

2009

Mitchell v. Mitchell : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DORANN C. MITCHELL,

Petitioner and Appellee,

vs.

NATHANIEL M. MITCHELL,

Respondent and Appellant.

BRIEF OF THE APPELLEE

Case No. 20091027-CA

**ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE TYRONE E. MEDLEY PRESIDING**

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PARTIES TO THE PROCEEDINGS

Petitioner/ Appellee: Dorann C. Mitchell is the Petitioner / Appellee.

Throughout this brief, the Petitioner / Appellee is referred to as “Ms. Mitchell.”

Defendants / Appellants: Nathaniel M. Mitchell is the Respondent / Appellant.

Throughout this brief, the Respondent / Appellant is referred to as “Mr. Mitchell.”

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STATEMENT OF JURISDICTION

This case presents an appeal of a post-divorce order enforcing the provisions of a decree of divorce. The Utah Court of Appeals has appellate jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(h).

ISSUES PRESENTED FOR REVIEW

ISSUE NO. 1: Appellee Ms. Mitchell restates Issue No. 1 as follows:

Whether the district court was correct in ruling that Respondent Nathaniel M. Mitchell's agreement to assign his interest in the parties' undivided joint interest in a judgment against Steven Collins (the "Collins Judgment") to MDI Equity Partners, LLC (hereinafter "MDI") remained his "individual obligation" under paragraph 19 of the parties Decree of Divorce ("Decree").

This is a question of law which this Court reviews "for correctness, according no particular deference to the trial court's actions." *Moon v. Moon*, 1999 UT App 12, ¶12, 973 P.2d 431, 434 (citing *State v. Pena*, 869 P.2d 932, 936 (Utah 1994)).

ISSUE NO. 2: Appellee Ms. Mitchell restates Issue No. 2 as follows:

Whether the district court erred in ordering distribution of the proceeds of the Collins Judgment, per the parties' Decree of Divorce, with one-half the proceeds to Ms. Mitchell and one-half to Mr. Mitchell, with Ms. Mitchell receiving one-half the proceeds, net the parties' agreed-upon one-third payment to their attorney, not net the parties' obligation to their attorney and Mr. Mitchell's obligation to MDI.

This is a question of law which this Court reviews “for correctness, according no particular deference to the trial court's actions.” *Moon v. Moon*, 1999 UT App 12, ¶12, 973 P.2d 431, 434 (citing *State v. Pena*, 869 P.2d 932 (Utah 1994)).

ISSUE NO. 3: Appellee Ms. Mitchell restates Issue No. 3 as follows:

Did the district court err in ruling that “As the total 2002 Collins distribution was approximately \$180,000 and Respondent remitted 1/3 to Mr. Mesmer and 1/3 to satisfy or partially satisfy MDI (his stipulated and Court-allocated debt), distributed 1/6 to Petitioner, and inappropriately retained 1/6, the additional sum due Petitioner is approximately \$30,000.00?”

“In order to challenge a court's factual findings, 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.” *Sweet v. Sweet*, 2006 UT App 216, ¶ 6 (quoting *Chen v. Stewart*, 2004 UT 82, ¶ 76, 100 P.3d 1177. This Court reviews a district court's factual findings for clear error. *Id.*, fn.3 (citing *State v. Widdison*, 2001 UT 60, ¶ 60, 28 P.3d 1278).

ISSUES PRESERVED FOR APPEAL

Mr. Mitchell argued that his assignment removed his joint interest in the Collins Judgment completely from the marital estate and abrogated any debt or obligation he might have had to MDI before the parties' divorce, resulting in Mr. Mitchell having no debt or obligation to MDI and leaving only Ms. Mitchell's joint interest subject to allocation at the time of the parties' Decree at the Order to Show Cause hearing held April 22, 2009. (R. 222: 5, 9-10) Mr. Mitchell reiterated his argument in Respondent's Objection to the Commissioner's Recommendation. (R. 108-113)

Mr. Mitchell could not have preserved a specific issue to the district court's order that MDI be paid from Mr. Mitchell's share of the Collins lawsuit, as the district court did not order payment to MDI. (R. 96-100; 155-161) However, Mr. Mitchell did object to the Commissioner's Recommendation on the grounds that his obligation to MDI was completely satisfied at the time the Decree was entered and that only Ms. Mitchell's joint interest subject to allocation at the time of the parties' Decree. (R. 109-112) As identified above, Ms. Mitchell argued that the parties' Decree divided the entire Collins Judgment proceeds one-half to Ms. Mitchell and one-half to Mr. Mitchell and that Mr. Mitchell's obligation to MDI was his own separate obligation under the Decree. (R. 56-58; 60-61; 222: 10-19) Ms. Mitchell reiterated these points and argued that the district court's ruling was also correct because Mr. Mitchell maintained interest and control over the Collins judgment, Mr. Mitchell had an obligation to MDI under his assignment

agreement, and the Statute of Frauds bars the enforcement of Mr. Mitchell's assignment against Ms. Mitchell. (R. 141-153)

Mr. Mitchell did not preserve his objection to the district courts' language, to which he now objects. Mr. Mitchell objected to the Commissioner's Recommendation. (R. 107-138) However, the specific language to which he takes exception was not in the Commissioner's Minute Entry. Mr. Mitchell did make factual allegations which contradict the language to which Mr. Mitchell takes exception; however, he did not object to the form or content of the Findings and Order (Hearing April 22, 2009) as his Objection to Commissioner's Recommendation and argument therein were submitted prior to the district court's order. *See* Respondent's Objection to the Commissioner's Recommendation. (R. 107-138) *See also* Findings and Order (Hearing April 22, 2009) (R. 155-161)

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

1. Utah Code Ann. § 25-5-4 (2004):

(1) The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement commitment:

- (a) every agreement that by its terms is not be performed within one year from the making of the agreement;
- (b) every promise to answer for the debt, default, or miscarriage of another. . .

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings and Disposition.

This case involves interpretation and enforcement of the parties' Decree of Divorce entered by this Court on or about July 19, 2002 (hereinafter the "Decree"). It is an appeal from a final order of the district court.

At issue in this case are the interpretation, application and enforcement of paragraphs 18, 19 and 20 of the Decree, which allocate debt and divide the parties' interest in the proceeds of two lawsuits, the Christensen lawsuit and the Collins lawsuit. It is the division and distribution of the proceeds from the Collins lawsuit (hereinafter the "Collins Judgment"), pursuant to these paragraphs, which is disputed and at issue here.

Subsequent to the entry of the Decree, there were two distributions of monies related to the Collins Judgment, the first in August 2002 and the second in December 2008. Some months after the delivery of the December 2008 Collins Judgment distribution, the parties were at an impasse and unable to resolve their differences as to the entire Collins Judgment and the matter was submitted to the district court.

On or about March 9, 2009, Mr. Mitchell obtained an Order to Show Cause. The original hearing date was continued, and Ms. Mitchell filed her Response to Order to Show Cause and Counter Motion to Enforce Decree and for Contempt, on or about April 15, 2009. On April 22, 2009, a hearing on the parties' motions was held in the district court before the Honorable Michelle Blomquist, District Court Commissioner.

Commissioner Blomquist issued a Minute Entry decision on June 30, 2009, recommending that Mr. Mitchell's request for relief be denied and that Ms. Mitchell's request for relief be granted. Counsel for Ms. Mitchell was instructed to draft the Order. Mr. Mitchell filed his Objection to the Commissioner's Recommendation on July 14, 2009. The Findings and Order (Hearing April 22, 2009) were entered by the district court on July 30, 2009. Mr. Mitchell did not file an objection to the Findings and Order.

After briefing, a hearing on Mr. Mitchell's Objection to the Commissioner's Recommendation was held October 19, 2009, the Honorable Tyrone E. Medley, District Court Judge, presiding. Following the hearing, the district court overruled Mr. Mitchell's Objection to the Commissioner's Recommendation, finding that Mr. Mitchell failed to establish that Commissioner Blomquist abused her discretion or committed an error of law. Mr. Mitchell did not include a transcript of the hearing before Judge Medley for the record on appeal.

II. Statement of Facts.

1. The parties were married January 27, 1971. (R. 1)
2. Sometime before the end of 1990, the parties obtained a judgment by default in their suit against Steven A. Collins, Christine Letendre Collins, Charles E. Black and Jefferson, Currier & Company, Inc. (hereinafter the "Collins Judgment"). (R. 42; 103; 122)
3. In December 1994, the FDIC obtained a judgment against Mr. Mitchell. (R. 42)

4. Subsequently, the FDIC assigned its judgment against Mr. Mitchell to MDI Equity Partners, LLC (hereinafter “MDI”). (R. 42)

5. In May 1998, Mr. Mitchell – and only Mr. Mitchell – entered into an agreement with MDI regarding the FDIC judgment against Respondent held by MDI. This agreement, memorialized in a letter dated May 7, 1998, from Mr. Mitchell’s attorney, Scott B. Mitchell, to MDI (the “Agreement Letter”), involved Mr. Mitchell’s assignment of “his interest”, less attorney fees, in the Collins Judgment, in exchange for MDI’s assignment of the FDIC judgment and related paper to Mr. Mitchell. In this letter, Mr. Mitchell promised MDI “Nat’s share of any amount collected” from the Collins Judgment. (R. 115-119)

6. Mr. Mitchell remained involved and continued to maintain control over the efforts to collect on the Collins Judgment, which control included changes in distributions and arrangements concerning payment with MDI subsequent to May 7, 1998, recalculations of the distribution of “assigned” funds to MDI, and discussions of escrowing the assigned proceeds, pending claim by MDI with potential subsequent additional distribution if no claim or inquiry was made by MDI. (R. 78)

7. The parties divorce and the Decree was entered July 22, 2002. (R. 29-34)

8. Paragraph 20 of the Decree states: “That the petitioner and the respondent are involved in two lawsuits and that petitioner be and she is awarded one-third of any proceeds, that respondent be and he is hereby awarded one-third of any proceeds, and that Scott Mitchell be awarded one-third of any proceeds received from the Christensen

lawsuit, and that petitioner and respondent each be and they are hereby awarded one-half of any proceeds received from the Collins lawsuit.” (R. 32)

9. Paragraphs 18 and 19 of the Decree allocate to each party their own “individual debts and obligations.” (R. 32)

10. In August 2002, shortly after the parties’ Decree, a piece of mail addressed to both parties from Frank B. Mesmer, the attorney handling the Collins Judgment for the parties’, was delivered to Ms. Mitchell’s residence, which Ms. Mitchell delivered to Mr. Mitchell, unopened. (R. 222:16)

11. After receiving the piece of mail, Mr. Mitchell notified Ms. Mitchell that it contained proceeds from the Collins Judgment. (R. 222:16) The parties met at a bank, executed and deposited the check, which was in the amount of \$66,274.79, into Ms. Mitchell’s account. (R. 222:16-17) Upon Mr. Mitchell’s request, Ms. Mitchell immediately wrote Mr. Mitchell a check in the amount of \$33,137.40 (one penny more than half of the total check deposited), which is the sum Mr. Mitchell told Ms. Mitchell he was entitled to. (R. 79; 222:17)

12. Ms. Mitchell was unaware of any previous distribution or payment to MDI, and she paid Mr. Mitchell what she believed was one-half the Collins Judgment proceeds, pursuant to the Decree. (R. 222: 17-18)

13. In December 2008, Mr. Mesmer sent another check, payable jointly to the parties in the sum of \$267,428.21. (R. 222:18; 78)

14. Ms. Mitchell came to realize, after conversation with Mr. Mesmer, that Mr. Mitchell’s entire portion of the proceeds had gone toward satisfaction of his obligations

under the Decree and his assignment to MDI and that Mr. Mitchell had claimed one-half of her share of the proceeds of the Collins Judgment. (R. 222:18)

15. The parties could not agree upon the distribution of the proceeds from the 2008 Collins Judgment distribution, with Ms. Mitchell believing that she was entitled to one-half of the entire proceeds (both the 2002 and the 2008 distributions) and Mr. Mitchell insisting that he was entitled to one-half of Ms. Mitchell's share of the proceeds. (R. 41; 59)

16. Pursuant to the agreement of the parties, the 2008 distribution check was signed and deposited into Ms. Mitchell's counsel's trust account. (R. 44)

17. As both parties had a contractual obligation to Mr. Mesmer for one-third the proceeds, they subsequently agreed upon dispersing payment of one-third (1/3) of the proceeds of the 2008 disbursement from the Collins Judgment to satisfy their respective obligations to Mr. Mesmer. (R. 222: 7)

SUMMARY OF ARGUMENTS

The district court found that the parties' Decree was unambiguous and interpreted its meaning using the principles of contract interpretation as matter of law. Under the plain language of the parties' Decree of Divorce, each party is entitled to one-half the proceeds from the Collins' judgment and each is responsible for their own obligations related to the same monies. Consistent with the Decree and the ruling below, the proceeds are to be divided equally, with the parties responsible for their obligations to

their attorney in the Collins lawsuit, which includes Mr. Mitchell's obligations to MDI, under the 1998 assignment of his interest in the Collins Judgment.

Contrary to Mr. Mitchell's repeated assertions that he owed no debt or obligation to MDI at the time of divorce, Mr. Mitchell had an obligation to MDI, to divide his interest from that of Ms. Mitchell and to collect and pay "his share" of the proceeds from the Collins Judgment, less the monies owed to the parties' attorney, to MDI. In contracting to assign "his share" of the Collins Judgment, Mr. Mitchell incurred these obligations, in exchange for MDI's assignment of all interest it held in the letter of credit and judgment against Mr. Mitchell and the filing of a satisfaction of judgment. These obligations existed at the time of the parties' Decree. Thus, Mr. Mitchell had an obligation to MDI at the time of the Decree under his agreement with MDI and his agreement with MDI, which would not be satisfied until after the entry of the parties' Decree.

Examination of the plain language of Mr. Mitchell's agreement with MDI reveals that the agreement does not even purport to allocate the parties' interest in the Collins Judgment, undermining Mr. Mitchell's argument that his assignment extinguished his obligations to MDI and removed "his share" of the Collins Judgment from marital estate divided in the parties' Decree. Further, Utah's Statute of Frauds would prohibit the enforcement of the pre-Decree division that Mr. Mitchell claims, as Ms. Mitchell was neither a party nor signatory to the agreement to satisfy Mr. Mitchell's debt and the agreement was not to be performed within one year. Accordingly, Mr. Mitchell's

obligation to MDI remained at the time of divorce, and the parties' interest in the Collins Judgment was determined and divided by the clear language of the parties' Decree.

Mr. Mitchell inappropriately raises several disputed and incendiary 'facts' concerning Ms. Mitchell's knowledge of his assignment which are of questionable truth and are neither relevant to the Court's decision nor properly before the Court on appeal. Thus, the Court should decline to consider these 'facts' and related argument.

As the district court's ruling is supported by the unambiguous language of the parties' Decree, concerning the division of the parties' interest the Collins Judgment, the Court should uphold the district court's ruling dividing the Collins Judgment according to the plain language of the Decree.

Mr. Mitchell challenges certain language in the district courts' Order. However, Mr. Mitchell failed to preserve this issue for appeal in the district court and failed to adequately marshal the evidence in support of this language. Further, the challenged language is neither a finding nor clearly erroneous. Accordingly, the Court should decline to address this issue and should not disturb the ruling below.

ARGUMENT

I. MR. MITCHELL’S OBLIGATION TO MDI, IN RELATION TO THE COLLINS JUDGMENT, WAS HIS “INDIVIDUAL OBLIGATION” UNDER PARAGRAPH 19 OF THE PARTIES’ DECREE OF DIVORCE.

The district court was correct in its determination that the Decree of Divorce is unambiguous that Mr. Mitchell’s assignment of his interest in the parties’ undivided joint interest in the Collins Judgment to MDI remained his “individual obligation” under paragraph 19, encumbering only his portion of the Collins Judgment.

A divorce decree is interpreted “according to established rules of contract interpretation” *Moon v. Moon*, 1999 UT App 12, ¶18, 973 P.2d 431, 435. “When parties to a contract disagree about the meaning of a provision, principles of contract interpretation require [the Court] to give effect to the meaning intended by the parties at the time they entered into the agreement.” *Uintah Basin Medical Center v. Hardy*, 2005 UT App 92, ¶ 12, 110 P.3d 168, 172 (citing *Central Fla. Investments, Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶ 12, 40 P.3d 599). In making the legal determination of whether a contract is ambiguous or unambiguous, the Court may, as the district court did in this case, engage in preliminary consideration of “relevant, extrinsic evidence of the facts known to the parties at the time they entered the contract.” *Id.* (citing *Nielsen v. Gold’s Gym*, 2003 UT 37, ¶ 7, 78 P.3d 600) (internal alteration and punctuation omitted). However, once it decides that an “agreement is unambiguous, the court must determine the parties’ intentions from the plain meaning of the contractual language as a matter of law.” *Id.* at ¶ 13 (citing *Fairbourn Commercial, Inc. v. American Housing Partners, Inc.*,

2004 UT 54, ¶ 10, 94 P.3d 292) (internal punctuation omitted). Thus, a disputed but unambiguous decree of divorce should be interpreted, under principals of contract interpretation, to give legal effect to the meanings intended by the parties' at the time.

Here, Mr. Mitchell does not argue that the district court erred in its determination that the Decree is unambiguous. Instead, he posits that, as a matter of law, by the clear and unambiguous terms of the Decree, Mr. Mitchell's did not have any obligation to MDI at the time of the Decree.¹ Contrary to Mr. Mitchell's assertion, the district court properly read and interpreted the Decree and reached the correct legal conclusion. Accordingly and for the reasons set forth below, this Court should reject Mr. Mitchell's argument and uphold the district court's decision.

A. The District Court Correctly Interpreted the Plain Language Decree.

As argued by the parties here and below, paragraphs 19 and 20 of the Decree of Divorce control the allocation of debt and division of assets at issue herein.

Paragraph 19 of the Decree of Divorce, which assigns Mr. Mitchell's debts and obligations, states:

19. That the Respondent be and he is hereby ordered to assume and pay and hold harmless from liability thereon, the following debt and obligations:
 - a. Respondent's individual debts and obligations;
 - b. All debts and obligations incurred by him subsequent to the date of separation.

¹ Brief of Appellant, p. 12.

Decree of Divorce, ¶19.² Paragraph 18 of the Decree mirrors this language in assigning Ms. Mitchell's debts and obligations.³ The allocation to the parties is for both debts and obligations.

Paragraph 20 of the Decree of Divorce, which divides the parties' interests in the two outstanding lawsuits, states:

20. That the petitioner and the respondent are involved in two lawsuits and that petitioner be and she is awarded one-third of any proceeds, that respondent be and he is hereby awarded one-third of any proceeds, and that Scott Mitchell be awarded one-third of any proceeds received from the Christensen lawsuit, and that petitioner and respondent each be and they are hereby awarded one-half of any proceeds received from the Collins lawsuit.

Decree of Divorce, ¶20.⁴

Conspicuously, paragraph 20, explicitly divides any proceeds from the 'Christensen lawsuit' into thirds, recognizing and assiduously protecting the interest of Mr. Mitchell's brother and attorney, Mr. Scott M. Mitchell, in allocating one-third of the proceeds to Scott Mitchell. In contrast, on the subject of the proceeds from Collins Judgment, the Decree is silent on the matter of attorney fees and provides no basis to expect that the parties intended to excuse Mr. Mitchell's obligation to MDI or to apply Mr. Mitchell's assignment of his interest in the Collins Judgment to MDI against both parties. Instead, the Decree clearly divides the parties' respective interests in the proceeds of the 'Collins lawsuit' equally, one-half to each.

² R. 38.

³ R. 38.

⁴ R. 38 (emphasis added).

Nonetheless and despite the plain language of the parties' Decree – dividing the Collins Judgment proceeds equally between the parties and assigning each responsibility for their own “individual debt and obligations” – Mr. Mitchell claims that proceeds from the entire Collins judgment should be encumbered by Respondent's earlier commitments to MDI, because his pre-Decree encumbrance of his “share” takes precedence over the division and distribution in the Decree, as it extinguished any debt or obligation of Mr. Mitchell before the Decree was entered.⁵ In essence, Mr. Mitchell is arguing that his assignment of “his interest” in the parties' unrealized and undivided judgment proceeds removed this interest from the marital estate. This argument fails both because Mr. Mitchell's pre-divorce assignment – or contract to assign – “his interest” in the Collins judgment created obligations to MDI and because Mr. Mitchell's contract with MDI did not – and could not – determine Ms. Mitchell's interest in this part of the marital estate.

B. The Contractual Assignment by Mr. Mitchell of “His Interest” in the Collins Judgment to MDI Created Obligations to MDI.

Rather than establishing that Mr. Mitchell owed no further obligation to MDI, Mr. Mitchell's assignment – or contract to assign – “his interest” in the parties' Collins Judgment created obligations in Mr. Mitchell to MDI.

Mr. Mitchell cites to the case of *Spears v. Warr*, 2002 UT 24, ¶39, 44 P.3d 742, 754 (holding abrogated on other grounds concerning proper standard of review for findings of fact of cases heard in equity), in support of the proposition and argument that, because Mr. Mitchell's assignment of ‘his share’ of the Collins judgment was a ‘legal’

⁵ Brief of Appellant, pp. 12,

assignment, to be interpreted according to the ordinary rules of contract construction, and because the writing evidencing this ‘legal’ assignment unconditionally assigned his interest in the parties’ Collins Judgment, he owed no ‘debt or obligation’ to MDI at the time of the Decree.⁶ This argument is untenable as it ignores the nature of the obligations inherently created through contract or assignment, its core tenant (“that an unconditional ‘legal’ assignment extinguishes both debt and obligation”) is unsupported by case law or logic, and it fails under the very contract analysis and determination forwarded by Mr. Mitchell.

First, *Spears*’ does stand for the proposition that “[a]n assignment is interpreted as is any other contract.” *Id.* However, to say that this means that an assignment extinguishes all obligations ignores the axiomatic reality that a contract, by definition, creates obligations between parties.⁷ *C.f. Mark Technologies Corp. v. Utah Resources Intern., Inc.*, 2006 UT App 418, ¶7, 147 P.3d 509 (express best efforts clause creates an independent contractual obligation); *State v. Green*, 2004 UT 76, ¶7, 99 P.3d 820 (legislature prescribes the duties and obligations created by contract to marry); *PDQ Lube Center, Inc. v. Huber*, 949 P.2d 792 (Utah App. 1997) (trial court correctly terminated obligation to perform on contract); *Seare v. University of Utah School of Medicine*, 882 P.2d 673 (Utah App. 1994) (court determines obligations under ambiguous contract by looking to extrinsic evidence).

⁶ Brief of Appellant, pp. 14-15.

⁷ The first definition of **contract** in Black’s Law Dictionary is “1. An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law <a binding contract>.” BLACK’S LAW DICTIONARY 381 (7th ed. 1999).

Further, Mr. Mitchell's cites no authority for the proposition that an assignment of an uncollected and undivided joint interest in the proceeds of a judgment, in satisfaction of a debt, relieves the assignor of any and all obligation to the assignee. This is likely because no such authority exists. *C.f. First American Commerce Co. v. Washington Mut. Sav. Bank*, 743 P.2d 1193, 1194 (Utah 1987) (holding that assignment of right to receive payment did not extinguish duties under contract and distinguishing between assignment of rights and delegation of duties). Indeed, persuasive authority suggests that the opposite is true. *C.f. Hofferberth v. Duckett*, 175 A.D. 480, 162 N.Y.S. 167 (an assignment of moneys to be collected is valid, and takes effect upon the fund or property when collected or received).

Finally, the written terms of Mr. Mitchell's contract with or assignment to MDI reveals both implicit and explicit obligations created. The letter of May 7, 1998, from Mr. Mitchell's counsel, Mr. Scott B. Mitchell, to MDI's manager, Mr. George Kelley, IV, (hereinafter the "Assignment Letter") was signed by Respondent, his attorney, Scott B. Mitchell, and Mr. Kelley, but was not signed or acknowledged by Ms. Mitchell.

The Assignment Letter, which on its face and by Mr. Mitchell's own citation, admission and argument, confirms the agreement between Mr. Mitchell and his individual creditor, MDI, reads, in relevant part:

This letter will confirm that we have agreed to the following settlement terms:

1. Nat will assign to MDI Equity Partner, L.L.C., all of his interest in the judgment which he and his wife have against Steve Collins. Frank Mesmer will continue to collect the judgment in accordance with the current arrangement

between them, which, as you know, includes a one-third contingency fee. MDI will be entitled to Nat's share of any amount collected.

2. MDI will assign to Nat all of its interest in the notes and judgment against Nat which it holds. MDI represents that it holds all of the notes and judgments involving Nat, Jefferson, Currier & Company, Inc., the Bank of New England, and the FDIC, so that there is nothing out there which may come back to haunt Nat at some later date. MDI will file a Satisfaction of Judgment with the court.⁸

Here the agreement evidenced by the Assignment Letter creates explicit obligations in Mr. Mitchell to continue collection of the Collins' Judgment through his attorney, Mr. Frank Mesmer, as well as an implicit obligation to determine "his interest in the judgment" vis-à-vis his then wife.⁹ These obligations existed at the time of the parties Decree. Further, the clear intent of Mr. Mitchell evidenced by the Assignment Letter is that he was assigning "his share" of the proceeds of the Collins Judgment, not creating a pre-distribution lien entitling him to seek another "share" of the proceeds.

In fact, although it did relieve Mr. Mitchell of the debt of the judgments discussed, rather than extinguishing his obligation to MDI, Mr. Mitchell's assignment of his share of the Collins judgment to MDI created obligations which were not, and retrospectively could not be, satisfied until after entry of the parties' Decree, such as the division of the parties joint interest. Notably, under the plain language of the Assignment Letter, Mr. Mitchell's agreement does not purport to divide the joint interest of the parties in the

⁸ Appellants' Addendum IV (emphasis added).

⁹ The Assignment Letter, arguably, also creates an obligation in Mr. Mitchell to ensure payment of "his share" to MDI.

shared Collins judgment, undoubtedly because the parties' interests were not divided until entry of the Decree.

Thus, Mr. Mitchell's pre-Decree assignment did not remove "his interest" in the Collins Judgment from the marital estate, because it did not determine what "his interest" in the Collins Judgment, and the Mr. Mitchell's obligation to determine the assigned interest remained at the time of the Decree. Further, Mr. Mitchell was not entitled to determine Ms. Mitchell's interest in the Collins Judgment through a contract with a third party, because enforcement of such a contract against Ms. Mitchell is barred by Utah's Statute of Frauds.

D. Utah's Statute of Frauds Prohibits Enforcing Mr. Mitchell's Interpretation of the Decree Against Ms. Mitchell.

Utah's Statute of Frauds expressly prohibits enforcing Mr. Mitchell's interpretation of the Decree, because Ms. Mitchell was neither a party nor signatory to the Assignment Letter and because the principal writing evidencing Ms. Mitchell's intent concerning the allocation and distribution of the Collins judgment is the Decree. Accordingly, Mr. Mitchell's attempt to charge Ms. Mitchell through his 1998 negotiations of his debt is barred by the Statute of Frauds.

Utah's Statute of Frauds, specifically Section 25-5-4 of the Utah Code states, in relevant part:

- (1) The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement commitment:

- (a) every agreement that by its terms is not be performed within one year from the making of the agreement;
- (b) every promise to answer for the debt, default, or miscarriage of another. . .

Utah Code Ann. §25-5-4(1). On its face, the Statute states that agreements, which are not to be performed within one year or contain a promise to answer for the debt of another, are void unless they are written and signed by the party to be charged with the commitment. Thus, enforcement of Agreement Letter, which was not signed by Ms. Mitchell, was not by its terms to be performed within a year of its making, and, under the interpretation of the Decree argued by Mr. Mitchell, was a promise for Ms. Mitchell to answer for the debt of another, is barred by the Statute of Frauds.

This application of this section of Utah's Statute of Frauds is consistent with Utah's well-established law concerning the application of the statute of frauds to transfers of undivided, joint interest in real property. *See Centennial Inv. Co., LLC v. Nuttall*, 2007 UT App 321, 17 P.3d 458 (real estate purchase contract purporting the transfer joint interest invalid under the statute of frauds without signature of other holder of joint interest). *See also Krantz v. Holt*, 819 P.2d 352, 353 (Utah 1991) ("If [ex-husband] retained a joint interest in the property, his written consent to the property's sale would be necessary, not because of any clause in the agreement, but because the Utah statute of frauds so requires."); *Williams v. Singleton*, 723 P.2d 421, 423 (Utah 1986) ("One joint tenant or tenant in common cannot bind his cotenant by a contract which he may make relating to the common property."); *Eckard v. Smith*, 527 P.2d 660, 662 (Utah 1974)

(holding that statute of frauds prevented wife, as joint owner of property, from the obligation to convey building where she never signed the lease which contained the purported purchase option).

Accordingly, Mr. Mitchell's assignment agreement with MDI, both did not and could not determine Ms. Mitchell's interest in the Collins Judgment. Thus, Mr. Mitchell's assignment agreement could not be enforced against the entire proceeds, against Ms. Mitchell, and had an existing obligation MDI to establish "his interest" in the Collins Judgment, which was established by the Decree.

E. The Parties' Interest in the Proceeds of the Collins Judgment was Divided by the Decree.

As set forth above, Mr. Mitchell's assignment of "his share" of the proceeds from the Collins Judgment did not and could not determine the parties' relative interest in the proceeds from the Collins Judgment. Thus the parties' interest in the proceeds of the Collins Judgment were determined and allocated by the clear and unambiguous language in the parties' Decree, which awarded each of the parties "one-half of any proceeds received from the Collins lawsuit."¹⁰

F. Ms. Mitchell's Awareness of Mr. Mitchell's Assignment to MDI, Mr. Mitchell's Intentions and Interpretation of the Decree Are Disputed and Not at Issue in This Appeal.

Mr. Mitchell inappropriately raises and argues facts, which were disputed and not established in the district court and which were not raised and are not at issue in this

¹⁰ R. 39.

appeal. Indeed, the ‘facts’ raised by Mr. Mitchell in support of his inappropriate argument concerning Ms. Mitchell’s awareness and involvement in Mr. Mitchell’s interpretation of the Decree were disputed and refuted by Ms. Mitchell’s proffered testimony in the hearing held April 22, 2009. These disputed facts include: 1) that Ms. Mitchell understood that the parties were to split the proceeds, with Mr. Mitchell to do whatever he needed to do with his half,¹¹ 2) that Ms. Mitchell was unaware of the receipt or of the total amount of the first August 2002 check from attorney Mesmer.¹² 3) that Ms. Mitchell believed that the roughly \$66,000.00 check which the parties split were the proceeds net attorney fees, not the proceeds net attorney fees and Mr. Mitchell’s obligation to MDI,¹³ and 4) that Mr. Mitchell did not reveal that his obligation to MDI had already been paid and the funds being splits were, in fact, Ms. Mitchell’s portion of the proceeds.¹⁴

Nonetheless and despite the clear dispute below and the fact that the disputed facts were not raised and are not at issue in this appeal, Mr. Mitchell inappropriately recounts as ‘facts’ matters which are neither established nor at issue. This Court should not entertain such tactics, and should decline to address the issues, arguments and alleged facts so raised.

II. THE DISTRICT COURT CORRECTLY INTERPRETTED THE DECREE AND DID NOT ERR IN ORDERING THE PROCEEDS BE DISTRIBUTED ACCORDING TO THE PLAIN LANGUAGE OF THE DECREE.

¹¹ R. 222: 15.

¹² R. 222:16-17.

¹³ R. 222: 17.

¹⁴ R. 222: 17-18.

Mr. Mitchell argues that the district court erred, as a matter of law, in finding that Mr. Mitchell's assignment of "his interest" in the Collins Judgment was Mr. Mitchell's individual obligation, instead of ruling that, by his assignment, Mr. Mitchell had removed "his interest" from the marital estate, leaving only Ms. Mitchell's interest to be considered as proceeds of the Collins Judgment at the time of the Decree. As set forth herein above, the district court did not err in rejecting the interpretation of the Decree argued by Mr. Mitchell. Further, the district court ruled correctly that the unambiguous language of the parties' Decree means that:

each party is entitled to one-half of the proceeds of the Collins Judgment, that each party is responsible for his or her own debts, that, as Mr. Mitchell's asserted in his pleadings, Mr. Mitchell's portion of the Collins judgment was encumbered with his obligation to MDI, as well as his obligation to Mr. Mesmer, and, therefore, that Ms. Mitchell is entitled to one-half (1/2) the proceeds from the Collins judgment, net the parties' agree[d] payment of one-third the gross proceeds to Mr. Mesmer, not net the parties' obligation to Mr. Mesmer and Mr. Mitchell's obligation to MDI.¹⁵ Consistent with the arguments set forth above, Mr. Mitchell is incorrect in his assertion that the unambiguous language of the Decree mandates that each party, including Mr. Mitchell, was entitled to one-half of the \$66,274.79 check received from Mr. Mesmer in August 2008, as Mr. Mitchell's one-half interest in the proceeds had already been distributed to his attorney and MDI and Mr. Mitchell was not entitled to receive additional sums from Ms. Mitchell's share of the proceeds.

Findings and Order (Hearing April 22, 2009), p. 3, ¶4. (Appellant's Addendum I) The Court should uphold the decision of the district court, as it was not an error of law for the

¹⁵ R. 39.

district court to order that the entire Collins Judgment proceeds be distributed according to the plain language of the parties' Decree.

III. THIS COURT SHOULD NOT DISTURB THE RULING OR FINDING BELOW.

Finally, Mr. Mitchell challenges certain language in the district courts' Findings and Order (Hearing April 22, 2009), as clearly a erroneous finding.¹⁶ The Court should not entertain Mr. Mitchell's challenge as he did not preserve his objection to the challenged language in the district court below. The Court should also decline to consider Mr. Mitchell's argument because Mr. Mitchell has failed to meet the marshalling requirements for consideration of his assignment of error. Finally, the Court should not disturb the ruling below, as the language is neither clearly erroneous nor a finding of the Court, as the particular challenged language is a mathematical descriptor of the distribution of the 2002 Collins Judgment proceeds and Mr. Mitchell's inappropriate retention of approximately \$30,000.00 of these proceeds supported by substantial evidence.

A. Mr. Mitchell Failed to Preserve His Objection to the Challenged Language Below.

The Court should not address Mr. Mitchell's challenge because he failed to adequately preserve the issue raised for appeal. Whether the Court will address an issue "depends on whether the issue was adequately preserved for appeal. That is, the trial court must be offered an opportunity to rule on an issue." *Spears v. Warr*, 2002 UT 24,

¹⁶ Brief of Appellant, p. 20.

¶11, 44 P.3d 742, 748 (quoting *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998) (citations and internal punctuation omitted). Here, Mr. Mitchell did not adequately preserve his objection because he did not offer the district court the opportunity to rule on the matter about which he now complains.

Mr. Mitchell objected to the Commissioner's Recommendation.¹⁷ However, the specific language Mr. Mitchell takes issue with was not in the Commissioner's Minute Entry.¹⁸ Although, Mr. Mitchell made factual allegations which are contradictory to the language to which he take exception, he did not object to the form or content of the Findings and Order (Hearing April 22, 2009), as his Objection to Commissioner's Recommendation and argument therein was submitted prior to the district court's order. *See Respondent's Objection to the Commissioner's Recommendation*¹⁹; Findings and Order (Hearing April 22, 2009)²⁰. By not objecting or raising the issue of the specific language he now takes exception to, Mr. Mitchell failed to give the district court the opportunity to rule and, thus, failed to adequately preserve the issue for appeal.²¹

B. Mr. Mitchell Failed to Adequately Marshal the Evidence.

The Court should not address Mr. Mitchell's challenge because he failed to meet his marshalling requirement. Under the well-established rules and case law, "[i]n order to challenge a court's factual findings, an appellant must first marshal all the evidence in

¹⁷ R. 107-138.

¹⁸ R. 96-100.

¹⁹ R. 107-138.

²⁰ R. 155-161.

²¹ Even if, through his Objection to the Commissioner's Recommendation and argument, Mr. Mitchell did present the district court with an opportunity to rule on this issue, he did not include in the record the transcript of the October 20, 2009 hearing before Judge Medley, where such argument would have been heard and should forfeit any opportunity to raise the issue now.

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.” *Boyer v. Boyer*, 2008 UT App. 138, ¶ 21 (citing *Chen v. Stewart*, 2004 UT 82, ¶ 76, 100 P.3d 1177 (internal quotation marks omitted) and Utah R.App. P. 24(a)(9) (“A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.”). Adequate marshalling requires appellant to “present ... every scrap of competent evidence introduced at trial which supports the very findings [she] resists.” *Chen*, 2004 UT at ¶ 77, 100 P.3d 1177. Here, Mr. Mitchell has presented some evidence in support of the challenged finding, but has not met his marshalling burden.

For example, Mr. Mitchell, somewhat facetiously, assumes “for the purpose of his marshalling requirement that the representations of Ms. Mitchell’s counsel set forth in an unverified memorandum constitute evidence”²² However, Mr. Mitchell ignores the proffered testimony of Ms. Mitchell in the hearing held April 22, 2009, wherein the district court was presented with her testimony that:

- 1) that Ms. Mitchell was unaware of the receipt or of the total amount of the first August 2002 check from attorney Mesmer, which was not disclosed or concealed by Mr. Mitchell;²³
- 2) that Ms. Mitchell believed that the roughly \$66,000.00 check which the parties split were the proceeds net attorney fees;²⁴

²² Brief of Appellant, p. 20, fn. 20.

²³ R. 222:16-17.

²⁴ R. 222: 17.

- 3) that Ms. Mitchell was attempting to keep her distance from Mr. Mitchell and there were irregularities and disputes surrounding the splitting of the \$66,000.00 between Ms. Mitchell and Mr. Mitchell, but she wouldn't have agreed to the split if she had known that Mr. Mitchell was claiming or receiving proceeds from her share;²⁵
- 4) that Mr. Mitchell did not reveal that his obligation to MDI had already been paid and the funds being splits were, in fact, Ms. Mitchell's portion of the proceeds;²⁶ and
- 5) that Ms. Mitchell believes she was deceived or frauded by Mr. Mitchell in 2002 and that she came to the realization in 2008, after discussing the distribution with the parties' attorney, Mr. Mesmer.²⁷

Mr. Mitchell also fails to acknowledge that a copy of the roughly \$180,000 endorsed check, which he claims Ms. Mitchell had full knowledge of, is conspicuously lacking, despite his ready supply of endorsed checks which he believes support his position, as a fact favoring the district court's language. He also does not acknowledge that he, indeed, retained the 1/6 of the 2002 Collins Judgment proceeds.²⁸

In short, Mr. Mitchell has failed to marshal the evidence presented to the Court in support of the challenged language, and, as a consequence, this Court should decline to entertain his challenge.

C. The Challenged Language is Neither a Finding Nor Clearly Erroneous.

²⁵ R. 222: 16.

²⁶ R. 222: 17-18.

²⁷ R. 222: 18.

²⁸ Brief of Appellant, p. 21-22.

The Court should not disturb the ruling below, as the language is neither clearly erroneous nor a finding of the Court. The particular challenged language is a mathematical descriptor of the distribution of the 2002 Collins Judgment proceeds noting Mr. Mitchell's inappropriate retention of approximately \$30,000.00. Despite this, as outlined above, the evidence presented to the district court supports the sums and proportions retained, as well as the district courts' pronouncement that Mr. Mitchell forced distribution and inappropriately retained 1/6 of the gross proceeds from Ms. Mitchell's court-ordered share.

Accordingly, as the challenged language is not against the clear weight of the evidence and Mr. Mitchell did not meet his marshalling burden or preserve the issue for appeal below, the Court should not disturb the ruling below. *See Parduhn v. Bennett*, 2005 UT 22, ¶30, 112 P.3d 495.

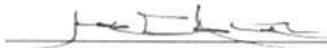
CONCLUSION

The parties' Decree is unambiguous and the district court did not err in interpreting its meaning and application, as matter of law. Under the Decree, each party is entitled to one-half the proceeds from the Collins' judgment, each is responsible for their own obligations related to the same monies, and Mr. Mitchell's assignment of "his interest" in the Collins Judgment was his own individual obligation. Additionally, although the district courts' language or finding was not clearly erroneous, the Court should not address Mr. Mitchell's assignment of error, as he did not preserve this issue for appeal in the trial court and did not meet his burden to marshal the evidence in

support of the ruling. Accordingly and for the reasons set forth above, the Utah Court of Appeals should affirm the district court's ruling applying proper principles of contract interpretation to the plain and unambiguous language of the parties' Decree in allocating the parties debts and obligations and dividing the parties' interest in the Collins Judgment.

Dated this 4th day of May 2010.

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Attorneys for Petitioner / Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this, the 4th day of May 2010, I caused a true and correct copy of the foregoing **BRIEF OF THE APPELLEE** to be served, via first class U.S. mail, postage pre-paid, to the following:

Scott D. Mitchell
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