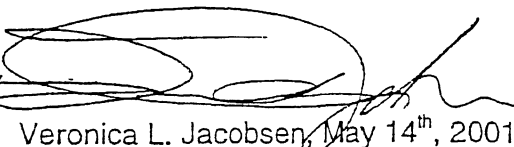
1. Take Veronica's name off the mortgage and equity loan for the 2043 Terra Vista property by the end of 2001, but keep both names on the property title.
2. Veronica and Isaac have the right to live in the Terra Vista property until the end of August 2004.
 - 2.1. Guenther will be responsible for the mortgage and equity loan payments on the Terra Vista property through the end of August 2004.
 - 2.2. Veronica will be responsible for the utility bills and the maintenance of and the replacement parts for the Terra Vista property.
 - 2.3. Repair costs for the property shall be shared equally. Each party will be responsible for damages whoever caused them.
3. Put the Terra Vista property on the market earliest in May 2004. Sale of the Terra Vista property shall take place after August 31st, 2004. The equity will be divided equally as follows:
 - 3.1. In the case of sale of the property:

Equity will be divided equally upon property sale closure.
 - 3.2. In the case of pay-out on September 1st, 2004:

Equity will be calculated based on property sale listing price (minus closing cost) at that time or \$70K, whichever the greater amount will be paid out to Veronica by Guenther.
4. Veronica can stay in the Terra Vista Property beyond August 2004, until the property sale is finalized or pay out is completed. After August 2004, mortgage and equity loan payments will be shared in the ratio of actual gross income.
5. Income tax return will be filed jointly until divorce and divided equally.
6. Upon divorce, the 401(k) and/or pension plans of both parties for the duration of the marriage shall be divided equally.
7. Veronica shall not seek for the alimony.

 May 14, 2001

Guenther Jacobsen, May 14th, 2001

 May 14, 2001

Veronica L. Jacobsen, May 14th, 2001

Exhibit ~C~

file

TERRY R. SPENCER, Ph.D., P.C.. #6335
A Professional Corporation
Attorney for Respondent
140 West 9000 South, Suite 9
Sandy, Utah 84070
Telephone: (801) 566-1884
Fax: (801) 562-5151

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH.

VERONICA LEE JACOBSEN,

FINANCIAL DECLARATION

Petitioner,

-vs-

GUENTHER JACOBSEN,

Case No. 054905684
Judge

Respondent.

Commissioner T. Patrick Casey

Name: Guenther Jacobsen

Address: 6934 Well Spring Road, Apt. 9C, Midvale, Utah 84047

SSN: 647-32-8883

Occupation: Chemist

Employer: Hexcel Corporation, 7000 West 5400 South, West Valley, Utah 84118

No. of Exemptions Claimed: 2

Birth date: 7/2/47

1. GROSS MONTHLY INCOME:

Salary/Wages: \$ 10,071.27

TOTAL MONTHLY INCOME: \$ 10,071.27

2. ITEMIZE MONTHLY DEDUCTIONS:

Federal Income Taxes	\$2,108.92
State Income Taxes	579.10
FICA	486.70
Medicare	146.03
Health Insurance	406.97
401(k)	1,666.67
Disability and Life Ins.	168.84

TOTAL MONTHLY DEDUCTIONS **\$5,563.23**

3. NET MONTHLY INCOME **\$4,508.04**

4. DEBTS AND OBLIGATIONS: NONE

<u>Creditor's Name</u>	<u>For</u>	<u>In whose Name</u>	<u>Balance</u>	<u>Mo. Pmt.</u>
Am Ex 71003	Living Exp.	Rsp.	\$4,637.55	In full each month
Zions VISA	Living Exp.	Rsp.	\$ 35.15	In full each month
Am Ex (corp)	Business	Rsp.	\$1,395.45	In full each month

5. PROPERTY – Sold

a. Real estate: Marital Residence Sold

Address:

Date of acquisition:

Original Cost:

Mortgage Balance:

Mortgage Holder:

Monthly Payment:

Other Liens:

Monthly Payment:

Current value:

Basis of Valuation:

b. Vehicles (Year, make and model)	Value	Balance Owed
2002 Volkswagen Golf GLS	8,950.00	0.00
1996 Chrysler (pre-marital)	3,000.00	0.00

Cash and Deposit accounts (banks, savings & loans, credit unions-savings and checking)

Name of Institution	Account No.	Current Balance	
Zions	123-32922-9	9,109.60	Checking
Zions	123-60519-8	10,010.85	Savings
Escrow Account-Home Sale		488,949.11	

d. Securities, stocks, bonds, money market funds (other)

Name of Institution	Account No.	Current Value
Hexcel Stock Options (pre-marital)	005291	\$0.00

e. Business Interests None

Name of Business	Shares	Current Value
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f. Other assets (include value or equity) None

6. PROFIT SHARING OR RETIREMENT ACCOUNTS --

(If more than two accounts, attach sheet with identical information)

Petitioner: Name of Company/Plan name: Fresenius

Plan representative: Fidelity

Address: P. O. Box 5425, Cincinnati Ohio

Current value: \$300,810.97 (estimate, excludes A-Tax)

Respondent: Name of Company: Hexcel Corporation; 401(k); Pension Plan (frozen 12/31/00)

Plan representative: Fidelity Investment;

Address: P. O. Box 5424; Cincinnati, OH 45250

Current value: Pension \$280.67 per month (estimate)

7. LIFE INSURANCE

Name of Company	Policy No.	Face Amount	Cash Value (if any)
Hexcel		\$290,000	\$0.00

8. MONTHLY EXPENSES:

Rent/Mortgage:	\$ 1,129.00
Real property taxes	0.00
Real property insurance	19.00
Maintenance	0.00
Housekeeping	60.00
Food and Household Supplies	400.00
Utilities:	
Electricity	30.00

Natural Gas	75.00
Water, Sewer & Garbage	45.00
Telephone: (cell included and Internet)	120.00
Cemetery Expense	40.00
Cable TV	32.14
Laundry and Dry cleaning	50.00
Clothing	200.00
Medical	125.00
Dental	90.00
Entertainment	100.00
Gifts and donations	100.00
Auto expense (gas, oil, maint., tax, license)	300.00
Auto insurance	77.00
Installment payments:	0.00
Attorney's fees	845.00
Vacation and Personal Travel Expenses	500.00
Car replacement cost	400.00

TOTAL EXPENSES: \$4,812.14

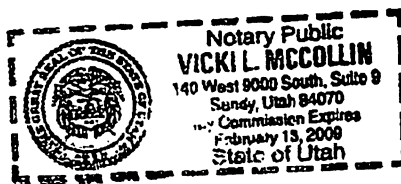
STATE OF UTAH)
 :ss.
 COUNTY OF SALT LAKE)

I swear that all of the information contained herein is true and correct.

Respondent *G. J. Lawrence*

Subscribed and sworn to before me this 22 day of Sept, 2006.

Vicki L. McCollin
 NOTARY PUBLIC

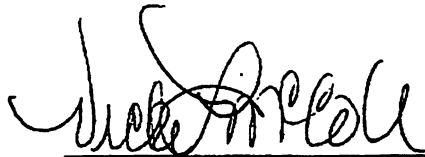


CERTIFICATE OF MAILING

I HEREBY CERTIFY that I employed by the offices of Terry R. Spencer, Ph.D., Attorney and Law, counsel for Petitioner and that I caused the foregoing to be served upon Respondent by placing a true and correct copy in a sealed envelope, addressed to:

John C. Green
John C. Green, P.C.
39 Exchange Place, Suite 60
Salt Lake City, Utah 84111

and depositing the same in the United States mail, first class postage prepaid thereon, on the 25 day of September, 2006.

A handwritten signature in black ink, appearing to read "John C. Green", is written over a horizontal line.



2005 EARNINGS SUMMARY

WAGE ANALYSIS		Box 1 Wages	Box 3 Wages	Box 5 Wages
Total Gross Earnings		198,469.79	198,469.79	198,469.79
Group Term Life Ins Over 50K				
Sec. 401(k), 403(b) and 457	-18,000.00			
Pre-Tax Health, FSA & Transportation	-3,055.04		-3,055.04	-3,055.04
Relocation/Moving Expense				
Other Exempt Earnings/Deductions				
EDCA, PARS and RSUs				
Excess Social Security Wages			-105,414.75	
2005 REPORTED WAGES:		177,414.75	90,000.00	195,414.75

EARNINGS		DEDUCTIONS	
REGULAR	55,883.39	HEALTH CARE	48.90
REGULAR - INDIRECT	52,101.97	HEXCEL PRETAX 401K	14,000.00
VACATION	5,984.65	HEXCEL AFTERTAX 401K	2,789.00
SICK	1,772.17	HEXCEL PRETAX 401K	4,000.00
HOLIDAY	4,648.30	ANTHEM PPO HIGH-FLEX	2,672.75
PERSONAL HOLIDAY	464.83	DELTA DPO-FLEX	293.35
MICP	27,138.00	VSP HIGH-FLEX	40.04
STOCK OPTION GAIN	33,492.48	EE SUPP LIFE	1,713.40
LTIP AWARD	16,984.00	FAMILY SUPP AD&D- NO	167.96
		STOCK OPTION OFFSET	22,289.23
TOTAL EARNINGS:		TOTAL DEDUCTIONS:	48,014.63

Emp #: 86415 Process Level: DUB Dept: 640

JUENTHER JACOBSEN
 1043 E.TERRA VISTA WAY
 NDY UT 84093-

W-2 Wage and Tax Statement 2005

employer's name, address, and ZIP code

 HEXCEL CORPORATION
 HEXCEL CORPORATION
 PO BOX 2627
 ANDERSON SC 29624

employee's name, address, and ZIP code

 GUENTHER JACOBSEN
 2043 E.TERRA VISTA WAY
 SANDY UT 84093-

State	Employer's state I.D. no.	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name
UT	203679	177414.75	11421.72			

Copy B To Be Filed With Employee's FEDERAL Tax Return

 This information is being furnished to the Internal Revenue Service.
 OMB No. 1545-0048

 Dept. of the Treasury - IRS
 Visit the IRS Web Site at www.irs.gov

This information is being furnished to the Internal Revenue Service. If you are required to file a tax return, you must attach this information to your return. If you are not required to file a tax return, you must still attach this information to your return.

W-2 Wage and Tax Statement 2005

employer's name, address, and ZIP code

 HEXCEL CORPORATION
 HEXCEL CORPORATION
 PO BOX 2627
 ANDERSON SC 29624

employee's name, address, and ZIP code

 GUENTHER JACOBSEN
 2043 E.TERRA VISTA WAY
 SANDY UT 84093-

State	Employer's state I.D. no.	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name
UT	203679	177414.75	11421.72			

Copy C For EMPLOYEE'S RECORDS (See Notice to Employee on back of Copy B)

OMB No. 1545-0048

 Dept. of the Treasury - IRS
 Visit the IRS Web Site at www.irs.gov

Excel Corporation P. Box 2627 Anderson, SC 29622				WEEK ENDING: 09/10/2006 ADVICE NUMBER: 00130591							
EMPLOYEE NAME: GUNTHER, JACOBSEN			EMP. # 86418		DEPT 840		FED STATE EX 70		STATE: SC EX 70		
HOURS			EARNINGS		TAXES AND DEDUCTIONS						
TYPE	CURRENT	RATE	CURRENT	YEAR TO DATE	TYPE	CURRENT	YEAR TO DATE				
REGULAR	72.00	58.10	4,183.45	67,574.32	FED IT	802.77	23,224.82				
101 HAY	8.00	58.10	464.83	3,718.64	MEDICARE	84.88	1,739.07				
				4,508.83	UT SIT	231.88	6,371.55				
				13,717.00	SOC SEC		5,840.40				
				9,534.79	*FSA-H	60.00	1,140.00				
				4,503.02	*401K CU	743.72	2,974.90				
				19,946.00	*MEDICAL	113.06	2,148.14				
					*DENTAL	11.43	217.17				
					*VISION	3.23	81.37				
					*401K		15,000.00				
					LTD EE	16.73	317.87				
					LIFE EE	54.73	1,039.87				
					AD&D FAM	6.46	122.74				
					401K AT		278.90				
DATE: 09/15/2006		TOT. GROSS		4,648.28	123,502.80	TOTAL DEDUCTIONS		2,108.49	60,476.60		
						NET PAY		2,539.79			

Excel Corporation
P.O. Box 2627
Anderson, SC 29622

ADVICE NUMBER: 00130591
ADVICE DATE: 09/15/2006

ADVICE INFORMATION ONLY!

GUNTHER JACOBSEN
6934 WELL SPRING RD #9C
MIDVALE, UT 84047

DIRECT DEPOSIT INFORMATION		
ACCOUNT & TYPE		AMOUNT
123329229	ZION CK	2,539.79
TOTAL DIRECT DEPOSIT		2,539.79

WARNING! - THE BACK OF THIS DOCUMENT CONTAINS AN ARTIFICIAL WATERMARK - HOLD AT AN ANGLE TO VIEW.

VOID

Exhibit ~D~

Statement of Income and Expenses

Income

Gross Monthly Income from:	
Salary	\$4,583.00
Total Montly Income:	\$4,583.00
Monthly Deductions:	
Federal withholding	\$744.66
OASDI	\$284.16
Medicare	\$66.45
State w/h UT	\$266.67
401(k)	\$0.00
Total monthly deduction:	\$1,361.95
Net Monthly Income:	\$3,221.06

Debts

Creditor's	Purpose of Debt	In whose name	Balance Payment	Monthly
AMEX	Living cost	Petitioner's	\$535.86	In full
Isaac Moanres	Property Down	Petitioner's	\$5,083.79	\$0.00

Property

Address:	1365East Emerson Ave Salt Lake City, UT 84105
Date of acquisition:	August 10th, 2006
Original cost:	\$330,000.00
Mortgage balance:	\$266,820.23
Mortgage holder:	Countrywide Home Loans
Monthly Payment:	\$1,800.00
Other liens:	\$33,750.00
Lien holder:	Countrywide Home Loans
Monthly Payment:	\$230.00
Current value:	\$330,000.00
Basis of evaluation:	Recently purchased

Vehicle (Year, Maker, & Model)	Value	Balance owed
2002 Volkswagen Golf	\$6,588.00	\$0.00

Cash and deposit accounts		
Name of Institution	Account No.	Current Bal.
Zion's Checking	003468360	\$749.33

401(K)

EM Assist, Inc Paychex http://benefits.paychex.com Current Value: \$6,543.00
Fresenius Medical Care Fidelity Investments P.O. Box 5424 Cincinnati, OH 45250-5424 Current Value: \$40,539.99
Pharmacia Savings Plan Fedelity Investments P.O.Box 770003 Cincinnati. OH 45277-0065

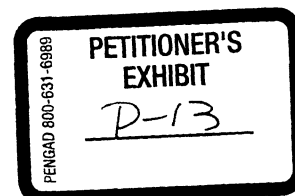


Exhibit ~E~

ZIONS BANK®

P.O. Box 30709, Salt Lake City, UT 84130-0709

Statement of Accounts

Page 1 of 3

This Statement: October 7, 2004

Last Statement: September 9, 2004

Primary Account 003448370

0003196 02 AV 0.503 **AUTO T5 0 2208 84093-106443 02 1 ZFN PG0023 00012

GUENTHER JACOBSEN
VERONICA L JACOBSEN
2043 TERRA VISTA WAY
SANDY UT 84093-1064

DIRECT INQUIRIES TO:

24-hour Account Information:

Logan: 755-9995

Ogden: 393-9995

Provo: 375-9995

Salt Lake: 974-8800

St. George: 674-9995

1 (800) 974-8800 (outside local areas)



Broadway Office
310 South Main
Salt Lake City, UT 84101-2105

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SUMMARY OF ACCOUNT BALANCE

Account Type	Account Number	Checking/Savings Ending Balance	Outstanding Balances Owed
Gold Interest Checking	003448370	\$11,024.52 ✓	

GOLD INTEREST CHECKING 003448370

705 12

Previous Balance	Deposits/Credits	Charges/Debits	Checks Processed	Ending Balance
10,424.76	35,357.36	4,144.42	30,613.18	11,024.52

10 DEPOSITS/CREDITS

Date	Amount	Description
09/17	2,461.93	HEXCEL CORPORATI PR PAY 0002- REF # 011900448111680 1103320859
09/22	9,610.65	WIRE/IN-200426603835;ORG ZIONS BANK DUE FROM DEUTSCHE BANK;O 1603203350
09/23	15,763.35	DEPOSIT 0050418094 <i>Stock Options</i>
09/24	2,578.79	DEPOSIT 0060525751
09/27	1,734.00	INTERNET XFER FROM DDA ***8360 ID: 271184721 2307014386
09/27	286.87	INTERNET XFER FROM DDA ***8360 ID: 271184833 2307014392
09/27	248.77	INTERNET XFER FROM DDA ***8360 ID: 271185051 2307014404
09/27	209.10	INTERNET XFER FROM DDA ***8360 ID: 271184936 2307014402
10/01	2,461.92	HEXCEL CORPORATI PR PAY 0002- REF # 011900444184263 1104377420
10/07	1.98	INTEREST PAYMENT 0001144454

10 CHARGES/DEBITS

Date	Amount	Description
09/13	37.79	ATT 800-222-0300 AT&T S 2311084462001 REF # 021000022961697 1104907529
09/14	1,236.98	AMERICAN EXPRESS ELEC R 040913060225228REF # 031201460568055 1104050603
09/14	30.00	INTERNET XFER TO DDA ***0425 ID: 258164614 2305206283
09/20	30.59	QWEST COMM AUTO PAY 68019444718050 REF # 071100265555994 1104925041
09/22	8.00	WireFee 1603203349
09/27	600.00	INTERNET XFER TO DDA ***1764 ID: 271185334 2307014407
09/27	14.10	Questar Gas Co. QGC 989285000007831REF # 091000011369389 1104245122
10/01	2,000.00	Countrywide MORTGAGE REF # 021000027198986 1104461858
10/04	149.83	BANKCARD CENTER PAYMENT JACOBSEN,VERONICA LEE 4388790000917 1104029512
10/04	37.13	PACIFICORP ELECTRIC C 036082947001040REF # 021200025403450 1104008443

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P.O. Box 30709, Salt Lake City, UT 84130-0709

Statement of Accounts

Page 1 of 3

This Statement: July 8, 2005

Last Statement: June 8, 2005

Primary Account 003448370

0002873 01 AV 0.278 **AUTO T1 2 1912 84093-106443 02 ZFN PG0023 00005

GUENTHER JACOBSEN
VERONICA L JACOBSEN
2043 TERRA VISTA WAY
SANDY UT 84093-1064

DIRECT INQUIRIES TO:

24-hour Account Information:

Logan: 755-9995

Ogden: 393-9995

Provo: 375-9995

Salt Lake: 974-8800

St. George: 674-9995

1 (800) 974-8800 (outside local areas)



Broadway Office
310 South Main
Salt Lake City, UT 84101-2105

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SUMMARY OF ACCOUNT BALANCE

Account Type	Account Number	Checking/Savings Ending Balance	Outstanding Balances Owed
Gold Interest Checking	003448370	\$6,158.09	

GOLD INTEREST CHECKING 003448370

706 5

Previous Balance	Deposits/Credits	Charges/Debits	Checks Processed	Ending Balance
4,979.70	28,243.79	10,634.80	16,430.60	6,158.09

7 DEPOSITS/CREDITS

Date	Amount	Description
06/09	19,589.23	DEPOSIT 0050257848 <i>Stock Options</i>
06/10	2,595.58	HEXCEL CORPORATI PR PAY 0002- REF # 011200363457166 1104718238
06/24	2,595.58	HEXCEL CORPORATI PR PAY 0002- REF # 011200365481085 1104216265
06/24	860.79	HEXCEL CORPORATI INV PA E86415 REF # 011200366358688 1104221721
07/05	2.87	DEPOSIT 0050453471
07/08	2,595.58	HEXCEL CORPORATI PR PAY 0002- REF # 011200361357307 1105009930
07/08	4.16	INTEREST PAYMENT 0000965407

10 CHARGES/DEBITS

Date	Amount	Description
06/13	39.92	ATT 800-222-0300 AT&T S 2311084462001 REF # 021000029782701 1107845520
06/15	2,477.90	AMERICAN EXPRESS ELEC R 050614060215815REF # 031201464022903 1104672441
06/20	32.04	QWEST COMM AUTO PAY 68019444718050 REF # 071100269882967 1104517497
06/27	78.65	Questar Gas Co. QGC 989285000087541REF # 091000011373511 1105246495
06/28	376.13	AMERICAN EXPRESS ELEC R 050627060218184REF # 031201462115079 1104650447
07/01	300.00	INTERNET XFER TO DDA ***1764 ID: 182182341 2306512608
07/05	32.38	PACIFICORP ELECTRIC C 036082947001050REF # 021200022398827 1106316626
07/05	19.95	BANKCARD CENTER PAYMENT JACOBSEN,VERONICA LEE 4388790000917 1106358772
07/08	7,199.84	INTERNET XFER TO DDA ***1764 ID: 189181255 2304610538
07/08	77.99	COMCAST COMCAST 4040160066 REF # 021000024407417 1105032487

3 CHECKS PROCESSED

Number	Date	Amount	Number	Date	Amount	Number	Date	Amount
1083	06/13 <i>C/Wide</i>	16,249.93	1084	07/07	46.67	1085	07/08	134.00

DAILY BALANCES

Date	Amount	Date	Amount	Date	Amount
06/09	24,568.93	06/15	8,396.76	06/27	11,742.44
06/10	27,164.51	06/20	8,364.72	06/28	11,366.31
06/13	10,874.66	06/24	11,821.09	07/01	11,066.31