

2009

Michael S. Robinson v. Debra J. Robinson : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL S. ROBINSON,

Petitioner/Appellant,

v.

DEBRA J. ROBINSON,

Respondent/Appellee.

BRIEF OF APPELLEE

Case No. 20090082

Trial Court No. 074900501

BRIEF OF APPELLEE DEBRA J. ROBINSON

APPEAL FROM A DECREE OF DIVORCE ENTERED BY THE THIRD JUDICIAL DISTRICT COURT
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JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(h) (2009) and Rules 3 and 4 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

I. Issue: Whether the trial court abused its discretion in adopting the Commissioner's recommendation and the parties' Stipulation and Property Settlement Agreement (the "Stipulation"), which was signed by both parties after consultation with their respective counsel and experts, as its basis for dividing the parties' property. The standard of appellate review for property distribution in a divorce action is abuse of discretion. *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 8, 176 P.3d 476.

II. Issue: Whether the trial court abused its discretion in refusing to revisit and rewrite the terms of the parties' Stipulation when enforcement of the Stipulation as written appeared fair and equitable on its face and the parties acknowledged in writing that the division of property represented a fair and equitable division. The standard of appellate review for property distribution in a divorce action is abuse of discretion. *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 8, 176 P.3d 476.

III. Issue: Whether the trial court erred in overruling Mr. Robinson's objections to the Commissioner's recommendation and denying Mr. Robinson an evidentiary hearing when both parties had a full and fair opportunity to present evidence and testimony by way of affidavits and exhibits and these documents were reviewed before the ruling enforcing the parties' Stipulation. The standard of review for modification of a

divorce decree is abuse of discretion, but a determination based on a legal conclusion is reviewed for correctness. *Sill v. Sill*, 2007 UT App 173, ¶ 8, 164 P.3d 415.

DETERMINATIVE LAW

There are no constitutional provisions, statutes, ordinances, or rules that are determinative of these issues.

STATEMENT OF THE CASE

Nature of the Case

This appeal questions the abilities of parties in a divorce action to voluntarily enter into stipulations to divide marital property and then be bound by such an agreement once it has been incorporated into a decree of divorce. At the center of the dispute is a parcel of real property known as the Phoenix Plaza (the “Plaza”), a strip mall in Southern Utah which represents the parties’ most significant asset. The parties negotiated directly and also participated in mediation with the goal of dividing their marital property and resolving all issues of their divorce action. Ultimately, the parties reached a stipulation that both were willing to sign. The Stipulation awarded the Plaza to Mr. Robinson and required him to refinance the mortgage encumbering the property and pay Ms. Robinson the amount of \$1,784,419, representing her equity in the asset after certain offsets were taken into account. As is appropriate and customary, the trial court based its findings of facts and conclusions of law on the signed Stipulation, which the court found to be fair and equitable.

Unhappy with the terms of the Stipulation after the fact, Mr. Robinson has claimed defenses to enforcement of the Stipulation, even though he himself breached the Stipulation within one month of its being made. Specifically, Mr. Robinson asserts that he was misled and that the assumptions underlying the parties' Stipulation were not met. In spite of Mr. Robinson's objections to a result which he chose (notably with the advice of experts and counsel), the trial court upheld the terms of the parties' Stipulation and entered its Decree of Divorce. Based on the evidence, and in an effort to achieve equitable distribution of the marital estate, the trial court properly adopted the Commissioner's recommendation and the Stipulation of the parties as its basis for dividing the marital estate. To do otherwise would disregard the agency and competency of individuals who, when represented by counsel and not under any type of duress, choose to bind themselves to contractual responsibilities and would unnecessarily open the door for the rescission of contracts for nothing more than hindsight.

Course of Proceedings and Disposition at Trial

Ms. Robinson generally accepts Mr. Robinson's statement of the course of proceedings except for the statement in the second paragraph regarding the "obvious difficulties, if not impossibility, of Mr. Robinson being able to comply with the Stipulation," and makes the following additional statements and clarifications.

On November 2, 2007, the parties successfully reached a resolution of their issues in mediation by which they distributed their properties and debts. (R. 115). The mediation was the culmination of ongoing settlement discussions throughout 2007. (R. 114). A

written Stipulation, which had already undergone several drafts, was signed at mediation and filed with the Court on November 6, 2007. (R. 14-28). On November 19, 2007, Ms. Robinson submitted the Decree of Divorce to the Court along with the necessary papers for entry. (R. 504). Ms. Robinson subsequently filed a Motion for Entry of Decree of Divorce. (R. 29-30).

On February 12, 2008, Mr. Robinson filed a Motion to Enter Bifurcated Decree of Divorce and to Stay Entry of Respondent's Proposed Findings of Fact, Conclusions of Law and Decree of Divorce and/or Set Aside Stipulation. (R. 38-88). On August 4, 2008, Mr. Robinson filed a second Motion to Set Aside Stipulation and Enter Bifurcated Decree of Divorce and an accompanying memorandum and declaration. (R. 95-190).

On September 29, 2008, Ms. Robinson filed a Supplemental Motion for Entry of Decree with an Affidavit and a Memorandum (i) in Opposition to Mr. Robinson's Motion to Set Aside Stipulation and Enter Bifurcated Decree of Divorce and (ii) in support of her motion for the Court to enter the Decree of Divorce. (R. 196-301).

On October 6, 2008, a hearing was conducted before Commissioner Michael S. Evans on Mr. Robinson's Motion to Set Aside Stipulation and on Ms. Robinson's Supplemental Motion for Entry of Decree. (R. 320). After considering the proffers of evidence, arguments, and the papers filed in support and opposition to the motions, the Commissioner recommended that Mr. Robinson's Motion to Set Aside Stipulation be denied and that Ms. Robinson's Supplemental Motion for Entry of Decree be granted. (R. 320, 484-85).

Ms. Robinson objected to the portion of the Commissioner's recommendation which denied her request for attorney's fees. (R. 321-36). Mr. Robinson did not timely file an objection to the Commissioner's recommendation, but rather requested an extension which was objected to by Ms. Robinson. (R. 337-42, 345-55). The Court ultimately granted Mr. Robinson's 6(b) Motion for Enlargement of Time. (R. 356-60). Thereafter, Mr. Robinson filed an Objection to the Commissioner's Recommendation and Request for Evidentiary Hearing and a supporting memorandum. (R. 361-474).

On December 24, 2008, after reviewing the evidence as presented and a transcript of the prior hearing, Judge Glenn K. Iwasaki denied both parties' objections and affirmed the Commissioner's recommendation, finding no error or abuse of discretion. (R. 657-59). On December 31, 2008, the Court entered its Findings of Fact and Conclusions of Law and the Decree of Divorce. (R. 660-75, 676-89).

Statement of the Facts

The parties married on October 4, 1992. (R. 661). Mr. Robinson filed a petition for divorce on February 2, 2007. (R. 1-5). Mr. Robinson is a sophisticated investor who purchased many investment properties before and during his marriage to Ms. Robinson. (R. 197).

During the course of the marriage, the parties acquired numerous parcels of income-producing real property including condominiums, vacant land, and two strip malls. (R. 15, 113). The parties divided the marital estate pursuant to a signed Stipulation

arrived at after substantial negotiations and a formal mediation—all of which occurred while both parties were represented by counsel. (R. 662-66).

The Phoenix Plaza

Located in St. George, Utah, the Phoenix Plaza is a strip mall that the parties purchased in 2004. (R. 113, 198). The Plaza, in which space is leased to numerous commercial tenants, has provided the main source of income for the parties during the course of their marriage. (R. 114, 456). While Ms. Robinson has primarily provided the bookkeeping services associated with the Plaza, Mr. Robinson “has had continuing access to all the information regarding the financial status of the Plaza” including value, monthly income, and expenditures. (R. 198, 646). Additionally, Mr. Robinson has had original copies of all tenant leases on his computer showing when they were set to expire. (R. 647).

Negotiations and Mediation

During much of 2007, the parties engaged in direct negotiations and drafted agreements with the intention of dividing their marital property. (R. 114). On November 2, 2007, the parties participated in a mediation session with Karin Hobbs at which they finalized a stipulation intended to settle all issues of the divorce action. (R. 115, 197, 660). Both parties were represented by counsel at the mediation. (R. 115). Both parties had the opportunity to and, in fact, did consult with financial advisors and experts regarding the terms of the Stipulation. (R. 199). During the mediation, Mr. Robinson specifically made phone calls to his accountant and real estate broker verifying the value

of the Phoenix Plaza. (R. 199). The parties stipulated to a value for the Plaza of \$7.25 million although the parties never agreed on the underlying elements for arriving at that figure. (R. 115, 199-200). Mr. and Ms. Robinson signed the Stipulation the day of the mediation. (R. 26-27).

Pursuant to the parties' Stipulation, the Phoenix Plaza was awarded to Mr. Robinson on the condition that he (1) refinance the mortgage encumbering the Plaza and (2) pay Ms. Robinson the amount of \$1,784,419 for her equity in the Plaza plus and minus certain offsets. (R. 664). The Stipulation expressly stated that Mr. Robinson had to submit the application to refinance the mortgage within fifteen days of signing the Stipulation. (R. 665). A rate of eight percent interest was to accrue on the unpaid principal if the refinancing had not occurred within 120 days of the parties having signed the Stipulation. (R. 665).

The parties' Stipulation was not solely the result of a one-day mediation session. Rather, the parties engaged in extensive discussions and negotiations about how to distribute their property throughout much of 2007. (R. 114). Moreover, a few days prior to mediation, the parties—at the initiation of Mr. Robinson—met with their accountant, Steven Shields, and discussed the financial consequences of refinancing the Phoenix Plaza. (R. 198). At this meeting, Ms. Robinson had no documentation with her besides a common area maintenance statement showing 2006 expenses, which she used, along with other assumptions, to prepare a handwritten financial analysis of the Plaza. (R. 199, 401). The analysis Ms. Robinson created and provided to Mr. Robinson was “a rough, hastily

constructed, estimated worksheet” provided only for the purpose of illustration and was not incorporated into the parties’ Stipulation. (R. 199, 14-28). Mr. Robinson did not rely on the document which he now claims was a misrepresentation. (R. 199). In fact, he consulted with his accountant, and they both concluded that the income as represented on Ms. Robinson’s handwritten worksheet was overstated. (R. 199).

Although Mr. Robinson has alleged that he was misled regarding the Plaza’s leasehold status, he had knowledge in October 2007 that several leases were expired or expiring and being renegotiated. (R. 201, 248). Furthermore, the Plaza was fully occupied on the day of mediation, a fact which Mr. Robinson acknowledged through a summary he prepared. (R. 201, 456). The first vacancy occurred thereafter in March 2008. (R. 201). Currently, the Plaza has only three vacancies. (R. 209).

Mr. Robinson Breaches the Stipulation

According to the terms of the Stipulation reached during mediation, Mr. Robinson should have filled out an application to refinance the mortgage on the Phoenix Plaza on or before November 17, 2007—fifteen days from the signing of the Stipulation. (R. 18-19). He did not and has not refinanced the mortgage on the Plaza in spite of opportunities to do so. (R. 203, 253). Despite encouragement from commercial loan broker John Gottschall to not speculate about interest rates and to lock in loan terms, Mr. Robinson refused to complete a loan application in November 2007. (R. 253). Moreover, he did not submit a loan application until January 17, 2008. (R. 147-61).

In contrast, Ms. Robinson has been cooperative in attempting to assist Mr. Robinson to refinance the mortgage. (R. 208). For example, on the first business day following mediation, Ms. Robinson contacted the parties' commercial mortgage broker and got loan quotes, which she promptly forwarded to Mr. Robinson. (R. 203, 253).

Mr. Robinson's delays in submitting a loan application and attempts to set aside the parties' Stipulation are nothing more than his attempt to renegotiate the terms of the parties' Stipulation related to the Phoenix Plaza, an effort he commenced almost immediately after the conclusion of the mediation. (R. 197-98, 241). He was looking for narrow, ideal terms of a loan while overlooking viable options as confirmed by John Gottschall (R. 205, 209, 253-54). Specifically, Mr. Robinson wanted nothing less than a twenty-year term and a twenty-year amortization, as he expressed in a conversation with Ms. Robinson. (R. 203). Following mediation, Mr. Robinson also tried to renegotiate items such as security deposits and a new roof on the Plaza. (R. 203).

The first time Mr. Robinson requested any financial information from Ms. Robinson to facilitate an actual loan was February 1, 2008—more than two months after he should have applied for a loan refinance on the Plaza. (R. 206). Even so, Mr. Robinson's attorney alleged that Ms. Robinson failed to provide information required for the loan application. (R. 206, 461-62).

In truth, Ms. Robinson was unable to "assist Petitioner in preparing and filing the loan refinance application" as agreed to in the Stipulation because of Mr. Robinson's own failure to forward to Ms. Robinson necessary information regarding rent deposits and

Plaza supplier bills—information to which Mr. Robinson alone had access. (R. 19, 206-07). Ms. Robinson could not “provide financial statements or other reports until [Mr. Robinson] sen[t] [her] the underlying source documents.” (R. 208). She did not receive this information from Mr. Robinson until February 2008. (R. 207). Thus, she could not have prepared any type of report or financial statement until February 2008. In spite of Ms. Robinson’s inability to compile information she had not yet received from Mr. Robinson, Mr. Robinson requested from her year-to-date financial information on the Plaza in mid-December. Ironically, this was already one month after the loan application should have been submitted and was not the result of a lender request. (R. 205).

Commissioner’s Findings

At a hearing on May 6, 2008, Commissioner Michael S. Evans found that “at the time [the Stipulation was signed], it’s clear to me that the deal was reached in fair fashion, and it represented the parties’ agreement at the time[.]” (R. 491). He also found that throughout the parties’ negotiations, Ms. Robinson did not engage in fraudulent or deceptive behavior. (R. 491). According to the transcript of the Commissioner’s ruling at the hearing:

Mr. Robinson chose freely and voluntarily and with the advice of counsel and others to enter into the terms of this Agreement. To the verbal extent he relied upon Ms. Robinson’s handwritten analysis or any other verbal representations that she made, Mr. Robinson chose to rely upon those representations and he chose not to include any of those representations in the Settlement Agreement, to make any reference to them whatsoever, or to include them as pre-conditions.

(R. 491).

SUMMARY OF THE ARGUMENT

The law recognizes the right of individuals to enter into contracts and craft their own legal agreements, especially in the specific case of divorce. Consequently, trial courts should be extremely hesitant to substitute their own judgment for that of the parties, who are more familiar with their individual situations than any judge could ever hope to be. In divorce proceedings, courts have broad discretion in dividing marital property—discretion which allows them to adopt parties' stipulations as their findings of fact and conclusions of law. While it is certainly possible for courts to reject or revise the terms of a stipulation and property settlement agreement in limited circumstances, it is both customary and appropriate to base a final decree of divorce on a stipulation of parties. The case law is clear that a divorce stipulation should be adopted and enforced as the order of the court except in extremely limited circumstances. To hold otherwise would discourage settlement and undermine the effect of contracts.

Another element of the discretion given to trial courts in divorce proceedings is that evidentiary hearings are allowed but not required. Instead, evidence is presented in the form of affidavits and other papers, including written stipulations. The trial court in this case relied on the evidence before it to make sufficient findings upon which its property distribution was based. The court should not disturb the trial court's decision, which achieved an equitable result.

There is nothing unique about the facts of this case that warrant any type of relief for Mr. Robinson. Because he voluntarily signed the parties' Stipulation and then

breached his responsibilities thereunder, he may not now claim defenses of mistake and impossibility. With the benefit of legal counsel, the parties carefully negotiated and crafted an agreement, which they both were willing to sign. Accordingly, the court did not abuse its discretion in denying Mr. Robinson's objection and enforcing the Stipulation of the parties as the order of the court.

ARGUMENT

I. IT WAS APPROPRIATE FOR THE TRIAL COURT TO ACCEPT THE COMMISSIONER'S RECOMMENDATION BECAUSE A STIPULATION MADE IN ANTICIPATION OF DIVORCE SHOULD BE ENFORCED ABSENT FRAUD OR ANOTHER COMPELLING REASON.

Under Utah law, a stipulation reached by divorcing spouses regarding property division should be recognized and enforced by the courts. *Sweet v. Sweet*, 2006 UT App 216, ¶ 3, 138 P.3d 63 (noting that spouses have general authority "to arrange property rights by contract." (quoting *Reese v. Reese*, 1999 UT 75, ¶ 24, 984 P.2d 987)); *Bayles v. Bayles*, 1999 UT App 128, 981 P.2d 403 ("Stipulations entered into in contemplation of a divorce 'are conclusive and binding on the parties unless, upon timely notice and for good cause shown, relief is granted therefrom.'" (quoting *Maxwell v. Maxwell*, 796 P.2d 403, 406 (Utah Ct. App. 1990))); *Colman v. Colman*, 743 P.2d 782 (Utah Ct. App. 1987) (stating that "a parties' stipulation as to property rights in a divorce action [is] advisory and usually followed").

"[P]arties to litigation are free—indeed encouraged—to stipulate to the resolution of their disputes and, when they do so, the courts of this state will enforce those

agreements as written and will not paternalistically substitute their judgment for that of the parties.” *Sill v. Sill*, 2007 UT App 173, ¶ 23, 164 P.3d 415 (J. Orme, concurring). Accordingly, when a party agrees to sign a settlement, he or she “waive[s] the right to claim that such agreement should contain additional or different terms.” *Stone v. Stone*, 2008 UT App 154, at *1 (unpublished).

Admittedly, courts have discretion to reject or set aside settlement agreements. *See Nunley v. Nunley*, 757 P.2d 473, 476 (Utah Ct. App. 1988) (finding “no abuse of discretion in the court’s rejection of the settlement agreement as being inequitable”). Yet, the exceptions are few to the general rule that courts enforce stipulations as written. *See e.g., Sill v. Sill*, 2007 UT App 173, ¶ 12, 164 P.3d 415 (noting that waivers of alimony and child support in stipulations are only recommendations and can be disregarded by the court); *Sweet v. Sweet*, 2006 UT App 216, 138 P.3d 63 (emphasizing the deference given to divorce stipulations absent fraud or duress); *Tanner v. Carter*, 2001 UT 18, ¶ 27, 20 P.3d 332 (stating that a court has “discretion to set aside [a] stipulation if it was based on erroneous assumptions that could affect the rights of parties who had not participated in the stipulation.”). One situation in which courts may disregard a stipulation is where child support or alimony is improperly curtailed. *Naylor v. Naylor*, 700 P.2d 707 (Utah 1985).

Legislators who enacted the law were probably aware of a fact, which is a matter of common knowledge to trial courts, that parties to divorce suits frequently enter into agreements relative to alimony or for child support which, if binding upon the courts, would leave children or divorced wives inadequately provided for. It is therefore reasonable to assume that *the law was intended to give the courts power to disregard the stipulations or agreement of the parties in the first instance and enter judgment for such*

alimony or child support as appears reasonable, and to thereafter modify such judgments when change of circumstances justifies it, regardless of attempts of the parties to control the matter by contract.

Id. at 709-10 (emphasis in original) (quoting *Callister v. Callister*, 261 P.2d 944, 948-49 (Utah 1953)).

In this case, Mr. and Ms. Robinson crafted and signed a Stipulation to resolve all issues pertaining to their divorce, including the ownership of and obligations related to the Phoenix Plaza. (R. 115-16, 197, 660). The parties had authority to reach this Stipulation and the trial court had discretion to adopt and enforce the Stipulation between the parties. While the trial court could have rejected the parties' Stipulation as inequitable, it chose instead to enforce the Stipulation's terms. (R. 657-89). In other words, none of the narrow exceptions to the general rule were found to apply. First, both parties actively participated in the extensive negotiations conducted prior to mediation, and both parties actively participated in the mediation and were present for the drafting and signing of the Stipulation. (R. 26-27, 115, 197, 199). Second, the disputed provisions of the Stipulation had no bearing on any ongoing child support or alimony obligation. (R. 14-28). Moreover, Mr. Robinson has at no time alleged that he signed the Stipulation as the result of fraud or duress on the part of Ms. Robinson. (R. 38-85, 112-90, 644-51). In short, it was entirely within the trial court's discretion to accept the Commissioner's recommendation and enforce the parties' Stipulation as written.

- a. **Both parties had equal and ample opportunity to review relevant documents and consult with experts and advisors prior to signing the Stipulation.**

The primary thrust of Mr. Robinson's argument that his performance under the Stipulation should be excused and the parties' assets reallocated is mutual mistake. (Appellant Brief 4-5, 14, 19-20, 22-25). He asserts that both parties made false assumptions in contemplation of the Stipulation—specifically regarding the value of the Plaza, its future income, and its continued occupancy. (Appellant Brief 23). Interestingly, Ms. Robinson has at no time maintained that she made a mistake when she signed the parties' Stipulation. (R. 31-33, 196-284). Thus, at best there could only be a unilateral mistake, not a mutual mistake.

While it is possible to set aside a stipulation or contract on the basis of mistake, “[a] party cannot avoid a divorce decree simply by ‘claiming a mistake in entering into the stipulation’ on appeal.” *Collins v. Collins*, 1999 UT App 187, at *1 (unpublished) (quoting *Maxwell v. Maxwell*, 796 P.2d 403, 406 (Utah Ct. App. 1990)). It would be especially rare for a court to set aside a stipulation where the party claiming the mistake is a sophisticated investor who had legal representation during the entire course of the relevant negotiations. *See Collins v. Collins*, 1999 UT App 187 (unpublished) (finding stipulation binding where wife was represented by counsel and took an active part in the negotiations); *Maxwell v. Maxwell*, 796 P.2d 403, 406 (Utah Ct. App. 1990) (finding stipulation binding even where a mistake existed). To provide a successful defense, the alleged mistake must be one of present facts, not future unknowns.

It is well settled that a contract is voidable if there is a mutual mistake of fact. However, there can be no mutual mistake as to an event which is to

occur in the future. This rule is justified because ‘a contract often functions primarily to insulate the parties from uncertainty and to allocate the risk of future events.’

Arnell v. Salt Lake County Bd. of Adjustment, 2005 UT App 165, ¶ 41, 112 P.3d 1214

(differentiating between failure of expectation and mutual mistake of material fact)

(citations omitted).

Mr. Robinson has not cited any case law where a mistake provided sufficient grounds for not enforcing a divorce stipulation. The fact that the parties were both represented by counsel and had the opportunity to review their Stipulation and consult with legal and financial advisors makes this case distinguishable from the cases cited by Mr. Robinson where *non-divorce contracts* were found unenforceable on the basis of mistake. (R. 115, 199).

As noted earlier, Mr. Robinson did not rely solely on representations from his wife when he chose to sign the Stipulation which formed the basis for the parties’ Decree of Divorce. Rather, he consulted with his counsel, accountant, and real estate broker. (R. 199). He relied on his prior experience as a real estate investor and businessman. (R. 197). And given the fact that the parties were in the middle of a divorce, he exercised a healthy degree of skepticism and disbelief, questioning the information provided by Ms. Robinson. (R. 199).

When the parties entered into their Stipulation, neither could foresee nor control the economic downturn of 2008 and how that economy would impact the vacancies and value of the Phoenix Plaza. (R. 366). In fact, in November 2007, the parties—after

considering all the data they chose to review—stipulated to the compromised value for the Plaza of \$7.25 million. (R. 18, 24). Mr. Robinson undoubtedly concluded that the leases were secure enough to enter into the Stipulation. (R. 201, 248, 456). Only later, after the passage of time and further investigation by Mr. Robinson, did the terms of the Stipulation begin to appear more favorable to Ms. Robinson. Yet, the changes in the Plaza's net income and tenancies were not a result of Ms. Robinson's surreptitious behavior. (R. 491). Nor was Mr. Robinson denied access to any information he deemed necessary to review prior to his signing of the Stipulation. (R. 198, 646, 671). The facts about which Mr. Robinson alleges to have been misled did not exist at the time the parties signed the Stipulation. Thus, there was necessarily no mistake of fact and thereby no sufficient reason for dismissing Mr. Robinson's obligations as outlined in the Stipulation.

b. Mr. Robinson's desire for a more favorable outcome does not rise to the level of impossibility in this case.

Mr. Robinson has also argued that he should be relieved of his contractual obligations based on the doctrine of impossibility. "The doctrine of impossibility of performance is one by which a party may be relieved of performing an obligation under a contract where supervening events, unforeseeable at the time the contract is made, render performance of the contract impossible." *Holmgren v. Utah-Idaho Sugar Co.*, 582 P.2d 856, 861 (Utah 1978). The party invoking the defense of impossibility must be without

fault and cannot have foreseen the event which made performance of the obligation impossible. *W. Props. v. S. Utah Aviation, Inc.*, 776 P.2d 656, 658 (Utah Ct. App. 1989).

Additionally, courts are hesitant to undo contracts simply because one party claims to have been misinformed or has experienced regret. *See id.* (concluding that a defendant was “bound by the sublease, regardless of whether he read or understood the full import of what he signed.”). As stated by the Utah Court of Appeals,

a signatory cannot, with hindsight, claim ignorance of the contract and thereby escape liability. ‘One party to a contract does not have a duty to ensure that the other has a complete and accurate understanding of all terms embodied in a written contract. Each party has the burden to understand the terms of a contract before he affixes his signature to it and may not thereafter assert his ignorance as a defense.’

Id. (quoting *Resource Mgmt. Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1047 (Utah 1985)). Courts “will not disturb a stipulation negotiated and voluntarily entered simply because a party has come to regret the bargain made.” *Collins v. Collins*, 1999 UT App 187, at *1 (unpublished).

In this case it is undisputed that Mr. Robinson did not submit a loan refinance application within the requisite time period under the Stipulation. (R. 117, 203, 253, 646). Therefore, Mr. Robinson breached his obligations by not securing the loan as he agreed to do. It is irrelevant to speculate what loan terms may or may not have been possible given the benefit of hindsight. The simple fact is that Mr. Robinson did not live up to his part of the contract. Therefore, it would be inequitable for this Court to allow him to now

find protection under the defense of impossibility. Moreover, no evidence has been presented that it remains impossible for Mr. Robinson to refinance the mortgage.

The known volatility and uncertainty of the credit market is another fact that prevents Mr. Robinson from invoking the defense of impossibility. It was entirely foreseeable to both parties that the credit market does and will change over time. Although the parties stipulated to a value of the Plaza, this assumption was just that—an assumption which the parties chose to rely on when they entered into their Stipulation. The value of the Plaza was not established as a condition precedent for Mr. Robinson's duties. (R. 14-28). The parties could have implemented a formula to determine the amount Mr. Robinson would be obligated to pay Ms. Robinson; for example, one half of the value of the Plaza once it was established by appraisal. But this the parties did not do. Instead, the parties inserted a specific value which would be paid to Ms. Robinson. (R. 18). That is the Stipulation that both parties signed. Thus, the court did not abuse its discretion when it adopted the parties' Stipulation as its basis for dividing the marital property in this case because neither mistake nor impossibility fit as a defense given the facts before the court.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ACCEPTING THE PARTIES' STIPULATION OF FAIRNESS AS ITS FINDING OF FACT AND CONCLUSION THAT THE PROPERTY DIVISION AGREED TO WAS EQUITABLE.

It is unnecessary for a judge to enter findings about mutual mistake and impossibility when the evidence before the court supports the conclusion that a particular

property division is equitable. In this case, the parties' Stipulation negated the need for such additional findings.

[A stipulation] has all the binding effect of findings of fact and conclusions of law made by the court upon the evidence. The rationale is that the stipulation constitutes an agreement of the parties that all the facts necessary to support it . . . pre-existed and would be sustained by available evidence, had not the agreement of the parties dispensed with the taking of evidence.

Davis v. Davis, 2001 UT App 225, ¶ 10, 29 P.3d 676 (quoting *United Factors v. T.C. Assocs., Inc.*, 445 P.2d 766, 768 (Utah 1968)).

In examining the parties' Stipulation, paragraph 50 states: "The parties represent that prior to the execution of this Agreement they have each reviewed and discussed its terms with their respective counsel, if deemed necessary, and that *the same represents a fair and equitable distribution of the assets acquired and liabilities incurred by the parties.*" (R. 24) (emphasis added). This paragraph has no language that the fairness achieved by the Stipulation is in any way premised on the value of the Phoenix Plaza. Nor is the equitable distribution conditioned on specific vacancy rates or income levels.

Because the above provision is contained in the Stipulation, it carries the force of findings of fact and conclusions of law. *Davis v. Davis*, 2001 UT App 225, ¶ 10, 29 P.3d 676. Regardless, the court made an independent finding of fairness as expressed in paragraph 49 of the Findings of Fact and Conclusions of Law, to which Judge Iwasaki affixed his signature on December 31, 2008. (R. 671-72) ("The Court finds that [the property division] . . . represents a fair and equitable distribution of the assets and

liabilities incurred by the parties.”). If Mr. Robinson wishes to challenge this finding, he bears the heightened burden of marshalling the evidence, which he has not done. *See* Utah Appellate R. 24(a)(9) (2009) (“A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.”); *Oneida/SLIC v. Oneida Cold Storage & Warehouse Inc.*, 872 P.2d 1051, 1052-53 (Utah Ct. App. 1994) (“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.’” (quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991))).

It is important to note that under Utah law, equitable does not mean the same thing as equal. Just because a property distribution is not “mathematically equal is not sufficient grounds to constitute an abuse of discretion, since a fair and equitable distribution is not necessarily an equal distribution.” *Colman v. Colman*, 743 P.2d 782, 789 (Utah Ct. App. 1987).

Mr. Robinson has misstated the law with his assertion that divorce stipulations “are not enforceable unless the court determines that the substantive terms are fair and reasonable.” (Appellant Brief 25). In fact, the reverse is true. Stipulations are generally enforceable except for rare circumstances such as those involving fraud or lack of

representation. *See supra* I. It is customary for a trial judge to adopt party stipulations and incorporate the stipulation into findings of fact and a decree of divorce. *See e.g., Sill v. Sill*, 2007 UT App 173, ¶ 4, 164 P.3d 415 (“The trial court approved the Agreement and incorporated its provisions in the parties March 2001 divorce decree”); *Maxwell v. Maxwell*, 796 P.2d 403, 404 (Utah Ct. App. 1990) (“Otis and Betty were divorced by decree of divorce entered pursuant to a stipulation executed by the parties.”). Further, the signing of a property settlement acts as a waiver of any additional terms, *Stone v. Stone*, 2008 UT App 154, at *1 (unpublished), and trial courts “should be reluctant to overturn parties’ specific and knowing waivers in agreements governing both property rights and alimony.” *Sill v. Sill*, 2007 UT App 173, ¶ 18, 164 P.3d 415. The court is certainly not *required* to revisit issues already resolved by way of stipulation. Utah courts have repeatedly upheld the principle that “spouses or prospective spouses may make binding contracts with each other and arrange their affairs as they see fit, insofar as the negotiations are conducted in good faith[.]” *Reese v. Reese*, 1999 UT 75, ¶ 25, 984 P.2d 987.

In this case, the parties voluntarily entered into and signed the Stipulation. (R. 26-27, 491). The Stipulation was intended to settle all issues of the divorce. (R. 115, 660). There was no fraud or duress. Both parties were represented by counsel. (R. 115). Both parties examined documents, consulted with advisors, and consulted with counsel. (R. 24, 199, 671). In sum, each chose to be bound by the terms of the Stipulation. When each party signed the Stipulation, he or she waived the right to additional or different terms.

Stone v. Stone, 2008 UT App 154, at *1 (unpublished). As a sophisticated and experienced real estate investor, Mr. Robinson knew what he was doing and was not improperly coerced. (R. 197). Accordingly, the court was required to and did exercise reluctance in amending the terms of the Stipulation.

The trial court's decision to deny Mr. Robinson's objection and to enforce the terms of the parties' Stipulation is entirely reasonable. Here, the trial court considered the evidence and determined that the result of the Stipulation—although different than Mr. Robinson's expectations—was, all things considered, equitable. (R. 671). Although the value of the Plaza may have decreased due to Mr. Robinson's delay in refinancing and although certain tenants may not have resigned leases as had been anticipated, the law allows for one spouse to receive more marital property than another where, as in this case, the overall outcome is equitable and the parties entered their Stipulation in good faith. Thus, the trial court did not abuse its discretion.

III. AN EVIDENTIARY HEARING IS UNNECESSARY GIVEN THAT MR. ROBINSON HAD HIS OPPORTUNITY TO BE HEARD.

Court commissioners have authority and discretion to conduct evidentiary hearings but are not required to do so. *See* Utah R. Judicial Admin. 6-401(2)(F) (2009) (noting that evidentiary hearings are conducted “[a]t the commissioner’s discretion”). Judges also have discretion to hold hearings, but the court did not *have to* grant Mr. Robinson an evidentiary hearing given the facts of this case. *See* Utah R. Civ. P. 7(e) (2009) (stating that the court “may hold a hearing on any motion”). Even were the motion

considered dispositive of the divorce case, which would mandate a hearing, “the issue of [property division] ha[d] been authoritatively decided” and thus no hearing was required. *Id.*

Mr. Robinson would have this Court believe that denial of an evidentiary hearing is synonymous with a denial of due process rights, yet he cites only one case for this proposition, which is distinguishable from the facts of the instant case. (*See* Appellant Brief III). Likewise, Mr. Robinson has cited no case law support for his assertion that the judge’s acceptance of the Commissioner’s recommendation “was a denial of Michael’s due process rights.” (Appellant Brief 29).

Although due process requires “the opportunity to be fully heard[.]” the *Wiscombe* case does not stand for the proposition that an evidentiary hearing before a court commissioner is always necessary. *See Wiscombe v. Wiscombe*, 744 P.2d 1024 (Utah Ct. App. 1987) (noting that a full evidentiary hearing should have been provided in a case where defendant failed to notify the commissioner and opposing counsel of his objection and there was a dispute about compliance with a rule). In fact, it is customary for hearings before court commissioners to be based on written pleadings and proffers. *Id.*

According to the express language of rule 7(g) of the Utah Rules of Civil Procedure, courts are not obligated to hold an evidentiary hearing when a party has objected to the recommendation of a court commissioner. *See Johnson v. Johnson*, 2007 UT App 113, at *1, n.1 (unpublished) (“[T]here is nothing in rule 7(g) . . . that requires a district court to conduct an evidentiary hearing before ruling on an objection to a

commissioner's recommendation."'). Rather, the objecting party is given the opportunity to "object to the recommendation by filing an objection in the same manner as filing a motion within ten days after the recommendation is made in open court or, if the court commissioner takes the matter under advisement, ten days after the minute entry of the recommendation is served." Utah R. Civ. P. 7(g) (2009).

In this case, an evidentiary hearing is unnecessary and would be a waste of judicial resources. Both parties had the opportunity to submit evidence in the form of affidavits and legal memoranda. The evidence which Mr. Robinson has presented to the court for appellate review is essentially the same evidence he proffered to the Commissioner and upon which the Commissioner's recommendation was made. Mr. Robinson has failed to establish why an evidentiary hearing is necessary. Further, the parties' Stipulation does away with the need for evidence. *See Davis v. Davis*, 2001 UT App 225, ¶ 10, 29 P.3d 676 (stating that "the agreement of the parties dispensed with the taking of evidence."').

CONCLUSION


The lower court was well within its discretion and committed no error by incorporating the parties' Stipulation into the Decree of Divorce. Both parties had a full and fair opportunity to review documents and consult with advisors before signing the Stipulation. In fact, each party did. Additionally, both parties were represented by counsel during the course of their negotiations and mediation session. Mr. Robinson is the only person claiming a mistake was made; therefore, there can be no mutual mistake. Furthermore, there is no evidence that it was or is impossible for Mr. Robinson to

perform his duties under the Stipulation because he did nothing to carry out his duties until the time frame for compliance had passed. Mr. Robinson's procrastination and attempts to renegotiate the parties' Stipulation is no reason to excuse his performance. Finally, no evidentiary hearing is required because the court has already entered a finding that the property distribution was fair and equitable, and the parties waived their right to revise the terms of their Stipulation when each affixed their signature to the document.

The decision of the trial court should be affirmed.

Dated this 14~~th~~ day of October 2009.

CLYDE SNOW & SESSIONS

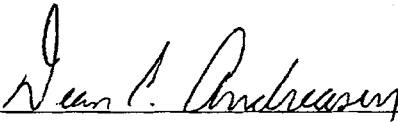


DEAN C. ANDREASEN
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Attorneys for Respondent/Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 14~~th~~ day of October, 2009, two true and correct copies of the foregoing **BRIEF OF APPELLEE DEBRA J. ROBINSON** were mailed via first-class U.S. mail, postage prepaid to:

Stephen T. Hard, Esq.
4141 S. Highland Drive, Suite 220
Holladay, UT 84124



IN THE UTAH COURT OF APPEALS

MICHAEL S. ROBINSON,

Petitioner/Appellant,

v.

DEBRA J. ROBINSON,

Respondent/Appellee.

BRIEF OF APPELLEE

Case No. 20090082

Trial Court No. 074900501

ADDENDUM TO BRIEF OF APPELLEE

EXHIBIT A - FINDINGS OF FACT AND CONCLUSIONS OF LAW, DATED
DECEMBER 31, 2008

FINDINGS OF FACT

DIVORCE

1. The Court finds that the parties shall proceed to obtain a Decree of Divorce granting each a divorce from the other as provided for by law dissolving the marriage of the parties.
2. The Court finds that the parties consent that a Decree of Divorce may be entered with terms consistent to the terms of the Agreement.
3. The Court finds that Petitioner is a bona fide and actual resident of Salt Lake County, State of Utah, and has been for more than three months prior to the commencement of this action.
4. The Court finds that Petitioner and Respondent are husband and wife, respectively, having been married on October 4, 1992.
5. The Court finds that disagreements have ensued between the parties concerning their marriage and their future together; meaningful communication between the parties has ceased; notwithstanding attempts by the parties to reconcile and resolve their differences, the same have been to no avail and have become irreconcilable making continuation of the marriage under the circumstances impossible.

CHILDREN

6. The Court finds that the parties have no children born as issue of their marriage and none are expected.

ALIMONY AND RELATED PROVISIONS

7. The Court finds that each party irrevocably waives any claim to past, present or future alimony under any circumstance or condition.

8. The Court finds that each party shall be responsible to maintain his or her own medical and dental insurance coverage and each shall be responsible for his or her own uninsured medical and dental costs.

PROPERTY AND DEBT DISTRIBUTION

9. The Court finds that prior to and during their marriage, the parties acquired certain real and personal property which shall be divided between the parties as described below. Prior to and during the marriage, the parties incurred certain debts and obligations which shall be allocated between the parties as described below. The party assuming a particular debt or obligation shall indemnify and hold the other party harmless therefrom.

10. The Court finds that Petitioner shall be awarded the Seven Springs residence and shall assume and pay any debt encumbering the property.

11. The Court finds that Respondent shall be awarded the ten acre parcel in Scenic, Arizona and shall assume and pay any debt encumbering the property.

12. The Court finds that Respondent shall be awarded the Mayan Palace timeshare and shall assume and pay any debt encumbering the property.

13. The Court finds that Petitioner shall be awarded the parties' interest in the condominium in St. George, subject to Petitioner assuming and paying any debt encumbering the property. Petitioner may continue to own and rent the condominium or, alternatively, sell it but Petitioner shall be responsible for all costs of sale. Respondent shall be given a credit as described below in the amount of \$62,500 for her equity in the condominium calculated as one half of the difference between the fair market value of the condominium (\$250,000) less the current mortgage (\$125,000). Rental income from the Phoenix Plaza property shall be used to pay all condominium costs and expenses including PITI until such time as Petitioner has paid Respondent for her interest in the Phoenix Plaza property as described below.

14. The Court finds that Respondent shall be awarded the parties' interest in the condominium in Deer Valley, subject to Respondent assuming and paying any debt encumbering the property. Respondent may continue to own and rent the condominium or, alternatively, sell it but Respondent shall be responsible for all costs of sale. Petitioner shall be given a credit as described below in the amount of \$234,000 for his equity in the condominium calculated as (i) one half of the difference between the fair market value of the condominium (\$900,000) less the purchase price (\$515,000), plus (ii) \$27,870 for the down payment paid by Petitioner, plus (iii) \$7,500 for the earnest money paid by Petitioner, plus (iv) one half of the mortgage pay down in the amount of \$6,130, at the time Petitioner has paid Respondent for her interest in the Phoenix Plaza property. Rental income from the Phoenix Plaza property shall be used to pay all condominium costs and expenses including PITI until such time as Petitioner has paid Respondent for her interest in the Phoenix Plaza property as described below. Rental income shall be recognized as income when earned, not deposited. Cash from rental income when earned shall be equally divided until such time as Petitioner has paid Respondent for her interest in the Phoenix Plaza property as described below.

15. The Court finds that the disposition of the parties' interest in the retail center in Sandy shall occur as described below.

A. The retail center shall be immediately listed for sale. The parties shall agree to the listing agent, the listing price, any reduction in the listing price, and the ultimate terms of sale. In lieu of Petitioner receiving cash from the sale, Petitioner shall be given a credit in the amount of \$391,000 (\$32,188 + \$358,812) for his interest in the retail center. This credit reflects and assumes estimated net sales proceeds in the amount of \$749,812 of which Petitioner shall receive \$391,000 and Respondent shall receive \$358,812. If the net sales proceeds are greater than

\$749,812, Respondent shall pay Petitioner one half of the difference between the actual net sales proceeds and \$749,812. If the net sales proceeds are less than \$749,812, Petitioner shall pay Respondent one half of the difference between the actual net sales proceeds and \$749,812.

B. The parties shall jointly manage the retail center until it is sold. Respondent shall provide the bookkeeping and accounting services for the retail center and provide Petitioner the regular monthly reports. The 2007 real property taxes shall be paid from the joint funds of the parties. Any CAM revenue shall be equally divided between the parties.

C. Until such time as the retail center is sold, the parties may agree to equally distribute to themselves a portion or all of the cash from the net rental income. At the time the retail center is sold, each party shall be awarded one half of any cash from the net rental income.

D. The parties shall agree as to whether any legal action shall be taken in an attempt to collect certain unpaid rents and other bad debt. Each party shall pay one half of any costs incurred and shall be awarded one half of any monies recovered.

16. The Court finds that the disposition of the parties' interest in the Phoenix Plaza property shall occur as described below.

A. Petitioner shall be awarded the Phoenix Plaza subject to Petitioner taking the following actions.

B. Petitioner shall re-finance the mortgage encumbering the Phoenix Plaza and pay Respondent the amount of \$1,784,419 for her equity in the Phoenix Plaza property calculated as (i) one half of the difference between the stipulated fair market value of the Phoenix Plaza property (\$7.25M) less the purchase price

(\$4.5M), plus (ii) \$891,803 for the down payment paid by Respondent, plus (iii) \$12,500 for the earnest money paid by Respondent, plus (iv) one half of the mortgage pay down in the amount of \$67,616 at the time Petitioner has paid Respondent for her interest in the Phoenix Plaza property, plus (v) \$62,500 for the St. George condominium credit, less (vi) \$234,000 for the Deer Valley condominium credit, less (vii) \$391,000 for the Sandy retail center credit. If the re-financing does not occur within one hundred twenty (120) days of the date the parties signed the this Agreement, Petitioner shall pay Respondent interest at the rate of eight percent (8%) from one hundred and twenty (120) days after the parties sign this Agreement. Petitioner shall file the loan refinance application within 15 days of the date of this Agreement. Respondent shall assist Petitioner in preparing and filing the loan refinance application.

C. The parties shall jointly manage the Phoenix Plaza until the time the re-financing occurs, Respondent shall provide the bookkeeping and accounting services for the Phoenix Plaza and provide Petitioner the regular monthly reports.

D. Until Respondent is paid her equity in the Phoenix Plaza, (1) the net rental income shall be used to pay, as necessary, the operating costs of the Phoenix Plaza and the other properties as described above and (2) the parties may agree to equally distribute to themselves a portion or all of the cash from the net rental income. At the time Respondent is paid her equity in the Phoenix Plaza, each party shall be awarded one half of any cash from the net rental income.

E. Tenants of the Phoenix Plaza owe certain common area maintenance fees ("CAM Fees") for the years 2005, 2006 and 2007. Any CAM Fees collected relative to time periods prior to the time Petitioner re-finances the mortgage on the Phoenix Plaza shall be equally divided between the parties. The parties shall agree

to any collection costs including attorney fees to be incurred in an attempt to collect the CAM Fees.

F. Each party shall pay one half of all costs and expenses including any prepayment penalty associated with the payoff of any existing mortgage or encumbrance or the origination of any new mortgage or encumbrance relative to the re-financing of the Phoenix Plaza debt.

17. The Court finds that the disposition of the parties' interest in the parking lot parcel next to the Phoenix Plaza shall occur as described below.

A. Petitioner shall be awarded the parking lot property subject to Petitioner taking the following actions.

B. At the time of and as a part of the re-financing relative to the mortgage encumbering the Phoenix Plaza, Petitioner shall pay Respondent the amount of \$105,777 which is equal to one half of the difference between (1) \$425,000 (representing the stipulated fair market value of the parking lot parcel) less (2) the unpaid principal amount of the mortgage in the amount of \$213,446 on the parking lot parcel at the time of the re-financing of the Phoenix Plaza mortgage. This amount may be adjusted as required by each party paying one half of the amount to settle or otherwise resolve the disputed claim of Keith Funk for certain asphalt services provided relative to the parking lot parcel. In the event the amount necessary to resolve the disputed claim of Keith Funk has not been determined by the time of the re-financing occurs, such amount shall not be taken into consideration and each party shall thereafter pay one half of the amount necessary to resolve the disputed claim.

18. The Court finds that Petitioner shall be awarded the Ford Excursion vehicle and the BMW motorcycle. Petitioner shall assume and pay the debt encumbering the Ford Excursion vehicle. There is no debt encumbering the BMW motorcycle.

19. The Court finds that Respondent shall be awarded the Chevrolet Avalanche and Toyota Matrix vehicles. Respondent shall assume and pay the debt encumbering the Chevrolet Avalanche vehicle. There is no debt encumbering the Toyota Matrix vehicle.

20. The Court finds that Petitioner shall be awarded the Cessna 210 airplane. There is no debt encumbering the airplane. On the first closing to occur of either the sale of the Sandy retail center or the refinancing of the Phoenix Plaza property, Petitioner shall pay Respondent \$22,500 from his share of the net sales proceeds in consideration of Petitioner being awarded the airplane.

21. The Court finds that Respondent shall be awarded the aluminum boat and motor. The interest of the parties in the sailboat shall be awarded to Matthew Larson.

22. The Court finds that Petitioner shall be awarded his retirement accounts in the Cardiomed Profit Sharing Plan. Petitioner represents that no contributions have been made to his account in the Cardiomed Profit Sharing Plan during the term of the marriage. Petitioner shall be awarded his IRA accounts.

23. The Court finds that Respondent shall be awarded her 401(k) retirement accounts. Respondent shall be awarded her IRA accounts.

24. The Court finds that each party shall be awarded one half of any Utah Education Savings Plan accounts in either parties' name.

25. The Court finds that any bank account maintained jointly by the parties for their personal use or used in conjunction with a real property shall be equally divided between the parties at the time the account is closed, the property is sold, or Respondent

is paid out her equity in the property. Petitioner shall be awarded the Rawkin Horse bank account and the cash in Petitioner's possession.

26. The Court finds that each party shall be awarded his or her individual checking and savings accounts.

27. The Court finds that the parties have no life insurance policy that has a cash surrender value.

28. The Court finds that each party shall be awarded his or her clothing, jewelry, sporting equipment, musical instruments, and personal effects.

29. The Court finds that each party shall be awarded as his or her separate property, property acquired prior to the marriage, property acquired by gift, devise or inheritance, or as a gift from the other party during the marriage

30. The Court finds that Petitioner shall be awarded the furniture, furnishings and other personal property located in the real properties awarded to him except as described in Exhibit A attached, which items shall be awarded to Respondent. Respondent shall be awarded the furniture, furnishings and other personal property located in the real properties awarded to her except as described in Exhibit B attached, which items shall be awarded to Petitioner. Respondent may store her personal property at the Seven Springs residence until thirty days after the date the Agreement was signed by the parties. The parties shall clearly identify in a list the property that is being stored. Respondent may store her grand piano at the Seven Springs residence for an indefinite period of time provided that Respondent shall remove the grand piano within 60 days of demand for such from Petitioner.

31. The Court finds that each party shall be awarded one half of any marital property not specifically provided for in the Agreement.

32. The Court finds that each party shall assume and pay one half of any marital debt or obligation not specifically provided for in the Agreement.

33. The Court finds that each party shall assume and pay his or her debts and obligations incurred since the time of the separation of the parties, and indemnify and hold the other party harmless therefrom.

TAX PROVISIONS

34. The Court finds that in the event any income tax return of the parties filed on a married filing joint basis is audited, the parties shall be equally liable for any tax, penalty or interest assessed or shall be equally entitled to any refund. The parties shall equally pay one half of the excise sales and lodging taxes due to the State of Utah relative to the rental of the Deer Valley condominium.

35. The Court finds that the parties shall file federal and state income tax returns on a married filing joint basis for the year 2007. Each party shall be awarded one half of any refund or each party shall pay one half of any taxes, penalties or interest due on the 2007 returns with the exception that the incremental taxes owed relative to retirement distributions taken by Petitioner during 2007 shall be paid solely by Petitioner from his separate funds. Each party shall be awarded one half of any alternative minimum tax credit carryforward from the 2007 federal income tax return.

36. The Court finds that Petitioner shall be entitled to any tax deduction relative to the Seven Springs residence accruing from January 1, 2008. Respondent shall be entitled to any tax deduction relative to the Scenic, Arizona property or the Mayan Palace timeshare accruing from January 1, 2008.

37. The Court finds that each party shall report one half of any net income or net loss relative to the St. George condominium from January 1, 2008 until Respondent is paid her equity in the Phoenix Plaza property.

38. The Court finds that each party shall report one half of any net income or net loss relative to the Deer Valley condominium from January 1, 2008 until Respondent is paid her equity in the Phoenix Plaza property.

39. The Court finds that each party shall report one half of any net income or net loss relative to the Sandy retail center from January 1, 2008 until the time of sale. Respondent shall elect to either realize the gain on the sale of the property or enter into a § 1031 exchange transaction since Respondent has assumed the tax basis in the property by granting Petitioner a credit for his interest.

40. The Court finds that each party shall report one half of any net income or net loss relative to the Phoenix Plaza property from January 1, 2008 until Respondent is paid her equity in the property.

41. The Court finds that each party shall be awarded and entitled to claim one half of any quarterly installment payment made for federal or state income taxes prior to Petitioner re-financing the mortgage on the Phoenix Plaza property and paying Respondent her equity in the property as described above.

42. The Court finds that Petitioner shall be liable for any income tax or penalty relative to distributions he has taken from his retirement during 2007 at the parties' highest marginal tax rate.

MISCELLANEOUS PROVISIONS

43. The Court finds that the parties shall execute such documents as may be necessary to transfer the property as awarded by the Court to the party entitled thereto.

44. The Court finds that each party shall pay his or her attorney fees and costs individually incurred in this action.

45. The Court finds that Respondent may have her previous surname of Johnson restored to her if she so desires.

46. The Court finds that a restraining order shall be entered enjoining each party from harassing, annoying or bothering the other party or any family member of the other party.

47. The Court finds that each party has made a full and fair disclosure to the other of his or her assets, financial condition and worth, and each party has had the opportunity to inspect the other's records as they relate to the subject matter hereof and is satisfied by the disclosures of the other party and knowingly and willingly waives any further disclosures.

48. The Court finds that the parties also represent that they have made no assignment, transfer, or distribution of any funds or property to any third party except in the course of typical and reasonable living and business expenses.

49. The Court finds that the parties represent that prior to the execution of the Agreement they have each reviewed and discussed its terms with their respective counsel, if deemed necessary, and that the same represents a fair and equitable distribution of the assets acquired and liabilities incurred by the parties.

50. The Court finds that in the event of a dispute between the parties as to the interpretation of a term of the Agreement, the parties shall mediate the issue before either party may initiate court action. Each party shall pay one half of the mediator's fee.

51. The Court finds that the file in this action shall be classified as private.

52. The Court finds that the prevailing party to an action for breach of a term of the Agreement shall be entitled to his or her attorneys fees and costs.

53. The Court finds that each party shall use his or her best efforts to effectuate the refinancing of the existing mortgage on the Phoenix Plaza property and shall cooperate and provide necessary documentation and signatures on a timely basis.

54. The Court finds that until the refinancing of the mortgage on the Phoenix Plaza property occurs, the parties shall maintain the status quo on the payment of their expenses and the receipt of funds.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court now concludes as follows:


1. That this Court has jurisdiction over the subject matter of this action and the parties to this action.


2. That Petitioner is entitled to be awarded a Decree of Divorce from Respondent on the grounds of irreconcilable differences and that such should become final upon its entry as provided by law.

3. That the Agreement of the parties settling all issues in this action, as set forth in the Findings of Fact, is equitable and should be incorporated into the Decree of Divorce.

DATED this 31 day of ^{OAC.} ~~January~~, 2008.

BY THE COURT:


GLENN K. IWASAKI
District Court Judge



APPROVED this _____ day of _____, 2007

JONES WALDO HOLBROOK & McDONOUGH

MELISSA M. BEAN
Attorney for Petitioner

CERTIFICATE OF SERVICE

On this 19th day of November, 2007, I hereby caused to be served on the
Petitioner a true and correct copy of the foregoing **FINDINGS OF FACT AND
CONCLUSIONS OF LAW** by having the same delivered by U.S. mail, postage prepaid,
to:

Kenneth A. Okazaki, Esq.
Melissa Bean, Esq.
Jones Waldo Holbrook & McDonough
170 South Main Street, #1500
P. O. Box 45444
Salt Lake City, Utah 84101

A handwritten signature, appearing to read "Melissa Bean", is written over a horizontal line.

EXHIBIT A

EXHIBIT A

ITEMS DEBRA WANTS FROM SANDY RESIDENCE

1. Tempurpedic Bed
2. ~~Marble Buddha~~ to Petitioner *APR ULR*
3. Washer & Dryer
4. Stainless Steel Barbeque
5. New Chase Lounges and Umbrella around pool
6. ~~Flat screen in bedroom~~ to Petitioner *APR ULR*
7. ~~Leather furniture~~ and Rug in downstairs family room
to Petitioner *APR ULR*
8. Treadmill
9. Purchases during travel equally divided
10. Photographs divided or copied - cost divided equally.
11. Equally divide sheet music
12. Freezer in garage

EXHIBIT B

None. *ULR APR*