

2009

Mitchell v. Mitchell : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

* * * *

DORANN C. MITCHELL,

Petitioner/Appellee,

vs.

NATHANIEL M. MITCHELL,

Respondent/Appellant.

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BRIEF OF APPELLANT

Case No. 20091027-CA

* * * *

RESPONDENT'S APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL
DISTRICT COURT, THE HONORABLE TYRONE E. MEDLEY PRESIDING

* * * *

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-4-103(2)(h).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

1. **Issue:** Whether the district court erred in ruling that appellant Nathaniel M. Mitchell's (hereinafter Mr. Mitchell) obligation to MDI Equity Partners, LLC, an obligation which had been completely satisfied and released more than four years prior to the entry of the Decree of Divorce, nevertheless remained as Mr. Mitchell's "individual obligation" within the meaning of paragraph 19 of the Decree of Divorce. This Court reviews questions of law for correctness. See, e.g., *Hom v. Utah Dept. of Public Safety*, 962 P.2d 95 (Utah App. 1998). This issue was preserved in Respondent's Objection to the Commissioner's Recommendation. (R. 109-112)

2. **Issue:** Whether the district court erred in ordering that MDI Equity Partners, LLC's share of the Collins Judgment be paid from Mr. Mitchell's share of the Collins lawsuit awarded in paragraph 20 of the Decree of Divorce. This Court reviews questions of law for correctness. See, e.g., *Hom v. Utah Dept. of Public Safety*, 962 P.2d 95 (Utah App. 1998). This issue was preserved in Respondent's Objection to the Commissioner's Recommendation. (R. 109-112)

3. **Issue:** Whether the district court erred in finding that, with respect to the 2002 Collins lawsuit distribution, Mr. Mitchell "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..." This is a question of fact reviewable under the clearly erroneous standard. *State v. Pena*, 869 P.2d 932 (Utah 1994). This issue was preserved in Respondent's Objection to the Commissioner's Recommendation. (R. 109-112)

DETERMINATIVE CONSTITUTIONAL PROVISIONS, ETC.

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative of this appeal or of central importance to this appeal.

STATEMENT OF THE CASE

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

This is an appeal from a final Order of the Third Judicial District Court of Salt Lake County.

A Decree of Divorce was entered in this case on July 22, 2002. On March 9, 2009, Mr. Mitchell obtained an Order to Show Cause requiring appellee Doran C. Mitchell (hereinafter Ms. Mitchell) to appear before the district court and show cause, inter alia, why she should not be held in contempt for failing to

distribute to Mr. Mitchell his one-half share of certain proceeds which Ms. Mitchell received from the "Collins lawsuit" in accordance with paragraph 20 of the Decree of Divorce. Ms. Mitchell filed her Response to Order to Show Cause and Counter Motion to Enforce Decree of Divorce and for Contempt on April 15, 2009.

An Order to Show Cause hearing was held before the Honorable Michelle Blomquist on April 22, 2009. On June 30, 2009 Commissioner Blomquist issued a Minute Entry recommending that the relief which Mr. Mitchell requested be denied and that the relief which Ms. Mitchell requested be granted.

Mr. Mitchell timely filed his Objection to the Commissioner's Recommendation on July 14, 2009. The Findings and Order (Hearing April 22, 2009) at issue on this appeal were entered July 30, 2009. Following a hearing held October 19, 2009, the Honorable Tyrone E. Medley overruled Mr. Mitchell's objection to Commissioner Blomquist's recommendation.

II. Statement of Facts

1. The parties were married on January 27, 1971. (R. 1)
2. On December 12, 1994, the Federal Deposit Insurance Corp. (FDIC) obtained a judgment (the "FDIC Judgment") against Mr. Mitchell in the Superior Court of the Northern District of Hillsborough County, Manchester, New Hampshire. (R. 42)
3. The FDIC subsequently assigned its judgment to an entity known as MDI Equity Partners, LLC (MDI) for collection. (R. 42)
4. Sometime prior to May 7, 1998, the parties obtained a judgment against Mr. Mitchell's former business partner, one Steven A. Collins (the "Collins Judgment"). (R. 42) Mr. Mitchell and Mr. Collins did business under the name Jefferson, Currier & Company, Inc. (R. 121) The FDIC Judgment arose out of Mr. Mitchell's personal guaranty of a promissory note which Jefferson, Currier Company, Inc., executed in favor of the Bank of New England. (R. 118-119) The Collins Judgment arose in part from Mr. Collins' misappropriation of the corporate funds of Jefferson, Currier Company, Inc. (R. 121-138)
5. In early 1998, MDI made contact with Mr. Mitchell attempting to collect the FDIC Judgment. In order to put a stop to MDI's collection efforts, on May 7, 1998, approximately four years prior to the parties' separation and the entry of the Decree of Divorce, Mr. Mitchell unconditionally assigned his interest in the Collins Judgment to MDI and, in consideration thereof, MDI unconditionally assigned the FDIC Judgment and the related promissory note, and guaranty to Mr. Mitchell. (R. 115-119)
6. Accordingly, four years prior to the parties' separation and the entry of the Decree of Divorce: (i) Mr. Mitchell no longer owed any obligation to either MDI, the Bank of New England or the FDIC; (ii) Mr. Mitchell's interest in the Collins Judgment

had been unconditionally assigned to MDI; and (iii) Ms. Mitchell retained her interest in the Collins Judgment. Thus, it was only Ms. Mitchell's retained interest in the Collins Judgment which was a marital asset subject to equitable distribution at the time of the parties' separation and divorce. (R. 115-119)

7. On July 22, 2002, more than four years after Mr. Mitchell's obligation to MDI had been completely satisfied and released and Ms. Mitchell's interest in the Collins Judgment was the only part of that judgment which remained as a marital asset, the district court entered a Decree of Divorce providing in paragraph 20 as follows: "...Petitioner and Respondent each be and they are hereby awarded one-half of any proceeds from the Collins lawsuit." (R. 69)

8. The Decree of Divorce further provides, in paragraph 19, that the parties are to be responsible for their own "individual debts and obligations." (R. 69)

9. Frank Mesmer is the attorney who represents the parties on a one-third contingency fee basis in connection with the Collins lawsuit. (R. 174-175)

10. In August 2002, approximately one month after the entry of the Decree of Divorce, Ms. Mitchell received a check in the mail from Mr. Mesmer in the amount of \$180,106.58 made payable jointly to the parties. (R. 78) This check was proceeds from the Collins lawsuit. Ms. Mitchell contacted Mr. Mitchell and both parties negotiated the check and returned it to Mr. Mesmer. Mr. Mesmer then sent Ms. Mitchell a second check in the amount of \$66,274.79, which represented Ms. Mitchell's one-third share of the proceeds collected by Mr. Mesmer in connection with the Collins lawsuit. (R. 79) What would otherwise have been Mr. Mitchell's share of the proceeds was paid by Mr. Mesmer directly to MDI in accordance with the May 7, 1998 assignment. (R. 78) Ms. Mitchell deposited the \$66,274.79 check into her Wells Fargo checking account and, in accordance with paragraph 20 of the Decree of Divorce, gave Mr. Mitchell a check in the amount of \$33,137.40 as his one-half share of her one-third share of the proceeds from the Collins lawsuit. (R. 80)

11. Approximately six and one-half years later, in December 2008, Ms. Mitchell received a third check from Mr. Mesmer made payable jointly to the parties in the sum of \$267,428.21, which are believed to be the final "proceeds from the Collins lawsuit." (R. 78)

12. This time, however, Ms. Mitchell refused to pay Mr. Mitchell his one-half of share of her one-third share of the check which she received from Mr. Mesmer. According to Ms. Mitchell, despite the fact that Mr. Mitchell's obligation to MDI had been completely satisfied and released more than four years prior to the entry of the Decree of Divorce, it nevertheless remained as Mr. Mitchell's "individual obligation" within the

meaning of paragraph 19 of the Decree of Divorce and the amount which MDI was entitled to receive in accordance with the May 7, 1998 assignment should be paid from Mr. Mitchell's one-half share of the proceeds of the Collins lawsuit awarded in paragraph 20 of the Decree prior to any distribution to Mr. Mitchell. (R. 56-63)

13. Unable to agree on how the December 2008 check should be divided, the parties did agree to deposit the check into Ms. Mitchell's attorney's trust account pending future agreement between the parties or a determination by the district court. (R. 43)

14. Because the parties were unable to reach an agreement between themselves, on March 9, 2009, Mr. Mitchell obtained an Order to Show Cause requiring Ms. Mitchell to appear before the district court and show cause why the court should not:

(a) hold [Ms. Mitchell] in contempt for her failure and refusal to deliver to [Mr. Mitchell] his one-half share of the "proceeds received from the Collins lawsuit" in accordance with paragraph 20 of the Decree of Divorce;

(b) order [Ms. Mitchell] and her attorney, Albert N. Pranno, to pay to Frank Messmer two-thirds of the funds presently being held in Mr. Pranno's trust account and to pay to [Mr. Mitchell] one-sixth of those funds as his one-half share of the "proceeds received from the Collins lawsuit;"

(R. 52-53)

15. Ms. Mitchell filed her Response to Order to Show Cause and Counter Motion to Enforce Decree of Divorce and for Contempt on or about April 15, 2009. In addition to arguing that MDI's share of the proceeds from the Collins Judgment should be subtracted from Mr. Mitchell's one-half share prior to any distribution to Mr. Mitchell, Ms. Mitchell asked the court to find that Mr. Mitchell purposely defrauded her in connection with the August 2002 division of the proceeds from the Collins Judgment. (R. 56-63)

16. The Order to Show Cause hearing was held before the Honorable Michelle Blomquist on April 22, 2009. On June 30,

2009, Commissioner Blomquist issued a Minute Entry in which she recommended that Mr. Mitchell's motion be denied and that Ms. Mitchell's motion be granted based upon her determination that the share of the proceeds from the Collins lawsuit which MDI received and was entitled to receive in accordance with the May 7, 1998 assignment was Mr. Mitchell's "individual obligation" to pay under paragraph 19 of the Decree of Divorce. (R. 96-99)

17. Mr. Mitchell timely filed his Objection to the Commissioner's Recommendation on July 14, 2009. (R. 107) Ms. Mitchell filed her Response and Objection to Respondent's Objection to the Commissioner's Recommendation on July 27, 2009. (R. 140) Mr. Mitchell filed his Reply in Support of Respondent's Objection to the Commissioner's Recommendation on August 10, 2009. (R. 165)

18. In the meantime, on July 30, 2009 the district court entered the Findings and Order (April 22, 2009) at issue on appeal. (R. 155)

19. Following oral argument, on November 10, 2009 the Honorable Tyrone E. Medley issued a Minute Entry Decision and Order overruling Mr. Mitchell's objection to the commissioner's recommendation. (R. 201)

20. Mr. Mitchell timely filed his Notice of Appeal on December 8, 2009. (R. 216)

SUMMARY OF ARGUMENT

The district court erred in determining that Mr. Mitchell owed a debt or obligation to MDI within the meaning of paragraph 19 of the Decree of Divorce. It is beyond serious dispute that Mr. Mitchell's obligation to MDI was completely satisfied and released more than four years prior to the entry of the Decree of Divorce when MDI assigned the FDIC Judgment to Mr. Mitchell.

The district court also erred in ordering that MDI's share of the Collins Judgment be paid from Mr. Mitchell's share of the Collins lawsuit awarded in paragraph 20 of the Decree of Divorce. Paragraphs 19 and 20 of the Decree of Divorce are clear and unambiguous. The MDI debt was clearly not Mr. Mitchell's "individual obligation" within the meaning of paragraph 19 because it had been satisfied and released more than four years prior to the entry of the Decree of Divorce. Just as clearly, it was only Ms. Mitchell's interest in the Collins lawsuit which remained as a marital asset subject to equitable distribution at the time of the Decree of Divorce. Accordingly, Mr. Mitchell was entitled to one-half of the \$66,274.79 check which the parties received from the Collins lawsuit in August 2002 and he was entitled to one-sixth of the \$267,428.21 check which they received in December 2008. There was simply no factual or legal basis for the district court's order that the amount which attorney Mesmer paid and was required to pay MDI in accordance

with the May 7, 1998 assignment be subtracted from Mr. Mitchell's share of the Collins lawsuit.

Finally, the district court's finding with respect to the 2002 Collins Judgment distribution that Mr. Mitchell "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..."¹ is unfounded and clearly erroneous. Mr. Mitchell and Ms. Mitchell both negotiated and returned the \$180,106.58 2002 distribution check to Mr. Mesmer. Mr. Mesmer then remitted 1/3 of the amount of the check directly to MDI in accordance with the May 1998 assignment, kept 1/3 for his attorney fee, and returned the other 1/3 to Ms. Mitchell in a check made jointly to the parties. Ms. Mitchell deposited this check into her personal Wells Fargo checking account and remitted one-half of the amount of the check to Mr. Mitchell in accordance with paragraph 20 of the Decree of Divorce.

¹Addendum I, p. 4.

ARGUMENT

I. THE DISTRICT COURT ERRED IN RULING THAT THE MDI OBLIGATION WAS MR. MITCHELL'S "INDIVIDUAL OBLIGATION" WITHIN THE MEANING OF PARAGRAPH 19 OF THE DECREE OF DIVORCE.

(A) Mr. Mitchell's obligation to MDI was completely satisfied and released more than four years prior to the parties' separation and divorce.

The district court erred as a matter of law in determining that the amount which MDI received and was entitled to receive from the collection of the Collins Judgment was Mr. Mitchell's "individual debt[] and obligation[]"² within the meaning of paragraph 19a of the Decree of Divorce. As demonstrated below, Mr. Mitchell's obligation to MDI was completely satisfied and released more than four years prior to the entry of the Decree of Divorce.

For purposes of this appeal, the relevant provisions of the Decree of Divorce are paragraphs 19 and 20. Paragraph 19 provides, in part, that Mr. Mitchell

"is hereby ordered to assume and pay and hold [Ms. Mitchell] harmless from liability thereon, the following debts and obligations:

a. [Mr. Mitchell's] individual debts and obligations.

...³

Paragraph 20 of the Decree of Divorce provides that Ms. Mitchell and Mr. Mitchell "each be and they are hereby awarded one-half of

²R. 69.

³R. 69.

any proceeds received from the Collins lawsuit."⁴

Paragraphs 19 and 20 of the Decree of Divorce are clear and unambiguous. The pivotal question which Mr. Mitchell is asking this Court to address is: Did Mr. Mitchell owe a debt or obligation to MDI at the time of the entry of the Decree of Divorce? If so, the district court was correct in concluding that MDI's share of the Collins Judgment should be subtracted from the one-half share of the Collins lawsuit which Mr. Mitchell was awarded in paragraph 20 of the Decree of Divorce. However, if Mr. Mitchell did not owe any debt or obligation to MDI at the time of the Decree of Divorce, then the district court's conclusion is contrary to the clear and unambiguous terms of the Decree.

Mr. Mitchell respectfully submits that the answer to this question is clearly that he did not owe any debt or obligation of any kind to MDI at the time of the entry of the Decree. In point of fact, as demonstrated below, Mr. Mitchell believes that it is beyond serious dispute that his obligation to MDI was completely satisfied **more than four years prior to the parties' separation and the entry of the Decree of Divorce.**

(B) The MDI assignments were not conditional.

Before the district court, Ms. Mitchell argued that despite Mr. Mitchell's assignment of his one-half share of the Collins

⁴R. 69.

Judgment to MDI more than four years prior to the Decree of Divorce, it nevertheless remained as Mr. Mitchell's "individual obligation" within the meaning of paragraph 19 of the Decree because it was "not an unconditional assignment."⁵ Ms. Mitchell's argument is without merit.

The May 7, 1998 letter memorializing the assignment is very clearly unconditional:

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

1. Nat [i.e., Mr. Mitchell] will assign to MDI Equity Partners, 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.

...

If you wish to have more formal settlement documents prepared, please let me know. Otherwise, please sign below and return this letter to me at your earliest convenience. I will then have Nat sign it and **we will consider this letter to constitute the agreement and assignments**. You may contact Frank Mesmer directly and send me the notes and a copy of the Satisfaction of Judgment against Nat.⁶

Both MDI and Mr. Mitchell executed the assignment agreement letter, and MDI subsequently delivered to Mr. Mitchell's counsel an Assignment of Guaranty and an Assignment of Judgment and

⁵R. 141 (Ms. Mitchell's emphasis).

⁶Addendum IV (emphasis added).

Liens.⁷ There is nothing conditional about any of these documents. To the contrary, they are all very clearly and unambiguously unconditional.

Ms. Mitchell relies on *Cook v. Cook*, 174 P.2d 434 (Utah 1946); and *Milford State Bank v. Parrish*, 53 P.2d 72 (Utah 1935), in support of her contention that the MDI assignment was conditional. Her reliance was misplaced. Both cases involved "equitable" assignments. All of the assignments at issue in the case at bar are clearly "legal" assignments⁸, which are interpreted according to the ordinary rules of contract construction. *Spears v. Warr*, 2002 UT 24, ¶ 39, 44 P.3d 742 (citing *Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991)).

"'In interpreting a contract, the intentions of the parties are controlling.' When presented with a written agreement, we look first to the four corners of the agreement to determine the parties' intentions. If the language within the four corners is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language."

Id. (quoting and citing *Central Florida Investments, Inc. v. Parkwest Assocs.* 2002 UT 3, ¶ 12, 40 P.3d 599).

In the case at bar, the May 7, 1998 assignment agreement letter is unambiguous. It clearly provides that Mr. Mitchell's

⁷Addendum V.

⁸"A legal assignment is a transfer or setting over of property, or of some right or interest in property, from one person to another; and unless in some way qualified, it is the transfer of the assignor's whole interest in an estate, or chattel, or other thing." 6 *Am Jur 2d Assignments* § 4, p. 47.

interest in the Collins Judgment was unconditionally assigned to MDI in consideration of MDI's unconditional assignment to Mr. Mitchell (and extinguishment of) any and all of the obligations which Mr. Mitchell had to either MDI, the Bank of New England or the FDIC.

Accordingly, because Mr. Mitchell no longer owed any debt or obligation to MDI as of more than four years prior to the parties' separation and the entry of the Decree of Divorce, the district court erred in determining that the amounts which MDI received and was entitled to receive from attorney Mesmer in connection with his collection of the Collins Judgment were in payment of Mr. Mitchell's own individual debt and obligation within the meaning of paragraph 19 of the Decree of Divorce.

(C) Mr. Mitchell's obligation to MDI was completely extinguished prior to the entry of the Decree of Divorce.

Before the district court, Ms. Mitchell also argued that "[Mr. Mitchell's] obligation to MDI was not extinguished prior to the entry of the Decree [of Divorce]..."⁹ Ms. Mitchell's argument is unfounded.

The May 7, 1998 fully executed assignment agreement letter and the subsequent Assignment of Guaranty and Assignment of Judgment and Liens (which were executed by MDI and delivered to Mr. Mitchell in accordance with the May 7, 1998 assignment

⁹R. 142 (Ms. Mitchell's emphasis).

agreement letter) clearly and unambiguously extinguished any obligation which Mr. Mitchell had to either MDI or the FDIC. The Assignment of Guaranty provides, in relevant part, that

"MDI Equity Partners, LLC, ... hereby assigns to Nathaniel M. Mitchell ... all of its right, title and interest ... in and to the guaranty of Nathaniel M. Mitchell ... of a note between Jefferson, Currier and Company, Inc. and Bank of New England ... TO HAVE AND HOLD the same unto Assignee ... forever."¹⁰

The Assignment of Judgment and Liens provides, in relevant part, as follows:

MDI Equity Partners, LLC ("Assignor") ... does hereby assign and convey to Nathaniel M. Mitchell ... all right, title and interest of Assignor in and to the Court Judgment, as well as any and all liens relating particularly described below:

....

Date Judgment Entered: December 12, 1994

Judgment Amount: \$119,578.61

Defendant: Nathaniel M. Mitchell

Plaintiff: Federal Deposit Insurance Corp.¹¹

Finally, pursuant to paragraph 2 of the May 7, 1998 assignment agreement letter, "MDI represent[ed] 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**

¹⁰Addendum V.

¹¹Addendum V.

date."¹²

As a matter of law, MDI's assignment of the FDIC Judgment to Mr. Mitchell extinguished the judgment.

"The general rule is that the assignment of a judgment to or for the benefit of the judgment debtor satisfies the judgment, because the antagonistic rights of creditor and debtor merge in one and the same person."

46 *Am Jur 2d, Judgments* § 441, p. 773 (citing *Jackman v. Jones*, 198 Or. 564, 258 P.2d 133 (1953)).

In short, contrary to Ms. Mitchell's unsupported assertion, Mr. Mitchell's obligation to MDI was completely extinguished long before the entry of the Decree of Divorce.

(D) Ms. Mitchell was well aware of the MDI assignments.

Ms. Mitchell was, of course, well aware of Mr. Mitchell's assignment of his share of the Collins Judgment to MDI (an assignment which was necessary in order to stop MDI from collecting the FDIC Judgment and thereby forcing the parties to face the prospect of bankruptcy). In August 2002, approximately one month after the entry of the Decree of Divorce, Ms. Mitchell received a check in the mail from attorney Mesmer in the amount of \$180,106.58 made payable jointly to the parties.¹³ Ms. Mitchell contacted Mr. Mitchell and both parties negotiated the check and returned it to Mr. Mesmer. Mr. Mesmer then sent Ms.

¹²Addendum IV(emphasis added).

¹³R. 78.

Mitchell a second check in the amount of \$66,274.79, which represented **Ms. Mitchell's one-third share** of the proceeds collected by Mr. Mesmer on the Collins Judgment.¹⁴ **What would otherwise have been Mr. Mitchell's share of the proceeds was paid directly to MDI by Mr. Mesmer in accordance with the May 7, 1998 assignment.**¹⁵ Ms. Mitchell deposited the \$66,274.79 check into her personal Wells Fargo checking account and gave Mr. Mitchell a check in the amount of \$33,137.40 as **his one-half share of her one-third share of the Collins lawsuit in accordance with paragraph 20 of the Decree of Divorce.**¹⁶

Thus, in August 2002, approximately one month after the entry of the Decree of Divorce when its terms were still fresh in her mind, Ms. Mitchell had no difficulty recollecting Mr. Mitchell's assignment of his interest in the Collins Judgment to MDI and, perhaps more importantly, **she did not hesitate in delivering to Mr. Mitchell a check for one-half of her share of the proceeds of the Collins Judgment in accordance with paragraph 20 of the Decree of Divorce.**

¹⁴R. 79.

¹⁵R. 78.

¹⁶R. 80.

II. THE DISTRICT COURT ERRED IN ORDERING THAT MDI'S SHARE OF THE COLLINS JUDGMENT BE PAID FROM MR. MITCHELL'S ONE-HALF SHARE OF COLLINS LAWSUIT AWARDED IN PARAGRAPH 20 OF THE DECREE OF DIVORCE.

As demonstrated above, Mr. Mitchell assigned his interest in the Collins Judgment to MDI more than four years prior to the entry of the Decree of Divorce. The only remaining interest which the parties had in the Collins lawsuit when the Decree of Divorce was entered was Ms. Mitchell's interest. Paragraph 20 of the Decree awards Mr. Mitchell and Ms. Mitchell each "one-half of any proceeds received from the Collins lawsuit."¹⁷ Accordingly, pursuant to the unambiguous language of the Decree each party was entitled to one-half the \$66,274.79 check which they received from Mr. Mesmer in August 2002 and each was entitled to one-sixth (i.e., one-half of Ms. Mitchell's one-third share) of the \$267,428.21 check which they received from Mr. Mesmer in December 2008.

Because (as demonstrated above) MDI's share of the Collins Judgment was not Mr. Mitchell's "individual debt[] and obligation[]"¹⁸ within the meaning of paragraph 19a of the Decree of Divorce, the district court erred in ordering that the amount which Mr. Mesmer paid and was required to pay directly to MDI be subtracted from Mr. Mitchell's one-half share of the Collins

¹⁷R. 69.

¹⁸R. 69.

lawsuit awarded in paragraph 20 of the Decree. There is simply no legal or factual basis for the district court's order.

III. THE DISTRICT COURT'S FINDING WITH RESPECT TO THE 2002 DISTRIBUTION IS CLEARLY ERRONEOUS.

In its Findings and Order (Hearing April 22, 2009), the district court found that Mr. Mitchell

"remitted 1/3 [of the 2002 Collins lawsuit distribution] 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..."¹⁹

This finding is clearly erroneous and reveals the district court's fundamental misunderstanding of the material facts of this case.

Mr. Mitchell marshals the following evidence²⁰ which supports the district court's finding. In her "Response to Order to Show Cause and Counter Motion to Enforce Decree of Divorce and for Contempt," Ms. Mitchell represented to the district court the following with respect to her receipt of the August 2002 Collins Judgment distribution check from attorney Mesmer:

"[Mr. Mitchell] presented the check to [her], required her to endorse the back, took back the check, and then wrote a check to [her] from [his] personal account for approximately \$30,000.00 which according to [Mr. Mitchell], represented [Ms. Mitchell's] share of the received proceeds... and because of the flurry in which [Mr. Mitchell] 'processed' the check and handed [Ms. Mitchell] her share, [Ms.

¹⁹Addendum I, p. 4.

²⁰Mr. Mitchell will assume for purposes of his marshaling requirement that the representations of Ms. Mitchell's counsel set forth in an unverified memorandum constitute evidence.

Mitchell] thought nothing better regarding the possibility that her share of the proceeds was improper."²¹

Based solely on Ms. Mitchell's representations, the district court's finding that Mr. Mitchell unilaterally determined how the 2002 Collins Judgment distribution would be allocated and "inappropriately retained 1/6"²² of that distribution for himself would have been proper.

However, Ms. Mitchell's representation that in a "flurry" Mr. Mitchell "required her to endorse the back [of the 2002 distribution check], took back the check, and then wrote a check to [her] from [his] personal account for approximately \$30,000.00 which according to [Mr. Mitchell], represented [Ms. Mitchell's] share of the received proceeds"²³ is demonstrably false. In point of fact, it was Mr. Mitchell who endorsed the check and gave it back to Ms. Mitchell.²⁴ Ms. Mitchell then deposited the check into her personal Wells Fargo checking account²⁵ and wrote Mr. Mitchell a check drawn on her personal account in the amount of \$33,137.40²⁶, which was exactly one-half of a penny more than one-half of Ms. Mitchell's share of the 2002 distribution and

²¹R. 58-59.

²²Addendum I, p. 4.

²³R. 58-59.

²⁴R. 79.

²⁵R. 79.

²⁶R. 80.

which was precisely the division required by paragraph 20 of the Decree of Divorce.

Accordingly, the district court's finding that Mr. Mitchell "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..."²⁷ is unfounded and clearly erroneous. Mr. Mitchell and Ms. Mitchell both negotiated and returned the \$180,106.58 2002 distribution check to Mr. Mesmer. Mr. Mesmer then remitted 1/3 of the distribution directly to MDI in accordance with the May 1998 assignment, kept 1/3 for his attorney fee, and returned the other 1/3 to Ms. Mitchell in a check made jointly to the parties. Ms. Mitchell deposited this check into her personal account and remitted one-half of the amount of the check to Mr. Mitchell in accordance with paragraph 20 of the Decree of Divorce.

CONCLUSION

Based on the foregoing, Mr. Mitchell respectfully requests that the district court's Findings and Order (April 22, 2009) be reversed and that this action be remanded to the district court for further proceedings consistent with this Court's decision.

DATED this ____ day of April 2010.

²⁷Addendum I, p. 4.

Scott B. Mitchell
Attorney for Appellant

MAILING CERTIFICATE

Undersigned certifies that two copies of the foregoing were mailed this ____ day of April 2009 via first class U.S. Mail, postage prepaid, to the following:

Albert N. Pranno
Justin T. Ashworth
Pranno Ashworth Law, PLLC
299 South Main, Suite 1300
Salt Lake City, Utah 84111

ADDENDUM I

Albert N. Pranno #9807
Justin T. Ashworth #9474
Pranno Ashworth Law, PLLC
Attorneys for Petitioner
Wells Fargo Center
299 South Main Street, Suite 1300
Salt Lake City, Utah 84111
Telephone: 801-534-4404
Facsimile: 801-534-4405

FILED DISTRICT COURT
Third Judicial District

JUL 30 2009

SALT LAKE COUNTY

By

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DORANN C. MITCHELL,

Petitioner,

vs.

NATHANIEL M. MITCHELL,

Respondent.

FINDINGS AND ORDER
(Hearing April 22, 2009)

Civil No.024904327

Judge Tyronne E. Medley
Commissioner Michelle R. Blomquist

The above captioned matter having come regularly for hearing before the above entitled Court on April 22, 2009 at the hour of 10:00AM, before the Honorable Michelle R. Blomquist, Third District Court, on the Respondent's Motion for Order to Show Cause and Petitioner's Response to Order to Show Cause and Counter Motion to Enforce Decree of Divorce and for Contempt, and the Petitioner being present in person and being represented by counsel, Albert N. Pranno, and Respondent being present in person and being represented by counsel, Scott B. Mitchell. The Court, having reviewed the file and the pleadings in this matter, and having heard the proffers and argument of counsel, and having taken the matter under advisement, in order to

consider documents filed by Respondent and the matter more fully, does hereby make the following findings and orders:

FINDINGS

1. Both parties seek the enforcement of paragraph 20 of the parties' Decree of Divorce, entered July 19, 2002, which states as follows:

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, emphasis added.

2. The Court finds that a review of the facts is necessary in order to determine the bases for the parties' arguments and the application of paragraph 20 of the parties' Decree of Divorce.

3. Both parties agree that the one-third of the gross proceeds from the Collins judgment are to be paid to the parties' attorney in the Collins matter, Mr. Frank Mesmer; however, they disagree as to the proper distribution of funds after payment of Mr. Mesmer. Mr. Mitchell argues that because his portion of the Collins judgment was encumbered with the obligation he had to MDI, when the decree was entered, that this prior obligation should be satisfied prior to the division of the remaining proceeds between the parties, that the Collins

proceeds should not be divided between the parties until after the obligations to both Mr. Mesmer and MDI have been paid. In contrast, Ms. Mitchell argues that she is entitled to one-half the proceeds, after payment of the agreed one-third to Mr. Mesmer, as paragraphs 18 and 19 of the parties' Decree of Divorce obligate the parties to pay their own debts and obligations, including the parties' individual debts and those incurred by the parties subsequent to the parties' separation and, as Mr. Mitchell concedes, that the MDI obligation is Mr. Mitchell's own separate debt and obligation while the Collins judgment was a joint asset.

4. The Court agrees with Ms. Mitchell's analysis and finds that, per the parties' Decree of Divorce, each party is entitled to one-half the proceeds from the Collins judgment, that each party is responsible for his or her own debts, that, as Mr. Mitchell asserts 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 one-half (1/2) the proceeds from the Collins judgment, net the parties' agree 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.

5. The Court finds that the parties' Decree of Divorce is clear, that Mr. Mitchell understood the Decree and that Mr. Mitchell failed to comply with the Court's order embodied in the parties' Decree of Divorce.

6. The Court finds that Ms. Mitchell's Motion should be granted as prayed.

ORDER

WHEREFORE, The Court HEREBY ORDERS and DECREES as follows:

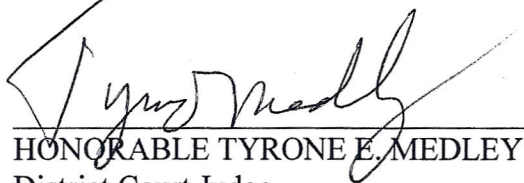
- A. The relief sought by Respondent in his Motion for Order to Show Cause is denied.
- B. Petitioner's Counter Motion is granted.
- C. The total proceeds of the Collins judgment, received in 2002 and 2008, are to be distributed to the parties, one-half each, as here-described:
 - i. After subtracting Mr. Mesmer's $\frac{1}{3}$ share from the 2008 distribution, one-half the remainder of the 2008 Collins judgment distribution, plus the actual additional monies retained by Respondent from the 2002 Collins judgment distribution shall be distributed to Petitioner, with the remaining sums, one-half the remained of the 2008 Collins judgment distribution, less the actual additional monies retained by Respondent from the 2002 Collins judgment distribution, to Respondent;
 - ii. As the total 2002 Collins distribution was approximately \$180,000 and Respondent remitted $\frac{1}{3}$ to Mr. Mesmer and $\frac{1}{3}$ to satisfy or partially satisfy MDI (his stipulated and Court-allocated debt), distributed $\frac{1}{6}$ to Petitioner, and inappropriately retained $\frac{1}{6}$, the additional sum due Petitioner is approximately \$30,000.00;
 - iii. Thus, Petitioner's shall receive her one-half portion of the remainder of the 2008 distribution, after payment to Mr. Mesmer, along with the sums (approximately

\$30,000.00) inappropriately distributed to Respondent from the 2002 Collins distribution from Respondent's share of the remainder of the 2008 distribution, and Respondent shall received his one-half portion of the remained of the 2008 distribution, less the sums (approximately \$30,000.00) inappropriately retained by Respondent from the 2002 Collins judgment distribution.

- D. The issue of Respondent's contempt for failing to comply with the Court's clear order concerning the division of the proceeds of the Collins judgment is certified for evidentiary hearing, with the issue of fees being reserved for that hearing, subject to submission of an Affidavit of Fees, by Petitioner, to the Court and counsel prior to hearing.
- E. The proceeds of the Collins judgment shall be divided and distributed to the parties according to this Order and as described above.
- F. Respondent is responsible to pay any other obligations from his portion of the Collins judgment.

DATED this 30 day of July 2009.

BY THE COURT:

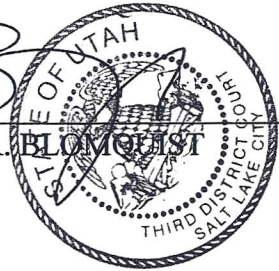

HONORABLE TYRONE E. MEDLEY
District Court Judge

DATED this 27th day of July 2009.

RECOMMENDED BY:

Michelle R. Blomquist

HONORABLE MICHELLE R. BLOMQUIST
District Court Commissioner



APPROVED AS TO FORM:

Scott B. Mitchell
Attorney for Respondent

Dated: _____

**NOTICE PURSUANT TO Rule 7(f)(2) OF THE UTAH RULES OF CIVIL PROCEDURE
TO THE RESPONDENT AND COUNSEL:**

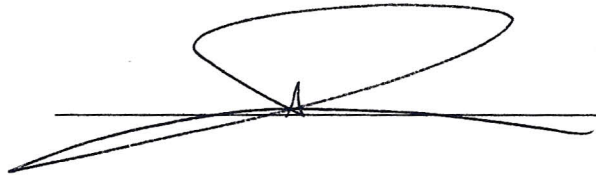
Notice is hereby given that pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure of the District Courts of the State of Utah, that this Order prepared by the Petitioner shall be the Order of the Court unless you file an objection in writing within five (5) days from the date of the service of this notice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was served as indicated below on this 9 day of JULY, 2009 to the following:

Scott B. Mitchell, Esq.
2469 East 7000 South #204
Salt Lake City, Utah 84121

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Electronic Facsimile

A handwritten signature in black ink, consisting of a large, stylized loop at the top and a horizontal line with a small upward tick in the center.

ADDENDUM II

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DORANN C. MITCHELL,	:	MINUTE ENTRY DECISION AND ORDER
Petitioner,	:	CASE NO. 024904327
vs.	:	
NATHANIEL M. MITCHELL,	:	
Respondent.	:	

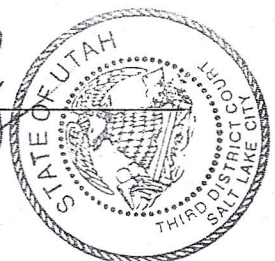
Respondent's Objection to the Commissioner's Recommendation, dated on or about July 1, 2009, was taken under advisement by the Court after the submission of Memoranda and oral argument by counsel on October 19, 2009. After further review and consideration, the Court rules as follows:

1 Respondent's Objection to the Commissioner's Recommendation is denied. The Court finds that respondent has failed to establish that Commissioner Blomquist abused her discretion or committed an error of law.

2 This signed Minute Entry Decision shall constitute the Order of the Court resolving the matter referenced herein, no further Order is required.

Dated this 10 day of November, 2009.

Tyrone E. Medley
TYRONE E. MEDLEY
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry Decision and Order, to the following, this 10 day of November, 2009:

Mary C. Rutledge
Attorney for Petitioner
192 North 100 West
Payson, Utah 84651

Scott B. Mitchell
Attorney for Respondent
2469 East 7000 South, Suite 204
Salt Lake City, Utah 84121

Justin T. Ashworth, Esq.
299 S. Main Street, Suite 1300
Salt Lake City, Utah 84111

J. Ashley

ADDENDUM III

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DORANN C. MITCHELL,	:	MINUTE ENTRY
Petitioner,	:	CASE NO. 024904327
vs.	:	
NATHANIEL M. MITCHELL,	:	
Respondent.	:	

This Court took under advisement the issues presented to it at a hearing held April 22, 2009. Petitioner Dorann Mitchell was present, represented by her attorney, Albert Pranno. Respondent Nathaniel Mitchell was also present, represented by his attorney, Scott B. Mitchell. Both parties had Motions before the Court. The Court was provided a Notice of Filing during the course of the hearing and the Court took the matter under advisement in order to review the Notice of Filing prior to making recommendations. The Court has now had the opportunity to review the Notice of Filing, consider the pleadings provided, and consider argument. Therefore, the Court hereby makes the following recommendations.

Both parties are seeking the enforcement of paragraph 20 of the parties' Decree of Divorce, entered July 19, 2002. Paragraph 20 states the following:

That the petitioner and respondent are involved in two lawsuits and that petitioner be and she is hereby 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, emphasis added.

Pursuant to paragraph 20, each party was to be awarded one-half of the proceeds received from the Collins lawsuit. A review of the facts is necessary in order to determine the bases for the parties' arguments. Mr. Mitchell argues that in December 2004, the Federal Deposit Insurance Corporation obtained a Judgment against Mr. Mitchell, which Judgment was assigned to an entity known as MDI Equity Partners, LLC (hereinafter referred to as "MDI"). Four years later in May 1998, the parties obtained a Judgment ("the Collins judgment") against an individual named Steven Collins, who was Mr. Mitchell's former business partner. About that same time, Mr. Mitchell argues that he assigned his interest in the Collins judgment to MDI, and MDI assigned Mr. Mitchell its interest in the FDIC Note.

The parties concede that Mr. Messmer should be awarded one-third of the Collins judgment, given that he had a one-third contingency fee on that lawsuit. Mr. Mitchell argues that the Collins judgment was encumbered, prior to the entry of the Decree, with his additional obligation to pay Mr. Messmer an additional one-third of the proceeds. Mr. Mitchell argues that because the Collins judgment was already

encumbered with the obligation he had to MDI when the Decree was entered, that the proceeds from the Collins judgment should be used to satisfy that obligation prior to the division of the remaining proceeds between the parties. He therefore argues that the proceeds of the Collins judgment not be divided between the parties until both obligations are paid.

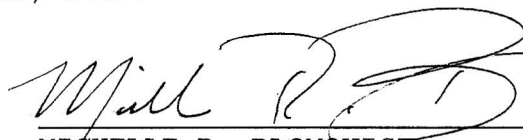
Ms. Mitchell counters, claiming that she should be entitled to one-half of the total amount of fees remitted to the parties, minus only one-third the parties agreed should be paid by them. She argues that pursuant to paragraphs 18 and 19 of the Decree of Divorce, both parties are obligated to pay their own debts and obligations. This includes all debts and obligations incurred subsequent to the date of separation and each party's own individual debts. Ms. Mitchell states that Mr. Mitchell concedes that the obligation to MDI is his own separate obligation. She states that Mr. Mitchell is clear in his pleadings that his MDI obligation was his sole obligation and that the Collins lawsuit proceeds was a joint asset.

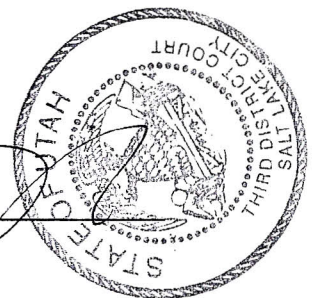
Upon review of the pleadings, the Court agrees with Ms. Mitchell's analysis. Mr. Mitchell asserts in his pleadings that this portion of the Collins judgment was encumbered with his obligation to pay Mr. Messmer amounts above those amounts the parties agreed they would pay him in the course of representing them to secure the Collins judgment.

Wherefore, the Court hereby recommends that Ms. Mitchell's Motion be granted as prayed. The issue of contempt is certified for evidentiary hearing, with fees being reserved for that hearing. Ms. Mitchell should submit an affidavit of fees to counsel and the Court prior to the hearing. The proceeds of the Collins judgment shall be immediately divided between the parties, minus the one-third fee to be paid to Mr. Messmer. Mr. Mitchell is responsible to pay any other obligation to Mr. Messmer from his portion of the Collins judgment.

Counsel for Ms. Mitchell is directed to prepare an order consistent with these recommendations.

Dated this 30th day of June, 2009.


MICHELLE R. BLOMQUIST
DISTRICT COURT COMMISSIONER



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 1 day of July, 2009:

Albert N. Pranno
Attorney for Petitioner
299 S. Main Street, Suite 1300
Salt Lake City, Utah 84111

Scott B. Mitchell
Attorney for Respondent
2469 East 7000 South, Suite 204
Salt Lake City, Utah 84121

Karrie Sprague

ADDENDUM IV

Scott B. Mitchell

Attorney at Law
SUITE 1112 WALKER CENTER
178 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84111

TELEPHONE: (801) 359-8400

TELECOPIER: (801) 359-8473

May 7, 1998

TRANSMITTED VIA FACSIMILE & U.S. MAIL
Facsimile Number (814) 632-2681

George Kelley, IV
1000 Main Street, 3rd Floor
New Rochelle, NY 10801

Re: Nathaniel Mitchell
Your Account #2143014

Dear George:

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

1. Nat will assign to MDI Equity Partners, L.L.C., all of his interest in the judgment which he and his wife have against Steve Collins. Frank Mesner 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.
3. Ralph Holmes will receive \$1,000.00 of the amount which has been interpleaded in the Hillsborough Superior Court, and MDI will be entitled to the balance.

If you wish to have more formal settlement documents prepared, please let me know. Otherwise, please sign below and return this letter to me at your earliest convenience. I will then have Nat sign it and we will consider this letter to

constitute the agreement and assignments. You may then contact Frank Mesner directly and send me the notes and a copy of the Satisfaction of Judgment against Nat.

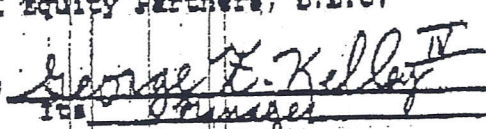
Please call me if you have any questions.

Regards,


Robert B. Mitchell

MDI Equity Partners, L.L.C.

By:


George E. Kelley IV
Its Manager


Nathaniel M. Mitchell

SEN:km
cc: client

TOTAL P.02

TOTAL P.02

ADDENDUM V

ASSIGNMENT OF GUARANTY

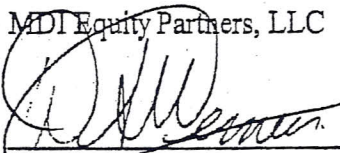
KNOW that MDI Equity Partners, LLC, a New Hampshire limited liability company, with an address of 385 Whitford Street, Manchester, County of Hillsborough, State of New Hampshire, ("Assignor"), for consideration paid, hereby assigns to Nathaniel M. Mitchell, of 2820 East Robidoux Road, Sandy, State of Utah, ("Assignee"), all of its right, title and interest, if any, in and to the guaranty of Nathaniel M. Mitchell dated April 21, 1986 of a note between Jefferson, Currier and Company, Inc. and Bank of New England, N.A. dated May 1, 1986.

TO HAVE AND HOLD the same unto Assignee, and to the successors, legal representatives and assigns of the Assignee forever.

This Assignment is made without recourse against, and without representations or warranties including collectively, or otherwise, express or implied by, Assignor in any event whatsoever.

IN WITNESS WHEREOF, the Assignor has caused these presents to be signed by its duly authorized Manager as of the 4th day of January, ~~2000~~ 2001.

MDI Equity Partners, LLC



By: Dennis A. Demers

Its: Manager

STATE OF NEW HAMPSHIRE
Hillsborough, ss.

January, 2001

This instrument was acknowledged before me this 4th day of ~~December~~ January, 2001 by Dennis A. Demers in his capacity as Manager of MDI Equity Partners, LLC.



Notary Public

BARBARA A. CABRAL, Notary Public
My Comm. Expires 12/31/2003

ASSIGNMENT OF JUDGMENT AND LIENS

MDI Equity Partners, LLC ("Assignor"), for value received, does hereby assign and convey to Nathaniel M. Mitchell, his heirs, successors and assigns, all right, title and interest of Assignor in and to the Court Judgment, as well as any and all liens relating particularly described below:

Court: Superior Court in the Northern District of Hillsborough County, Manchester, NH

Docket or Case Number: Index No. 90-C-689

Date Judgment Entered: December 12, 1994

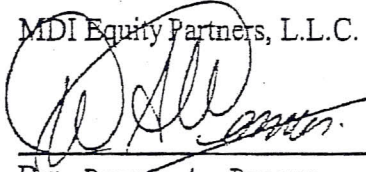
Judgment Amount: \$119,578.61

Defendant: Nathaniel M. Mitchell

Plaintiff: Federal Deposit Insurance Corp.

This Assignment is executed without recourse and without representations of or warranties of title, collectibility, or otherwise, express or implied.


MDI Equity Partners, L.L.C.


By: Dennis A. Demers
Its: Manager

STATE OF NEW HAMPSHIRE
Hillsborough, ss.

January, 2001

This instrument was acknowledged before me this 4th day of ~~December~~, ~~2000~~ by
Dennis A. Demers in his capacity as Manager of MDI Equity Partners, LLC.


Notary Public

BARBARA A. CABRAL, Notary Public
My Commission Expires May 15, 2005