

2008

# Veronica Jacobsen v. Guenther Jacobsen : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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VERONICA LEE JACOBSEN,	)	
	)	Appeals Case No. 20080802- CA
	)	Third District Court No. 054905684
Petitioner/Appellant,	)	
	)	BRIEF OF APPELLEE
vs.	)	
	)	
GUENTHER JACOBSEN,	)	
	)	
Respondent/Appellee.	)	

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**BRIEF OF APPELLEE**

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APPEAL FROM THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND  
DECREE OF DIVORCE, OF THE THIRD JUDICIAL DISTRICT COURT OF UTAH,  
SALT LAKE COUNTY, THE HONORABLE DENISE LINDBERG, PRESIDING.

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## STATEMENT OF JURISDICTION

Rules 3(a) and 4(a) of the Utah Rules of Appellate Procedure, and Utah Code Ann. §78A-4-103(2)(h) confer jurisdiction upon this court to hear this appeal.

## STATEMENT OF ISSUES & STANDARD OF REVIEW

[The Brief of Appellant refers to the parties “Petitioner/Appellant” as Veronica and “Respondent/Appellee” as “Guenther.” This Brief will continue to use those references for the parties.]

### **I. THE CLERICAL ERRORS IN THE BRIEF OF APPELLANT MAY BE SO EGREGIOUS AS TO WARRANT SANCTIONS.**

Judicial discretion does include whether or not sanctions are imposed for failure to comply with briefing requirements and this issue is reviewed under the abuse of discretion standard.

While we decline to sanction . . . under rule 24(k), we warn future litigants that compliance with our briefing requirements is not discretionary, and litigants who fail to comply take the risk that *we may* disregard or strike briefs or arguments. See, e.g., Peters v. Pine Meadow Ranch Home Ass'n, 2007 UT 2, P 23, 151 P.3d 962. . . . [emphasis added.]

Madsen v. Wash. Mut. Bank FSB, 2008 UT 69; 613 Utah Adv. Rep. 29.

. . . we recognize that we may **disregard** or strike briefs that do not comply with the requirements of rule 24. See *id.* R. 24(k). “However, *we are not obligated* to strike or disregard a marginal or inadequate brief,” State v. Gamblin, 2000 UT 44, P 8, 1 P.3d 1108 (emphasis added), and we usually reserve such a harsh sanction for cases where the noncompliance with rule 24 is much more egregious than that here. . . . [emphasis added.]

Anderson v. Thompson, 2008 UT App 170, n.4; 176 P.3d 464.

### **II. VERONICA DID NOT MARSHAL THE EVIDENCE TO SHOW JUDICIAL ERROR or ABUSE OF JUDICIAL DISCRETION BY THE TRIAL COURT**

**IN ITS FINDING THAT THE PARTIES' POST-NUPTIAL AGREEMENT (the "DIVORCE AGREEMENT") IS ENFORCEABLE.**

- A. Contracts Between Spouse are Enforceable.
- B. It Was Not Judicial Error to State the Rule of Law that Ambiguities in Contracts Should be Resolved Against the Drafter

... parties that fail to marshal the evidence do so at the risk that the reviewing court will decline, in its discretion, to review the trial court's factual findings. See Chen v. Stewart, 2004 UT 82, P82 n.16, 100 P.3d 1177 (explaining that the marshaling requirement is critical because in its absence the appellate court "must go behind the trial court's factual findings," which often requires a "colossal commitment of time and resources").

Traco Steel Erectors, Inc. v. Control Inc., 2009 UT 81; 645 Utah Adv. Rep. 30.

"in order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." Neely v. Bennett, 2002 UT App 189, P11, 51 P.3d 724 (emphasis omitted). This does not mean that the party may simply provide an exhaustive review of all evidence presented at trial. Id. at P12 n.1. Rather, appellants must provide a precisely focused summary of all the evidence supporting the findings they challenge. Id. This summary must correlate all particular items of evidence with the challenged findings and then convince us that the trial court erred in the assessment of that evidence to its findings. W. Valley City v. Majestic Inv., Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991). What appellants cannot do is merely re-argue the factual case they presented in the trial court. Oneida/SLIC v. Oneida Cold Storage & Warehouse Inc., 872 P.2d 1051, 1053 (Utah Ct. App. 1994).

Chen v. Stewart, 2004 UT 82. Because Veronica has not properly marshaled the evidence, this Court should accept the Findings of Fact of the trial court and affirm the enforceability of the Divorce Agreement.

**III. VERONICA FAILED TO MARSHAL THE EVIDENCE THAT THERE WAS AN ABUSE OF DISCRETION IN THE TRIAL COURT'S DIVISION OF THE PARTIES' FINANCIAL ACCOUNTS**

- A. Award of Extra Payments to Retire Mortgage

- B. Award of Escrow Account Interest
- C. Date of Division of Financial Accounts

“.... even if the trial court[’s divorce decree] does not exactly follow the parties’ agreement, such a decree is still within the court’s reasonable discretion.”

Jensen v. Jensen, 2008 UT App 392; 197 P.3d 117.

“Trial courts have considerable discretion in determining . . . property distribution in divorce cases, and [their decisions] will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated.”

Trubetzkoy v. Trubetzkoy, 2009 UT App. 77; 215 P.3d 161.

Guenther contends that Veronica has failed to properly “marshal [all of] the evidence supporting the trial court’s findings and then ... show that the findings are unsupported.”

Kimball v. Kimball, 2009 UT App 233 (citing Utah R. App. P. 24(a)(9)); 217 P.3d733.

This Court has found the trial court is in the best position to determine if an inheritance has lost its separate character. Veronica failed to provide any evidence at trial regarding whether she has by

“her efforts augmented, maintained, or protected the inherited or donated property, when the parties have inextricably commingled the property with marital property so that it has lost its separate character, or when the recipient spouse has contributed all or part of the property to the marital estate.”Schaumberg v. Schaumberg, 875 P.2d 598, 602 (Utah Ct. App. 1994) (emphasis added) (quoting Burt v. Burt, 799 P.2d 1166, 1169 (Utah Ct. App. 1990)). ... “The question of whether a gift or inheritance has remained separate is highly fact intensive and the trial court is in the best position to weigh the evidence and make that determination.”

Stonehocker v. Stonehocker, 2008 UT App 11, P 29, 176 P.3d 476.

**IV. VERONICA FAILED TO ADEQUATELY BRIEF or MARSHAL THE EVIDENCE, TO SHOW THAT THERE WAS AS AN ABUSE OF JUDICIAL DISCRETION, IN THE TRIAL COURT’S DIVISION OF THE REMAINDER OF THE MARITAL ESTATE.**

Rule 24(a)(9) of the Utah Rules of Appellate Procedure requires that a party's argument include citations to the authorities, statutes, and parts of the record relied on. See Utah R. App. P. 24(a)(9). "Implicitly, rule 24(a)(9) requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority. We have previously stated that this court is not a depository in which the appealing party may dump the burden of argument and research." State v. Thomas, 961 P.2d 299, 305 (Utah 1998) (internal quotation marks omitted).

State v. Scott, 2009 UT App 367. Veronica did not cite authorities or statutes that support her claim that the trial court abused its discretion in valuing the parties' personal property. Neither did Veronica marshal the evidence in support of the trial court's findings and then show this Court the "fatal flaw" in the trial court's ruling.

**V. VERONICA FAILED TO ADEQUATELY BRIEF HER REQUEST FOR A REVIEW OF ATTORNEY'S FEES or MARSHAL THE EVIDENCE THAT THE TRIAL COURT ABUSED ITS DISCRETION IN LIMITING THE AMOUNT OF FEES AWARDED TO HER.**

Veronica did not cite case authorities or statutes to support her request that the trial court review the amount of attorney's fees if this matter is remanded. Neither did she marshal the evidence in support of the trial court's findings as to the award of attorney's fees, and then find the fatal flaw which would show an abuse of discretion by the trial court. Veronica omitted the fact that the trial court considered the reasonableness of her attorney's fees and her knowing and willful violation of prior orders in determining the amount of attorney's fees she would receive. The trial court also considered her need and Guenther's ability to assist her as required by Jones v. Jones, 700 P.2d 1072 (Utah 1985).

**CONSTITUTIONAL, STATUTORY OR RULE PROVISIONS**

The constitutional provisions, statutes, ordinances, rules, regulations or case law

whose interpretation is determinative, are set out verbatim in the Addendum to Brief of Appellee.

### **STATEMENT OF THE CASE**

This is an appeal from the division of the marital estate as contained in the final order of the Third District Court, by the Honorable Denise Lindberg. [Again, the initial brief filed by Appellant refers to the Petitioner/Appellant as “Veronica” and the Respondent/Appellee as “Guenther,” the brief will use the same designations.]

Veronica has appealed: (I) the trial court’s ruling that the Divorce Agreement, “drafted by Petitioner [Veronica], with modifications provided by Respondent [Guenther], is an enforceable contract entered into by the parties in contemplation of divorce...[and], is essence, a partial stipulation...” (Findings of Fact and Conclusions of Law and Order, dated June, 19, 2008, p. 19, para. 22, Addendum #1); (II) the trial court’s categorical rejection of Veronica’s claim to one-half of Guenther’s inheritance based solely on Veronica’s claim that she had retained signing authority on the account into which he deposited those funds (FOF/COL, p. 34, para. 32.); (III) the trial court’s award of the interest from the escrow account holding the sales proceeds of the former marital residence to “the party claiming the interest on the escrow account [on his or her tax filings]” (Decree of Divorce; R.O.A.403; para. 8.(b)); (IV) the trial court’s acceptance of Veronica’s testimony that she “changed and separated [her] accounts so [she] had her own accounts on May 25, 2001” (Tr 84, L 15 thru 19) and using May 25, 2001 as the date the parties separated their financial accounts; (V) the trial court’s determination of the date of valuation of the automobile (using Veronica’s

December 2005 Financial Declaration, FOF/COL, p. 12, L 4) and the furnishings awarded to Veronica (the time of purchase, FOF/COL, p. 11, para. C); and (VI) the amount of attorney's fees awarded to Veronica.

### **STATEMENT OF FACTS**

1. Both parties worked for Hexcel Corporation and met at a work production meeting in Decatur, Alabama, in December 1996. (Tr 7 L 13-25.)

2. Guenther had asked Veronica to move to Salt Lake City, Utah, but that was not acceptable to Veronica without marriage and Guenther subsequently proposed. (Tr 9 L 11-23; 209 L 13-16.)

3. Veronica resigned from her job, received approximately \$6,000.00 from the sale of her Decatur home, and moved into Guenther's home in Kearns, Utah, approximately June 2, 1997. (Tr 10 L 12-25.) Veronica's proceeds from the sale of the Decatur home were deposited into a joint account. (Tr 11 L 2-3.)

4. The parties subsequently sold the Kearns residence, which had been placed in both parties' names (Tr 47 L 6-10), and used the proceeds towards the purchase and construction of another home ("Terra Vista") in May 2000. (Tr 16 L 2-5.)

5. In February 2001 and in contemplation of a divorce, Veronica filled out "on line" forms for Divorce (Tr 83 L 19-15), but never filed those forms with any court. (Tr 83 L 19-22.)

6. In April 2001, Guenther moved out of the Terra Vista home, at Veronica's request. (Tr 135 L 7-9). Veronica continued to reside at Terra Vista with her son from



another relationship, paying only utilities. Veronica testified that she jointly paid home maintenance expenses, but provided no documentation as to any repairs or costs of repairs. Guenther paid the mortgage for Terra Vista, the property taxes and insurance for Terra Vista. (Tr 89 L 12 - 90 L 17.)

7. In May of 2001, Veronica became worried that Guenther may leave the marriage when he secured his green card (Tr 30 L 10-11 and 31 L 1-5). So, Veronica drafted the document referred to by the trial court and the parties as the “Divorce Agreement” (Tr 30 L 2) “just in case he decided to take off” (Tr 31 L 25). Veronica testified that “after we signed the agreement, he was very nicer to me than before.” (Tr 32 L 6-7.)

8. The Divorce Agreement stated, among other things, that (a) “Repair costs for the property shall be shared equally” (Veronica’s Brief, Exhibit B, para. 2.3); (b) “After August 2004, mortgage and equity loan payments will be shared in the ratio of actual gross income” (Id., para. 4); and (c) that “Veronica shall not seek alimony” (Id., para. 7.)

9. On May 25, 2001, Veronica changed and separated the parties’ banking accounts, so she would have her “own accounts” (hereinafter referred to as the “new account”) (Tr 84 L 15-19). Guenther testified the accounts were divided in April 2001 (Tr 205 L 5-9). Veronica did give Guenther “access” to the new account. (Tr 84 L 22-23). However, Veronica did not close the parties’ joint banking account (hereinafter referred to as the “original account”), and remained as a signatory on the original account. Guenther did not open a new account, but continued to use the original account as his sole and separate account. Veronica used the new account as her separate account. Guenther accessed the new

account solely for reimbursements. (Tr 85 L 6-86 L 15.)

10. After accepting employment, Veronica moved to Hong Kong in January 2003. (Tr 33 L 19-23.) Veronica's son continued to reside with Guenther in the Terra Vista home until he finished high school. (Tr 135 L 14-19.)

11. Veronica contributed no monies to the mortgage, property taxes or insurance at Terra Vista from April 2001 through the date of the sale of the property in August 2006. (Tr 111L 10-22.)

12. During the thirty-two months Veronica was in Hong Kong, Guenther used his savings and, approximately \$45,000.00 from his inheritance (Tr 204 L 19-21) to make extra principal payments, totaling approximately \$184,000, to retire the mortgage on the Terra Vista home (Tr 203 L 17-19).

13. During the thirty-two months Veronica was in Hong Kong, her annual salary, including a housing allowance, was about \$104,000.00 (Tr 91 L 8-10). Veronica voluntarily left that employment (Tr 91 L 11-13) and returned to Utah to be with her family, even though Guenther had said "don't come back without a job." (Tr 92 L 8 - 17.) Veronica arrived in Utah in August 2005, and filed the instant divorce action in October 2005. (Tr 99 L 22-25.)

14. On January 31, 2007, the parties appeared for a bench trial before the Honorable Denise P. Lindberg. The trial court requested counsel prepare and submit new findings (Tr 222 L 2-4). The trial court also scheduled a telephone conference for February 2, 2007. (Tr 229 L 18-19.)

15. After reviewing all the testimony and the exhibits and case law, that trial court

entered its Ruling on February 2, 2007. (R.O.A. 394, Addendum #2). The trial court requested Guenther's counsel prepare the proposed Findings from the ruling and forward them to Veronica's counsel for approval. Counsel could not agree on the form of the Findings of Fact and Conclusions of Law. Veronica's counsel filed her "Proposed Findings of Fact and Conclusions of Law" on June 4, 2007, but the electronic form was not received by the trial court. (R.O.A. 481, p.2, L 15 - p. 3, L 13, Addendum #3.) Guenther's counsel filed an Objection to the proposed Findings on June 21, 2007, but no further action was taken until the trial court dismissed the matter "due to inactivity" on December 6, 2007. (R.O.A. 481, p. 3, L 13- p. 4, L 10, Addendum #3.)

16. Guenther filed a Motion to Set Aside the Dismissal and the trial court held a hearing on that motion on March 27, 2008. The dismissal was set aside and both counsel were instructed to file another set of proposed Findings of Fact and Conclusions of Law in electronic format. (R.O.A. 481, p. 5, L 5-21, Addendum #3.)

17. The trial court entered its Findings of Fact and Conclusions of Law on June 19, 2008, and the Decree of Divorce was signed and entered on August 25, 2008.

18. Veronica filed a timely Rule 59 motion, urging the trial court to "correct" at least one of its Findings and Conclusions. On September 10, 2008, Veronica filed a second (and untimely) Rule 59 motion. (Addendum #1, p. 1, para. 2 & 3.)

19. On November 10, 2008, Guenther filed a Motion to Enforce Judgment, and Veronica filed a Motion to Stay Enforcement. (Id., p. 2, para. 4.)

20. After finding that the monies from the sale of Terra Vista had been in escrow

for more than two and one-half years (Id., p. 3, para. 5), and that “[t]he track record in this case is that it has been Petitioner [Veronica] who repeatedly violated court orders” (Id., p. 4, para. 4), the trial court denied Veronica’s post-trial motions and granted Guenther’s motion. The escrowed sales proceeds, including the accrued interest, were distributed to the parties pursuant to the Decree of Divorce.

### **SUMMARY OF THE ARGUMENT**

Veronica has apparently either misunderstood or ignored her duty, as a matter of law, and as required by Utah R. App. P. 24(a)(9), to marshal the evidence. Rather than meeting the burden of marshaling the evidence, Veronica presented selected facts which favor her argument, while, at the same time, omitting critical evidence which supports the trial court’s findings. In essence, Veronica has merely reargued the factual case she presented to the trial court.

Veronica did not show any abuse of discretion relating to the trial court’s ruling as to the parties’ Divorce Agreement because, although agreements between spouses are enforceable, they are not binding on the court. Neither has Veronica shown any abuse of discretion in the trial court’s division of the marital property, the award to Guenther of his inheritance, or the date of valuation of the marital estate.

Veronica has failed to marshal all the evidence supporting the trial court’s findings and then demonstrate that, despite such marshaled evidence, the trial court’s findings are against the clear weight of the evidence. As such, this Court should accept the trial court’s findings as valid.

Veronica failed to adequately brief her issues of: (1) ambiguities in the Divorce Agreement being construed against Veronica as the drafter, or (2) her request that the trial court reassess the amount of its attorney's fee award in light of additional areas of success as a result of this appeal. Veronica merely states the trial court erred in stating that rule of law and that "[i]t is unclear whether this finding had any effect as the court did not note any ambiguity in its interpretation of the contract." As to the amount of attorney's fees awarded to Veronica, the trial court considered Veronica's need, Guenther's ability to pay, and the reasonableness of Veronica's fees (Addendum #2, p. 20, L 19- p. 21, L 25.) The trial court also found that Veronica was not entitled to a greater award due to her contemptuous actions as to prior court orders. Guenther was awarded attorney's fees by the trial court due to Veronica's contemptuous acts, and should be awarded his attorney's fees and costs incurred in this appeal.

### **ARGUMENT**

#### **I. THE CLERICAL ERRORS IN THE BRIEF OF APPELLANT MAY BE SO EGREGIOUS AS TO WARRANT SANCTIONS.**

Guenther acknowledges, as this Court is aware, that Veronica's Brief has several areas which appear not to comply with the Rules 24 and 27 of the Utah Rules of Appellate Procedure.

Veronica set forth her "Statement of Facts" in the "Statement of the Case" section beginning on page 3. Rule 24(a)(7) of the Utah Rules of Appellate Procedures defines the Statement of the Case as a statement indicating "briefly the nature of the case, the course of proceedings, and its disposition in the court below." The Rule goes on to state that "A

statement of facts relevant to the issues present for review shall follow.”

Veronica’s Brief does not comply with the form set forth in Rule 27 of the Utah Rules of Appellate Procedure. Subsection (d) requires “. . . the name of the court and judge, agency or board below;” which is absent from Veronica’s cover. Subsection (b) requires “A proportionally spaced typeface must be 13-point or larger for both text and footnotes.” Subsection (e) allows Veronica to correct these errors within five days. Veronica’s Brief might have exceeded the 50 page limit set forth in Rule 24(g) of the Utah Rules of Appellate Procedure if the proper font had been used. Were that the case, Veronica would be required, by Rule 24(h) of the Utah Rules of Appellate Procedure to request permission from the Court to file an over length brief.

Guenther would ask this Court to consider that the entry of the Decree of Divorce (the final order from which this appeal is taken) was delayed from the trial date of January 31, 2007, until August 25, 2008, due to clerical errors and multiple post-trial motions filed by Veronica (R.O.A. 481, Motion Hearing, March 27, 2008, Addendum # 3). In addition, the statutory filing deadlines for the appeal process were also extended (approximately five months) when this Court temporarily remanded the matter back to the trial court for reconstruction of the record to conform to the trial court docket. As these clerical errors appear not to be substantive, Guenther has no objection to the Court exercising its discretion and accepting Veronica’s Brief. With the permission of the Court, Guenther provides his responsive Brief as to the issues raised in Veronica’s Brief to avoid any further delay in resolution of this matter.

**II. VERONICA DID NOT MARSHAL THE EVIDENCE TO SHOW JUDICIAL ERROR or ABUSE OF JUDICIAL DISCRETION BY THE TRIAL COURT IN ITS FINDING THAT THE PARTIES' POST-NUPTIAL AGREEMENT (the "DIVORCE AGREEMENT") IS ENFORCEABLE.**

This Court, in Chen v. Stewart, 2004 UT 82, acknowledged the lack of understanding of the marshaling requirement and, painstakingly restated the requirements of marshaling.

... an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below ...

... appellant [must] marshal all the evidence in favor of the facts as found by the trial court and then demonstrate that even viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact.... the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists ...appellants must provide a precisely focused summary of all the evidence supporting the findings they challenge. ... [which] must correlate all particular items of evidence with the challenged findings and then convince us that the trial court erred in the assessment of that evidence ... What appellants cannot do is merely re-argue the factual case they presented in the trial court....The process of marshaling is thus fundamentally different from that of presenting the evidence at trial. The challenging party must ... fully embrace the adversary's position...[and] must present the evidence in a light most favorable to the trial court,... and not attempt to construe the evidence in a light favorable to their case. . . . Appellants cannot merely present carefully selected facts and excerpts from the record in support of their position. . . . Nor can they simply restate or review evidence that points to an alternate finding or a finding contrary to the trial court's finding of fact. . . . In sum, to properly marshal the evidence the challenging party must demonstrate how the court found the facts from the evidence and then explain why those findings contradict the clear weight of the evidence.

The purpose of this rigorous and strict requirement is to promote two interrelated court objectives: efficiency and fairness. A proper marshaling of the evidence promotes efficiency by avoiding "retrying the facts" and by assisting the appellate court in its "decision-making and opinion writing." It promotes fairness by requiring that the appellants bear the expense and time of marshaling the evidence rather than putting the appellee in the "precarious

position" of performing the appellant's work at "considerable time and expense." This deference to a trial court's findings is "based on and fosters the principle that appellants rather than appellees bear the greater burden on appeal."

If the marshaling requirement is not met, the appellate court has grounds to affirm the court's findings on that basis alone. ... If appellants have failed to properly marshal the evidence, we assume that the evidence supports the trial court's findings. [citations omitted.]

Veronica has not marshaled the evidence, but, instead ignored damaging findings, restated evidence favorable to her position, pointed out facts that would support findings contrary to the trial court's findings, and attempted to recast damaging evidence in a light more favorable to her position and, essentially, attempt to reargue the facts before this Court.

#### **A. Contracts Between Spouses Are Enforceable**

Veronica appeals the trial court's findings that Divorce Agreement is enforceable, without marshaling the evidence which supports the finding. Veronica does cite to trial testimony where, under direct examination by her counsel, she states Guenther "finalized" the Divorce Agreement. However, Veronica did not cite to her trial testimony on cross examination by Guenther's counsel that: (1) Veronica entered into the Divorce Agreement voluntarily; (2) Veronica never attempted to set aside the Divorce Agreement or make the Divorce Agreement unenforceable; (3) that prior to drafting the Divorce Agreement, Veronica filed on line (but not with any court) for divorce; (4) that the Divorce Agreement was in contemplation of a divorce; (Tr 83 L 5-25); (5) that she did not ask Guenther to sign the Divorce Agreement until one month after he moved out of the Terra Vista home (at her request), and (6) that the execution of the Divorce Agreement was to benefit Veronica



because she was worried Guenther would leave her for another woman (Tr 30, L 5 - 31 L 5.) Neither did Veronica cite to her testimony that she wanted the Divorce Agreement in place “just in case if he decided to take off,” given that Veronica needed to stay in one place until her child finished high school. (Tr 31 L 18- 32 L 2.) Veronica also did not cite to any portion of the record that disputes the trial court’s findings that: (1) “the elements of the contract have been met;” (2) “both parties participated in drafting and revising the agreement, and reaching a meeting of the minds;” and (3) “[b]oth accepted legal detriments. He [Guenther] assumed responsibility for the mortgage, but she [Veronica] stayed on the title for property. She gave up the right to alimony...” (R.O.A. 481, p. 6 L 10 -15, Addendum #3.)

Veronica also does not explain her conflicting testimony that “I never had the intention to divorce.” (Tr 83 L 7). But she admits the Divorce Agreement was in contemplation of a divorce, as she had filled out, but not filed, on line forms for divorce. (Tr 83 L 19-25.)

Veronica has not marshaled the evidence and then demonstrated the fatal flaw in the trial court’s decision. Thus, the trial court’s ruling as to the enforceability of the Divorce Agreement should be affirmed.

**B. It Was Not Judicial Error to State the Rule of Law that Ambiguities in Contracts Should be Resolved Against the Drafter.**

Veronica next appeals the trial court’s statement of contract law, that ambiguities are construed against the drafter of the contract. Veronica did not marshal any evidence to dispute this finding. Veronica did not cite to her testimony that she drafted the Divorce Agreement, that Guenther requested changes which were accepted by Veronica, and that the

Divorce Agreement itself was her idea (Tr 30 L 2-4; Tr 82 L 22 - 83 L 1; Tr 190 L 11-16). Guenther is unsure as to why Veronica included this as judicial error requiring correction by this Court. The trial court did not find any specific ambiguities in the contract. There was disputed testimony as to the date the parties divided their financial accounts, but the court resolved that dispute in Veronica's favor by adopting May 25, 2001, the date testified to by Veronica. (Tr 84 L 17.) The trial court further found there was no ambiguity as to the date the Terra Vista home should be sold, as the Divorce Agreement clearly states that the sale of the home "shall take place **after** August 31, 2004." [emphasis added] (R.O.A. 394, p. 7, L 21-8 L 7, Addendum #1.) Veronica did not marshal the evidence as to this issue, and, in fact, admits "the court did not note ambiguity in its interpretation of the contract." (Brief of Appellant, p. 21, para. 4. Veronica did not marshal the evidence and then demonstrate the fatal flaw in the trial court's ruling, that any ambiguities would be construed against the drafter of the Divorce Agreement. The finding of the trial court should be affirmed.

Neither did Veronica marshal the evidence as to an abuse of discretion regarding the fact that the Terra Vista home was not sold in August 2004. The facts in this case are similar to Jensen v. Jensen, 2008 UT App 392, in which this Court found it was not judicial error when the trial court did not enforce the parties' stipulation to immediately sell their residence. In Jensen, this Court found the "decision to reject or modify a stipulation related to a property division in a divorce proceeding is reviewed for abuse of discretion." See, also, Clausen v. Clausen, 675 P.2d 562, 564 (Utah 1983). Again, Veronica failed to marshal the evidence as to any abuse of discretion by the trial court in resolving ambiguities against

Veronica as the drafter of the Divorce Agreement. Thus, this Court should assume the record supports those findings.

**III. VERONICA FAILED TO MARSHAL THE EVIDENCE THAT THERE WAS AN ABUSE OF DISCRETION IN THE TRIAL COURT'S DIVISION OF THE PARTIES' FINANCIAL ACCOUNTS.**

**A. Award of Extra Payments to Retire Mortgage**

Veronica failed to marshal the evidence related to the trial court's award to Guenther of payments toward the Terra Vista mortgage from his separate monies and inheritance. Veronica did not cite the portions of the record that were damaging to her case, highlighted only the facts that were favorable to her position, and merely reargued her position at trial before this Court. Veronica alleges in her Brief that her primary reason for giving up alimony was for the equity in the Terra Vista home of \$70,000.00 or one-half of the equity when the home was sold, whichever was greater, but fails to cite to the record as to how she preserved this issue for appeal.<sup>1</sup> Veronica fails to cite to the record her testimony: (1) that she wanted Guenther to sign the Divorce Agreement primarily to insure she and her son would be able to live in the Terra Vista home (without any obligation that she pay the mortgage, property taxes or insurance); (2) because of her fear that Guenther would leave her for another woman; (3) and to make Guenther be nicer to her. The parties had been married for four years only when Veronica asked Guenther to sign the Divorce Agreement (which guaranteed Veronica, or her son, would receive a monthly benefit of \$1,624.41 (Tr 176 L

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<sup>1</sup>(Tr 3 L 15 thru 4 L 22); (2) the issue of fault in determining an alimony award (Tr 13 L 18 thru 22); (3) the result of a hearing regarding a request for temporary alimony, which was denied Tr 61 L 4 thru 63 L 15); (4) Veronica's need for alimony (Tr 76 L 17); and (5) the fact that there was no claim for alimony in Veronica's original petition for divorce (Tr 188 L 7 thru 13)

2-3) for thirty-nine months. (From August 2004, through August 2006, either Veronica or her son received the monthly benefit of residing in the Terra Vista home without an obligation to pay the mortgage or property taxes or insurance thereon. This included the period of August 2005 through February 2006, when Veronica had quit her job in Hong Kong and was unemployed in Utah.) Veronica continued to stay at the Terra Vista home, without any contribution for utilities, maintenance and other living expenses, after she obtained employment until the home was sold in August, 2006. Veronica has not marshaled the evidence or demonstrated a fatal flaw in the trial court's finding that the Divorce Agreement was enforceable, especially in light of the benefits received by Veronica as a result of the Divorce Agreement.

Veronica also has not marshaled the evidence as to her claim that the trial court erred in awarding Guenther an offset for the payments made toward the Terra Vista mortgage from his inheritance (approximately \$45,000.00) and his monies from his employment, after the parties separated their financial accounts, while Veronica was in Hong Kong. Veronica did state that at the time of trial, Guenther admitted that equity in the Terra Vista home included monies from inheritance, but omitted Guenther's testimony that there was no inheritance at the time the Divorce Agreement was signed (Tr 195 L 7-11). However, Veronica's claim that the Divorce Agreement reflects Guenther would pay off the Terra Vista mortgage and the parties would divide the equity upon the sale of the home is incorrect. The Divorce Agreement is clear that "[a]fter August 2004, mortgage and equity loan payments will be shared in the ration of actual gross income." (Exhibit B to Appellant's Brief, para. 4.)

Veronica's claim that the monies were gifted to her is also not supported by the record or the trial court's findings. Veronica chose not to cite the facts that support the ruling by the trial court: (1) Veronica testified there was no gift letter (Tr 120 L 4-9); and (2) the trial court found that leaving the parties' names on each other's account was primarily a convenience to Petitioner (R.O.A. 481, p. 13 L 19- 20, Addendum #3). Veronica provided no evidence to set aside the trial court's rejection of her contention that "his money would be her money, too." (Id., L 1- 2 .) Additional facts supporting the trial court's ruling include: (1) Veronica's testimony that the parties separated their financial accounts on May 25, 2001; (2) Veronica's testimony that she kept her annual \$104,000.00 salary from her Hong Kong employment in her separate account; (3) Veronica's testimony that she had saved \$67,000.00 during her Hong Kong employment, which she kept in her separate account when she returned to Utah; (4) Guenther's payments of \$45,000.00 (approximately) representing his inheritance are traceable; (5) the fact that Veronica paid no monies toward the Terra Vista mortgage after August 2004, as required by the Divorce Agreement; (6) the trial court's finding that the only default under the terms of the agreement was Petitioner's failure to pay anything on the home after she returned in August of 2005 (R.O.A. 394, p.8 L 13-18, Addendum #1); and (7) the fact that Veronica provided no evidence that she enhanced the value of the Terra Vista home after Guenther had used his inheritance payments and separate monies to retire the mortgage. <sup>2</sup>

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<sup>2</sup>Veronica could have asked the trial court to calculate the credits to Guenther based on the percentages set forth in the Divorce Agreement. However, Veronica did not present any evidence as to what those calculations would have been during trial or mention an alternate

This Court, in Kimball v. Kimball, 2009 UT App 233, 217 P.3d 733 (UT App. 2009) found that inherited monies that are traceable in and out of joint accounts, do not lose their separate status through commingling. The Kimball Court also confirmed the requirement that Veronica must prove she “augmented, maintained, or protected the inherited property.”

"[T]rial courts making 'equitable' property division pursuant to section 30-3-5 should . . . 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[.]" Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988). But[c]ourts have considered inherited property as part of the marital estate when "the other spouse has by his or her efforts augmented, maintained, or protected the inherited or donated property, when the parties have inextricably commingled the property with marital property so that it has lost its separate character, or when the recipient spouse has contributed all or part of the property to the marital estate." Schaumberg v. Schaumberg, 875 P.2d 598, 602 (Utah Ct. App. 1994) (emphasis added) (quoting Burt v. Burt, 799 P.2d 1166, 1169 (Utah Ct. App. 1990)). ... "The question of whether a gift or inheritance has remained separate is highly fact intensive and the trial court is in the best position to weigh the evidence and make that determination." Stonehocker v. Stonehocker, 2008 UT App 11, P 29, 176 P.3d 476.

Veronica has not marshaled the evidence that it was judicial error or an abuse of discretion for the trial court to award Guenther the full value of his separate payments to retire the Terra Vista mortgage. The award by the trial court of \$230,000.00 (approximately) to Guenther, representing his inheritance and/or separate payments, should be affirmed.

#### **B. Award of Escrow Interest**

Veronica, once again, selected only the facts which support her position in arguing that it was judicial error to award Guenther the interest which accrued on the account which

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(note 2 cont'd) calculation for Guenther's overpayment in her post-trial motions. As such the issue was not preserved for appeal and is not before this court.

held the proceeds from the sale of the Terra Vista home. The most important being the funds were not distributed until over two years after the trial, matter pursuant to the trial court's ruling on Petitioner's Rule 59 motions, Rule 60 Motion, Respondent's Motion to Enforce Judgment and Petitioner's Motion to Stay Enforcement and Waive Bond. (Addendum #1).

Veronica focuses on the fact that the e-mail in which she agreed Guenther could have all of the interest from the escrow account was not presented at trial. However, Veronica did not cite to the record, which clearly indicates both parties submitted additional information to the trial court after the trial in this matter as to the division of the interest in the escrow account. In the post-trial motions, Guenther argued that: (1) Veronica refused to file joint tax returns, as previously ordered by the court and pursuant to the Divorce Agreement; (2) Guenther had to declare the interest as income on his state and federal tax filing; and (3) Guenther had to pay taxes on the interest income at the higher rate of married, filing separately. (R.O.A. 453, Addendum #5.) Veronica provided no response to the interest income issue in her Reply in Response to Respondent's Response. (R.O.A. 463, Addendum #6.)

Veronica has failed to marshal the evidence that the trial court abused its discretion in awarding the interest income from the escrow account to the party who declared that interest. The award to Guenther by the trial court of the interest in the escrow account should be affirmed.

### **C. Date of Division of Financial Accounts**

Although there are multiple discussions as to the date the parties' financial accounts

were divided, it is undisputed that Veronica testified she separated her own accounts May 25, 2001, and that she kept her money separate from that day forward. There was no evidence provided to dispute Veronica's testimony. Guenther did testify as to different dates he believed should have been used for the division of the financial accounts. However, Guenther never produced the e-mail (R.O.A. 465, Addendum #6) and, despite her ability to still access the joint accounts, as they could not be closed without her signature (Tr 144 L 10 - 13), Veronica never produced the bank statements at trial. Veronica had access to the information she alleges would disprove her testimony at the time she requested a new trial and/or that the trial court obtain the statements to insure the accounts were divided on May 25, 2001. The trial court did not abuse its discretion in failing to grant Veronica's request, given her inaction.

The bank statements are not newly discovered evidence relating to the facts as they existed at the time of trial. See, In re Disconnection of Certain Territory, 668 P.2d 544 (Utah 1983); In re S.R., 735 P.2d 53 (Utah 1987); Hancock v. Planned Dev. Corp., 791 P.2d 183 (Utah 1990). Rule 59 and applicable case law require that "the moving party show that ordinary prudence was exercised to guard against the accident or surprise." Powers v. Gene's Bldg. Materials, Inc., 567 P.2d 174 (Utah 1977). All that was required to meet this "ordinary prudence standard" was for Veronica to request copies of the statements from the financial institution or from Guenther, using standard discovery, at any time during the fifteen months from the time she received Guenther's Answer and Counterclaim and the date of trial in this matter.



There was no abuse of discretion in not reopening the case to allow the plaintiff to present evidence on the debts. In the first place, the trial was not held until fourteen months after the plaintiff had filed her complaint, and the plaintiff had that time to conduct her discovery.

Race v. Race, 740 P.2d 253 (Utah 1987).

Veronica failed to marshal the evidence that the trial court erred in its determination of the date the financial accounts were divided or in refusing her motion that the trial court allow a new trial, based on documents which existed at the time, and were available to Veronica. The ruling of the trial court as to the division of the financial accounts and Veronica's post trial motions should be affirmed.

**IV. VERONICA FAILED TO ADEQUATELY BRIEF or MARSHAL THE EVIDENCE, TO SHOW THAT THERE WAS AS AN ABUSE OF JUDICIAL DISCRETION, IN THE TRIAL COURT'S DIVISION OF THE REMAINDER OF THE MARITAL ESTATE.**

**A. Failure to Brief the Issue of Value of Personal Property (Automobile and Furnishings.)**

Veronica does cite to the record as to the values submitted to the trial court of both the "Major Household Items" and the 2002 VW Golf, but cites no case law which supports her position that the trial court abused its discretion in valuing those items.

Should this Court consider Veronica's cite to Mortensen ("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") as adequate briefing of the issue.

**B. Failure to Marshal the Evidence.**

Veronica chose not to cite the findings which support the trial court's valuation of the personal property: (1) the only evidence presented at trial was the purchase price of the

furnishings; (2) no appraisals establishing present value were provided to the trial court, nor was the trial court offered any other method by which it could reasonably determine present value; (3) the parties did identify the purchase price of the disputed items; (4) neither party presented evidence of the vehicle's original price (FOF/COL, page 6, para. C and page 7); (5) the only evidence before the trial court of the value of the car is the value listed by petitioner [Veronica] and adopted by the respondent [Guenther] somewhere in excess of \$10,000 (as the value at the time Veronica filed her Petition for Divorce); (6) the vehicle will not be valued as new; (7) the Court rejects respondent's [Guenther's] claim for a different distribution of value, making petitioner [Veronica] carry a greater share of the cost of the dining room set; and (8) everything is marital property and the value is to be shared half and half. (R.O.A. 394, p. 18, L 21- 20 L 6, Addendum #2)

. . . the trial court may, in the exercise of its equitable powers, value a marital asset at some time other than the time the decree is entered," such as at separation. Thomas v. Thomas, 987 P.2d 603, 609 (Utah Ct. App. 1999) (quoting Andersen v. Andersen, 757 P.2d 476, 479 (Utah Ct. App. 1988)). See Marshall v. Marshall, 915 P.2d 508, 516 n.14 (Utah Ct. App. 1996).

Parker v. Parker, 2000 UT App. 30, 996 P.2d 565 (UT App. 2000). In addition, the trial court specifically set forth the "exceptional circumstances that overcome the general presumption that marital property be divided equally between the parties." Stonehocker v. Stonehocker, 2008 UT App 11; 176 P.3d 476 (UT App. 2008).

As Veronica has failed to marshal the evidence that the trial court abused its discretion in the valuation of the marital property, ruling of the trial court should be affirmed.

**V. VERONICA FAILED TO ADEQUATELY BRIEF HER REQUEST FOR A REVIEW OF ATTORNEY'S FEES or MARSHAL THE EVIDENCE THAT**

**THE TRIAL COURT ABUSED ITS DISCRETION IN LIMITING THE AMOUNT OF FEES AWARDED TO HER.**

The last line of Veronica's paragraph discussing attorney's fees requests "[i]n 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." The trial court did discuss the fact that Veronica prevailed on only one issue (the designation of Guenther's pre-marital interest in the Kearns home as a marital assets) in concluding that Veronica should be awarded \$2,500.00 for attorney's fees. Veronica failed to provide any reference to the record on appeal or case law which support her opinion that attorney's fees in a divorce matter are awarded solely on the basis of which party prevails.

"The decision to award attorney fees and the amount thereof rests primarily in the sound discretion of the trial court." Kelley v. Kelley, 2000 UT App 236, P30, 9 P.3d 171 (quotations and citation omitted). Still, in awarding attorney fees, the trial court must consider "the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees." Id. (quotations and citation omitted).

Wall v Wall, 2007 UT App 67; 157 P.3d 341, cert. denied, 168 P.3d 819 (Utah 2007) .

Veronica failed to cite to the findings where the trial court considered the "Jones" factors of Veronica's need and Guenther's ability to pay (R.O.A. 394, p. 21, L 1-9, Addendum #2).

Veronica failed to cite to the trial court's findings regarding the absence of reasonableness of her attorney's fees (Id., L 10-21). Veronica failed to cite to the trial court's findings that her fees were deliberately limited due to: (1) her knowing and willful violation of the order of the Court not to dissipate assets; (2) Veronica's actions being contemptuous; and (3) that Veronica did not come to this court with clean hands. As such, the trial court found Veronica

was not entitled to a greater reward (Id., L 7-16).

A trial court has "broad discretion in determining what constitutes a reasonable fee." Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998) (quoting Dixie ', 764 P.2d 985, 991 (Utah 1988)). Such discretion is granted because the trial court "is in a better position than an appellate court to gauge the quality and efficiency of the representation and the complexity of the litigation." Id. at 317 (quotations and citation omitted). Thus, a trial court's calculation of a reasonable attorney fee "will not be overturned in the absence of a showing of a clear abuse of discretion." Dixie State Bank, 764 P.2d at 988.

Colleli v. Colleli, 2004 UT App 318; 2004 Utah App. LEXIS 334. Veronica has failed to adequately brief her request for a review of attorney's fees or to marshal the evidence and show a fatal flaw in the trial courts determination as to her reasonable attorney's fees. The ruling of the trial court as to attorney's fees should be affirmed.

Veronica failed to cite to the fact that Guenther was also awarded attorney's fees incurred as a result of bringing Veronica's actions to the trial court's attention. (FOF/COL, para. 30; pp. 23-24.) Veronica's failure to marshal the evidence as required by Utah R. App. P. 24(a)(9) has shifted the burden and cost of the appeal from Veronica as the appellant to Guenther as the appellee, in direct contradiction of the purpose of the marshaling requirement.

Generally, when the trial court awards fees in a domestic action to the party who then substantially prevails on appeal, fees will also be awarded to that party on appeal.

Leppert v. Leppert, 2009 UT App 10, ¶29, 200 P.3d 223 (citation omitted). The standard of review is, again, abuse of discretion. ". . . a trial court's calculation of a reasonable attorney fee 'will not be overturned in the absence of a showing of a clear abuse of

discretion.”” Colleli v. Colleli, 2004 UT App 318, citing Dixie State Bank, 764 P.2d at 988.

### CONCLUSION

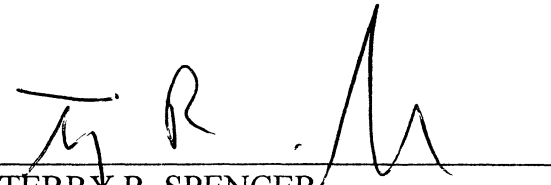
Veronica has not marshaled the evidence and has not demonstrated the fatal flaw in the trial court’s ruling that: (1) the Divorce Agreement is enforceable, and that the only default under the Divorce Agreement was Petitioner’s; (2) the trial court abused its discretion in the valuation and/or division of the marital estate; (3) the trial court abused its discretion in determining the parties separated their financial accounts on May 25, 2001; (4) the trial court abused its discretion in awarding Guenther 100% of the extra principal payments he made to retire the mortgage from his separate funds; (5) there was performance on the Divorce Agreement by the parties; (6) the trial court abused its discretion as to the value of the furniture and automobile awarded to Veronica; or (7) the trial court abused its discretion as to the amount of attorney’s fees awarded to Veronica.

As such, this Court should defer to the “trial court’s pre-eminent role as fact-finder” and “take the trial court’s findings of fact as [the] starting point.” Neeley v. Bennett, 2002 UT App 189, para. 12, 51 P.3d 724, cert. denied, 59 P.3d 603 (Utah 2002). See, also, Chen v. Stewart, 2004 UT 82, 100, P.3d 1177 (Utah 2004), stating “[w]ithout proper marshaling of the evidence, we refuse to set aside the ruling of the trial court or the findings upon which it is based.” The ruling of the trial court should be affirmed.

Guenther should be awarded his attorney’s fees and costs on appeal, as he was awarded fees by the trial court and Veronica’s clear failure to follow the Utah Rules of

Appeal's the marshaling requirement, which shifted the burden and cost of the appeal from Veronica to Guenther.

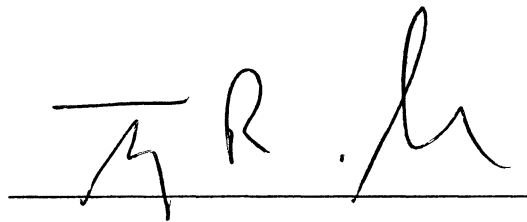
DATED THIS 15 day of April, 2010.

  
TERRY R. SPENCER  
Attorney for Appellee/Respondent

#### CERTIFICATE OF SERVICE

Terry R. Spencer, counsel for Appellee, hereby certifies that I personally caused to be mailed by first class mail, postage pre-paid thereon, two and correct copies of the foregoing Brief of Appellee to the following on the 15 day of April, 2009.

David S. Pace  
Pace & Schmidt  
136 East South Temple, Suite 1600  
Salt Lake City, Utah 84111



# ADDENDUM

1. Minute Entry and Order, dated February 4, 2009
2. Transcript from February 2, 2007 Bench Trial (First Findings)
3. Transcript from March 27, 2008 Motion Hearing
4. Findings of Fact and Conclusions of Law and Order, dated June 19, 2008
5. Response to Motion for New Trial (R.O.A. 449)
6. Reply to Response for Motion for New Trial (R.O.A. 465)
7. Utah R. App. P. 3, 24 & 27
8. Utah R. Civ. P. 59 & 60
9. Utah Code Ann. § 78A-103(2)(h)

ADDENDUM “1”



FEB - 4 2009

SALT LAKE COUNTY

By                      Deputy Clerk

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

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VERONICA LEE JACOBSEN,	:	
Petitioner,	:	
vs.	:	MINUTE ENTRY AND ORDER
GUENTHER JACOBSEN,	:	Case No. 054905684
Respondent..	:	Judge Denise Posse Lindberg

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PROCEDURAL BACKGROUND

On June 19, 2008 this Court entered extensive Findings of Fact, Conclusions of Law, and Order following a divorce trial held in 2007.<sup>1</sup> In its decision and order, the Court directed Respondent's counsel to "prepare and promptly file a Decree of Divorce" consistent with the Court's Findings of Fact/Conclusions of Law. Respondent timely prepared and filed a proposed Decree, and provided a copy to Petitioner's counsel. No objection to the Decree was received by the Court, so when Respondent filed a notice to submit for decision on August 15, 2008, the Court reviewed the proposed Decree and signed it on August 25, 2008.

The same day the Court signed the Decree, Petitioner filed a timely Rule 59 motion for new trial and to alter or amend judgment. Petitioner did not expressly identify in her motion the basis under Rule 59 on which she was relying. However, in her motion and supporting memorandum Petitioner argued that the Court had erred in at least one of its Findings and Conclusions (regarding date for separating bank balances), and urged the Court to "correct" its findings.

On September 10, 2008, Petitioner filed a second (untimely) Rule 59 motion for new trial and to alter or amend judgment. The second motion also referenced Rule 60, but did not expressly state the basis (under Rule 60) supporting Petitioner's request to vacate or amend the Decree of

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<sup>1</sup>See decision of June 19, 2008 for detailed explanation for the delay between completion of trial and issuance of Findings of Fact and Conclusions of Law.

Divorce. In addition to rearguing her position that certain of the Court's findings were in error, Petitioner's second Rule 59(60) motion also complained that Respondent's counsel had not responded to correspondence sent by her during July 2008 concerning the proposed Decree. As noted, however, Petitioner did not contemporaneously communicate to the Court her objections or concerns with the proposed Decree. See Utah R. Civ. P. 7(f)(2) ("Objections to the proposed order shall be filed within five days after service"). In her second motion Petitioner also objected to the fact that her attorney had received "[n]o formal correspondence . . . that the [proposed Decree] was being submitted" to the Court for action. However, Rule 7(f)(2) also states that "[t]he party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object." Respondent's counsel acted consistent with the requirements of Rule 7.

Respondent timely responded to both of Petitioner's motions. The first response was filed September 4, 2008; the second one (to the combined Rule 59/60 motion) was filed September 23, 2008. Petitioner filed her reply ("Response to Respondent's Response . . .") on September 26, 2008; a notice to submit on the first Rule 59 motion was filed by Respondent three days later, on September 29<sup>th</sup>. On October 6, 2008, the Court entered a brief minute entry and order denying Petitioner's Rule 59 motion. According to the certificate signed by the Court's clerk, a copy of the Court's minute entry was mailed to both counsel on October 6, 2008.

On October 15, 2008, without referencing the Court's minute entry and order, Petitioner filed a reply in support of her second and untimely Rule 59/60 motion, but did not file a notice to submit at that time. Without a notice to submit to trigger Court review, the motion remained in the file without a ruling.

Nothing more happened until November 10, 2008 when Respondent filed a Motion to Enforce Judgment.<sup>2</sup> In his motion Respondent noted that Petitioner had filed various post-trial motions that the Court had denied, but had not asked for a stay pending her appeal of the Court's judgment. In his Motion to Enforce Judgment Respondent argued that he was experiencing financial hardship because the escrow agent was refusing to release the funds. On November 24, 2008, Petitioner, now through new counsel, filed a counter-motion asking the Court to Stay Enforcement and to Waive or Set Bond Pursuant to Rule 62.<sup>3</sup> Respondent timely filed his Opposition to Petitioner's Motion to Stay, but notices to submit the competing motions for

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<sup>2</sup>Although Respondent included argument in his motion, he did not file an *accompanying* memorandum as required by Rule 7.

<sup>3</sup>Petitioner also filed a separate Opposition to Respondent's Motion to Enforce Judgment; the Opposition raises identical arguments to those in Petitioner's Motion to Stay Enforcement and Waive Bond.

decision were not filed until January 13, 2009. On January 27, 2009, Petitioner also filed a notice to submit on her second Rule 59/60 motion.

## DISCUSSION

### Petitioner's Second (and Untimely) Rule 59 Motion

The Court has detailed the most recent procedural history of this long-pending case because it appears to the Court that Petitioner's duplicative Rule 59 motions may have caused confusion to both the Court and the parties regarding the posture of the case. It is unclear whether Petitioner received the Court's October 6, 2008 ruling on her first Rule 59 motion, because Petitioner did not reference the Court's ruling in her second Rule 59/60 motion or in her motion to stay enforcement and to waive bond.

The Court's October 6, 2008 Minute Entry was entered in response to Petitioner's first Rule 59 motion and Respondent's September 29, 2008 notice to submit. Admittedly, the Court's Minute Entry does not elaborate on the basis for the Court's decision to deny Petitioner's motion. However, implicit in the Court's statements in the Minute Entry (to the effect that the Court had reviewed the parties' submissions, its previously entered Findings of Fact and Conclusions of Law, and the proposed Decree) the Court determined that Petitioner had not stated an adequate basis under Rule 59 for the relief she was seeking. Having already ruled once on Petitioner's Rule 59 motion, the Court declines to enter a second ruling on Petitioner's untimely second motion.

### Petitioner's Rule 60 Motion to Vacate Decree

The Court also declines to vacate the Decree of Divorce entered August 25, 2008 because Petitioner's combined Rule 59/60 motion did not clearly argue any particular grounds (under R. 60) for her request.

### Respondent's Motion to Enforce Judgment and Petitioner's counter-motion to Stay Enforcement and to Waive Bond

The sale of the parties' home was completed in August 2006, but the Decree of Divorce was not entered until August 25, 2008. The case is under appeal. For more than two and a half years, proceeds from the sale of the parties' home (totaling \$488,949.11) have been held in escrow. In its June 19, 2008 decision the Court concluded that the parties' agreement to share equally the proceeds from the sale of the home was enforceable. As discussed by the Court in its decision, there would need to be various adjustments to Petitioner's share of the equity in the home to repay Respondent for various expenditures he had incurred with respect to the home, or to

compensate him for Petitioner's wrongful withdrawal or dissipation of funds belonging to Respondent.

As previously noted, in his Motion to Enforce Judgment Respondent correctly noted Petitioner's failure to request a stay of judgment in connection with her filing of the Rule 59 motions. See Utah R. Civ. P. 62. Only after Respondent's motion made that point did Petitioner belatedly file a R.62 request to stay enforcement. Not only was Petitioner's motion untimely, she offered little factual support for her claims.

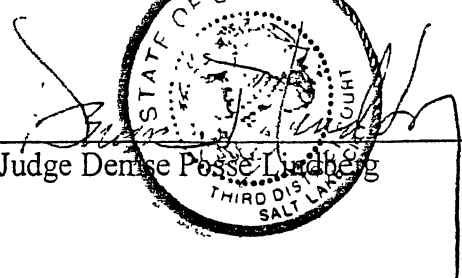
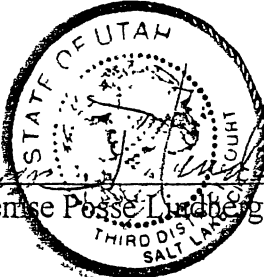
The sum and substance of Petitioner's argument is that Respondent is a resident alien who could decide at some point to return to Germany. Petitioner argues that if funds are disbursed pursuant to the Court's judgment and that judgment is subsequently reversed, it could be difficult to recoup those funds if Respondent left this jurisdiction.

Petitioner's argument is pure conjecture. There is simply no evidence before the Court to suggest that Respondent is planning to leave this jurisdiction, or that even if he did, he would not continue to submit to the Court's jurisdiction and comply with Court orders. The track record in this case is that it has been Petitioner who has repeatedly violated Court orders—not Respondent. Absent specific facts, the Court is not inclined to give any weight to Petitioner's fears. Because the Court rejects Petitioner's motion, it need not reach the issue of bond setting. Had the Court granted the stay of judgment, however, it is not the Court's general practice to waive the bond requirement, and Petitioner has failed to state good cause why the Court should depart from its general practice.

#### ORDER

The Court declines to rule on Petitioner's second and untimely Rule 59 motion, and therefore DENIES the same. The Court DENIES Petitioner's Rule 60 motion to vacate judgment because Petitioner has failed to articulate adequate grounds for her motion. Because Petitioner has failed to present adequate facts to support her argument in support of a stay of enforcement, the Court DENIES Petitioner's motion and GRANTS Respondent's motion to enforce judgment. Based on the foregoing, Petitioner's motion to waive bond is DENIED as moot.

Entered by the Court this 4<sup>th</sup> day of February, 2009.

  
Judge Denise Posse Lundberg  


CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 054905684 by the method and on the date specified.

METHOD NAME

Mail	DAVID S PACE Attorney PET 136 E SOUTH TEMPLE STE 1600 SALT LAKE CITY, UT 84111
Mail	TERRY R SPENCER Attorney RES 140 W 9000 S STE 9 SANDY UT 84070

Dated this 4 day of Feb, 2009.

MB  
Deputy Court Clerk

ADDENDUM “2”

06700582

-1-

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

VERONICA LEE JACOBSEN,  
Petitioner,  
vs.  
GUENTHER JACOBSEN,  
Respondent.

ORIGINAL

Case No. 054905684 DA

**FILED DISTRICT COURT**  
Third Judicial District

JUL 28 2008

By *bn*

SALT LAKE COUNTY

Deputy Clerk

Bench Trial  
Electronically Recorded on  
February 2, 2007

BEFORE: THE HONORABLE DENISE P. LINDBERG  
Third District Court Judge

APPEARANCES

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Transcribed by: Beverly Lowe, CSR/CCT

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Telephone: (801) 377-2927

**FILED**  
**UTAH APPELLATE COURTS**

OCT 27 2008

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P R O C E E D I N G S

(Electronically recorded on February 2, 2007)

THE COURT: We are on the record. We are on the record on the matter of Jacobsen vs. Jacobsen, and I have -- could I have Counsel state your appearances and whether you have the parties with you.

MR. GREEN: John Green representing the petitioner, and the petitioner is here with me, your Honor.

THE COURT: Thank you.

MR. SPENCER: Terry Spencer, your Honor, along with the respondent who is here.

THE COURT: All right, thank you. Well, as the parties know, we held this bench trial on January 31<sup>st</sup> of 2007. There were only two witnesses who testified; those being the parties, the petitioner and respondent.

The -- at the conclusion of the cross examination of respondent, which was approximately 4:30, there was a request by plaintiff's Counsel for a brief closing, or in the alternative to have closing arguments submitted in writing.

I declined the offer, because I believed with the trial briefs that had been filed, and the proposed findings, as well as a day full of testimony that I had adequate information to address the matters that were placed before me.

I will note for the record that there was no request to have plaintiff's Counsel -- petitioner's Counsel to have his



1 client called back in rebuttal, but simply to address closing  
2 So I indicated that I would review my notes and the exhibits,  
3 and I would give you my oral ruling today, by way of this  
4 telephone call -- means of this telephone conference.

5 As -- I guess I'll start off by saying that this is --  
6 all cases are unique, in a way, because they all have different  
7 facts; and obviously to the parties, their cases, it's the most  
8 important case, and rightly so.

9 This case truly is unique in that it presents a number  
10 of issues about when the parties terminated their relationship,  
11 what actions they took in the process of separating that would  
12 give the Court some guidance as to how to properly and to  
13 equitably address the issues before the Court.

14 I'm going to take this in a little bit different  
15 format, because I guess what I want to do is start out by  
16 saying that I am convinced, after reviewing all the testimony  
17 and the exhibits and the case law, that the divorce agreement  
18 drafted by the parties and signed by the parties on May 21 of  
19 2001 is an enforceable agreement. The -- and will be enforced  
20 by the Court.

21 That does not necessarily mean that I accept wholesale  
22 the scenarios opposed by respondent; and I'll address that in  
23 more specificity in a moment. First of all let me identify the  
24 facts on which I am relying for determining that this agreement  
25 is enforceable.

1           It was petitioner's testimony that the agreement was  
2 her idea. That the genesis of the idea came from an experience  
3 that she had had which she viewed as being a physical abuse  
4 by respondent, and certain extramarital affairs which she  
5 asserted and which he did not challenge.

6           She acknowledged in her testimony that she had drafted  
7 the agreement, that had then given it to the respondent, who  
8 had apparently made some changes. The two of them apparently  
9 negotiated the matter, and to fi -- to their satisfaction, and  
10 ultimately appeared before a notary on May 21 of 2001 to have  
11 the agreement notarized.

12           Petitioner also testified that she did not -- that  
13 while she had no specific immediate intent to implement the  
14 agreement, and was proceeding with it just in case, there is  
15 contrary -- she also testified and acknowledged that she had  
16 a couple of months act -- prior to the production of this  
17 agreement, had filled out paperwork for the divorce, even  
18 though the paperwork was not ultimately filed with the Court  
19 until several years later.

20           She also indicated that she needed -- because she had  
21 a child and needed a secure place for him to live until she  
22 finished -- he finished high school, she had an impetus to  
23 protect that.

24           Although neither party took specific action to file  
25 the divorce agreement, or to file actual divorce papers at that

1 time, I believe that this agreement was done in anticipation  
2 of a divorce, certainly within the context of that; and that  
3 as a result, the parties -- while they did not make a complete  
4 disposition of all their assets, certainly took care of  
5 addressing a substantial number of now the majority of their  
6 financial assets.

7           The divorce agreement is silent as to the disposition  
8 of personalty, but it does provide for the disposition of  
9 the Terra Vista home under one of two scenarios. One is an  
10 equitable division of interest when the home was sold; or if  
11 respondent chose to exercise the option of doing a payout to  
12 the petitioner by September 1 of 2004.

13           The agreement also provided that petitioner would  
14 have her name take off the mortgage, but she would remain on  
15 the title; and she and her son would have the right to reside  
16 in the home until August of 2004. The agreement allocated  
17 responsibility for costs and utilities and upkeep of the  
18 home, provided for the equitable distribution of pensions  
19 and retirement accounts for income tax filings and equitable  
20 distribution of tax refunds; and it expressly disclaimed any  
21 alimony.

22           Following the signing of the agreement, there was  
23 performance on the agreement by the parties. Petitioner's name  
24 was taken off the mortgage, pursuant to the agreement. Husband  
25 responded continued making the mortgage payments, even though

1 he had moved out of the home in April 2001, pursuant to their  
2 agreement.

3 The agreement had allowed petitioner to remain in the  
4 home until August of 2004. She personally moved out of the  
5 home in January of 2003, when she left for Hong Kong; but  
6 pursuant to the agreement, her son, Isaac -- Isaac I believe  
7 it is -- remained in the home until August of 2004.

8 I see this as a partial stipulation regarding the  
9 disposition of most, if not all the as -- but not all the  
10 assets. The elements of the contract have been met, and  
11 that both parties participated in drafting and revising the  
12 agreement, and reaching a meeting of the minds.

13 Both accepted certain legal detriments. He assumed  
14 responsibility for mortgage, but she stayed on the title. She  
15 gave up the right to alimony; and there was at least partial,  
16 and frankly, in my view, almost complete performance of the  
17 agreement. The fact that the parties did not follow through  
18 with the actual filing of the divorce at the time does not take  
19 away from the enforceability of the contract.

20 Let's see, as to the mortgage, as I already indicated,  
21 the petitioner has conceded that her name was taken off the  
22 mortgage and the equity loan for the Terra Vista home. It is  
23 also undisputed that respondent assumed responsibility for  
24 those expenses, plus the taxes on the property.

25 While the agreement provided that he would have that

1 obligation through August of 2004, after which time the parties  
2 apparently expected to sell the home, in reality, respondent  
3 continued to shoulder those expenses through mid 2006, when the  
4 house was finally sold.

5           The agreement provided that petitioner and her son  
6 had the right to live at the house. In fact, petitioner did  
7 live with her son at the house until she left to move to Hong  
8 Kong in January of 2003; but since her son remained at the  
9 house until 2004, which by her testimony was one of the most  
10 significant reasons she wanted to insure that that protection  
11 was afforded, her interests were certainly addressed in that  
12 issue.

13           Notwithstanding her view that it was -- or her apparent  
14 argument that there was some kind of problem because respondent  
15 moved into the home after she moved to Hong Kong, given that  
16 the son was a minor at the time, and was by contract required  
17 to remain at the home until August 2004, it was entirely  
18 appropriate that respondent would move into the house and  
19 manage the home and insure that there was no waste committed,  
20 and be maintained appropriately until the son vacated.

21           Petitioner has argued that the house was not put up  
22 for sale in August of 2004, as contemplated, and therefore that  
23 the agreement was not performed and should not be enforced.  
24 While it is true that the house was not placed for sale as soon  
25 as initially contemplated, the contract by its express agree --

1 terms, anticipated that this precise situation might occur.

2 Item No. 3 of the agreement provides that the sale  
3 of the home, quote, "shall take place after August 31, 2004."  
4 Notably, no date for completion of that sale process was  
5 specified by the parties. They simply provide that there  
6 would be an equal division of equity under property sale  
7 closure, whenever that occurred.

8 Additionally, item No. 4 of the agreement authorized  
9 petitioner to remain in the property past August 2004, until,  
10 quote, "until the sale was finalized, or payout was completed,"  
11 unquote. In that event, petitioner was to pay her proportionate  
12 share of the mortgage and equity loan payments on the house.

13 In short, the fact that the property was not sold on  
14 August 20, 2004 does not mandate a determination of default.  
15 The only default apparent under the terms of the agreement were  
16 -- was petitioner's default, since she did not pay anything on  
17 the home after she returned to live at the property in August  
18 of 2005.

19 The buyout provision of item 3.2 of the divorce  
20 agreement essentially provided respondent with the option to  
21 buy out wife by September 1, 2004, and guaranteed her a return  
22 of no less than \$70,000 at that time. That was an option that  
23 was extended to the respondent, but it was not a requirement of  
24 performance by that date.

25 It is undisputed that the parties chose not to pursue

1 this option, but instead took the alternative offered under  
2 item 3.1, which was that the parties would share the equity  
3 whenever the house sold.

4 As to the filing of the tax returns, the testimony  
5 was that the parties did file joint returns for a few years  
6 pursuant to the terms of the agreement; and the undisputed  
7 testimony is  
8 that those tax refunds were split 50/50 by the parties. This  
9 is consistent with their demonstrated intent to keep their  
10 finances separate. On two occasions where there was testimony  
11 that they filed separate returns, tax returns each kept any  
12 refunds received, again consistent with the intent to keep  
13 finances separate.

14 As to the distribution of 401-K and pension plans, the  
15 agreement expressly provided that those would be contributions  
16 made during the period of the marriage, would be divided  
17 equally; and as to alimony, petitioner expressly disclaimed  
18 her right to seek alimony.

19 Notably, the divorce agreement makes no provision for  
20 distribution of personalty, including stock options, but that  
21 does not take away from the enforceability of the agreement.  
22 It is common for parties to enter into partial stipulations  
23 that resolve some but not all of their disputes attentive  
24 to a divorce. This agreement, in large measure, addressed  
25 distribution of assets, and is enforceable as written.

1           Now, let me address a few other things. As to the  
2           Kearns house -- and this all goes into the issue of things that  
3           respondent claims are premarital assets versus separate assets  
4           versus marital assets. As to the Kearns house, the issue there  
5           is whether the proceeds of that sale were marital property, or  
6           they were simply respondent's premarital property.

7           In his testimony, respondent claimed that all of  
8           the proceeds from the sale of the Kearns house, except for  
9           approximately \$4,300 or so, which he admitted was paid from the  
10          mortgage of marital -- on the mortgage from marital funds, should  
11          be credited to him as premarital property, and deducted from  
12          the escrow of the accounts from the sale of the Terra Vista  
13          house.

14          Petitioner argues that once her name was placed on the  
15          title, respondent effectively gifted her with one-half of the  
16          interest in the property; and since the money from the sale of  
17          the Kearns house eventually went to the purchase of the Terra  
18          Vista house, the funds had been so comingled as to lose their  
19          separate status as a premarital asset.

20          At -- on this issue, I must agree with petitioner.  
21          When her name went on the title for the Kearns house, she was  
22          effectively gifted with one-half of the value of that home,  
23          irrespective of the fact that respondent had paid for it in  
24          full before the marriage.

25          Additionally, when the mortgage was taken out, it was



1 paid back with marital funds from the joint account into which  
2 at the time both salaries were being deposited. Then the  
3 proceeds were used towards the construction of the Terra Vista  
4 house, which was indisputably a marital asset.

5 Therefore, I believe that the value realized from  
6 the sale of the Kearns house became marital property, to which  
7 she can properly claim one-half interest; and goes into the  
8 interest -- her share of the interest in the Terra Vista house.

9 There's a different conclusion as to the joint account,  
10 however. The testimony was that the parties had joint checking  
11 and savings accounts when they first married. Somehow -- and  
12 there's dispute as to exactly how and why this occurred --  
13 petitioner's name became the primary name on the accounts,  
14 and the accounts were listed under her Social Security number

15 Petitioner's testimony was that because her Social  
16 Security number was needed. Respondent says that he was not  
17 aware of that, and he only, quote, "only signed what was put  
18 in front of him." I must say that I find that last statement  
19 from respondent to not be credible. Every bit of evidence  
20 that was presented to me establishes that he kept such close  
21 rein on all things financial, to make this a believable  
22 statement to me.

23 Initially both parties deposited money into the joint  
24 account. The salaries went through direct deposit. Also into  
25 the joint account went proceeds of the sale from petitioner's

1 home in Decader. However, the equally undisputed testimony is  
2 that as of May 25<sup>th</sup> of 2001, the parties separated their bank  
3 accounts.

4           Although he remained able to access her account, and  
5 she similarly could access his -- which was previously the  
6 joint account -- the undisputed testimony is that at the time  
7 the accounts were separated in May of 2001, the money there was  
8 divided equally. Thereafter, her checks went into her account;  
9 his checks went into his account, which was previously the  
10 joint account.

11           Petitioner never again deposited any monies into  
12 the joint account. Respondent paid for the mortgage, taxes,  
13 insurance on the home from the -- his account, or the joint  
14 -- former joint account from 2001 forward, without any  
15 contribution by petitioner.

16           Respondent deposited his inheritance into the account  
17 which had become his account, which totaled approximately  
18 \$45,000. From there, he used that money to pay off the Terra  
19 Vista -- as partial payment towards paying off the Terra Vista  
20 house in full.

21           Essentially petitioner claims two basis for entitlement  
22 to money in the joint account, which I view as his account.  
23 First she claims that it's because her name was still on the  
24 account, she had a claim to any monies that went through that  
25 account, regardless of source; and two, because he had promised

1 that essentially, quote, "his money would be her money, too."

2 I reject those contentions. In my view, although it  
3 is true that generally all monies earned by either party during  
4 the term of the marriage and prior to separation are considered  
5 marital assets, in this case the parties signified a clear  
6 intent to separate, at least financially, in May of 2001 -- to  
7 separate their finances in 2001; and their respective incomes  
8 and accounts should be treated as separate property after that  
9 date.

10 From the date of separation of the financial accounts,  
11 petitioner no longer contributed her salary to the joint  
12 account. When she accepted the position in Hong Kong, she  
13 opened other accounts, where she deposited all of her salary  
14 and living allowance. None of that money was shared with the  
15 respondent, other than her periodic deposits to a Utah account,  
16 solely for the purpose of having -- facilitating respondent  
17 to take care of her AMEX bills and her son's private school  
18 tuition.

19 It is clear that if they thought about it at all, the  
20 fact that the parties remained signatories on each other's  
21 accounts was primarily a convenience to petitioner. There  
22 does not appear to have been much reason for her to remain a  
23 signatory on what had previously been the joint account, and  
24 which became, in my view, his account as of May 2001.

25 Further evidence that the parties separated their

1 financial dealings in May of 2001 is found in how petitioner  
2 treated her salary after that date. While she was still in  
3 Utah and working in Ogden, she deposited her check into her own  
4 separate account. From that, she paid some but not all of her  
5 living expenses, as respondent continued pursuant to the terms  
6 of the agreement, to pay the mortgage and taxes on the home  
7 that she alone occupied with her son.

8           When she moved to Hong Kong, she again kept her  
9 salary separate, depositing it into the account that was  
10 not accessible to respondent. In addition to her salary  
11 she received a substantial living allowance, and because of  
12 reimbursable business travel, she testified that she was able  
13 to save approximately \$67,000 during the two-and-a-half years  
14 she spent in Hong Kong.

15           When she returned to the United States, she did not  
16 divide those savings with respondent. Rather, she drew on  
17 those funds to sustain what frankly I view as an apparently  
18 lavish living standard that was wholly inconsistent with the  
19 reality of her financial situation, which was that she was  
20 unemployed.

21           Until she again secured employment approximately  
22 seven months after her return, respondent continued to pay  
23 for essentially all of the expenses of the household. Although  
24 it appears that petitioner went through a substantial amount of  
25 money from the savings, plus incurring substantial additional

1 debt to provide for relatively few clearly identifiable goods  
2 or services. Primarily to provide food and other personal  
3 items for herself.

4 When she had substantially depleted "her," unquote,  
5 savings, she incurred other significant debt, and then she took  
6 advantage of the fact that she had remained as a signatory on  
7 the joint account, and then withdrew somewhere between 30,000  
8 and a little more, \$31,000 from that account, that had remained  
9 in husband's account, in respondent's account.

10 I conclude that by the parties' course of dealing,  
11 they acknowledged that financial separation as of May 25<sup>th</sup> of  
12 2001, they intended to have those funds remain separate assets.  
13 I further conclude that in accessing respondent's account and  
14 withdrawing that money for her personal benefit, petitioner  
15 improperly took funds that were by then respondent's separate  
16 property.

17 So I hold that from the equity in the Terra Vista  
18 house, respondent is entitled to deduct the amount of money  
19 that was improperly taken by petitioner, and that can -- needs  
20 to come out prior to the division of the equity.

21 The fix-up expenses expended by respondent, there  
22 certainly has been no challenge by petitioner about that; and  
23 in fact, she essentially conceded in her testimony that he was  
24 entitled to those expenses being deducted from the equity that  
25 has accumulated on the house from Terra Vista. Accordingly,

1     respondent should be given that credit before the equity  
2     generated by the sale of the home is split.

3             As to the respondent's claim for entitlement to  
4     reimbursement for certain loans that he assisted -- or that  
5     he paid off at the time of the marriage that had been -- that  
6     were debts that had been brought by petitioner, I will note  
7     that petitioner, in her direct examination, essentially  
8     conceded the point that these were her debts, and that he  
9     was entitled to repayment for those debts.

10            Based on that admission, I am concluding that those  
11     should also be credited, those should be payments credited to  
12     respondent, I will note as an aside that, but for that admission  
13     and concession, and the clear fact that these were her debts  
14     that she had incurred premaritally, and which were paid off not  
15     with her funds, but really solely with his funds, the absence  
16     of any kind of evidence of express agreement from the parties  
17     might have led to a different result in terms of the Court's  
18     analysis here. It is undisputed that petitioner conceded that  
19     these were here debts, that they were paid, and that he was  
20     entitled to reimbursement.

21            I started out by saying that this is an unusual case  
22     in terms of identifying the separation date for purpose of  
23     valuing the assets; and respondent has posited several dates,  
24     what he calls his "three scenarios." One is as of August 2004,  
25     which is what he argues that is what the divorce agreement

1 provides. First, I reject that. I don't believe that that's  
2 what the divorce agreement provides for.

3 Secondly, as of the time that petitioner left for  
4 Hong Kong in January of 2003, I also do not find that to be  
5 persuasive, because it appears to me, based on the testimony  
6 received, that even though the parties had separated their  
7 finances in 2000 -- May of 2001, they did continue cohabiting  
8 through the time that petitioner left for Hong Kong.

9 After her departure for Hong Kong and during the time  
10 that she was in Hong Kong, they continued to put themselves  
11 forward as husband and wife. They did travel together. They  
12 visited each other periodically. Petitioner came back to the  
13 states to care for respondent when he was undergoing surgery,  
14 and remained for a substantial period of time providing for  
15 his care. They, in short, evidenced a continuing relationship  
16 that certainly transcends January of 2003. So I reject that  
17 scenario for that reason; and then the third scenario is as of  
18 the time of the divorce trial or the divorce decree.

19 I do note that notwithstanding those scenarios, he  
20 does argue, and she does not dispute, that the parties had  
21 separated the financial accounts. Both parties in their  
22 submissions have acknowledged that the default position of  
23 the law for valuing marital assets under the case law is as  
24 of the date of the divorce trial and decree. It is also clear  
25 from the case law that the Court has discretion to select

1 other dates for valuation, taking into account the unique  
2 circumstances of each case; and provided that adequate findings  
3 are made to support alternative dates chosen.

4 As I indicated, this case is unique, and so the  
5 Court's approach is similarly unique. I conclude that  
6 different dates need to be attached to valuing different  
7 assets. I expressly reject the wholesale adoption proffer  
8 of respondent's scenarios. However, I do draw upon facts  
9 presented in conjunction with that testimony that was received  
10 about those scenarios in reaching my determination.

11 So as to the separation of the checking and savings  
12 account, I hold that the date of separation of those accounts  
13 is May 25, 2001. Thereafter, the monies held in the respective  
14 accounts were separate property of the parties and were treated  
15 as such by the parties, and intended as such by the parties.

16 Valuation of the Terra Vista home -- house should be  
17 as of the date of sale. That is the date that was contemplated  
18 by the divorce agreement that was negotiated by the parties.  
19 As to the valuation of the personalty, the cars, the furniture,  
20 here I am not including stock options.

21 Let me deal first with the car. The only evidence  
22 before me of the value of the car is the value listed by the  
23 petitioner and adopted by the respondent, somewhere in excess  
24 of \$10,000. Neither party has provided the Court with evidence  
25 of the original price, or has provided the Court with any



1 information about the source of -- or sworn testimony as to the  
2 source of funds that paid for the car payments, or how those  
3 divided.

4           Absent any other basis for evaluating the cars' value,  
5 the Court adopts the amount that the Courts -- that the parties  
6 have offered. That is, the 10,000 -- whatever amount that  
7 was put forward by petitioner, and adopted by respondent. I  
8 declare that car to be marital property, subject to equitable  
9 division, 50/50 split of the value reported in the petitioner's  
10 declaration.

11           As to the furnishings at issue, it appears that the  
12 only ones of note were the washer/dryer, the Sony TV, the  
13 dining set. . The only evidence before the Court is the value  
14 at purchase that was offered by the respondent. No other  
15 information has been provided to the Court through testimony  
16 or exhibits on which the Court can rely for assessing either  
17 the age of the items, or what kind of depreciation schedule  
18 should be used.

19           So for that reason, the only information on which  
20 the Court can base its decision is the value at purchase, as  
21 reported by the respondent. Since petitioner has retained  
22 those major furnishings and the car, husband/respondent is to  
23 be given credit for his one-half interest in the value of those  
24 vehi -- of those items.

25           Again, the vehicle value will not be valued as new,

1 but rather the value that has been adopted by the parties. All  
2 the others are the value new as reported in the exhibits. The  
3 Court rejects respondent's claim for a different distribution  
4 of value, making petitioner carry a greater share of the cost  
5 of the dining room set. Everything is the marital property,  
6 and it's -- the value of that is to be shared half and half.

7 As to the stock options, I am going to take the  
8 default position that the Court and the case law provides for.  
9 That is, valuation as of the date of the -- of the divorce, and  
10 the lump sum pension to be QUADRO'd. The income tax filings  
11 and refunds have already been divided between the parties  
12 equitably, or each has retained their own. So I don't believe  
13 I need to do anything further about that.

14 Because I find that the agreement is enforceable, I  
15 need not reach the question of alimony, or the Jones factors  
16 in evaluating alimony, because it is clear that that was  
17 expressly -- it was an entitlement or a right or a claim that  
18 was expressly contracted away by petitioner.

19 As to attorney's fees, I note that the petition does  
20 not request attorney's fees, although attorney's fees have  
21 been requested in trial. I -- since I do not find, even  
22 if I were inclined to give petitioner some assistance with  
23 attorney's fees -- and I do think that some minor assistance is  
24 appropriate -- the majority of matters, essentially petitioner  
25 has not prevailed on.

1           So I do determine, however, that respondent is in a  
2 financial position where he is able to assist, and the relative  
3 income of the petitioner and respondent are such that she has  
4 some need of assistance, and he is in a position to be able to  
5 assist her with that. Although there was no express request  
6 for attorney's fees in the petition, I believe that the statute  
7 providing for the divorce gives this Court the power to make an  
8 equitable award of attorney's fees in consideration of the fact  
9 that -- well, considering all of the facts of the case.

10           I note that petitioner has been through three separate  
11 attorneys, that there is no documentation to establish the  
12 reasonableness of those expenditures; and again, because she  
13 has not prevailed on the majority of these issues -- frankly,  
14 the most significant area that she prevails on is her argument  
15 that she was entitled to have the Kearns home be viewed as a  
16 joint marital asset -- I am determining that -- am ordering  
17 that the respondent provide an assist of petitioner with \$2,500  
18 towards her attorney's fees.

19           I believe that that is a proper amount, in light of  
20 the absence of information about the reasonableness of the fees  
21 expended. I am expecting an affidavit of attorney's fees from  
22 current Counsel for petitioner; but my -- the award will not  
23 be for the full amount of those amounts that would be deemed  
24 reasonable, but I believe that \$2,500 should adequately address  
25 those issues.

1 I think that I have covered all the matters that were  
2 at issue. Have I left anything out?

3 MR. SPENCER: This is Terry Spencer, your Honor. One  
4 item that was left out was the remove -- was the attorney's  
5 fees that went with the removal of the \$30,000. That was  
6 certified by the Commissioner.

7 THE COURT: Okay. Those I am -- I am going to award  
8 that I have found that the respond -- that petitioner was  
9 wholly unwarranted in her actions to remove those funds; and  
10 she readily admits in her testimony that she did so. Her  
11 claims of entitlement are auspicious, as I have indicated.  
12 So not only will those amounts be returned and credited to  
13 petitioner -- I mean, to respondent prior to the division of  
14 the equity of the home, but she will be assessed the costs of  
15 the -- incurred by respondent in bringing that issue to the  
16 Court.

17 MR. SPENCER: Would you like a separate affidavit on  
18 that issue?

19 THE COURT: Yes, please; and I will then determine  
20 the reasonableness of those fees.

21 MR. GREEN: Your Honor, this is John Green. You  
22 indicated that the division -- the division date as far as  
23 the pension was concerned was the date of the divorce.

24 THE COURT: Correct.

25 MR. GREEN: Is that also -- that include the 401-K?

1 That's all pension assets.

2 THE COURT: No, the pension. I'm sorry, let me -- let  
3 me go back to the agreement. The terms of the agreement, item  
4 6, were that the 401-K pension plans of both parties for the  
5 duration of the marriage -- and I am holding that that is  
6 through the divor -- date of the divorce, shall be divided  
7 equally. So yes, those are to be --

8 MR. GREEN: Thank you, your Honor.

9 THE COURT: Okay, and as to the stock options, let me  
10 -- I believe -- I don't know if I addressed that or not.

11 MR. GREEN: You did, your Honor. You divided those as  
12 of the date of the decree.

13 THE COURT: Okay. Have I left anything else out?

14 MR. GREEN: I don't believe so, your Honor.

15 MR. SPENCER: I don't think so either, your Honor.

16 THE COURT: Okay. As you can see, the disadvantage I  
17 have is that I have departed dramatically from the proposed  
18 findings that were submitted. I am going to ask Mr. Spencer  
19 to prepare new findings of fact and conclusions of law in a  
20 decree that incorporates this ruling, the facts upon which I  
21 relied and any other subsidiary facts from the record that  
22 support the ruling that I have given you.

23 MR. SPENCER: I will do that, your Honor.

24 THE COURT: And then I will look for the additional  
25 separate affidavit of attorney's fees, and I will review that

1 for reasonableness and make a determination as to what -- what  
2 would be appropriate at that point.

3 MR. SPENCER Thank you, your Honor.

4 THE COURT: Okay.

5 MR. GREEN Thank you, your Honor

6 THE COURT. All right. I will then wait to hear from  
7 you, once you have reduced these to writing. Mr Spencer,  
8 please make sure that Mr. Green has the opportunity to review  
9 and approve as to form the documents.

10 MR. SPENCER I will, your Honor.

11 THE COURT: And when -- when you submit it, just out of  
12 an abundance of caution, again, do submit the hard copy; but  
13 also, if we do not have Mr. Green's sign off and approval as to  
14 form, then provide me the -- with a (inaudible) or CD.

15 MR. SPENCER: Okay. Will do, your Honor.

16 THE COURT: Okay. This telephone conference has been  
17 recorded. You can request a copy of the recording for purposes  
18 of identifying and developing the written findings.

19 MR. SPENCER: Thank you, your Honor.

20 THE COURT: Thank you very much. I hope that this  
21 allows both parties to now move on. I will add parenthetically  
22 that it is clear to me that this is a case where substantial  
23 cultural issues were present, and substantial issues as to  
24 fundamental disagreements on money management, which really is  
25 also unfortunately a very common reason why marriages fail.

1           I hope that the parties can now put this behind them  
2 and move on with their lives without continuing acrimony; and  
3 that this determination will allow them to do so. So thank you  
4 for being available, and I'll wait to hear from you.

5           MR. GREEN: Thank you.

6           THE COURT: Bye-bye.

REPORTER'S CERTIFICATE

STATE OF UTAH            /  
                              ) ss.  
COUNTY OF UTAH        )

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.


That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

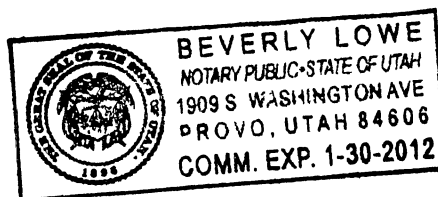
That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 21<sup>st</sup> day of July 2008.

My commission expires:  
January 30, 2012



Beverly Lowe  
NOTARY PUBLIC  
Residing in Utah County





ADDENDUM “3”

067051205

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

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VERONICA LEE JACOBSEN,	:	Case No. 054905684 DA
	:	
Petitioner,	:	Appellate Case No. 20080802-CA
	:	
v	:	
	:	
GUENTHER JACOBSEN,	:	
	:	
Respondent.	:	

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MOTION HEARING MARCH 27, 2008

BEFORE

THE HONORABLE DENISE P. LINDBERG

---

DUPLICATE  
ORIGINAL

---

CAROLYN ERICKSON, CSR  
CERTIFIED COURT TRANSCRIBER  
1775 East Ellen Way  
Sandy, Utah 84092  
801-523-1186

FILED  
UTAH APPELLATE COURTS

20080802-CA

DEC 31 2008

1 SALT LAKE CITY, UTAH - MARCH 27, 2008

2 JUDGE DENISE P. LINDBERG

3 For the Petitioner: JOHN C. GREEN

4 For the Respondent: TERRY C. SPENCER

5 P R O C E E D I N G S

6 THE COURT: We're on the record in the matter of  
7 Jacobsen vs. Jacobsen and this matter is set for 11:00 but  
8 since you're both here, we might as well get started. If I  
9 could please have counsel state your appearances.

10 MR. GREEN: John Green, basically representing  
11 myself. I filed a -

12 THE COURT: I know, I ordered you to be here.

13 MR. SPENCER: Terry Spencer appearing on behalf of  
14 the respondent.

15 THE COURT: All right. This has a convoluted  
16 history but as you know we had the trial in this case back in  
17 January of last year. At the time I asked respondent to  
18 prepare proposed findings of fact and conclusions of law and  
19 a proposed decree, when he did. Mr. Green filed an objection  
20 raising some issues which I thought were legitimate, others  
21 which I didn't think were particularly legitimate but enough  
22 that I wanted to give him leave to submit alternative  
23 findings. Those were submitted. Frankly they were - they  
24 lacked a lot and so I expressly asked that those proposed  
25 findings be submitted in electronic form for purposes of

1 editing. You never did.

2 MR. GREEN: Your Honor -

3 THE COURT: At least I have no record that they were  
4 ever received, let me put it that way. My minute entry of,  
5 let me see, May 21, 2007 specifically says, "Petitioner is  
6 directed to provide her proposed findings in electronic  
7 format readable by WordPerfect.

8 MR. GREEN: I apologize, Your Honor. I was under  
9 the impression that had been done. I know that was, you  
10 know, there was a problem at a point in time but I mean, they  
11 were both submitted and electronically and...

12 THE COURT: Somehow I never received the electronic  
13 copy. So it sat there without any action, nobody ever  
14 contacted - the matter again. I didn't have, unfortunately  
15 a tickler to remind me that we were waiting for this. When  
16 nothing had occurred as is my practice to maintain my case  
17 load current, this matter was dismissed for lack of activity  
18 after six months. Respondent was not sent notice of the  
19 dismissal because it is not the Court's practice to send  
20 notices to parties that are not the petitioner because after  
21 all typically a defendant, the party interested in  
22 maintaining the case is the party that had brought the suit.  
23 It is our practice to send notice of an intent to dismiss if  
24 the party on the other side has filed a counterclaim, counter  
25 petition. In this case respondent had not. So it was solely

1 petitioner's motion, I mean petitioner's matter and if  
2 petitioner didn't care that the matter got dismissed then  
3 that's sort of the thinking of the court. We are examining  
4 whether we want to keep it that way but that is the practice  
5 of the courts. So that's why you received no notice of that.

6 It was our error because we should have put it on  
7 tracking to reflect that we were waiting for final resolution  
8 of the findings of fact, conclusions of law and decree and I  
9 accept responsibility for that. We should have picked that  
10 up, we didn't, the case got dismissed.

11 So the bottom line is, there was an unresolved  
12 matter pending precipitated primarily because of the  
13 objections raised by Mr. Green on behalf of his client and so  
14 when Mr. Spencer brought the matter to my attention through  
15 his most recent motions, I went back into the file and sort  
16 of refamiliarized myself with what had gone on and what had  
17 and hadn't happened. That's why I decided it was important  
18 to schedule this hearing, get us all in the room together and  
19 be able to address the issue. It seems to be clear to me  
20 that the dismissal was improvidently granted - entered  
21 because there was a pending matter that had gone to trial and  
22 we were just really waiting for the final resolution of the  
23 paperwork rather than - and so I am setting aside the  
24 dismissal. It shouldn't have ever been entered. Now -

25 MR. SPENCER: May I make a suggestion, Your Honor?

1 THE COURT: Certainly.

2 MR. SPENCER: You have findings of fact and  
3 conclusions of law by both parties.

4 THE COURT: Correct.

5 MR. SPENCER: Would you like both of us to submit  
6 our findings in an electronic format -

7 THE COURT: I think that would be the most useful  
8 at this point and that would allow me to - I understand that  
9 I have to get my head back into this by listening to the  
10 recording of our trial -

11 MR. SPENCER: Of the ruling.

12 THE COURT: And at least of the ruling and get my  
13 head back into it and then reexamine the two sets because I  
14 have your objections and your reasoning and that objection.  
15 So if the two of you could get that to me in electronic  
16 format, I think we're now to WordPerfect XIII so anything  
17 WordPerfect readable, WordPerfect 12 or higher would be -

18 MR. SPENCER: You can only read up.

19 THE COURT: Yeah, right. Would be - then I can get  
20 that. But for now I am setting aside the dismissal because  
21 the matter is still pending resolution. I will, as soon as I  
22 get that from the two of you, I have one other matter that I  
23 am working on but basically your matter and that other matter  
24 are my top priorities to get those resolved and out the door  
25 and we'll get this wrapped up.

1 MR. SPENCER: Do you want it on a thumb drive disk,  
2 is that how the Court is (inaudible) -

3 THE COURT: You can put it that way or you can just  
4 email it to my clerk.

5 MR. SPENCER: Okay. The email address will be the-

6 THE COURT: She can just give you her card and you  
7 can both email it just as an attachment and she can let you  
8 know if she's received it without any difficulties and if  
9 there's a problem then we can bring it in in a CD or a thumb  
10 drive or something like, okay?

11 MR. GREEN: And then my withdrawal basically is  
12 rejected? That's fine.

13 THE COURT: Until the matter gets resolved. I  
14 think I need to have you both on here.

15 MR. GREEN: No, I understand that-

16 THE COURT: At this point I think your involvement  
17 will be fairly minimal because I'm basically taking over that  
18 responsibility as soon as I get your materials and I have a  
19 chance to review the hearing results, okay?

20 MR. SPENCER: Okay, thank you, Your Honor.

21 THE COURT: All right any - so Mr. Green, your  
22 withdrawal will be granted as soon as I enter my findings,  
23 okay?

24 MR. GREEN: Okay.

25 THE COURT: In the meantime, I just need to have a

1 contact person and I will feel more comfortable contacting,  
2 having my clerk contact both counsel rather than a pro se  
3 party.

4 MR. GREEN: This makes the best sense, Your Honor.

5 THE COURT: Okay. All right. So thank you both  
6 for being here and I will wait to get your email versions and  
7 I'll try to get it as quickly as possible.

8 MR. SPENCER: Now would you just like findings of  
9 fact and conclusions of law -

10 MR. SPENCER: Or do you want the decree?

11 MR. GREEN: Oh you want the decree?

12 THE COURT: Well, send me the decrees too because  
13 I'll just go ahead and finalize it.

14 MR. SPENCER: Okay, fair enough. Thank you.

15 THE COURT: All right. (Recording turned off and  
16 on, approximately a 10 second lapse) - a proposed decree from  
17 Mr. Spencer, which to the extent that I find that I agree  
18 with some of your objections, I can modify the decree. I  
19 don't want to run up a further bill when you're -

20 MR. GREEN: I won't charge you anything. If you'd  
21 just give me seven days to -

22 THE COURT: Don't worry about it. What I'll do is  
23 I'll just work off of the form that Mr. Spencer submits and  
24 I'll modify it as I need to, okay?

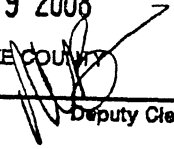
25 MR. SPENCER: Okay. (Hearing concluded) -c-



ADDENDUM "4"

JUN 19 2008

SALT LAKE COUNTY

By  Deputy Clerk

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

-----ooOoo-----

VERONICA LEE JACOBSEN,	:	FINDINGS OF FACT,
	:	CONCLUSIONS OF LAW
Petitioner,	:	AND ORDER
	:	
v.	:	
	:	
GUENTHER JACOBSEN,	:	Civil No. 054905684
	:	Judge Denise Lindberg
Respondent.	:	

-----ooOoo-----

BACKGROUND

A bench trial was held in this case on January 31, 2007. Petitioner was present and represented by her counsel, John C. Green. Respondent was present and represented by his counsel, Terry R. Spencer. As a preliminary matter, Petitioner moved the Court for leave to amend her Petition to include an unconditional claim for alimony. The Court denied the belated motion, although it ruled that Petitioner could attempt to present a case for alimony based on Respondent's failure to meet conditions precedent to the waiver. The matter then proceeded to trial, with the parties presenting exhibits and testimony to the Court. The Court took the matter under advisement and scheduled a follow-up telephonic conference for February 5, 2007 at which time the Court announced its rulings and directed Respondent's counsel to prepare and submit proposed Findings of Fact, Conclusions of Law ("FF/CL"), and Decree of Divorce ("Decree"). After Respondent submitted his proposed FF/CL, Petitioner filed an objection and

moved the Court for leave to file her own proposed FF/CL and Decree. On May 21, 2007 the Court granted Petitioner's motion after concluding that Respondent's proposed FF/CL did not fully and accurately capture the Court's rulings. The Court directed Petitioner's counsel to file the submissions in electronic format to facilitate review and, as necessary, modification by the Court. On June 4, 2007, Petitioner filed her submissions in "hard copy"; no electronic copy was provided. The docket reflects that on June 21, 2007, the Court's clerk renewed the request for an electronic copy, but none was again received. That same day Respondent filed his objections to Petitioner's submission. For unknown reasons, neither Petitioner's proposed submissions nor Respondent's objections were brought to the Court's attention for action.

Due to inaction in the case, after six months the Court noticed the matter for dismissal absent a showing of "good cause" by Petitioner. As was the Court's then-practice (which has subsequently been modified), only counsel for Petitioner, as the party bearing the duty to prosecute the case, was notified of the anticipated dismissal.<sup>1</sup> When Petitioner's counsel failed to respond to the dismissal notice the case was dismissed on December 6, 2007, for failure to prosecute.

On February 15, 2008, Petitioner's counsel filed a notice to withdraw from the (dismissed) case. Respondent, who was unaware that the case had been dismissed, objected

---

<sup>1</sup>The Court erred when it failed to notify Respondent's counsel of the anticipated dismissal because Respondent had timely filed a Counterclaim and paid the appropriate fees. As a cross-Petitioner, Respondent should have been notified that a dismissal was being contemplated.

arguing that the matter was still pending final determination. After receiving Respondent's objection the Court held a hearing on March 27, 2008. At that hearing the Court reviewed with the parties the status of the case, and agreed with Respondent that the matter should not have been dismissed. Accordingly, the Court vacated the dismissal and again directed Petitioner's counsel to submit an electronic version of the proposed documents; the submissions were received by the Court in April 2008. The Court declined to allow counsel for Petitioner's withdrawal until the case was fully resolved. A notice to submit for decision was filed on May 12, 2008.

Having now reviewed the parties' submissions and objections the Court is fully advised and enters the following:

#### FINDINGS OF FACT

1. The Petitioner and Respondent, are husband and wife having been married in Salt Lake County, State of Utah, on or about the 18<sup>th</sup> day of April, 1997. The parties resided in a marital relationship in Salt Lake County, State of Utah.
2. Petitioner has a son, Isaac, who is not an issue of this marriage.
3. During the course of the marriage the parties have experienced irreconcilable differences that prevent them from pursuing a viable relationship.
4. Petitioner filed her Petition for Divorce (the "Petition") on October 13, 2005. Respondent filed his Answer and a Counterclaim on October 26, 2005.

### Kearns House Proceeds

5. At the time the parties married in April 1997 Respondent owned outright a house located in Kearns, Utah; there was no mortgage on the property. Petitioner and her son moved into the Kearns house with Respondent.

6. At some point thereafter, the parties decided to buy a lot and build a new house (which the parties called the “Tera Vista” house and which will be referred herein as the “Residence”). They took out a \$60,000 mortgage on the Kearns house in order to secure funds to purchase their desired lot, which was valued at \$81,000. The remaining \$21,000 balance on the lot price was paid from marital assets—a joint account to which both parties contributed.

7. The mortgage on the Kearns house (until the time it was sold), was paid from the joint account.

8. Either prior to, or in connection with, securing the mortgage on the Kearns house, Respondent put Petitioner’s name on the title to the Kearns house as “joint tenants with right of survivorship.”

9. When the Kearns house was sold, proceeds from that sale (\$103,529.83) were used towards the construction of their new Residence.

10. The parties dispute whether the proceeds from the sale of the Kearns house were “marital” assets as Petitioner argues, or “premarital” property of Respondent, as he claims. If the Court finds that the Kearns house was premarital property of Respondent, an additional issue is

whether Petitioner should be given credit for those payments made from marital funds.

Respondent argues that all of the proceeds from the sale of the Kearns house—except for approximately \$4,300.00, which he acknowledges was paid on the mortgage from marital funds—should be credited to him as premarital property and deducted from funds placed in escrow following the 2006 sale of the Residence. For 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.<sup>2</sup> Moreover, Petitioner argues that since the money from the sale of the Kearns house was used to purchase their new Residence, those funds have been so commingled as to lose any separate status as a premarital asset.

#### Dates of Separation

11. 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.<sup>3</sup> For example, Petitioner relocated to Hong Kong in January 2003, but her

---

<sup>2</sup>Petitioner acknowledges that even if the Court accepts her position that the proceeds from the Residence should be equitably divided, prior to such division Respondent should be reimbursed or credited with certain expenses he incurred. Specifically, Petitioner testified that Respondent should be credited with (a) \$14,417.21 he paid on her behalf to retire certain of her pre-marital debts, (b) maintenance and repair expenses Respondent incurred for benefit of the Residence (which the Court finds totaled \$7,616.09), and (c) his share of a commission discount the parties received (one-half of a \$5,200 credit).

<sup>3</sup>Respondent suggested that the Court consider various dates as the relevant “separation” dates in this case. First he suggests that the Court should consider either January 2003 (when Petitioner left for Hong Kong) or August 2004, the date contemplated in the parties’ Divorce Agreement, as the date the parties separated. In contrast, in her Petition filed October 13, 2005,

son remained at the house with Respondent pursuant to the terms of a “Divorce Agreement” (the “Agreement”) the parties negotiated in February 2001 (see discussion *infra*). Moreover, during Petitioner’s time in Hong Kong the parties continued to put themselves forward as husband and 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 the 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.

12. Among the main issues in dispute in this case are the dates the Court should use to fix the value of various assets for purposes of their division. Based on the testimony received at trial, the Court finds that several different dates of “separation” and/or “valuation” should be employed in adjudicating this matter:

- A. Date of separation of checking/savings accounts.<sup>4</sup> After they married the parties maintained joint checking and savings accounts. Petitioner’s name was listed as “primary” name on the accounts, and they carried her social security

---

Petitioner indicated that the parties “would be separating during the pendency of the action.”

<sup>4</sup>Although the Court’s notes did not reflect any discussion at trial of accounts acquired by the parties prior to marriage, it appears there may have been such accounts. The law is clear that to the extent, if at all, that the parties held such accounts and did not co-mingle them, those funds are the separate pre-marital property of each party.

number. The parties dispute the reasons for this arrangement, but it is clear from the evidence that they viewed the accounts as joint accounts. Initially, both parties deposited money into the joint account; their salaries were deposited through direct deposit. Also into the joint account Petitioner deposited the approximately \$7,100 received as proceeds from the sale of her home in Decatur,<sup>5</sup> Alabama. Respondent presented evidence (not contested by Petitioner) that the parties “separated” their bank accounts on or before May 25, 2001.<sup>6</sup> Nevertheless, Respondent remained able to access “her” account and she, similarly, was able to access what became “his” account (previously their “joint” account). The undisputed testimony was that at the time the parties separated their accounts, all the money in what had been the “joint” account was divided 50/50. Thereafter, Petitioner’s checks went into “her” account; Respondent retained the joint account as “his” account and his salary was deposited into that account. Petitioner never again deposited any moneys into that account. From May 2001 forward, Respondent paid for the mortgages, taxes and insurance on the Residence from his

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<sup>5</sup>Trial exhibits show that Petitioner received \$5,598.66 in cash, plus a mortgage refund of \$634.43, and a mortgage premium refund of \$881.77, for a total of \$7,114.86.

<sup>6</sup>The Court’s notes from trial reflect that, at different times, the parties testified that the division of accounts occurred in either April or May 2001. Although most of the testimony referenced the May 25, 2001 date, there were some references to April 13, 2001 as the actual date the accounts were split. In any event, the parties’ testimony is consistent that the parties did not intend to retain “joint” accounts after May 25, 2001 at the latest.



account without contribution from Petitioner. Respondent also deposited his inheritance, totaling approximately \$45,000 into his account; he later used that money to pay off (in full) the mortgage on the Residence. Notwithstanding this undisputed evidence, Petitioner subsequently claimed one-half ownership in the funds in that account on two bases: (1) that her name was still on his account; and (2) that when they married Respondent had promised that “his money would be her money too.” The Court rejects both of Petitioner’s arguments and finds that after May 25, 2001, the parties’ prior joint account became, by agreement of the parties, solely Respondent’s account.

Support for the Court’s finding is drawn from the conduct of the parties subsequent to May 25, 2001. When Petitioner relocated to Hong Kong in January 2003, she opened bank accounts into which she deposited her salary and a substantial living allowance. Respondent had no access to that account. By the time she completed 2 1/2 years in Hong Kong, Petitioner had managed to save approximately \$67,000. When she returned to the U.S. she did not divide her savings with Respondent. Instead, she drew upon those funds to sustain an apparently lavish living standard wholly inconsistent with the reality of her financial situation, which was that she was unemployed. Until she again secured employment—approximately seven months after her return—Respondent continued

to pay for mortgage, upkeep, taxes, basic utilities, etc., in the Residence she was occupying. During that period Petitioner appears to have spent in excess of \$30,000 from her savings and incurred substantial additional debt in order to provide food and other personal items for herself (Respondent was covering the mortgage and taxes on the Residence). The Court finds that when Petitioner had substantially depleted “her” savings and incurred other debt, she took advantage of the fact that she still had signing authority in Respondent’s account (the former joint account) by withdrawing \$29,777.29 from that account.<sup>7</sup> Petitioner acknowledged at trial that none of the money she withdrew from Respondent’s account had been contributed by her. The amount withdrawn by Petitioner equaled one half of the balance in Respondent’s account.

Although the parties retained signing rights in each other’s accounts, the Court finds this does not evince an intent to have the parties retain an interest in the other’s accounts. Rather, it was either intended as a convenience to Petitioner (in the case of Respondent’s right to access Petitioner’s account) or resulted from inadvertence (in the case of Petitioner’s right to access Respondent’s account).

When Petitioner left for Hong Kong her son remained in Utah with Respondent.

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<sup>7</sup>Considering interest in the account accruing at 2.5%, the Court finds value of the Petitioner’s withdrawal to have been \$30,105.65. However, at trial Respondent waived any claim to interest. Therefore, only the \$29,777.29 should be credited to Respondent.

Petitioner made periodic deposits into her Utah account which Respondent could access so that he could pay her American Express bills and her son's private school tuition. There was absolutely no evidence that Respondent accessed Petitioner's account for his own benefit; rather, he rendered her a service by paying her bills. On the other hand, the Court could discern no reason why Petitioner remained a signatory after Respondent assumed the joint account as his own. The Court finds that this was mere inadvertence by the parties and not intended to convey any right to Petitioner to access the funds in Respondent's account. As noted earlier, the parties had previously divided the funds in that account evenly, and Petitioner had received her share of those moneys. Therefore, the Court finds that Petitioner wrongfully withdrew these moneys from Respondent's account. Petitioner should be required to return those funds in full by having her share of the equity in the Residence reduced by \$29,777.29.

B. Date for valuation of the Residence. The Residence was sold on or about August, 2006, and resulted in net proceeds of \$488,949.11. Those proceeds have been placed in escrow pending resolution of the issues between the parties. Valuation date for the Residence should be as of the date of sale. This is consistent with the date contemplated by the parties' negotiated Agreement (see discussion below).

After 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). He should be credited with the full value of those extra payments before equity in the Residence is allocated to the parties.

C. Date for valuation of personalty (excluding stock options). As to household furnishings, the parties do not dispute these are marital assets. The only evidence presented at trial was the purchase price of the furnishings. No appraisals establishing present value were provided to the Court, nor was the Court offered any other method by which it could reasonably determine present value. At trial, however, the parties did identify the purchase price of the disputed items. Absent any other measure of present value, the Court adopts the cost of the furnishings at time of purchase (as identified by the parties), and finds that they should share that value on a 50/50 basis. Since Petitioner retained the major furnishings at issue (i.e., the washer and dryer, a Sony TV, a dining set), it is fair and reasonable that Respondent be given credit for his one-half interest in each of

those items, and that after assets are divided, Respondent's one-half interest be subtracted from Petitioner's share of the equity being held in escrow.

As to the value of the 2002 VW Golf, the only evidence presented to the Court was the value listed by Petitioner in her December 2005 financial declaration. At trial, Respondent also adopted the value reported by Petitioner as an appropriate measure of the vehicle's value. Neither party provided evidence of the vehicle's original price, nor of the source of funds used to pay on the car loan prior to the time Petitioner left for Hong Kong. After Petitioner relocated overseas, Respondent made the loan payments on the vehicle from his funds. At a minimum, it appears that both parties contributed to the vehicle's purchase, maintenance, and operation. The Court finds that the VW Golf is marital property subject to equitable division based on the value reported in Petitioner's financial declaration. Since Petitioner retained the vehicle, Respondent should be given credit for his one-half interest in the reported value thereof. Respondent should be reimbursed for his half-interest from Petitioner's share of the equity in escrow.

D. Date of valuation of stock options. Respondent accumulated stock options during the term of the marriage. Those options should be valued as of the date of the divorce trial,<sup>8</sup> and equitably divided between the parties.

E. Date for valuation of pensions/401K plans, etc. Both parties participated in defined *contribution* retirement accounts during the term of their marriage. Additionally, Respondent participated in a defined *benefit* retirement account. Pursuant to the parties' negotiated Agreement, they agreed to divide those amounts equally. During her trial testimony Petitioner acknowledged that Respondent is entitled to one-half of the amounts she accumulated towards retirement during the time she was in Hong Kong. The Court finds that all the pensions, retirement plans, and 401K plans accumulated by the parties from date

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<sup>8</sup>In the usual case, the date of trial is in reasonably close proximity to the time the Divorce Decree enters so that it is often used as a proxy valuation date for the "end of marriage" date. In this case, however, more than 18 months will have lapsed between the trial date and the date the Decree will finally be entered. Neither the parties nor the Court anticipated this protracted delay. Because it is clear that the parties expected the divorce trial to bring finality to their relationship, the Court believes that is the appropriate date to use for valuation, rather than the date when the Divorce Decree is actually entered. In doing so the Court acknowledges that there may have been significant fluctuation in the value of certain assets during the intervening period, but such fluctuation would largely be attributable to market forces rather than to the actions of the parties. Therefore, the Court believes neither party will be disadvantaged by adopting the date of trial as the valuation date.

of marriage to the date of trial<sup>9</sup> should be equitably divided between the parties, and distributed pursuant to Qualified Domestic Relations Orders (“QDROs”).

Sometime in 2006, Respondent removed funds from his 401K account in the amount of \$68,829.64. Because of Respondent’s actions, those funds are no longer available for distribution through a QDRO. The Court finds those funds were marital property subject to equitable division as of the date of trial.

Petitioner is to be credited with one-half of this amount, which should be drawn from Respondent’s share of the equity in escrow. Similarly, Petitioner apparently “cashed out” certain retirement funds totaling approximately \$12,000, including some retirement benefits accumulated during her time in Hong Kong. The Court finds those accounts to have also been marital funds; Respondent apparently did not receive his equal share of those funds. To the extent Petitioner may have accessed such funds, Respondent is entitled to one-half thereof, to be drawn from Petitioner’s share of the funds in escrow.

#### Enforceability of “Divorce Agreement”

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<sup>9</sup>Although it is likely that the value of those pensions/retirement/401K accounts also fluctuated due to market forces, the parties’ own contributions (or those of their employers) to those accounts have also played a role in their present value. Given that the parties anticipated that their relationship would terminate shortly after the divorce trial, the Court also sets the date of trial as the time for valuing the pensions/retirement/401K accounts. To select the date of entry of the Divorce Decree, as suggested by Petitioner, would mean that the parties would be entitled to funds contributed by or on behalf of the other spouse long after the parties intended their relationship to terminate.

13. On or about February 2001 the parties were experiencing marital difficulties. At about that time Petitioner down-loaded, and partially completed, the on-line forms provided by the courts to assist *pro se* parties to petition for divorce. The *pro se* Petition was never filed, but shortly thereafter the parties negotiated and entered into a written Agreement (the previously referenced "Divorce Agreement"). 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.<sup>10</sup> The Court finds that the parties generated the Agreement in contemplation of a divorce proceeding to be filed thereafter.

14. The parties' Agreement covered the following issues:

- A. The mortgage on the Residence.
- B. Who would live at the Residence.
- C. The sale of the Residence.
- D. Respondent's ability to "buy-out" Petitioner's interest in the Residence.
- E. The filing of tax returns and the distribution of any tax refunds until the Decree was entered.
- F. The distribution of 401K and pension plans.

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<sup>10</sup>Petitioner testified that after the parties signed of the Agreement she did not immediately pursue divorce proceedings and the parties "never again" discussed the Agreement. Petitioner testified she gave Respondent her copy of the Agreement when she left for Hong Kong.



G. Alimony.

15. The Agreement was silent as to disposition of personalty, including stock options accruing during the parties' marriage.

16. With respect to each of the issues referenced at ¶14, the Agreement provided as follows:

A. Respondent would be responsible for paying the mortgage on the Residence, but Petitioner would remain on the title.

B. Petitioner and her son, Isaac, would have a continuing right to reside in the home until August 2004, and would be responsible for the cost of utilities and upkeep of the home during that occupancy period.

C. The Residence would be sold "after August 31, 2004"; however, the Agreement did not specify a date by which the sale would be completed.

D. Respondent would have the option to buy out Petitioner's interest by September 1, 2004. If he did so, Petitioner was guaranteed a return of not less than \$70,000. Alternatively, the Agreement provided that the parties would share the equity whenever the Residence was sold.

E. The parties would continue to file joint tax returns, and would share on a 50/50 basis any tax refunds received.

F. The contributions made by the parties to their pensions and/or retirement accounts during the term of the marriage would be divided equally.

G. Petitioner would not seek alimony.

17. In partial fulfillment of the terms of the Agreement, the parties performed as follows:

A. 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.

B. Respondent moved out of the Residence on April 14, 2001. Petitioner remained at the Residence until January 2003, when she left to work in Hong Kong, China. At that point, Respondent moved back into the Residence and assumed responsibility for its maintenance. Petitioner's son, Isaac, remained at the Residence living with, and under the care of, Respondent until after he completed high school. Isaac moved out of the Residence in August 2004.

C. Of the two options available under the Agreement whereby Respondent could address/purchase Petitioner's interest in the Residence, the Court finds that

Respondent chose the option by which the parties would share equally the equity in the Residence once it was sold.<sup>11</sup>

D. For most years after entering the Agreement the parties filed joint tax returns and divided their tax refunds equally. On the two occasions they filed separate tax returns, they each kept any refunds received.

18. Petitioner now argues that she should not be held to the provisions of the Agreement—and, in particular, to her disclaimer of alimony—because there was a failure of a “condition precedent” to its enforceability. Petitioner argues that the Agreement required that the house be sold by August 2004 and that she be paid her \$70,000 in equity by September 1, 2004. Since those actions did not occur by the identified deadlines, Petitioner claims the Agreement does not bar her alimony claim. For the reasons given below as part of the Court’s Conclusions of Law, Petitioner’s argument is categorically rejected.

#### CONCLUSIONS OF LAW

19. The jurisdictional requirements for granting the requested Decree have been met.

20. Petitioner should be awarded a Decree of Divorce from the Respondent on the grounds of irreconcilable differences, with the same to become final upon signing and entry.

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<sup>11</sup>Paragraph 3 of the Divorce Agreement gave Respondent two options: Under paragraph 3.1, the parties could share equally in the equity of the home. Under paragraph 3.2, Respondent could buy out Petitioner’s interest in the Residence by paying her no less than \$70,000.00 by September 1, 2004.

#### Kearns House Proceeds

21. When Respondent placed Petitioner's name on the title to the Kearns house, he effectively gifted Petitioner with one-half of 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 on 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.

#### Enforceability of Divorce Agreement

22. The Court concludes that the Agreement drafted by Petitioner, with modifications provided by Respondent, is an enforceable contract entered into by the parties in contemplation of divorce. The Court concludes that the Agreement is, in essence, a partial stipulation regarding the disposition of most, but not all, the parties' assets. Furthermore, the Court concludes that the

elements of contract have been met: both parties participated in the drafting and revising of the Agreement, ultimately reaching a “meeting of the minds” as to the terms found therein. Both parties accepted certain legal detriments (Respondent assumed responsibility for the mortgage on the Residence, but Petitioner remained on the title; Petitioner gave up the right to alimony), and there was at least partial performance by the parties. Moreover, because Petitioner essentially drafted the Agreement, any ambiguity therein should be resolved against her, as she was in the best position to ensure her concerns were addressed. The fact that the parties did not timely follow-through with the contemplated divorce at or about the time they signed the Agreement does not diminish the Court’s conclusion that it is an enforceable contract. There is more than adequate evidence to support the Court’s determination that the parties knowingly negotiated their Agreement intending to be bound thereby. They also performed in a manner consistent with their understandings of the Agreement. The Court finds Petitioner’s “failure of condition precedent” argument to have no merit. By its terms the Agreement did not require the sale of the home by a date certain—it merely indicated the earliest date by when the Residence would be offered for sale. The Agreement also gave Respondent the option of how to satisfy Petitioner’s claim to equity in the Residence: either by a payment of \$70,000 by September 1, 2004, or by dividing the equity when the Residence actually sold. Since the Residence did not sell as early as the parties may have hoped, Respondent was foreclosed from exercising the first option. When the Residence did sell in 2006, the proceeds were placed in escrow awaiting equitable division.

The Court concludes there were no “conditions precedent” to the enforceability of the Agreement. Furthermore, there is no evidence that either party was subjected to undue pressure or duress by the other in negotiating their Agreement. In short, the Agreement is valid, enforceable, and its terms are binding on the parties.

23. Accordingly, the Court concludes that Petitioner knowingly and intelligently waived any claim to alimony in the Agreement, and is therefore foreclosed from seeking relief from that provision of the Agreement.<sup>12</sup> Because Petitioner is bound to the terms of the Agreement, including the express disclaimer as to alimony, the Court need not analyze that issue further under the *Jones v. Jones* factors.

#### Financial Issues

24. Separation of accounts. Based on the evidence received at trial the Court has found that the parties intended to, and in fact did, separate their checking and savings accounts by May 25, 2001 at the latest. Thereafter, the funds placed into their respective accounts became their separate property. Thus, notwithstanding her signing authority, Petitioner had no entitlement to the funds she withdrew from Respondent’s account (the former joint account) in 2006. Similarly, Respondent had no entitlement to funds placed in Petitioner’s separate accounts after that date. The monies improperly removed by Petitioner from Respondent’s account,

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<sup>12</sup> Indeed, in her Petition, Petitioner expressly stated that neither party should receive alimony from the other (although she qualified her waiver by asking for temporary support).

totaling \$29,777.29, must be refunded to Respondent as follows: After all marital assets have been divided, Respondent's reimbursement shall be drawn from Petitioner's share of the proceeds.<sup>13</sup>

25. Pension, retirement, and 401K accounts. The parties must account to, and arrange for, appropriate one-half credit to the other party for any retirement plans, pensions, or 401K accounts improperly accessed by either side without giving credit to the other. This includes the 401K withdrawals by Respondent, the Hong Kong retirement benefits of Petitioner, and any other such accounts, if any.<sup>14</sup>

26. Pursuant to the Divorce Agreement, the balances of the parties' defined contribution retirement accounts, and Respondent's defined benefit account, should be divided equally pursuant to properly prepared QDROs.

27. Reimbursement for Fix-up and Repair expenses to Residence. Petitioner acknowledges that Respondent is entitled to reimbursement for the monies he expended in repairing the Residence prior to its sale in August 2006. The evidence at trial was that Respondent spent \$7,616.09 in "fix up" costs. Presumably those expenditures enhanced the ability to sell the Residence, to the benefit of both parties. The Court concludes that it is fair and

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<sup>13</sup>Petitioner acknowledged at trial that at the time she withdrew these funds she was aware the Court had ordered the parties not to dissipate disputed assets, but proceeded to withdraw those funds anyway.

<sup>14</sup>Based on the parties' submissions it appears Petitioner liquidated two retirement accounts, and Respondent accessed funds from at least one 401K account.

appropriate that both parties share equally the cost of those repairs. Petitioner should reimburse Respondent for one half of those costs from her share of the equity in escrow..

28. Income Tax Returns. The Court need not address the division of income tax returns since the parties have already done so pursuant to their Agreement. To the extent, if at all, that the parties have filed taxes jointly since the time of the trial, any refund received (if any), should be equally divided.

29. Attorney's fees In her Petition for Divorce Petitioner did not affirmatively seek attorney's fees as part of her requested relief. However, under the statute the Court can award fees equitably in the appropriate case, and before the Commissioner both parties asked that the issue be certified for trial. The Commissioner's Recommendation on this issue stated as follows: "There does not appear to be a basis for a finding that one party or another proceeded unreasonably in this matter. It would appear that respondent's overall financial situation is such that he could contribute towards petitioner's fees were the court to order fees."

30. After considering the evidence at trial, the Court concludes that Petitioner only fully prevailed on one substantial claim—the one that recognized her interest in the Kearns house. Nevertheless, as recommended by the Commissioner, and based on the salary difference between the parties (\$177,000.00 to \$198,000.00 for the Respondent; about \$55,000.00 for the Petitioner), the Court concludes that Petitioner is in need of some assistance towards her attorney's fees, and Respondent is in a position to assist her. Therefore the Court concludes that Respondent should



assist Petitioner in the amount of \$2,500.00 towards her attorney fees. The Court has deliberately limited Petitioner's attorney's fees because these awards are based on equitable considerations, and the Court concludes that Petitioner knowingly and willfully violated a Court order not to dissipate assets. The Court views Petitioner's actions to have been contemptuous of the Court's order. Because she does not come to Court with clean hands, the Court concludes that Petitioner is not entitled to a greater award.

31. Moreover, the Court also concludes that Petitioner should be held responsible for the attorney's fees incurred by Respondent in bringing to the Court's attention Petitioner's wrongful removal of those funds from Respondent's account. Respondent's counsel is directed to submit an Affidavit of attorney's fees incurred on that issue alone. The Court will review the Affidavit in order to determine the reasonableness of the amounts claimed.

32. Respondent's inheritance. Petitioner asserted a claim to one-half of Respondent's inheritance solely on the basis that she had retained signing authority on the account into which he deposited those funds (the former joint account) after May 2001. The Court categorically rejects Petitioner's claim and concludes that the inheritance was Respondent's sole and separate property. As indicated earlier, Respondent used some or all of the inheritance towards retiring the mortgage on the Residence. Therefore, he should receive full credit for that contribution from the escrowed funds.

Miscellaneous issues

33. Other than otherwise addressed herein, the Court concludes that each party should be awarded all assets or debts in his or her individual name, free and clear of any claim or responsibility of the other party.

34. Each party should be ordered to execute and deliver any necessary documents to implement the findings of fact and conclusions of law identified herein.

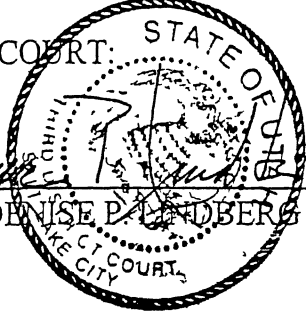
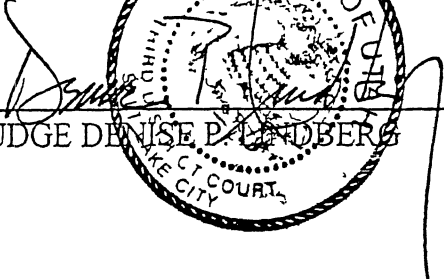
35. Petitioner has requested, and should be granted, a name change to Veronica HyunJoo Lee.

ORDER

36. Counsel are ordered to meet and identify the specific dollar amounts that should be awarded to each party in conformance with this decision. Respondent's counsel to take the lead in convening this meeting.

37. Respondent's counsel is ordered to prepare, and promptly file, a Decree of Divorce consistent with these Findings of Fact and Conclusions of Law.

DATED this 19<sup>th</sup> day of June, 2008.

BY THE COURT:   
  
JUDGE DENISE P. LINDBERG

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 054905684 by the method and on the date specified.

METHOD NAME

Mail	JOHN C GREEN Attorney PET 39 EXCHANGE PL STE 60 SALT LAKE CITY, UT 84111
Mail	TERRY R SPENCER Attorney RES 140 W 9000 S STE 9 SANDY UT 84070

Dated this 19 day of June, 2008.

  
\_\_\_\_\_  
Deputy Court Clerk

ADDENDUM “5”

FILED  
THIRD JUDICIAL DISTRICT COURT  
3000 SEP 23 PM 5:00  
SALT LAKE COUNTY  
BY Amw  
DEPUTY CLERK

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

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VERONICA LEE JACOBSEN,  
Petitioner,

-vs-

GUENTHER JACOBSEN,  
Respondent.

**RESPONSE TO MOTION FOR NEW TRIAL  
AND/OR TO ALTER OR AMEND THE  
FINDINGS OF FACT AND CONCLUSIONS OF  
LAW OR TO VACATE OR AMEND JUDGMENT  
THE DECREE OF DIVORCE**

Case No. 054905684  
Judge Denise Lindberg  
Commissioner Casey

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COMES NOW THE RESPONDENT, Guenther Jacobsen, by and through counsel, Terry R. Spencer, and responds to the Motion For New Trial and/or to Alter or Amend the Findings of Fact and Conclusions of Law or to Vacate or Amend the Decree of Divorce as follows:

Both of Petitioner's Motions to Amend the Findings of Fact and Conclusions of Law are untimely and should be denied.

... Utah Rules of Civil Procedure 50, 52, and 59. See Utah R. Civ. P. 50(b) (stating that a motion for judgment notwithstanding the verdict must be filed within ten days); id. 52(b) (**stating that a motion to amend findings must be filed within ten days**); id. 59(e) (providing that a motion to alter or amend judgment must be filed within ten days). Therefore, the motion to reconsider could not extend the time for filing an appeal. See Utah R. App. P. 4(b) (listing certain postjudgment motions that,

Radakovich v. Cornaby, 2006 UT App. 454. Further, even if Petitioner's Motion to Amend the Decree of Divorce was timely, the Decree restates the Court's Findings and Petitioner's time to object to the Findings has expired. Should the Court find the motion to Amend the Decree has merit, Respondent provides the following as a response to Petitioner's Motion to Amend the Decree of Divorce:

#### **PETITIONER'S STATEMENT OF FACTS**

**Petitioner's ¶1.** The telephone conference with the Court occurred on Friday, February 2, 2007, not February 5, 2007, as stated by Petitioner.

**Petitioner's ¶2.** Petitioner misstates the facts as found by the Court in her Statement of Facts, when she states she filed her proposed Findings electronically. The Court found that Petitioner did **not** file an electronic copy prior to the June 4, 2007 filing of the hard copy of Petitioner's proposed Findings of Fact and Conclusions of Law. In fact, the Court found that Petitioner failed to file an electronic copy of her proposed Findings of Fact and Conclusions of Law even after an additional request by the court clerk on June 21, 2007. Findings, p.2, ll 5 thru 7.

**Petitioner's ¶3, 3 (sic), 4, 5, 6 & 7.** Respondent's counsel attempted to speak with Petitioner's counsel regarding Petitioner's interpretation of the monies which should be awarded to each party. Petitioner's proposed allocation of the proceeds from the sale of the former marital residence was her proposed allocation and did not follow the Findings entered by the Court. However, after receiving the letter from Petitioner's counsel dated July 14, 2008, Respondent's counsel prepared and filed his proposed Decree of Divorce. Petitioner was provided a copy of the proposed Decree of Divorce by facsimile transmission on July 31, 2008, as well as a copy of the

transmittal letter to the Court, which clearly indicated the document was being filed with the Court. Petitioner's reference to the letter as an "ex parte" communication is without merit, as Petitioner admits receiving a copy of the letter. As this court is aware, an ex parte communication with the Court is one that is "without notice to" or "without the opposite party having had notice..." Black's Law Dictionary 662, (4<sup>th</sup> Ed. Rev. 1972). Petitioner admits she was advised of the communication. Further, Respondent is unsure exactly what more "formal correspondence" Petitioner believes Rule 7(f)(2) requires as the Rule contains no such requirement. The Rule states:

Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. **Objections to the proposed order shall be filed within five days after service.** The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object. [Emphasis added.]

**Petitioner's ¶8.** Pursuant to Rule 7(f)(2), Petitioner had five days, or not later than July 11, 2008, which allows for an extra day for facsimile transmission after 5:00 p.m. and three days for mailing, to object to the proposed form of the Decree of Divorce. Petitioner failed to take any action.

On or about August 15, 2008, Respondent prepared a Notice to Submit for Decision, which was filed with the court on August 18, 2008. Petitioner still failed to file any objection to the proposed Decree of Divorce or even object to the Notice to Submit for Decision. The Court did not take any action on the proposed Decree of Divorce until after the time for Petitioner to object had expired. The Decree of Divorce was not signed until August 25, 2008, and, again, Petitioner failed to file any objection with the Court or Respondent's counsel during the 24 days from the time Petitioner was served with the proposed Decree and the time the Decree was signed by the Court.

Based on the foregoing, any objection to the Decree of Divorce pursuant to Rule 7(f)(2) should be overruled and the Decree of Divorce should stand as entered.

**Petitioner's ¶9.** Again, Petitioner misstates the facts. Although the **judgment** resulting from the Decree of Divorce was not entered until August 26, 2008, the Decree of Divorce itself was signed by the Court on August 25, 2008 and entered as an order on August 25, 2008. Petitioner's Motion for a New Trial was filed, according to the Court Docket, later that same day, August 25, 2008.

**Petitioner's ¶10.** Petitioner is correct that she previously objected to May 25, 2001 as the date for division of the "joint" banking accounts. However, the Court considered Petitioner's May 9, 2007 pleadings and found, due to the testimony at trial, that Petitioner did not provide any evidence to refute the May 9, 2007 date and the Court found that "Respondent presented evidence (not contested by Petitioner) that the parties "separated their bank accounts on or before May 25, 2001." Findings, p.7, l.6. The Court also found that the "undisputed testimony was that at the time the parties separated their accounts, all the money in what had been the "joint" account was divided 50/50." Findings, p.7, ll.10 & 11.

**Petitioner's ¶11.** Petitioner's concerns regarding the February 2005 value of Respondent's retirement accounts are also without merit. Perhaps Petitioner forgot that Respondent withdrew the monies from his retirement account in February 2005, even though those withdrawals were indicated by the parties' joint tax filings for 2005, which Petitioner agreed to sign after Respondent agreed to give her 100% of the parties' net tax refund in the sum of \$3,560.00.



**Petitioner's ¶12.** As to the interest on the escrowed proceeds from the sale of the former marital residence, again, Petitioner is either forgetful or misstates the facts to the Court. Petitioner refused to file joint tax returns for the tax years 2006 and 2007, as previously agreed in the Divorce Agreement, which the Court found to be "an enforceable contract." Findings, p.19, ¶22. As a result of Petitioner's failure to comply with the Divorce Agreement, Respondent was forced to declare all of the interest from the escrow account on his tax return and pay taxes on that interest, even though Respondent had not received the monies. Petitioner chose not to declare any of the interest income on her tax returns for the appropriate tax year. Either all of the interest accumulated must be distributed to Respondent, who has already declared the income and paid taxes on that income, or both parties must file amended tax returns for the appropriate tax year. Petitioner would then owe taxes, and possibly interest and penalties, on that interest income and Respondent would receive a refund on Petitioner's portion of the interest income he was previously forced to declare as interest income on his tax filings.

The transmittal letter to the Court, a copy of which Petitioner acknowledges receiving, clearly states the interest is still an outstanding issue and that Respondent would agree to any interlineations the Court deemed necessary. Again, Petitioner had 26 days to object and/or provide her position as to the award of the interest to the Court and Respondent prior to the Court signing the Decree of Divorce and she failed and refused to do so. In fact, Petitioner waited almost six weeks to object to the interest being awarded to Respondent.

**Petitioner's ¶13.** Petitioner's concerns regarding the amount of the remaining sales proceeds is also without merit. The remaining sales proceeds number of \$247,483.59 is correct because, as Petitioner points out, the Court did not address the issue of interest in its Findings.

**Petitioner's ¶14.** Petitioner's objection to paragraph 8(b)(I) of the Decree is actually an untimely objection to the Court's Findings of Fact and Conclusions of Law entered on June 19, 2008. The language included in the Decree of Divorce was taken directly from the Court's Findings, page 9, ll. 11 thru 13, which states "Petitioner should be required to return those funds in full by having **her share of the equity** reduced by \$29,777.29." Petitioner is, once again, filing an untimely objection to the Court's Findings.

Respondent has not obtained a transcript of the oral ruling and Petitioner, although making multiple references to the oral ruling, did not provide a transcript of that ruling with her pleadings. As such, Respondent is unsure as to whether or not Petitioner's representations regarding the oral ruling of the court is correct or incorrect. However, the trial court does have the discretion to amend its oral ruling in its findings, especially after the length of time that passed and the proposed findings submitted by both parties and reviewed by the Court prior to the entry of the Findings.

**Petitioner's ¶15.** Petitioner's concerns regarding the value of the personal property retained by her are, again, an untimely objection to the Findings entered by the Court on June 19, 2008. The Court adopted the purchase price as the value of the disputed items. Findings, p.11, ¶C. Petitioner retained the Dining Room Set (not just the table), valued at \$4,599.64; the Sony TV, valued at \$2,020.54; and the Washer and Dryer valued at \$1,648.32. Those items total value is \$8,268.50 and Respondent's ½ share of that amount is \$4,134.25.

**Petitioner's ¶16.** Petitioner again, untimely, objects to the Court's Findings regarding the value of the VW Golf automobile. The Court found that "the **only** evidence presented to the Court was the value listed by Petitioner in her **December 2005** financial declaration." [emphasis added.] Findings, p.12, ll. 3 thru 4. The Decree correctly sets forth the findings of the Court and Petitioner's objection to this Finding is nothing more than a poorly disguised motion to reconsider the date of the valuation of the VW Golf.

**Petitioner's ¶17.** Once again, Petitioner is filing an untimely objection as to the Affidavit of Attorney's Fees filing by Respondent's counsel. Petitioner received a copy of the Affidavit of Attorney's Fees, together with the proposed Decree and transmittal letter to the Court on July 31, 2008. Petitioner failed and refused to object to the Affidavit of Attorney's Fees until September 10, 2008. The entry of the award of attorney's fees to Respondent was based on the Court's view that Petitioner's actions were "contemptuous of the Court's order." Findings, p.24, ll. 4 thru 5. The Court also stated in its Findings that the Court would review the Affidavit in order to determine the reasonableness of the amounts claimed. Findings, p. 22, ¶20.

**Petitioner's ¶18.** Again, Petitioner is correct that the oral ruling did not specify whether the monies to reimburse Respondent for payment of Petitioner's pre-marital debt should be taken out prior to the division or not. However, if the monies are paid prior to the division of the remaining sales proceeds, Petitioner is not fully reimbursing Respondent the \$14,417.21 as ordered by the Court.

**Petitioner's ¶19.** In objecting to the valuation of the retirement and stock options, Petitioner, once again, forgets that Respondent's retirement accounts and stock options were cashed out and/or

exercised, taxes were paid in 2005 and Petitioner received the parties' entire tax refund.

**Petitioner's ¶20.** Respondent has previously addressed Petitioner's concerns regarding the award of interest on the account in paragraph 10, above.

**Petitioner's Exhibit "D".** Petitioner's table includes the following incorrect numbers:

**Estimated interest** of \$45,000.00, is excessive considering the recent drop in interest rates. Respondent estimates the interest to be between \$39,000.00 and \$40,000.00. Petitioner has discussed the distribution of the interest from the escrow account above. Petitioner has provided absolutely no basis for her receiving any tax free distribution of the interest earned on the escrow account, neither has she agreed to file amended tax returns and pay the taxes due and owing on those monies.

**Extra Mortgage Payments.** Petitioner is, again, filing an untimely objection to the Court's Findings that Respondent should be awarded the extra payments he made to retire the mortgage while Respondent was living outside the country and using her financial resources to support herself and not contributing to the mortgage payments on the former marital residence. Petitioner, once again, is asking the Court to return to the oral ruling, which has been modified by the written Findings of the Court reach after the submission of proposed Findings by both parties. The Findings of the Court clearly state on page 11, ll. 6 thru 7 that "Respondent should be credit with **the full value of those extra payments** before equity in the Residence is allocated to the parties." [emphasis added.] Although, Petitioner stated in her February 21, 2007 response to Respondent's Proposed Findings of Fact and Conclusions of Law that "Respondent is entitled to reimbursement of his extra principal payments in the amount of \$236,094.26..."[emphasis added], the Court did not

limit reimbursement of Respondent's extra payments to principal and specifically found Respondent should be paid the "full value" of the extra payments.

**VW Golf.** Petitioner again files an untimely objection to or request the Court reconsider the evidence at trial as to the valuation of the VW Golf vehicle. The Findings of the Court clearly state the value of the VW Golf vehicle will be as set forth by Petitioner in her December 2005 Financial Declaration. Petitioner declared the value of the VW Golf vehicle to be \$10,275.00, as evidenced by a copy of Petitioner's Financial Declaration, page 3, 5(b), dated December 9, 2005, attached hereto as Exhibit "A" and incorporated herein by reference. The \$5,137.50 set forth in the Decree of Divorce is the correct amount Petitioner owes Respondent for his ½ interest in the VW Golf.

**Furnishings.** Petitioner's valuation of the furnishings does not include the full value of the furnishings she received as set forth above in response to Petitioner's paragraph 12.

**Stock Options.** Petitioner's again requests valuation of the stock options and after tax 401(k) as of the date of decree, not January 2002 and February 2005. Again, those are the dates those accounts were cashed out and Respondent paid the taxes due and owing on those distributions. Just as the value of Petitioner's retirement is the money she cashed out of her retirement. Any other retirement accounts, including the Petitioner's 401(k) valued at \$40,539.99 as of June 30, 2006, would be divided pursuant to qualified domestic relations orders as of the date of trial, the date the Court found the should be the division of all retirement accounts. Findings, p. 14, lines 1 thru 2 and fn. 9.

Petitioner's Exhibit "D" is a gross misrepresentation of the Findings of this Court and is, yet again, another untimely objection to the Findings of this Court entered on June 19, 2008.

### ARGUMENT I

Petitioner's reliance on Rule 60 for relief from the entry of the Findings of Fact, entered on June 19, 2008 and the Decree of Divorce, signed on August 25, 2008, is without merit. The Utah Court of Appeals, in Henshaw v. Estate of Jack King, 2007 UT App 378, reaffirmed Petitioner's obligations as to the entry of any order.

... we reaffirm the generally accepted rule that the moving parties in a 60(b)(6) motion asserting that they had **no notice** of the trial court's judgment must show either "diligence in trying to determine whether judgment had been entered," or that they were "actually misled. . . as to whether there had been entry of judgment." ... Furthermore, "[o]ur rules. . . put the burden on counsel to check periodically with the clerk of the court as to the date of entry of the findings and judgment so that post-trial motions may be timely filed." Automatic Control Prods. Corp. v. Tel-Tech, Inc., 780 P.2d 1258, 1260 (Utah 1989) (holding that trial court did not err by failing to notify counsel promptly after signing findings of fact and conclusions of law and judgment); see also West v. Grand County, 942 P.2d 337, 340 (Utah 1997). [emphasis added.]

Petitioner did not allege that she was not notified of the entry of the Findings. Petitioner cannot show that it was because she was not properly notified of the entry of the Findings, as her counsel was mailed a copy of the Findings by the court. As such, Petitioner cannot use Rule 60 as a defense for her failure to file timely objections to those Findings.

Neither can Petitioner use Rule 60 as a basis to set aside the entry of the Decree. Petitioner acknowledges that she received a copy of the Decree of Divorce prepared by Respondent's counsel on or about July 31, 2008. Petitioner also acknowledges that she received a copy of the transmittal letter to the Court. Petitioner's counsel had the burden to "check periodically with the court" to determine if and when the Decree was signed.

Respondent's counsel made multiple attempts to meet with Petitioner's counsel, but was unsuccessful in arranging that meeting. As this Court is aware, finalization of this matter has been unduly delayed. The Findings were entered by the Court on June 19, 2008 and required Respondent's counsel to "promptly file" the Decree of Divorce. Petitioner provided the exact same numbers included in her proposed Findings, which the Court refused to adopt, in response to Respondent's proposed numbers. Petitioner's counsel sent a letter to Respondent's counsel, but never agreed to schedule an in person meeting or return a telephone call. Petitioner's counsel clearly stated in his letter "I will simply file an objection to the form of the Decree" and then failed to timely file such an objection.

Lastly, Petitioner's counsel's failure to timely object to the Findings and/or the Decree "does not constitute 'mistake, inadvertence, surprise, or excusable neglect,' see Utah R. Civ. P. 60(b)." Swallow v. Kennard, 2008 UT App 134.

## **ARGUMENT II**

Petitioner misstates Rule 7(f)(1) of the Utah Rules of Civil Procedure, which Petitioner repeatedly states requires "formal" notice. Rule 7(f)(1) actually states:

An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made **without notice to the adverse party** may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative. [emphasis added.]

Petitioner does not dispute that she was provided notice of the filing of Respondent's proposed Decree of Divorce, together with the transmittal letter to the Court. There is no requirement in Rule

7(f)(1) that a party provide some additional “formal” notice, or any specific requirement as to the form of the any additional notice. Petitioner was notified that the Decree was being filed with the Court and her request that the Decree be set aside pursuant to Rule 7(f)(1) should be denied.

### ARGUMENT III

Petitioner has not provided any error in law or fact to support her motion for a new trial. Petitioner is providing only the same old arguments she made at trial and in her proposed Findings, which were not incorporated into the Court’s Findings. Petitioner provided absolutely no case law or reference to the Court’s Findings to support her position. Petitioner has not provided any newly discovered evidence relating to the facts as they existed at the time of trial and is only requesting the Court “reconsider” the evidence presented at trial. Such evidence cannot support a motion to amend or alter under Rule 59 of the Utah Rules of Civil Procedure. See, In re Disconnection of Certain Territory, 668 P.2d 544 (Utah 1983); In re S.R., 735 P.2d 53 (Utah 1987); Hancock v. Planned Dev. Corp., 791 P.2d 183 (Utah 1990). If the evidence existed at the time of trial and, it is not newly discovered evidence. See, Hancock v. Planned Dev. Corp., 791 P.2d 183 (Utah 1990).

Petitioner has unsuccessfully attempted to disguise a motion to reconsider as a motion to amend. “*Mere recitation of rule 59 does not convert a motion to reconsider into a legitimate motion for new trial.*” Cline v. State, 2007 UT App 111.

Petitioner has not presented any new evidence that would justify the Court amending its Findings, especially in response to a motion filed well after the ten day deadline. Although Petitioner’s motion is not titled “Motion to Reconsider,” that is what relief the Petitioner is actually seeking from the Court.

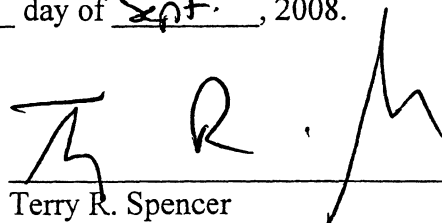


The filing of postjudgment motions to reconsider has become a common litigation practice, notwithstanding the Utah Rules of Civil Procedure's failure to authorize it and our previous attempts to discourage it. In this opinion, we consider whether this practice tolls the time for filing a notice of appeal. We answer this question by absolutely rejecting the practice of filing postjudgment motions to reconsider. We also warn that future filings of postjudgment motions to reconsider will not toll the time for appeal and therefore may subject attorneys to malpractice claims.

Gillett v. Price, 2006 UT 24.

Based on the foregoing, both of Petitioner's post judgment motions should be denied, the Court should find the time to appeal is not tolled and award Respondent his attorney's fees and costs incurred subsequent to trial as set forth in an affidavit of fees to be provided to the Court. In the alternative, this Court should award Respondent his attorney's fees and costs incurred subsequent to the entry of the Findings of Fact and Conclusions of Law. See, Lyngle v. Lyngle, 831 P.2d 1027 1031 (Utah Ct. App. 1992), (holding Petitioner is entitled to an award of attorney's fees in an enforcement action regardless of ability to pay.)

DATED THIS 23 day of Sept., 2008.

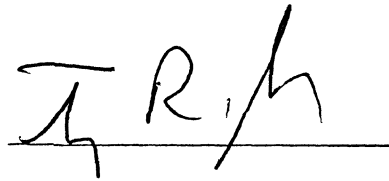
  
\_\_\_\_\_  
Terry R. Spencer  
Attorney for Respondent

CERTIFICATE OF SERVICE

I caused the foregoing to be delivered to Petitioner by faxing and mailing a true and correct copy to:

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

on the 23 day of September, 2008.

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

ADDENDUM “6”

JOHN C. GREEN - 1242  
JOHN C. GREEN, P.C.  
39 Exchange Place, Suite 60  
Salt Lake City, Utah 84111  
Telephone (801) 519-8090

SEP 26 P.M. 1:14



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

VERONICA LEE JACOBSEN,	-----ooOoo-----	<del>RESPONSE</del> <b>REPLY</b> IN RESPONSE TO
Petitioner,	:	RESPONDENT'S RESPONSE TO
	:	MOTION FOR NEW TRIAL AND/OR
v.	:	TO ALTER OR AMEND THE FINDINGS
	:	OF FACT AND CONCLUSIONS OF LAW
GUENTHER JACOBSEN,	:	AND JUDGMENT
	:	Civil No. 054905684
Respondent.	:	Judge Denise Lindberg
	:	
	-----ooOoo-----	

COMES NOW, the Petitioner by and through her attorney of record, and respectfully files this response as follows:

1. Contrary to the statement made by the Respondent at paragraph 1 of his response, "The court issues its Findings of Fact and Conclusions of Law on June 19, 2008, almost eighteen months after the January 31, 2007 trial in this matter. Petitioner did not voice any objection, either by pleadings or correspondence, either written or verbal, to the Court or Petitioner's counsel until August 26, 2008" that Petitioner did not voice any objections by pleading or correspondence until August 26, 2008, it is submitted that Petitioner filed her objection to proposed Findings of Fact and Conclusions of Law which Respondent's counsel prepared and submitted on or about May 1, 2008. Petitioner

filed an objection to the Findings of Fact and Conclusions of Law on May 9, 2008. The subject bank account statements were attached as exhibit "A" to this particular objection. In Petitioner's objection at page 1, of the Objection provides as follows:

"The wording, a final version was compiled by Petitioner, should be changed to read: "Following the parties negotiations a final version was compiled by the Respondent" to comport with the Petitioner's testimony at trial and the courts ruling. In addition, the finding should include a statement that contrary to the Respondent's verified response to Motion for Temporary Order signed by the Respondent on the 23<sup>rd</sup> day of January, 2006, there was no oral modification of the subject agreement. This becomes important because in that response, the Respondent indicated that there had been an oral modification of the Divorce Agreement and that he complied with the terms of the oral modification by paying all monies due to the Petitioner. There was no evidence at trial that any such modification took place or than any payment was made."

2. At pages 2 and 3 of the Objection, Petitioner suggested that proposed finding 4h(1) be changed and stated:

"Paragraph 4h(1) should be changed to read" Petitioner oped a separate account in February 2001. All income from Petitioner's employment went into this account after May of 2001, joint checking account number 603-44837-0 and joint savings account 003-681764 were maintained by the Respondent as his separate accounts. There was no division as of May, 2001. The bank balances as of May 26, 2001 were as follows; joint savings: \$8,037.89, joint checking \$4,785.79, for a total of \$12,823.68. As of that same date, the Petitioner's account balance was \$5,409.12.

This is an appropriate finding since there was no evidence other than Respondent's testimony adduced at trial to prove that the accounts were divided equally. On cross examination Respondent indicated that there was an e-mail reflecting information about the division of the accounts. No such e-mail however was included in the Respondent's trial binder. Copies of account balances are attached as exhibit "A".

3. The Respondent at paragraphs 2, 3 and 4 suggests that Petitioner is asking the court to include evidence not adduced at trial, rearguing what date should be used to determine the division of the bank accounts and once again including evidence not adduced at trial without indicating that there is newly discovered evidence to support this Petition. It is submitted that there is no evidence before this court that, the bank accounts were divided prior to May of 2001, other than the Respondent's testimony during cross examination during the trial, Petitioner's counsel ask Respondent to provide evidence of the bank accounts being separated. The court actually interrupted the cross examination.

MR. GREEN: Your honor, I'm simply asking him if there's anything in writing-

THE COURT : And he's answered. The answer is, he believes it's in the email.

Q. MR. GREEN: Okay. Can you point out email where-

A Yes.

Q. - that agreement is-

A. Email April 29<sup>th</sup>, where I wrote her an email to- on her American Express credit card, with the airline tickets she - then let me see. Then there is an email where she agrees to write a check, yeah, saying we had a balance in savings account before you transferred and so on. So basically the agreements exists in that way that we did it. See court transcript at page 194 lines 3 through 15.

The email of April 29, was never produced at trial. In actuality the email of April 29, addressed the Petitioner's American Express credit card bill, it had nothing to do with the division of bank accounts and as indicated above, Respondent adduced no evidence of the division.

4. In response to the Respondent's statement at paragraph 5, that Petitioner provided no testimony to support her position that the accounts were or should have been divided at a different date, Petitioner has no problem with the fact that the court has determined that the accounts were divided. For this reason, it is reasonable that the court review the accounts as of May 26, as that should be the date of division because there is no physical evidence that there was a prior division of these accounts.

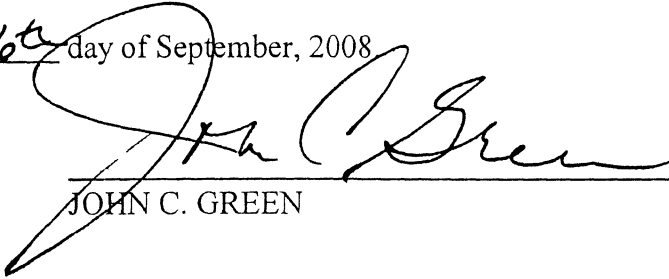
5. At paragraph 7, once again Respondent indicates that the Judge stated "Respondent presented (not contested by Petitioner) that the parties separated their bank accounts on or before May 25, 2001." Once again the only evidence of the division was the testimony of the Respondent and his statement on cross examination that the division was outlined or agreed to in an e-mail was support by an alleged e-mail. The e-mail was never presented. The fact that there were bank accounts however is part of the record and therefore it is appropriate that the court consider the account balances at the end of May because no prior division had been made.

6. At paragraph 11 the Respondent once again indicates that "the petitioner provided no evidence at trial." Once again it is submitted that the evidence relating to the fact that there were joint bank accounts is in the record. Petitioner is simply asking that the court consider an appropriate

day for dividing those accounts and to take into account the monies in the accounts at the end of May and include them as an appropriate calculation.

7. In response to the allegations contained in paragraph 14, as outlined in the Motion for new trial, the Petitioner and counsel at all times have in good faith, attempted to resolve the issues of the calculation ordered by the court to be completed by the parties but once again as outlined in the Motion the Respondent and counsel failed or neglected to respond in any way to Petitioner's request for meetings.

Respectfully submitted this 26<sup>th</sup> day of September, 2008



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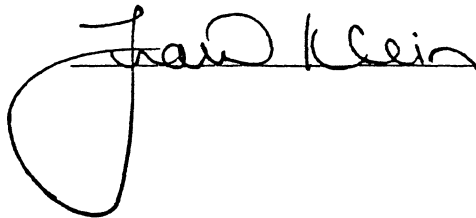
JOHN C. GREEN



CERTIFICATE OF SERVICE

I hereby certify that on the 26<sup>th</sup> day of September, 2008, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing to the following:

Terry Spencer  
140 West 9000 South #9  
Sandy, UT 84070

A handwritten signature in cursive script, reading "Jan Klein", is written over a horizontal line. The signature is written in dark ink.

Pamela T. Greenwood  
Presiding Judge

William A. Thorne, Jr.  
Associate Presiding Judge

Russell W. Bench  
Judge

Judith M. Billings  
Judge

James Z. Davis  
Judge

Carolyn B. McHugh  
Judge

Gregory K. Orme  
Judge

# Utah Court of Appeals

450 South State Street  
P.O. Box 140230  
Salt Lake City, Utah 84114-0230

Appellate Clerks' Office (801) 578-3900  
Judges' Reception (801) 578-3950  
FAX (801) 578-3999  
Utah Relay 1-800-346-4128



Marilyn M. Branch  
Appellate Court Administrator

Lisa A. Collins  
Clerk of the Court

**FILED DISTRICT COURT**  
Third Judicial District

September 24, 2008

SEP 26 2003 Lyn

DAVID S PACE  
PACE & SCHMIDT  
136 E S TEMPLE STE 1600  
SALT LAKE CITY UT 84111

By \_\_\_\_\_  
SALT LAKE COUNTY  
Deputy Clerk

RE: Jacobsen v. Jacobsen

Appellate Case No. 20080802

Dear Mr. PACE,

Please be advised that the notice of appeal in this case has been filed with the Utah Court of Appeals. The case number is 20080802 and should be indicated on future filings and correspondence.

Rule 11(e)(1) of the Utah Rules of Appellate Procedure requires that, within ten days of the filing of the notice of appeal, appellant must submit a transcript request for such parts of the proceedings as the appellant deems necessary. The transcript request should be directed to the court executive in the trial court. A copy of the request should also be mailed to the clerk of the appellate court to which the appeal is taken.

If no transcripts of the proceedings are to be requested, appellant must file a certificate to that effect with the clerk of the court from which the appeal is taken and a copy with the clerk of the appellate court.

This court will permit documents of 10 pages (including attachments) or less that do not require a filing fee to be filed by fax. The faxed document, which must bear a facsimile of the required signature, will be accepted as an "original" document until the true original and any required copies are received by the court. The original must be received by this court within 5 business days from the date of the transmission by fax. If the original is not received within that period, the court will treat the filing as void. A faxed filing is considered "received" when

ADDENDUM “7”

### **Rule 3. Appeal as of right: how taken.**

(a) *Filing appeal from final orders and judgments.* An appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

(b) *Joint or consolidated appeals.* If two or more parties are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in an appeal of another party after filing separate timely notices of appeal. Joint appeals may proceed as a single appeal with a single appellant. Individual appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

(c) *Designation of parties.* The party taking the appeal shall be known as the appellant and the adverse party as the appellee. The title of the action or proceeding shall not be changed in consequence of the appeal, except where otherwise directed by the appellate court. In original proceedings in the appellate court, the party making the original application shall be known as the petitioner and any other party as the respondent.

(d) *Content of notice of appeal.* The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall designate the court from which the appeal is taken; and shall designate the court to which the appeal is taken.

(e) *Service of notice of appeal.* The party taking the appeal shall give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order; or, if the party is not represented by counsel, then on the party at the party's last known address. A certificate evidencing such service shall be filed with the notice of appeal. If counsel of record is served, the certificate of service shall designate the name of the party represented by that counsel.

(f) *Filing fee in civil appeals.* At the time of filing any notice of separate, joint, or cross appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court the filing fee established by law. The clerk of the trial court shall accept a notice of appeal regardless of whether the filing fee has been paid. Failure to pay the filing fee within a reasonable time may result in dismissal.

(g) *Docketing of appeal.* Upon the filing of the notice of appeal, the clerk of the trial court shall immediately transmit a certified copy of the notice of appeal, showing the date of its filing, and a statement by the clerk indicating whether the filing fee was paid and whether the cost bond required by Rule 6 was filed. Upon receipt of the copy of the notice of appeal, the clerk of the appellate court shall enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the trial court, with the appellant identified as such, but if the title does not contain the name of the appellant, such name shall be added to the title.

**History:** Amended effective October 1, 1992; November 1, 1996; November 1, 1999; November 1, 2008.

#### ADVISORY COMMITTEE NOTE

The designation of parties is changed to conform to the designation of parties in the federal appellate courts.

The rule is amended to make clear that the mere designation of an appeal as a "cross-appeal" does not eliminate liability for payment of the filing and docketing fees. But for the order of filing, the cross-appellant would have been the appellant and so should be required to pay the established fees.

**Amendment Notes.** - The 2008 amendment, in Subdivision (f), substituted "shall accept a notice of appeal regardless of whether the filing fee has been paid" for "shall not accept a notice of appeal unless the filing fee is paid" and added the last sentence, and in the first sentence of Subdivision (g), deleted "and payment of the required fee" after "notice of appeal" near the beginning and substituted "a statement by the clerk indicating whether the filing fee was paid and whether the cost bond required by Rule 6 was filed" for "a copy of the bond required by Rule 6 or a certification by the clerk that the bond has been filed, to the clerk of the appellate court."

**Cross-References.** - Justice courts, appeals from, § 78A-7-118.

Juvenile courts, appeals from § 78A-6-1109.

#### NOTES TO DECISIONS

##### Analysis

## **Rule 24. Briefs.**

(a) *Brief of the appellant.* The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references.

(a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant

with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(a)(10) A short conclusion stating the precise relief sought.

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) *Brief of the appellee.* The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) *Reply brief.* The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) *References in briefs to parties.* Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the

injured person," "the taxpayer," etc.

(e) *References in briefs to the record.* References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) *Length of briefs.* Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) *Briefs in cases involving cross-appeals.* If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs. No brief shall exceed 50 pages, and no party's briefs shall in combination exceed 75 pages.

(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal.

(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal.

(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-Appellant.

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee.

(h) *Permission for over length brief.* While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages requested, and the good cause for granting the motion. A motion filed at least seven days before the date the brief is due or seeking five or fewer additional pages need not be accompanied by a copy of the brief. A motion filed less than seven days before the date the brief is due and seeking more than 5 additional pages shall be accompanied by a copy of the draft brief



for in camera inspection. If the motion is granted, any responding party is entitled to an equal number of additional pages without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(i) *Briefs in cases involving multiple appellants or appellees.* In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) *Citation of supplemental authorities.* When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall state the reasons for the supplemental citations. The body of the letter must not exceed 350 words. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) *Requirements and sanctions.* All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

**History: Amended effective October 1, 1992; July 1, 1994; April 1, 1995; April 1, 1998; November 1, 1999; April 1, 2003; November 1, 2004; April 1, 2006; November 1, 2006; April 1, 2008.**

#### **ADVISORY COMMITTEE NOTE**

Rule 24 (a)(9) now reflects what Utah appellate courts have long held. See *In re Beesley*, 883 P.2d 1343, 1349 (Utah 1994); *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1278 (Utah 1987). "To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. '[Attorneys] must extricate [themselves] from the client's shoes and fully assume the adversary's position. In order to properly discharge the [marshalling] duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists.'" *ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc.*, 872 P.2d 1051, 1052-53 (Utah App. 1994) (alteration in original) (quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991)). See also *State ex rel. M.S. v. Salata*, 806 P.2d 1216, 1218 (Utah App. 1991); *Bell v. Elder*, 782 P.2d 545, 547 (Utah App. 1989); *State v. Moore*, 802 P.2d 732, 738-39 (Utah App. 1990).

ADDENDUM “8”

## **Rule 59. New trials; amendments of judgment.**

(a) *Grounds.* Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(a)(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(a)(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(a)(3) Accident or surprise, which ordinary prudence could not have guarded against.

(a)(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(a)(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(a)(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(a)(7) Error in law.

(b) *Time for motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) *Affidavits; time for filing.* When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) *On initiative of court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) *Motion to alter or amend a judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

**Compiler's Notes.** - This rule is similar to Rule 59, F.R.C.P.

**Cross-References.** - Harmless error not ground for new trial, U.R.C.P. 61.

Juror's competency as witness as to validity of verdict or indictment, Rules of Evidence, Rule 606.

## NOTES TO DECISIONS

### Analysis

## **Rule 60. Relief from judgment or order.**

(a) *Clerical mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

**History: Amended effective April 1, 1998.**

### **ADVISORY COMMITTEE NOTE**

The 1998 amendment eliminates as grounds for a motion the following: "(4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action." This basis for a motion is not found in the federal rule. The committee concluded the clause was ambiguous and possibly in conflict with rules permitting service by means other than personal service.

ADDENDUM “9”

## **CHAPTER 4**

### **COURT OF APPEALS**

#### **Section**

78A-4-101. Creation - Seal.

78A-4-102. Number of judges - Terms - Functions - Filing fees.

78A-4-103. Court of Appeals jurisdiction.

78A-4-104. Location of Court of Appeals.

78A-4-105. Review of actions by Supreme Court.

78A-4-106. Appellate Mediation Office - Protected records and information - Governmental immunity.

#### **78A-4-103. Court of Appeals jurisdiction.**

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire, and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63G-3-602;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its review of agency adjudicative proceedings.

**History:** C. 1953, 78-2a-3, enacted by L. 1986, ch. 47, § 46; 1987, ch. 161, § 304; 1988, ch. 73, § 1; 1988, ch. 210, § 141; 1988, ch. 248, § 8; 1990, ch. 80, § 5; 1990, ch. 224, § 3; 1991, ch. 268, § 22; 1992, ch. 127, § 12; 1994, ch. 13, § 45; 1995, ch. 299, § 47; 1996, ch. 159, § 19; 1996, ch. 198, § 49; 2001, ch. 255, § 20; 2001, ch. 302, § 2; renumbered by L. 2008, ch. 3, § 350; 2008, ch. 382, § 2210; 2009, ch. 344, § 42.

**Amendment Notes.** - The 2008 amendment by ch. 3, effective February 7, 2008, renumbered this section, which formerly appeared as § 78-2a-3.

The 2008 amendment by ch. 382, effective May 5, 2008, updated references to conform to the recodification of Title 63.

The 2009 amendment, effective May 12, 2009, added the second comma in the name of the Division of Forestry, Fire, and State Lands.

**Cross-References.** - Composition and jurisdiction of military court, §§ 39-6-15, 39-6-16.