

2010

## Liston v. Liston : Brief of Appellee

Utah Court of Appeals

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ANNETTE LISTON,

Appeal No. 20100666  
District Court Case No.084900427

Judge Robert K. Hilder

Respondent/Appellant.

FILED  
UTAH APPELLATE COURT

ANNETTE LISTON,

Appeal No. 20100666

District Court Case No.084900427

**Judge Robert K. Hilder**

**Respondent/Appellant.**

APPEAL FROM JULY 15, 2010 ORDER OF THE HONORABLE ROBERT K.  
HILDER THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH

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### **STATEMENT OF JURISDICTION**

The Court of Appeals has jurisdiction pursuant to Utah Code Annotated Section 78A-4-103(2)(h).

### **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

The Appellee takes exception to Appellant's framing of his issues 1 and 3.

Issue #1 as presented in Appellant's Brief states: "Whether the District Court abused its discretion in finding that petitioner's debts incurred solely by herself during the marriage, and without any knowledge, consent, input or control of the respondent should be shared by the respondent," is misconstrued. The District Court below did not make findings that would suggest these issue as presented by Appellant. The issue is better stated as follows: Whether the District Court correctly specified which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during the marriage.

Issue #3 as stated by Appellant is also not clear and misleading. It states: "Whether the Court abused its discretion by finding that Appellant commingled premarital financial accounts and cash gifts from his mother made during the marriage with another account in which Appellant deposited traceable income earned during the marriage and paid business operation expenses and personal living expenses; and whether Appellant premarital accounts lost their identity and character as separate property by temporarily depositing them into a joint account

with Appellee to protect them from seizure by his former spouse." The issue as framed suggests that the District Court made it's findings based upon a commingling of funds notion and therefore the accounts in question lost their identity as separate property. As will be discussed below, the District Court ~~did not~~ base it's findings on a commingling theory but provided the basis of its findings only after a full, detailed and careful analysis of the unraveling of the accounts in question. The District Court was more specific and the issue is better stated as: Whether the District Court correctly determined that the Investment and Retirement Accounts were subject to division as marital property.

**PROVISIONS OF CONSTITUTIONS, STATUTES, ORDINANCES,  
AND REGULATIONS WHICH ARE DETERMINATIVE OR OF CENTRAL  
IMPORTANCE**

There are no constitutional provisions, ordinances, or regulations that are determinative of this case.

**Statutes:**

UTAH CODE ANN. § 30-3-5(1) (2010) provides, in relevant part:

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties.

UTAH CODE ANN. § 30-3-3(1) and (2) (2008) provides:

(1) In any action filed under Title 30, Chapter 3, Divorce, Chapter 4, Separate Maintenance, or Title 78B, Chapter 7, Part 1, Cohabitant Abuse Act, and in any



action to establish an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

(2) In any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party is impecunious or enters in the record the reason for not awarding fees.

UTAH CODE ANN. § 73-1-11(4) (2010) provides:

(4) The right to the use of water evidenced by shares of stock in a corporation shall not be deemed appurtenant to land.

**Rules:**

Utah Rule Of Civil Procedure Rule 26.

(a)(3) Disclosure of expert testimony.

(a)(3)(A) A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence.

(a)(3)(B) Unless otherwise stipulated by the parties or ordered by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness or party. The report shall contain the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(a)(3)(c) Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(3) shall be made within 30 days after the expiration of fact discovery as provided by subdivision (d) or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (3)(B), within 60 days after the disclosure made by the other party.

## **UTAH RULES OF EVIDENCE**

### **Rule 201. Judicial notice of adjudicative facts.**

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

**Rule 614. Calling and interrogation of witnesses by court**

(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

**STATEMENT OF THE CASE**

This is an appeal from a final order entered on July 15, 2010 arising from a two-day bench trial in a divorce proceeding before Judge Robert K. Hilder, Third District Court, Salt Lake County. The findings of fact issued by the Court on July 2, 2010 was reduced to a final divorce decree that was entered on July 15, 2010.

**STATEMENT OF RELEVANT FACTS**

Both parties are 73 years old, having met in high school but not marrying until later in life ( R. 20). Each party has two previous marriages and lived with each other since 1999 ( R. 21; Findings, 1). Appellant divorced from his second wife in

January 2002 and the parties married May 20, 2002 (Findings, 2). The parties separated January 15, 2008 and the marriage lasted 5 years and 8 months (Findings, 6).

During the proceeding the District Court Judge reviewed and took judicial notice of a 42 page Davis County docket of Appellant's prior divorce with his second wife (Findings, 8; R. 299-304, 346, 347, 350,351). The court did so after hearing testimony of his previous marriage and his attempt to shield his assets. There was never an objection made by Appellant over this Judicial Notice or the questioning that followed by the District Court Judge. Based upon testimony given by the parties the court found that Appellant had actively taken steps to protect his financial interests in his previous marriage and the current marriage of the parties that went well beyond legitimacy. According to the District Court, it was clear from the Davis County Docket and Appellant's own testimony that he was willing to undertake acts that included deception to shield assets (Findings, 9; R. 300, 346, 347). Appellant claimed he had to protect his assets due to a difficult second marriage and that that was evidence that he had to do so in the present marriage as well. The court disagreed and indicated that Appellant understood other options such as a pre- or post-marital agreement but no such written agreement was provided (Findings, 10;R. 350).

The court found that Appellant maintained his own funds in the name of his elderly mother, Lorena Liston, at Barnes Bank and that none of those funds

belonged to his mother ( R. 299-303). These fictitious accounts were the primary accounts that Appellant used during the course of the present marriage with Appellee to obscure and shield his financial dealings and to avoid judgment collection ( R. 346-347). Appellant routinely deposited earnings from consulting as an engineer into this account, said deposits being marital earnings (Findings, 11; R. 348, 349, 422).

During the course of the marriage the parties used separate accounts, but the court found that the fact that they may have had separate accounts does not mean that the parties finances were not combined in substantial ways. For example, both had separate credit cards but both cards were used to purchase the entire range of marital goods and expenses (Findings, 12; R. 117-120, 183, Petitioner's Ex. 54, 55). Further, the court found that the Appellee left the marriage with \$30,500 of debt and that the debt related to family expenses that was unpaid at the time of separation. The two credit cards in question total approximately \$30,500.00 (Petitioner's Ex. 54, 55). There was no evidence to suggest that the debt was for the sole benefit of Appellee (Findings, 13). The court found that the Appellant did not identify debts to be allocated but that the Appellee did support her claim of \$30,500 of marital debt and that these debts were not for her exclusive benefit nor were they used without marital benefit. Moreover, Appellee did not have the income to support many of these expenditures (Finding, pp. 11; R. 117-120,183,293,294; Petitioner's Ex 54). The court further found that many of the day-to-day expenses, including food,

entertainment, use of and gas for the car, Christmas for the families, and travel where substantially paid by Appellee and therefore the court found that \$30,500 of debt was marital and should be shared equally between the parties (Findings, p. 12; R. 117-120, 183, Petitioner's Ex. 54, 55).

The court found that the parties had obtained a marital residence and that residence was the subject of a mediation agreement between the parties, Appellee having giving up her equity for payment of \$10,000 ®. 65; Petitioner's Ex 16). During the course of the marriage the parties also subdivided their real property and sold off a portion of the property to maximize its value (Findings pp 8-10). The real property also included shares in Holliday Water Company, one of the shares the court found to be appurtenant to the property. Subsequent to the subdividing of the property, 4 water shares from Holliday Water Company existed and related to the real property. Based upon the testimony of the manager of Holliday Water Company, which the court found to be persuasive, the court found that only one of the 4 shares was appurtenant to the property, that share having been tied to a single meter on the property which is necessary for the property to receive culinary water (Findings, pp. 10; R. 68, 70, 73, 239, 243, 244, 246, 247; Petitioner's Ex 17). The other 3 shares were valued at \$5000 each (total value \$15,000) and the court found that the real value was in order to obtain new service to a new meter and not to obtain additional water without charge (Findings pp. 10-11). The court further determined that these 3 shares were not the subject of the mediation agreement

between the parties for the satisfaction of Appellees interest in the real property and that Appellant could either pay Appellee \$7500 or could transfer her 1 share and pay her \$2500 (Findings, pp. 11; R. 68).

The Appellant accumulated and held money over the years and the course of the marriage with Fidelity Investments. Appellant was gainfully employed during the marriage but was rather reluctant to say that the monies in Fidelity Accounts came from income while working ( R. 51-52, 348,349,357,383,422). He provided no evidence as to the source of those funds ( R. 357, 383 422,425, 427,428,431). The money found in Barnes Bank which showed numerous transactions had nothing to do with his mother Lorena Liston but were a fiction created by Appellant to avoid judgment collection ( R. 427-431). The Barnes account shrunk because the majority of the money went to Fidelity ( R. 431). The Appellant failed to bring evidence such as taxes to show his income or gifts from his mother as he claimed ®. 446). During the marriage accounts were closed, funds transferred, and combined causing the court to have to "unravel" what is separate and marital property in this divorce (Findings, p. 14).

The court was aided by an expert, Rebecca Schreyer, CPA, and also used it's own analysis ( R. 202-235). The court concluded that the CPA letter of December 18, 2009, provided the best starting point (Findings, p. 14; Petitioner's Ex 28). This letter was prepared after she reviewed the voluminous financial statements from Fidelity ( R. 207).



The court agreed with the expert's analysis that the IRA rollover account ending in account number 3460 was Appellant's premarital property and his sole property (Findings, pp. 14-15; R. 208; Petitioner's Ex. 30). The court also agreed with the with the expert CPA that the amounts found in account ending in numbers 5706 and having a balance of \$72,065.66, were also premarital property but were added to during the marriage ( R. 209; Petitioner's Ex 31). The court stated that there could have been an argument as to this particular account 5706 and the amount therein could be considered marital, since subsequent activity could be seen as converting it to marital property, but Appellee did not urge this strongly and the court prudently fore bore from this equitable approach (Findings, p. 15).

Starting in on October 30, 2002, however, marital funds were added during the marriage to this 5706 account (Findings, p. 15). Appellant claimed the additions came from his mother but offered no evidence of this statement ( R. 338-341, 343, 344-345). Appellant further stated he was not sure of the source of funds ( R. 357). Appellant stated he transferred accounts as a diversionary tactic to protect his money ( R. 345). The court stated that even if it believed the money might have been a separate gift, subsequent actions involving this account, combined with the lack of evidence regarding the source of the funds, persuaded the court that the all of these amounts should be treated as marital funds (Findings, p. 15). With the additions, the account grew to \$161, 984.31 and that amount was transferred to another account in it's entirety to an account ending with number 3162 which was in Appellees sole

name (Findings, p. 16; R. 210), This transfer occurred in June 1, 2004, and about 6 months later the money in account 3162 was again transferred to an account ending in numbers 7442, which the Appellant opened in his mothers name ( R. 212; Petitioner's Ex 35). The court found it was not Appellant's mother's money as Appellant had claimed, but instead another device to protect his accounts either from his second wife or the Appellee (Findings 16).

The court further focused on this account ending in numbers 7442 (Findings, p. 16). The amount transferred in January 2005 from account 3162, which was in Appellee's sole, name to Lorena Liston's sole name account 7442 was \$169,415.85 (Findings, p. 16). Account 7442 was opened in November 2004 with a \$30,000 deposit, the deposit from a Lorena Liston account that the court had found was held solely by Appellant and was not for Lorena ( R. 338-341). No evidence was shown to the contrary by Appellant ( R. 343). This account was used by Appellant to channel all of his income and expenses, including marital earning, which were substantial during this period of time (Findings, pp. 16-17). From the Lorena Liston account which reached \$397,334.89, all monies were again transferred into Sergay Liston's sole account ( R. 217). The court did not have any doubt that the \$30,000 that funded the Lorena Liston account initially, and subsequent account deposits in the total of \$95,000 were comprised of marital money (Findings, p. 17). The only difference that the court had with the expert CPA was an apparent omission of \$5,000 business account deposit. The court further noted that none of the accounts

discussed at this point were retirement accounts except the account previously determined to be separate property (Findings, p. 17; R. 210-217).

The CPA testified that a great deal of money came into the Fidelity Accounts subsequent to the sale of the marital property subdivision in 2005. For example, in April 2005 prior to the close of the marital property subdivision the Barnes Bank Account was just \$4,000. In May 2005, after the close of the property the account grew to \$160,964.48 due to the sale of the subdivision ( R. 431; Ex 27, 40). She recognized these as proceeds from the sale. There was also over \$345,000 placed into Barnes Bank in just 10 bank statements alone ( R. 428). They had nothing to do with his mother Lorena ( R. 429). At one point during the marriage the accounts grew to \$613,577.93 ( R. 222).

The court then came to another difference with the expert CPA. The expert CPA identified an account ending in numbers 2680 as a retirement account opened on April 1, 2002, with a balance of \$123,215.12. The CPA looked at a deposit in November 2006 and a transfer to an account 5584 in December 2007 and assumed that the entire marital portion of the IRA account 2680 was transferred into account 5584. The CPA then identified a balance of \$24,924.97 which was transferred in March 2008 to account 5385 which was the last account that appears to have held funds based upon evidence presented at trial (Findings, p. 17). After hearing all the evidence provided by the parties the court found that the funds held in the account ending in 2680 and the transactions discussed by the expert CPA did not in fact

constitute either receipt or transfer of marital funds. The account was determined to be the sole account of Appellant and the \$24,924.97 transfer into account 5584 his sole property (Findings, p. 18).

Based upon the court's analysis, the court adjusted the CPA calculation found on page 2 of her expert letter (See Petitioner's Ex 28), by deducting \$19,924.97 from the balance in account 5585. The sum was reached by the court by subtracting \$24,924.97 and adding \$5000 from the business check deposit during the course of the marriage and discussed above that was not in the expert CPA's calculations (Findings, p. 18). One more adjustment was made. The court deducted \$97,027 premarital value resulting in a marital interest at the time of separation in the amount of \$273,563 but the court further reduced the amount by \$513. The reason for the final deduction is that the CPA analysis included growth in the fund. The court applied a percentage of the total that included growth and determined the difference between the growth on the account determined by the expert CPA (\$293,558) and the amount determined by the court (\$273,050).

Many deposits were made into the Fidelity accounts after the sale of the marital subdivision that was partitioned off from the marital home ( R. 160, 211,214, 431).

Based upon it's thorough and careful analysis, the court determined that Appellee's portion of the financial accounts was \$136,525 (Findings p. 18).

The court found as to attorney fees, that based upon the awards set forth in it's Ruling and Order that it did not find that either party had an inability to pay fees incurred. The court did find however that based upon the issue of fault, primarily Appellant's ongoing and blatant attempts to hide assets, confuse financial transactions, and otherwise be accountable for his court ordered and marital obligations, an award of fees was appropriate. The point of the award in the court's view was that Appellant had made the case much more difficult than it should have been ( R. 159, 164; Findings 23).The amount given was conservative given the complexity of the case that should have been much more simple. The court found that \$5,000 to be given to Appellants attorney was fair and equitable considering the many hours of extra work that went into bringing this matter to conclusion (Findings, 23).

From the Findings and Order counsel for Appellee prepared a Decree of Divorce.

### **SUMMARY OF ARGUMENT**

The District Court correctly and equitably specified which party is responsible for the payment of joint debts, obligations, or liabilities of the parties that were contracted or incurred during the marriage. The evidence was presented and the trial judge should be given great deference in the findings of fact and should not be overturned as they are not clearly erroneous.

The District Court also ruled correctly and was within its discretion when it equitably awarded the additional water shares between the parties and its decision should be upheld.

The District Court correctly determined which investments and retirement accounts were marital property and divided them equitably between the parties. The trial court should be given considerable discretion concerning this property division and the court's actions enjoy a presumption of validity and are not erroneous.

The District Court handled itself appropriately throughout the trial and with the upmost courtesy when it interrogated Appellant after taking judicial notice of a prior divorce action in Davis County. The Appellant should be held responsible for his actions.

Lastly, the District Court correctly awarded Appellee's Attorney fees based on the issue of fault of Appellant's ongoing and blatant attempt to hide assets, confuse financial transactions, and otherwise avoid being accountable for his court ordered marital obligations. The Appellant made this case much more difficult than it should have been.

### **ARGUMENT**

#### **POINT I. THE DISTRICT COURT CORRECTLY SPECIFIED WHICH PARTY IS RESPONSIBLE FOR THE PAYMENT OF JOINT DEBTS, OBLIGATIONS, OR LIABILITIES OF THE PARTIES CONTRACTED OR INCURRED DURING THE MARRIAGE.**

Appellate courts give great deference to the trial court's findings of fact in divorce cases and will not overturn them unless they are clearly erroneous. See,

*Kimball v. Kimball*, 2009 UT App 233, ¶ 14, 217 P.3d 733; *Thompson v. Thompson*, 2009 UT App 101, ¶ 10, 208 P.3d 539; *Leppert v. Leppert*, 2009 UT App 10, ¶ 8, 200 P.3d 223; *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 9, 176 P.3d 476; *Kelley v. Kelley*, 2000 UT App 236, ¶ 18, 9 P.3d 171. A finding of fact will be adjudged clearly erroneous if it violates the standards set by the appellate court; is against the clear weight of the evidence; or the reviewing court is left with a definite and firm conviction that a mistake has been made, although there is evidence to support the finding. See, *Kimball*, 2009 UT App 233, ¶ 14; *Shinkoskey v. Shinkoskey*, 2001 UT App 44, ¶ 10 n.5, 19 P.3d 1005; *Kelley*, 2000 UT App 236, ¶ 18.

In divorce proceedings, the trial court is given considerable discretion in fashioning an equitable property distribution, and its findings will not be disturbed absent an abuse of discretion." *Carlton v. Carlton*, 756 P.2d 86, 87 (Utah Ct.App.1988). In that case the Utah Court of Appeals stated:

The trial court must make findings on all material issues, and its failure to do so constitutes reversible error unless the facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor of the judgment. In addition, the findings must be sufficiently detailed and consist of enough subsidiary facts to reveal the steps the court took to reach its conclusion on each factual issue presented.

*Id.* at 87-88.

Here, the District Court's division of debt determination explains a clear factual basis and analysis supporting its determinations on the marital debt and provides this appellate court with enough information to allow meaningful review.

Appellee presented evidence regarding the balances on her credit cards. ( R. 178; Ex. 54, 55.) During the course of the marriage the parties used separate accounts, but the court found that the fact that they may have had separate accounts did not mean that the parties finances were not combined in substantial ways. For example, both had separate credit cards but both cards were used to purchase the entire range of marital goods and expenses (Findings, 12; R. 117-120, 183, Petitioner's Ex. 54, 55). Further, the court found that the Appellee left the marriage with \$30,500 of debt and that the debt related to family expenses that was unpaid at the time of separation. The two credit cards in question total approximately \$30,500.00 (Petitioner's Ex. 54, 55). There was no evidence to suggest that the debt was for the sole benefit of Appellee (Findings, 13). The court stated that “[p]etitioner did not have the income to support many of the expenses she was called upon to pay during the marriage. It is true that petitioner terminated full-time work, and cut back substantially on her part-time working activities, but at the time of the marriage each of the parties was 65 years old.” (Findings, 11). The trial judge is in the best position to make this decision and his broad powers of discretion should be



supported. It would be unfair to the parties and the judge if a review of each transaction that occurred in the marriage had to be individually reviewed.

Appellee testified she incurred credit card debt to pay for meals out together, groceries, things for the house, use and gas for the car, clothing, and two trips to see her dying father and his funeral. ( R. 118-119, 183) She also testified she paid for all the parties' food. ( R. 280). The court found that “[d]uring the marriage, petitioner paid for many day-to-day expenses, including food, entertainment, Christmas for families, and travel.” (Findings, 11.) Appellee testified that both she and Appellant received benefits through these credit charges. ( R. 118-19.) Appellee testified that between \$30,000 and \$35,000 of her current debt was incurred during the marriage. ( R. 281-83.) The court found that Appellee had established debts of at least \$30,500, which debts constituted “a marital obligation, to be shared equally.” (Findings, 12.)

To suggest, as the Appellant is suggesting, that he was in a “powerless and ignorant position” and should therefore not be held jointly liable for debts incurred during a marriage by a spouse who was “concealing” the use of their individual credit account makes absolutely no sense unless you are either trying to delay or avoid payment of a debt or unaware of where the food you are eating came from. Did he not eat the food as she paid for it at the restaurant? He is not an “innocent bystander” as he suggests. He was her husband and if he had any evidence of this

victimization as he suggests, he should have brought the evidence to trial. He did not.

As a review of the record reveals there was no contrary evidence to rebut Appellee's testimony put forth by Appellant. The trial court's decision should be affirmed.

**POINT II: THE TRIAL COURT RULED CORRECTLY AND WAS WITHIN ITS DISCRETION WHEN IT EQUITABLY AWARDED THE ADDITIONAL WATER SHARES TO THE PARTIES.**

The court found that the parties had obtained a residence during the marriage and that residence was the subject of a mediation agreement between the parties, Appellee having giving up her equity for payment of \$10,000 @. 65; Petitioner's Ex 16). During the course of the marriage, the parties also subdivided the real property that the marital home was situated on and sold off a portion of the property to maximize its value (Findings pp 8-10). The real property also included 4 shares in Holliday Water Company, one of which shares the court found to be appurtenant to the property. Based upon the testimony of the manager of Holliday Water Company, Marlin K. Sundberg, which the court found to be persuasive, the court found that only one of the 4 shares was appurtenant to the property, that share having been tied to a single meter on the property which is necessary for the property to receive culinary water (Findings, pp. 10; R. 68, 70, 73, 239, 243, 244, 246, 247; Petitioner's Ex 17). Mr. Marlin Sundberg of the Holliday Water Company testified that the

company sells water shares for \$5,000.00 each. ( R. 247.) The court found that the real value was in order to obtain new service to a new meter and not to obtain additional water without charge (Findings pp. 10-11). Marlin Sundberg testified that the other shares could be sold. ( R. 70, 242-43.) One share “is tied to the single meter on the property . . . and is absolutely necessary to permit the property owner to receive culinary water from the Holliday Water Company” (Findings, 10).

The court further determined that these 3 shares were not the subject of the mediation agreement between the parties for the satisfaction of Appellees interest in the real property and that Appellant could either pay Appellee \$7500 or could transfer her 1 share and pay her \$2500 (Findings, pp. 11; R. 68).

Mr. Sundberg’s testimony and the Judge’s Findings are supported by Utah law. In Utah Code Annotated Section 73-1-11 (4) it reads in pertinent part:

(4) The right to the use of water evidenced by shares of stock in a corporation shall not be deemed appurtenant to land.

Mr. Sundberg testified that only one water share was appurtenant to the land and needed to remain with the meter. The other shares were freely transferable.

While it is true that under Utah law, a stipulation reached by divorcing spouses regarding property division should be recognized and enforced by the courts (*Sweet v. Sweet*, 2006 UT App 30 216, 3, 138 P.3d 63 (slip op.) (noting that spouses have general authority “to arrange property rights by contract.”) (quoting *Reese v.*

*Reese*, 1999 UT 75, 24, 984 P.2d 987)), what Appellee was transferring was the real property and the 1 appurtenant share of water, not the other shares that were freely transferable under Utah law and according Mr. Sundberg.

The court was within its discretion to divide the other 3 shares of water as it did.

**POINT III: THE TRIAL COURT CORRECTLY DETERMINED WHICH INVESTMENT AND RETIREMENT ACCOUNTS WERE SUBJECT TO MARITAL PROPERTY.**

A trial court has considerable discretion concerning property [division] in a divorce proceeding, thus its actions enjoy a presumption of validity" *Jensen v. Jensen*, 2009 UT App 1, ¶ 6, 203 P.3d 1020 (quoting *Elman v. Elman*, 2002 UT App 83, ¶ 17, 45 P.3d 176). On appeal, we therefore " will not disturb a property award unless we determine that there has been a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderates against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion." *Id.* (citation and internal quotation marks omitted). Further, "[w]e review the legal adequacy of findings of fact for correctness as a question of law." *Id.*

Stated another way, when reviewing a district court's findings of fact on appeal, we do not undertake an independent assessment of the evidence presented during the course of trial and reach our own separate findings with respect to that

evidence. Rather, we endeavor only to evaluate whether the court's findings are so lacking in support that they are against the clear weight of the evidence. *438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 75, 99 P.3d 801.

In this case, the trial court's findings are not so lacking in support as to be clearly erroneous. Indeed, the Appellee was forced to go on an unnecessary and expensive discovery journey to just get to the bottom of Appellant's finances which were more complicated and voluminous than reasonably necessary. In a bench trial or other proceeding in which the judge serves as fact finder, the court has considerable discretion to assign relative weight to the evidence before it. This discretion includes the right to minimize or even disregard certain evidence. *State v. Comer*, 2002 UT App 219, ¶ 15, 51 P.3d 55. There is ample evidence supporting this finding of the trial court that Appellee's portion of these marital accounts was \$136,525 (Findings p.18). For instance, The Appellant accumulated and held money prior to and during the course of the marriage with Fidelity Investments and Barnes Bank. Appellant was gainfully employed during the marriage but was rather reluctant to say that the monies in Fidelity Accounts came from income while working ( R. 51-52, 348, 349, 357, 383, 422). He was employed by Conestoga Cold Storage as late as late 2007 although he had testified earlier it was 2005 ( R. 425). The trial court also specifically found that Appellant had taken steps to hide accounts from his former and current wife ( R. 344, 345, 427-431). He provided

no evidence as to the source of those funds ( R. 357, 383 422,425, 427,428,431).

The money found in Barnes Bank which showed numerous transactions had nothing to do with his mother Lorena Liston but were a fiction created by Appellant to avoid judgment collection ( R. 427-431). Further, the Barnes account shrunk because the majority of the money went to Fidelity ( R. 431). The Appellant failed to bring evidence such as taxes to show his income or gifts from his mother that he claimed ( R. 446). During the marriage accounts were closed, funds transferred, and combined causing the court to have to "unravel" what is separate and marital property in this divorce (Findings, p. 14).

Due to the complicated financial structure of the Appellant's accounts, the court was aided by an expert, Rebecca Schreyer, CPA, and also used it's own analysis ( R. 202-235). The court concluded that the CPA letter of December 18, 2009, provided the best starting point (Findings, p. 14; Petitioner's Ex 28). This letter was prepared after she reviewed the voluminous financial statements from Fidelity ( R. 207). The CPA was retained pursuant to a Court Order that was signed November 23, 2009, and entered November 30, 2009. That Order resulted from a Stipulation entered by the parties (See Attached, November 30, 2009 Order). To the knowledge of Appellant and a thorough review of the Record there was never an objection to the CPA, nor to her Report. Further, to now suggest that it is a violation of Utah Rule of Civil Procedure 26(a)(3), is not true either. She was Stipulated to by the parties and Court Ordered which is an exception to Rule 26 that is now being

announced by Appellant (See Addendum, Court Order of November 30, 2009 attached). Further, the Report was delivered to Appellant's counsel and he even corresponded with the expert ( Ex. 28, 29). It is also a stretch, as Appellant has suggested, that she claimed she was not an expert (See Appellant's Brief, p. 35). What the record states is that she did not consider herself an "expert at being an expert witness" ( R. 236). It was an attempt by the witness to be self-deprecating. The Court felt she enunciated the rules of marital distribution well ( R. 237). In any event, what is true, Appellant agreed to admit the Report and Appellant never objected to that Report or her being an expert witness ( R. 131, 227).

In many instances, the court agreed with Appellant. The court agreed with the expert's analysis that the IRA rollover account ending in account number 3460 was Appellant's premarital property and his sole property (Findings, pp. 14-15; R. 208; Petitioner's Ex. 30). The court also agreed with the CPA that the amounts found in the account ending in numbers 5706 and having a balance of \$72,065.66, was also premarital property but was added to during the marriage ( R. 209; Petitioner's Ex 31-53). The court stated that there was an argument as to this 5706 account that it was marital since subsequent activity could be seen as converting it to marital property, but that Appellee did not urge this strongly and the court prudently forebore from using this equitable approach (Findings, p. 15). The Appellant's argument seems to be stuck on this point, and goes on into detail about commingling of accounts, but this is not the basis for the court's findings.

In October 30, 2002, marital funds were added to the account 5706 (Findings, p. 15; R., 210). Ten thousand dollars in 2002, \$63,000.00 in July 2003, \$4500.00 in March of 2004. The account grew during the marriage to \$163,219.18 ( R. 210). In account ending 7442, the Lorena K. Liston account, deposits were made of \$115,000 ( R. 214). Appellant claimed the additions came from his mother but offered no evidence of this statement ( R. 338-341,343,344-345). He continues this theory in his current brief. But as was found in court, Appellant stated he was not sure of the source of funds ( R. 357). At one point, the Appellant claimed none of his earnings went into the accounts ( R. 348). But once pushed on the subject he admitted he did put money in those accounts during the marriage ( R. 349). Most unusual was his admission in court that he transferred accounts as a diversionary tactic to protect his money( R. 345).

With additions, the 5706 account grew to \$161,984.31 and that amount was transferred to another account in it's entirety to an account ending with number 3162 which was in Appellees sole name (Findings, p. 16; R. 210), This transfer occurred in June 1, 2004, and about 6 months later the money in account 3162 was again transferred to an account ending in numbers 7442, which the Appellant opened in his mothers name ( R. 212; Petitioner's Ex 35). The court found it was not Appellant's mother's money as Appellant had claimed, but instead another device to protect his accounts either from his second wife or the Appellee. The court further focused on this account ending in numbers 7442 (Findings, p. 16). The amount



transferred in January 2005 from account 3162 which was in Appellee's sole name to Lorena Liston's sole name account 7442 was \$169,415.85 (Findings, p. 16). Account 7442 was opened in November 2004 with a \$30,000 deposit from a Lorena Liston account that the court had found was held by solely by Appellant and was not for Lorena ( R. 338-341). No evidence was shown to the contrary by Appellant ( R. 343). This account was an account that Appellant channeled all of his income and expenses, including marital earnings, which were substantial during this period of time (Findings, pp. 16-17). From the Lorena Liston account which reached \$397,334.89, all monies were again transferred into Sergay Liston's sole account ®. 217). The court did not have any doubt that the \$30,000 that funded the Lorena Liston account initially, and subsequent account deposits in the total of \$95,000 comprised of marital money (Findings, p. 17). The only difference that the court had with the expert CPA was an apparent omission of \$5,000 business account deposit. The court further noted that none of the accounts discussed at this point were retirement accounts except the account previously determined to be separate property (Findings, p. 17; 210-217).

The CPA testified that a great deal of money came into the Fidelity accounts subsequent to the sale of the marital property subdivision in 2005. In April of 2005, prior to the close of the marital property subdivision the Barnes Bank Account was just \$4,000. In May 2005, after the close of the property the account grew to \$160,964.48 due to the sale of the subdivision ( R. 431; Ex 27, 40). She testified

that she “recognized that there were proceeds from the sale of the property that would have funded a lot of the deposits that were made into this account that I’ve allocated to deposits made during the marriage.” ( R. 225).

There were over \$345,000 placed into Barnes Bank during the marriage in just 10 bank statements alone ( R. 428). They had nothing to do with his mother Lorena ( R. 429). At one point, the actual value of the fidelity accounts totaled \$613,577.93, the marital portion being less ( R. 222)

In April of 2005, the Barnes Bank balance was \$4,000.00. But upon the sale of the subdivision property in May 2005 that balance jumped to \$160,964.48 due to the sale of the subdivision ( R. 431; Ex. 27, 40) The balance dropped significantly shortly after because the money went in the Fidelity Accounts and Appellant admits this ( R. 431).

The court then came to another difference with the expert CPA. The expert CPA identified an account ending in numbers 2680 as a retirement account opened on April 1, 2002 with a balance of \$123,215.12. The CPA looked at a deposit in November 2006 and a transfer to an account 5584 in December 2007 and assumed that the entire marital portion of the IRA account 2680 was transferred into account 5584. The CPA then identified a balance of \$24,924.97 which was transferred in March 2008 to account 5385 which was the last account that appears to have held funds based upon evidence presented at trial (Findings, p. 17). After hearing all the evidence provided by the parties the court found that the funds held in the account

ending in 2680 and the transactions discussed by the expert CPA did not in fact constitute either receipt or transfer of marital funds. The account was determined to be the sole account of Appellant and the \$24,924.97 transfer into account 5584 his sole property (Findings, p. 18; R. 217).

To suggest as Appellant does that Appellee does not have a marital portion in these accounts flies in the face of reason. While on one hand, the Appellant concedes that earnings during the marriage in his Mountain Lion Engineering business was marital property, he forgets to mention that the greatest source of funds accumulated in Fidelity were from the sale of the marital subdivisions that was partitioned off from the marital home (R.160, 211,214, 431). Those amounts went into Fidelity. Those amounts were identified and were marital. They bought the property together when married and worked on the subdivision together during the marriage. Appellant wants it all and does not share well, plain and simple. Perhaps he should have had a pre- or post-marital agreement which he was familiar with ( R. 349).

Based upon the court's analysis, the court adjusted the CPA calculation found on page 2 of her expert letter (See Petitioner's Ex 28), by deducting \$19,924.97 from the balance in account 5585. The sum was reached by the court by subtracting \$24,924.97 and adding \$5000 from the business check deposit during the course of the marriage and discussed above that was not in the expert CPA's calculations (Findings, p. 18). One more adjustment was made. The court deducted \$97,027

premarital value resulting in a marital interest at the time of separation in the amount of \$273,563 but the court further reduced the amount by \$513. The reason for the final deduction is that the CPA analysis included growth in the fund. The court applied a percentage of the total that included growth and determined the difference between the growth on the account determined by the expert CPA (\$293,558) and the amount determined by the court (273,050). Finally, based upon its thorough and careful analysis, the court determined that Appellee's portion of the financial accounts was \$136,525 (Findings p. 18).

Appellant's commingling diatribe misses the point that the court made in its findings. The court's analysis is much more than a discussion on commingling. It is an extensive, time consuming and accurate Findings. To further suggest that there was no evidence to identify the source of funds that were deposited during the marriage, other than Appellant's own testimony, and that they were gifts from his mother and in making numerous transactions of the same funds (which were admittedly appreciating over time) into different accounts to protect them from garnishment by his former wife, and that Appellee did not meet her burden of proof, make little sense. Appellant was employed and they bought and sold property that they worked on together during the marriage. If his elderly mother gave him money as he claimed, he clearly never showed any proof of it to the court.

With these facts in mind, as well as the deferential standard of review, see, e.g., *Leppert v. Leppert*, 2009 UT App 10, ¶ 9, 200 P.3d 223 ("We afford the trial

court considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity.'" (quoting *Davis v. Davis*, 2003 UT App 282, ¶ 7, 76 P.3d 716)); *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 44, 176 P.3d 476 ("We defer to the trial court in its findings of fact related to property valuation and distribution."), we cannot say that the trial court's fair, thorough and reasonable findings are clearly erroneous and it must be upheld.

**POINT IV. THE TRIAL COURT APPROPRIATELY INTERROGATED THE APPELLANT AFTER TALKING JUDICIAL NOTICE OF THE APPELLANT'S PRIOR DIVORCE ACTION IN DAVIS COUNTY.**

The trial court asserted "judicial notice" as its basis for independently obtaining the court docket in Appellant's prior divorce case in the Second District Court for Davis, County and referring to it while questioning the Appellant while he was on the witness stand. (See Utah R. Evid. 201 (stating the rule for judicial notice)). While it is true that neither counsel for the parties had provided this information to the court beforehand, nor was counsel for either party given any advance notice by the court that it was conducting its own discovery into Appellant's prior divorce action and would refer to it, it is also true that there was absolutely no request or objection to the court to be heard by Appellant under Rule 201. The Rule states in pertinent part(s):

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the

tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken...

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

Ironically, the court was tipped off by Appellant's own testimony of avoiding judgments in Davis County ( R. 299-301) and became puzzled by his answers ( R. 301). The judge very astutely went online with the court's computer and pulled the docket from Davis County while Appellant's testimony continued. The judge did not ask about the Davis Court Docket action until approximately a half an hour later at which time he questioned Appellant about his previous divorce and statements ( R. 346, 347). Appellant, as opposed to what his brief says, was afforded the opportunity to look at the Docket ( R. 347). Further, no objection was made.

Rule 614 of the Utah Rules of Evidence provides:

**Rule 614. Calling and interrogation of witnesses by court.**

(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

( c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Appellant argues that the trial judge abandoned its role as an impartial adjudicator by questioning him. Because Appellant did not object to the court's questioning, he must demonstrate plain error on appeal. *See State v. Kell*, 2002 UT

106, ¶ 45, 61 P.3d 1019 ("Because defendant did not object to the comments during the trial, we review this issue for plain error."); *see also State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993) (stating to establish plain error a defendant must show: "(I) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful").

Under rule 614(b) of the Utah Rules of Evidence, "[t]he court may interrogate witnesses, whether called by itself or by a party." In this case, the trial court questioned Appellant about the Davis County divorce where he was also hiding funds from a former wife's judgment (Findings p. 16; R346, 347).

The court questioned Appellant to help clarify perhaps whether Appellant's earlier testimony was credible or showed a pattern of deceit . "It is within the judge's prerogative to 'ask whatever questions of witnesses as in his judgment is necessary or desirable to clarify, explain or add to the evidence as it relates to the disputed issues.' " *State v. Boyatt*, 854 P.2d 550, 553 (Utah Ct.App.1993) (quoting *State v. Mellen*, 583 P.2d 46, 48 (Utah 1978)).

Further, even if it was error for the trial court to solicit testimony from Appellant, the error was harmless. "If the error was harmless, that is, if the error was sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the case, then a reversal is not in order." " *Armed Forces Ins. Exch. v. Harrison*, 2003 UT 14, ¶ 22, 70 P.3d 35 . In this case, the trial court's questioning of

Appellant (without a jury) is "sufficiently inconsequential," *id.*, and does not warrant reversal. It is true that the judge mentions this testimony from the colloquy in its findings, but it is not plain error. From the Findings it is clear that the court relied on numerous grounds for its decision including credibility determination about Appellant. Indeed, the court weighed all the evidence and noted Appellant's pattern and method of hiding money. Moreover, Appellant's use of a 1989 7<sup>th</sup> Circuit opinion that relates to judicial notice should not be seen by this court as controlling.

Because evidence for the court's credibility determination was ample in many areas and the court did not rely solely on the disputed portion of Appellant's testimony, Appellant's plain error argument fails.

**POINT V. THE TRIAL COURT CORRECTLY AWARDED APPELLEE ATTORNEY FEES.**

The trial court's division of debts is reviewed for abuse of discretion. See *Connell v. Connell*, 2010 UT App 139, ¶ 8, 233 P.3d 836. Similarly, an appellate court will "review a trial court's decision regarding attorney fees in a divorce proceeding for an abuse of discretion." *Id.* ¶ 6.

The court found that "based on the issues of fault, primarily respondent's ongoing and blatant attempt to hide assets, confuse financial transactions, and otherwise avoid being accountable for his court ordered marital obligations, an award of fees is appropriate. The point of the award is that in the Court's view,



respondent has made this case much more difficult than it should have been.”

(Findings, 23)

The court found “that it is completely fair and equitable that respondent be required to pay the sum of \$5,000 to petitioner’s attorney as partial compensation for the many hours of work and effort that have gone into bringing this matter to conclusion.” (Findings, 23; R. 159, 164),

As opposed to what Appellant is stating, the court found that he did have resources to pay an award and judgment of attorney fees (Findings 23).

Appellant relies upon Utah Code section 30-3-3 which generally governs awards of attorney fees in domestic actions. It provides that a trial court may order a party to pay costs, attorney fees, and witness fees, including expert fees, of the other party. See, e.g., *Rhen v. Rhen*, 1999 UT App 41, ¶ 22, 974 P.2d 306 (“[A]n award [of attorney fees pursuant to Utah Code section 30-3-3] must be based on sufficient findings addressing the financial need of the recipient spouse; the ability of the other spouse to pay; and the reasonableness of the fees.”).

Here, the record indicates that the district court did not award attorney fees pursuant to Utah Code Section 30-3-3, but rather because Appellant’s fault, primarily Appellant’s ongoing and blatant attempt to hide assets, confuse financial transactions, and otherwise avoid being accountable for his court ordered marital obligations, an award of fees is appropriate. The point of the award is that in the

Court's view, a very patient court, is that Appellant made this case much more difficult than it should have been. Such awards fall within the district court's inherent powers and do not implicate Utah Code section 30-3-3. See generally *Griffith v. Griffith*, 1999 UT 78, ¶¶ 12-14, 985 P.2d 255 (upholding the trial court's monetary sanction for waste of judicial resources as an exercise of the court's inherent powers); *Barnard v. Wassermann*, 855 P.2d 243, 249 (Utah 1993) ("[C]ourts of general jurisdiction . . . possess certain inherent power to impose monetary sanctions on attorneys who by their conduct thwart the court's scheduling and movement of cases through the court."). Appellant raises no argument on appeal that the district court exceeded its inherent powers when it awarded attorney fees and therefore fails to address the actual basis of the district court's ruling. Under these circumstances, the appeals court should not disturb the district court's attorney fees award. Cf. *State v. Hurt*, 2010 UT App 33, ¶ 16, 227 P.3d 271 (affirming denial of a suppression motion where appellant failed to acknowledge or address the legal basis for the district court's ruling).

Instead of basing an award of attorney fees on the factors enumerated in *Stonehocker*, 2008 UT App 11, 10, as Appellant relies, the court imposes fees based upon "fault" of the Appellant. The court was imposing fees, at least in part, because of Appellant's shifting funds between accounts to protect assets. Moreover, Appellant does not take court orders seriously. Even during the pendency of the

district court proceeding he withdrew money and purchased a home with his new girlfriend in Davis County even though he had been court ordered not to withdraw more than \$10,000.00 (Findings p. 13 ).

Appellee requests attorney fees on appeal. "Generally, when fees in a divorce case are awarded to the prevailing party at the trial court, and that party in turn prevails on appeal, then fees will also be awarded on appeal." *Marshall v. Marshall*, 915 P.2d 508, 517 (Utah Ct.App.1996).

### **CONCLUSION**

The District Court correctly and equitably specified which party is responsible for the payment of joint debts, obligations, or liabilities of the parties that were contracted or incurred during the marriage. The evidence was presented and the trial judge should be given great deference in the findings of fact. The decision should be upheld.

The District Court also ruled correctly and was within its discretion when it equitably awarded the additional water shares between the parties and its decision should be upheld.

The District Court correctly determined which investments and retirement accounts were marital property and divided them equitably between the parties. The trial court should be given considerable discretion concerning this property division and its actions enjoy a presumption of validity and are not erroneous.

The District Court handled itself appropriately throughout the trial and with the upmost courtesy when it interrogated Appellant after taking judicial notice of a prior divorce action in Davis County. The Appellant should be held responsible for his actions.

Lastly, the District Court correctly awarded Appellee's Attorney fees based on the issue of fault of Appellant's ongoing and blatant attempt to hide assets, confuse financial transactions, and otherwise avoid being accountable for his court ordered marital obligations. The Appellant made this case much more difficult than it should have been.

Appellee asks this Court to uphold the determinations of the District Court, as set forth above. Further, Appellee requests attorney fees on appeal.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of April, 2011.

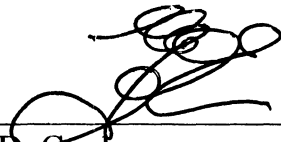
A handwritten signature in black ink, appearing to read 'Todd D. Gardner', written over a horizontal line.

Todd D. Gardner  
Attorney for Petitioner/Appellee

# CERTIFICATE OF SERVICE

I hereby certify that on this 7<sup>th</sup> day of April 2011, I caused to be HAND DELIVERED, two (2) true and correct copies including one (1) pdf, read only CD of the foregoing BRIEF OF APPELLANT to the following:

Clark Ward  
6925 Union Park Center, #600  
Midvale, Utah 84047  
Attorney for Respondent/Appellant

  
\_\_\_\_\_  
Todd D. Gardner

## **ADDENDUM**


Findings of Fact, issued July 2, 2010;  
Decree of Divorce entered July 15, 2010.  
Copy of November 30, 2009 Order

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

**FILED DISTRICT COURT**  
Third Judicial District

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

**JUL 02 2010**

By  SALT LAKE COUNTY  
Deputy Clerk

ANNETTE LISTON,

:

Petitioner,

FINDINGS OF FACT,  
RULING AND ORDER

vs.

:

SERGAY LISTON,

CASE NO. 084900427

Respondent.

:

Judge Robert K. Hilder

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This divorce action was tried to the Court on June 24 and 25, 2010. Todd D. Gardner appeared for petitioner and Clark R. Ward appeared for respondent. Following the testimony of the parties and additional witnesses, and closing argument, the Court took the matter under advisement. Having now fully considered all of the evidence and applicable law, the Court enters the following Findings of Fact, and specific Rulings on each of the issues presented by the parties. The Findings and the Rulings are intended to provide a sufficient factual and legal basis for a Decree of Divorce to be prepared by counsel for petitioner, but if either counsel believes additional Findings are necessary, they may be included as long as they are supported by the record and consistent with this Ruling and Order.

**FINDINGS OF FACT**

1 The parties to this action are both 73 years of age. They

originally met during the 9<sup>th</sup> grade of high school, but they did not marry until May 20, 2002, after each of the parties had been married and divorced on two prior occasions. Before the parties were married, they lived together commencing approximately 1999, at which time petitioner was divorced from her second husband, and respondent was still married, but in the process of obtaining a divorce.

2 Respondent's divorce Decree was entered in January, 2002, and the parties were married the following May.

3 The parties announced an engagement on New Year's Eve, 1999, at which time respondent presented petitioner with a wedding/engagement ring. It is disputed whether the ring presented at that time included a substantial diamond at its center. It is not disputed that the ring as it now exists does not include a primary diamond, but that it now consists of small diamond pieces surrounding a cubic zirconium. The Court cannot determine whether there was ever a large diamond in the ring, but the Court does find that respondent either deliberately misled petitioner at the time of engagement and for several years thereafter into believing that he had bought her a genuine diamond, or alternatively, respondent had an original diamond replaced by cubic zirconium sometime after the marriage.

4 The Court cannot determine the value of the ring, with or without a diamond. The insurance renewal for the ring, which was dated in 2001, more than a year after the ring was purchased, showed a maximum



insurance value of \$14,000. Respondent recalls that he paid about \$475, which included his wedding band.

5 The parties disagree on whether the marriage was ever a happy one. It is agreed that they separated on or about January, 2008. There is some dispute over the precise date, but the Court finds that a date of approximately January 15, 2008, is close to the reality, and sufficient for the Court's need to establish a date when the marriage effectively ended.

6 As discussed with counsel at the close of trial, and pursuant to the Court's discretion to determine a date for division of property, debts, and financial assets, the Court will use the January 15, 2008 separation date, rather than the date of trial. Using this date, the Court finds that the parties were engaged in a bona fide marriage for approximately five years and eight months. The Court specifically finds that the parties lived separate lives, both physically and in the management of their finances, from the date of separation.

7 As stated above, the parties disagree as to the essential happiness of their relationship. The Court finds that petitioner's belief that the parties were generally happy in their marital association is correct, but it is also true that their happiness was marred by disagreements regarding inappropriate activities conducted by respondent, which the Court finds did occur, but which the Court also finds do not need to be examined in any further detail. The parties engaged in marital

counseling at various times during the marriage, including in the first year or so, but the fact of this counseling and the concerns that prompted the parties to go to counseling, do not play any significant part in the Court's determination of the issues presented at trial.

8 The Court has reviewed, and taken judicial notice of, the 42 page docket reflecting the course of the divorce case between respondent and his second wife, which matter was handled in Davis County. The Court is also aware that petitioner has been divorced on two prior occasions, but the Court does not have substantial or detailed information regarding the cause of those divorces.

9 Based on both the court docket and the testimony of the parties, primarily respondent's own testimony, the Court finds that respondent has very actively taken steps to protect his financial interests, both with respect to the second divorce, and during this marriage, which is not of itself improper, but the Court finds that respondent has gone well beyond measures to protect what is legitimately his. It is clear from the docket and respondent's own testimony, that he was willing to undertake any acts, including substantial deception, to shield assets that should have been available to satisfy claims of his former wife, which claims were vindicated by Court Judgments.

10 Respondent claims that his difficult second divorce and his necessary efforts to protect his assets are evidence that he took appropriate steps to preserve all separate property in the present

marriage. The Court disagrees. Despite respondent's prior experiences regarding marital and separate assets, and whatever his desires, the Court finds that in many respects he was ineffective in separating and shielding assets from the reach of petitioner. For example, respondent alluded to an "agreement" between the parties to this marriage regarding separate finances, but no such agreement was written, and neither was any such agreement conceded by petitioner. This is so despite the fact that respondent had a property agreement in his second marriage, which agreement apparently was invalidated by the Court. Nevertheless, the Court finds that respondent understood the option of preparing either a pre- or post-nuptial agreement to protect or segregate assets, and did not do so.

11 The Court finds that as part of his effort to protect or hide assets from the reach of his former spouse, respondent maintained the majority of his liquid funds in a Barnes Bank checking account in the name of his mother, Lorena Liston. The respondent candidly admitted that none of those funds actually belonged to his mother, although some of them may have been received initially as gifts from his mother. Nevertheless, the Lorena Liston account, which was a fiction invented to obscure and shield respondent's financial dealings, was in fact respondent's primary account during much of the parties' relationship. Among other deposits into that account, respondent routinely deposited earnings from his freelance work as a consultant/engineer. These deposits represented marital earnings,

which were deposited into an account controlled solely by respondent.

12 During the marriage, the parties did keep separate financial accounts, but the Court finds that the fact that the accounts were in one or the other sole name does not mean that the parties' finances were not combined in substantial ways. For example, both parties had individual credit cards, which cards were used for the entire range of expenses and purchases, including items purchased for the individual, and items purchased for the benefit of the household. As a general rule, items purchased generally throughout the course of a marriage, particularly including food, clothing, utilities, and all of the usual expenses of day-to-day living, are considered marital expenses, not subject to scrutiny or allocation after the parties divorce or separate.

13 In this case, the evidence is persuasive that petitioner incurred debt related to family expenses in the amount of at least \$30,500, which debt was unpaid at the time of separation. Except for a disputed item regarding purchase of a motor vehicle, there is no evidence to suggest that any purchases on the account at issue were for petitioner's individual benefit or that those purchases resulted in acquisition of individual property that should be addressed in an ultimate personal property allocation by this Court.

14 The transaction raised by respondent relates to an undisputed purchase of a motor vehicle for about \$10,000, which amount was charged to a credit card while it was bearing zero interest. Petitioner testifies

that the debt was paid off before the parties separated, and it is not part of the \$30,500 debt balance she took at the time of separation. Respondent claims that by check number 282 from the Lorena Liston account, in the amount of \$10,900, he in fact paid off that debt. The Court has examined the check at issue carefully, and agrees with petitioner that the memo entry, in respondent's handwriting, refers to a home or house purchase payment. The Court believes the first word is "house," petitioner believes that word is "home," but regardless of the precise word, there is no suggestion on the check that it related to a vehicle purchase or debt payment. Furthermore, even if respondent used funds to pay off a debt on his wife's credit card, more than two years before the parties separated, which sum is not a part of the \$30,500 debt that petitioner seeks to divide between the parties, there is no basis for the Court to second guess the motive for that payment during the marriage.

15 The Court finds that the vehicle that was paid off during the marriage was traded in on a new vehicle for petitioner, at the insistence of petitioner's daughter, who the Court finds paid the remainder of the cost of the new vehicle.

16 The new vehicle in question is a 2005 Subaru, which is petitioner's present vehicle. Respondent claims an interest in this vehicle, as marital property. Apart from the fact that respondent asserts what this Court deems to be an inflated present value for the Subaru, the Court finds that the evidence is clear that except for the \$3,400 down-

payment, which came from marital funds, the vehicle was a gift to petitioner, which gift was never converted to marital property.

Having determined the foregoing facts, the Court now turns to its rulings on each of the specific issues submitted to it, which rulings will include by necessity additional specific findings:

Grounds and Jurisdiction

The Court finds from the evidence that the parties were both residents of Salt Lake County at least 90 days before the filing of this matter, although respondent is now a resident in Davis County. Therefore, the Court has jurisdiction of the parties and of the subject matter. It is apparent from the evidence that the parties have suffered irreconcilable differences, such that the marriage cannot be preserved, and they should be awarded a divorce on grounds of irreconcilable differences.

Petitioner's surname

Petitioner has asked to be restored to the use of her prior surname; to wit: Lindsay. She should be permitted to change her name to Lindsay upon execution of the Decree of Divorce in this matter.

Real Property

The parties initially lived in a mobile home (to be addressed in the personal property section below) but within a few months of marriage, they moved into a house on approximately one acre of land located at 1835 Gunderson Lane in Salt Lake County. There was argument at trial about

whether the property was in fact marital, but that issue has been almost entirely resolved by a mediation agreement that both parties submitted to the Court to resolve the real property issue, except for the disputed issue of water shares. Nevertheless, the Court is concerned that there may be lingering doubts about whether the property was in fact marital. In the event that is the case, the Court now states its findings and conclusions that both parties contributed to the down payment on the house. The amounts may have been similar, if a loan from respondent's mother is excluded, but regardless, they each contributed at least \$8,000, and the fact that petitioner's contribution was in the form of foregoing her real estate commission is of no consequence, because that was money to which she was fully entitled. In addition, mortgages were paid by respondent, but out of an account from which he paid numerous household expenses, and which account received money that could only be considered marital property. Both parties worked to maximize the value of the property and accomplish a subdivision, which they did successfully. All of these factors make it clear to the Court that the property was marital.

The foregoing determination is apparently consistent with the parties' conduct in negotiating a settlement of any interest petitioner may have in the property at the time of mediation. The agreement that was received by stipulation makes it clear that petitioner should receive \$10,000 upon execution of a Quit-Claim Deed. There is a dispute whether or when that Deed was executed. Regardless, that is an act that still

needs to occur. The Court finds that the \$10,000 was consideration for petitioner giving up all interest in the real property on Gunderson Lane. The real property included shares in Holliday Water Company, one of which shares the Court finds was, in fact, appurtenant to the property. Subsequent to the subdivision, and at the time of the mediation agreement, there were four shares in Holliday Water Company which are related to the real property. Based on the testimony of the Holliday Water Company Manager, which the Court found to be persuasive, the Court finds that only one of the four shares is in fact appurtenant to the property. More specifically, this share is tied to the single meter on the property titled in the parties' names, and is absolutely necessary to permit the property owner to receive culinary water from Holliday Water Company.

The remaining three shares are undisputedly valued at \$5,000 each. Those shares represent three of the total 7,200 shares issued by the Water Company. The value of those shares is that installation of a meter in any of the areas served by Holliday Water Company must be tied to a single share of stock for service to be provided. Accordingly, there is a market for individual shares as property owners add water service. The other value of the shares is that for each share held, the owner is entitled to 60,000 gallons of free water each year, perhaps twenty percent of the modest requirements of one family. At current rates, that benefit is worth about \$63 per year, and the Court finds, consistent with the testimony of the Manager, that the real value of a share is in the ability



to obtain a new service to a new meter, and not the ability to obtain an additional 60,000 gallons of water per year, without charge.

The Court determines that the three non-appurtenant water shares were not covered by the mediation agreement for satisfaction of petitioner's interest in the real property. Those shares are marital property, with a total value of \$15,000. Respondent shall be ordered to pay to petitioner the total sum of \$7,500 for her half interest in the shares, or he may alternatively transfer one share to petitioner, and pay \$2,500 to equalize the division. Petitioner is ordered to execute a Quit-Claim Deed as soon as possible in exchange for the yet to be tendered payment of \$10,000 as provided by the mediation agreement.

Marital debts

The Court does not see where respondent identified any marital debts for allocation. Petitioner has established debts of at least \$30,500, which sum the Court finds to be supported sufficiently by the evidence. The Court finds that there is no evidence supporting any argument that petitioner incurred the \$30,500 for her exclusive benefit, or that the parties did not benefit through the course of the marriage from her expenditures. Petitioner did not have the income to support many of the expenses she was called upon to pay in the marriage. It is true that petitioner terminated full-time work, and cut back substantially on her part-time working activities, but at the time of the marriage each of the parties was 65 years old. There was no agreement or requirement that

petitioner would continue to work, and until the parties' marriage, while they were living together, respondent paid virtually all of their expenses.

During the marriage, petitioner paid for many day-to-day expenses, including food, entertainment, Christmas for families, and travel. The Court is not determining that she paid all of these expenses, but she made substantial payments towards these items. For the foregoing reasons, the Court finds that the \$30,500 in debt as of the date of separation in January, 2008, is a marital obligation, to be shared equally. Respondent shall be ordered to pay \$15,250 to petitioner to satisfy his share of the marital debt. The Court finds that the debt is in fact outstanding for one or more credit cards, none of which bear respondent's name, and he should have no liability therefor. Nevertheless, in the event there should be any claim made against respondent by a creditor for said debt, petitioner shall be ordered to indemnify and hold him harmless therefrom after respondent pays his \$15,250 allocation.

**Petitioner's Motion for Protective Order and Motion for Order to Show Cause Regarding Use of Assets**

There are two proceedings that occurred during the pendency of this action that give rise to opposing claims for attorney fee reimbursement. In June, 2009, petitioner filed a Motion for a Protective Order, in which she alleged she was in fear of respondent, specifically based on what she perceived as a threat contained in a

letter respondent wrote to her attorney approximately one week prior. The Petition was unsuccessful, but this Court determined, as stated during trial, that as to the core issue of fear, and the existence of an implied threat by respondent, implying the potential use of force, including using deadly force, the allegations were not manifestly untrue. This Court does not second guess the determination of the Court that denied the Protective Order, but neither can this Court find that there is any basis for an award of attorney's fees based solely on the fact that the Order was dismissed.

On the other hand, the parties were clearly engaged in efforts to protect assets during the pendency of the action. Respondent was ordered to not use more than \$10,000 each month from the various investment accounts he controlled, but in August, 2009, respondent withdrew about \$195,000 to purchase his present home. It is true that respondent gave notice of this intention, through his counsel, but respondent's notice was mere lip service. That is, he gave notice to his counsel, counsel acted promptly to convey the notice and a request for an exception to the Order to petitioner's counsel, imposing a very short deadline, but respondent went ahead and completed the transaction without waiting for that date to pass.

Respondent's main response to criticism of his actions is that he had a good faith belief that the money was his. In fact, he almost certainly did have a right to the sum he withdrew, and more, at the

appropriate time, but such belief, right or wrong, does not justify respondent in ignoring a Court Order. There is no request for a finding of contempt, and none will be made, but the Court does find that respondent should reimburse petitioner the amount of \$500 as a reasonable amount for attorney's fees incurred in relation to this matter. Such award shall be in addition to any other attorney's fee award that may be granted herein.

**Investment and Retirement Accounts**

Respondent has accumulated various monies over the years, including before this marriage, which are held in a series of Fidelity Investment accounts. During the marriage some accounts have been closed, some funds have been transferred, and others have been combined, resulting in the necessity for the Court to unravel separate and marital property for division as part of this divorce action.

The Court was greatly aided in this task by the analysis and testimony of Rebecca Schreyer, CPA, but the Court also applied its own legal analysis and application of the facts to modify the recommended allocation provided by Ms. Schreyer. The Court concludes that Ms. Schreyer's initial analysis, set forth in her letter of December 18, 2009 (petitioner's Exhibit 28) provides the best starting point.

First, the Court agrees with the ultimate determination that respondent's rollover IRA account ending in the numbers 3460 was respondent's premarital property, with no additions or reductions

during the period of May 2, 2002 through January 15, 2008, which dates the Court finds to be appropriate for analysis. Accordingly, any amounts in that account are respondent's sole property.

The Court also agrees that account number ending in the digits 5706, and the balance of \$72,065.66 at the time of marriage, were premarital property. There is a tenable argument that subsequent activity in this account could convert the entire account to marital property, but petitioner does not urge that position strongly, and the Court agrees that her forbearance from so doing is consistent with an equitable approach to this account. Starting on October 30, 2002, however, funds were added to that account in the total of \$77,559.89 all of which funds were added during the marriage. Respondent claims that some or all of those funds came from his mother, as a gift. There is one exception, a check for \$4,500 dated March 23, 2004, which came from respondent's business account. Such sum is clearly marital property.

With respect to the other sums that respondent claims came from his mother, he proffers no documentary evidence or other evidence that would support his claim. Even if the Court was inclined to believe those sums might have come as a separate gift, subsequent actions involving this account, combined with the lack of evidence regarding the source of the funds, persuade the Court that all of these amounts should be treated as marital funds. With these additions, the account

grew to \$161,984.31, and the entire amount was transferred to an account ending in the number 3162, which account was in petitioner's sole name.

Respondent admits that he made that transfer, and claims without any apparent understanding of the irony of the situation, that he did so to protect the money from garnishment for sums due to his second wife, pursuant to judgments in Davis County. That transfer occurred on June 1, 2004, and about six months later the money in account ending 3162 was transferred to account ending 7442, which respondent opened, this time in his mother's name. The Court does not believe that respondent claims that the money was in fact his mother's, but even if he made such a claim, it is clear to the Court that the use of his mother's name on this Fidelity account (7442) was simply another device to protect money, either from his second wife, or from petitioner. This series of transactions leads the Court to further analysis focused on the funds in account ending 7442.

The amount transferred from account 3162 in petitioner's name, to 7442, in Lorena Liston's name, was \$169,415.85. The transfer occurred in January, 2005. Account 7442 was opened in November 2004 with a \$30,000 deposit, check number 208, from the Lorena Liston account, maintained solely by respondent, for his benefit. Respondent claims that these were not marital funds, but the Court has already determined that this was the account in which respondent channeled all of his day-

to-day income and expenses, including his marital earnings, which were substantial during this time period. The Court does not have any doubt that the \$30,000 that funded the account initially, and subsequent deposits in the total amount of \$95,000 (\$90,000 from the personal account in the name of Lorena Liston, from May 2005 through March 2006, and \$5,000 from respondent's business account, which funneled business earnings, on May 2, 2005) comprise marital property. Accordingly, the only difference the Court has with Ms. Schreyer on her accounting of deposits to account 7442 from 29 November, 2004 through 15 March, 2006, is that she apparently omitted the \$5,000 business account deposit.

The Court notes at this point that none of the accounts discussed thus far include retirement funds, except for the account that has been determined to be separate property.

The Court's analysis now comes to another difference with Ms. Schreyer. Ms. Schreyer identifies account number ending 2680 as a retirement account, which opened on April 1, 2002 with a balance of \$123,215.12. She looks at a deposit in November of 2006, and a transfer to account 5584, in December 2007, and assumes that the entire marital portion of the IRA account 2680 was transferred into account 5584. Ms. Schreyer then identifies a balance of \$24,924.97, which was transferred in March, 2008, to account ending 5385, which is the last account that appears to have held the funds, based on the evidence available at trial.

After hearing the evidence of all of the parties, the Court determines that the funds held in account 2680, and the transactions discussed by Ms. Schreyer, do not in fact constitute either receipt or transfer of marital funds. This account is determined to be entirely the property of respondent, and the transfer of \$24,924.97 into account 5584, is determined to be separate property owned by respondent.

Based on the foregoing analysis, the Court adjusts the calculation on page 2 of Ms. Schreyer's letter (petitioner's Exhibit 28), by deducting \$19,924.97 from the balance in account 5385 as shown on the Exhibit. This sum is reached by subtracting \$24,924.97, and adding the \$5,000 from the business check deposit during the term of the marriage that was not included by Ms. Schreyer. One more adjustment needs to be made. The Court deducts the \$97,027 premarital value, resulting in a marital interest at the time of separation in the amount of \$273,563, but the Court further reduces that sum by \$513, to \$273,050. The reason for this final deduction is that Ms. Schreyer's analysis included growth in the fund. The Court applied the percentage of the total that represented growth, and determined the difference between the growth on the amount determined by Ms. Schreyer (\$293,558) and the amount determined by the Court (\$273,050).

Based on all of the foregoing, the Court determines that petitioner shall be awarded as her marital interest in investment accounts the total sum of \$136,525. The Court notes that based on the



records presented at trial, this sum is available and held in non-retirement funds, and the Court finds no basis to determine that petitioner does in fact have any interest in designated retirement funds, which funds to the extent they still exist should be awarded in their entirety to respondent.

Personal Property

The personal property issues present some difficulties, but more based on the emotional component issues than the numbers or characterization of property. Both parties feel that they have been treated unfairly by the other, and that certain property awards should be made in the interest of fairness, and to validate each party's subjective belief regarding that fairness. The Court will do its best to address those issues in turn, and briefly:

(a) Mobile home. The first item is the mobile home in which petitioner is living, as well as a second mobile home she owns. Both of those mobile homes are premarital property; there is a credible claim that petitioner holds one of homes in constructive trust for her brother; and the value is likely less than respondent asserts, and not substantial. Because the Court finds that respondent has no interest in the properties, they are awarded to petitioner, with no final determination of value.

(b) Holliday Water Shares. These shares have already been addressed in connection with real property, and shall be allocated as

set forth herein.

(c) Violins. The Court is persuaded that respondent has spent substantial sums purchasing violins during the marriage, but the un rebutted testimony is that he did so from funds received through selling or trading other property that was indisputably premarital. Respondent shall retain all violins with no compensation to petitioner.

(d) Engagement/wedding ring. Petitioner is awarded the wedding ring in its present condition, without any credit to respondent. The ring was a gift. The Court must find that the petitioner has not met her burden of showing that there was a diamond in the ring when it was given to her, although it is admitted that there is no diamond in the ring now. Even if petitioner did in fact meet her burden of showing it was a diamond, she has failed in her burden to establish the value of the ring, including a diamond. Regardless of what the ring once was, it was a gift to petitioner, it is in her possession, and she may retain it without any credit to respondent.

(e) 2005 Subaru Legacy Outback. This vehicle is petitioner's sole property, except for the contribution of the down payment of the marital vehicle. That sum was \$3,400. This Court is unaware of any principle that would require it to award a share in the full amount of the down payment, because the value of the traded vehicle and the new vehicle both depreciated before separation, but the

Court finds it equitable that respondent should receive \$1,000 as compensation for the trade-in from the vehicle purchased during the marriage from marital funds.

(f) Premarital property owned by respondent. The Court finds that a number of items, including all of the older vehicles, are respondent's sole property. They include the 1963 Chevrolet pickup, the 1942 Ford, and other older vehicles and engines, etc., that were listed at trial, whether they are in their current form, or whether that asset has been sold and replaced with other assets. Unless specifically stated herein, petitioner has no interest in any such assets.

(g) Miscellaneous property. Each of the parties shall be awarded the general furniture, televisions and other such items in their possession. These items do not have substantial value, they are no longer necessary for day-to-day living, and no value should be ascribed. The Court is concerned about the cavalier disregard shown by respondent in the lack of care taken for certain furniture items owned by petitioner, but petitioner also took too long in following through to pick up those items. Based on the values at issue, the amount of funds already divided herein, and because the only basis to award compensation to petitioner for these items would be essentially punitive, which the Court is unwilling to resort to on these issues, the parties will simply be awarded furniture and other items in their

possession, with no financial value ascribed. The Court, in fact, believes that the parties have come out very even in terms of the distribution of the relatively nominal personal property that was marital.

Alimony

Alimony is a difficult issue in this case in some ways. Neither party, both of whom are now retired, has sufficient income, excluding any potential investment income, to support the lifestyle they enjoyed during the marriage. Both, however, will have investment funds following the allocation decided herein, which will provide the ability to do two things: One, the parties, particularly petitioner, will have the ability to pay off all consumer debt, thus reducing her monthly expenses very substantially. Petitioner will also receive a contribution from respondent to pay of marital debt. Second, any sums remaining after debt reduction may be used to generate modest return.

The Court may not invade the individual funds remaining after allocation of all property to provide alimony assistance except in extreme cases, and the Court cannot make any such determination in this case. This is particularly true in light of the age of both parties and the relatively short marriage. For these reasons, no alimony will be awarded.

**Attorney's fees**

Based on the awards set forth above, the Court does not find that either party has an inability to pay fees incurred, but the Court finds that based on the issue of fault, primarily respondent's ongoing and blatant attempts to hide assets, confuse financial transactions, and otherwise avoid being accountable for his Court Ordered and marital obligations, an award of fees is appropriate. The point of the award is that in the Court's view, respondent has made this case much more difficult than it should have been. Both of the attorneys in this case are very able and they have acted with the utmost integrity and professionalism. Neither is asserting a claim for attorney's fees in any amount close to what could be justified given the complexity of what should have been a much more simple case. Nevertheless, the Court finds that it is completely fair and equitable that respondent be required to pay the sum of \$5,000 to petitioner's attorney as partial compensation for the many hours of work and effort that have gone into bringing this matter to conclusion.

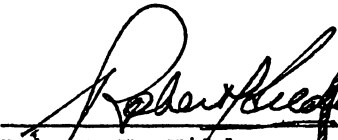
**CONCLUSION**

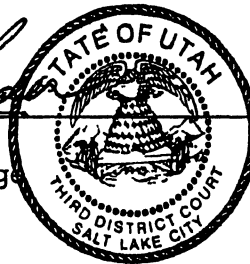
Counsel for petitioner is directed to prepare a final Decree consistent with the Findings and Rulings set forth herein. This document may serve as the Findings of Fact and Conclusions of Law for

that purpose.

Dated this 2<sup>nd</sup> day of July, 2010.

By the Court:

  
Robert K. Hilder  
District Court Judge

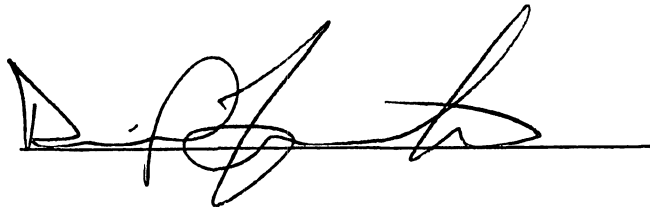


MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Ruling and Order, to the following, this 2 day of ~~June~~ <sup>July</sup>, 2010:

Todd D. Gardner  
Attorney for Petitioner  
4120 S. Highland Drive, Suite 100  
Salt Lake City, Utah 84124

Clark R. Ward  
Attorney for Respondent  
6925 Union Park Avenue, Suite 600  
Midvale, Utah 84047

A handwritten signature in black ink, appearing to be 'Clark R. Ward', is written over a horizontal line.

Todd D. Gardner (#5953)  
**BATEMAN, GOODWIN & GARDNER**  
4120 South Highland Drive, Suite 100  
Salt Lake City, Utah 84124  
Telephone: (801) 424-3451  
Facsimile: (801) 424-3429

**FILED DISTRICT COURT**  
Third Judicial District

**JUL 15 2010**

SALT LAKE COUNTY  
By AW Deputy Clerk

Attorney for Petitioner

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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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ANNETTE LISTON,	:	<b>DECREE OF DIVORCE</b>
Petitioner,	:	
	:	
<b>vs.</b>	:	
	:	
SERGAY LISTON,	:	Case No. 084900427
	:	
Respondent.	:	Judge: Robert K. Hilder

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The above-entitled matter came before the court and was tried June 24 and June 25, 2010. Petitioner was represented by Todd D. Gardner and Respondent was represented by Clark R. Ward. The Court, having found and entered its Findings of Fact, Ruling and Order on July 2, 2010, and that document being incorporated by reference as the Findings of Fact and Conclusions of Law in this matter and being otherwise fully advised, it is hereby

ORDERED ADJUDGED AND DECREED:



1. Petitioner is awarded a Decree of Divorce upon the grounds of of irreconcilable differences to become final upon entry of this decree.

2. Petitioner shall be returned to her former surname; to wit: Lindsay

3. Respondent shall pay to Petitioner \$15,250 to satisfy his share of the marital debt. In the event that there should be a claim made against Respondent by a creditor for said debt, Petitioner shall indemnify and hold harmless Respondent therefrom after Respondent pays his \$15,250.00 allocation of marital debt.

4. During the course of the marriage, the parties acquired a home and real property located at 1835 Gunderson Lane in Salt Lake County, Utah. That real property, pursuant to the Mediation Agreement the parties entered into December 2, 2009, shall be awarded to Respondent. Respondent shall pay to Petitioner \$10,000.00 for her interest in the marital home upon Petitioner signing a quit claim deed conveying her interest in the property to Respondent.

5. Respondent shall pay to petitioner the total of \$7,500.00 for her half interest in the three non-appurtenant water shares that the parties own with Holliday Water Company. Respondent may alternatively transfer one share to Petitioner and pay and additional \$2,500.00 to Petitioner to equalize distribution.

6. No alimony shall be awarded in this matter.

7. Respondent shall reimburse Petitioner the amount of \$500.00 as a reasonable amount of attorney's fees incurred by Petitioner having to enforce and Respondent violating the \$10,000.00 per month investment withdrawal limits as ordered by the court during the pendency of this action.

8. Petitioner shall be awarded as her marital interest from the parties investment accounts in the the total amount of \$136,525.00.

9. Petitioner shall be awarded the interest in her mobile home that she may have without any claim by Respondent.

10. Respondent shall retain all violins without compensation to Petitioner.

11. Petitioner shall be awarded her wedding ring in its present condition.

12. Respondent shall receive from Petitioner \$1,000.00 as compensation from the trade-in from the 2005 Subaru Legacy Outback purchased during the marriage from marital funds.

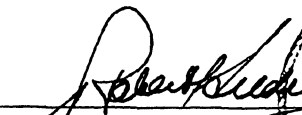
13. Petitioner shall have no interest in the 1963 Chevrolet Pick-Up, the 1942 Ford and other older vehicles and engines, etc. that were listed at trial.

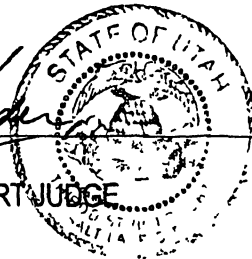
14. An additional award of \$5,000.00 shall be paid by Respondent to Petitioner's attorney as additional compensation for attorney's fees.

IT IS SO ORDERED.

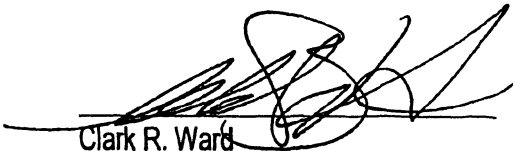
DATED this 13<sup>th</sup> day of July, 2010.

BY THE COURT

  
Robert K. Hilder  
THIRD DISTRICT COURT JUDGE



Approved as to Form:

  
Clark R. Ward

**CERTIFICATE OF MAILING**

This is to certify that on this 6<sup>th</sup> day of July, 2010, that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing **DECREE OF DIVORCE** to the following:

Clark R. Ward  
6925 Union Park Avenue, Suite 600  
Salt Lake City, UT 84124



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Todd D Gardner

**FILED DISTRICT**  
**Third Judicial District**

**SALT LAKE COUNTY**

Docu. Cl.

ANNETTE LISTON,	:	ORDER
	:	
Petitioner,	:	
	:	
vs.	:	
	:	
SERGAY LISTON,	:	Case No. 084900427
	:	
Respondent.	:	Judge: Hilder
	:	Comm: Blomquist

**1. The court orders ADR between the parties if it can occur on or before December 3, 2009.**

2. The marital home located on Gunderson Lane shall be appraised for valuation by a qualified appraiser agreed upon by the parties as soon as possible. The Petitioner shall pay for the

appraisal but the parties agree that the appraisal fee may be apportioned at a later hearing if the Petitioner decides that is necessary.

3. The appraiser should be agreed upon and named by the parties no later than 14 days from the date of this Order or the parties shall come back before the court to submit names before the court and allow the court to decide who the appraiser will be.
4. The named appraiser shall submit the appraisal report to the parties after he or she has determined an appraised value of the home. The parties will accept the determination of the appraised value as indicative of the value and agree not to oppose the determined value of the appraisal, except for good cause shown by the parties within 10 days of the appraisal report to the court and the parties.
5. After the appraised value has been determined, the parties shall either agree to purchase the home by paying the other party what their equity in the home would be according to the new appraisal. The equity, if any, should be determined on a 50/50 basis, after deducting traditional impounds, liens, mortgage loans, real estate fees, taxes, closing costs and the like. The purchasing party shall give notice to the other party of their intent to purchase out the other's equity in the marital home within 14 days of the appraisal report and shall close within 60 days from the date of the final appraisal report. Or, if both parties desire to purchase the marital home and cannot determine which party is to prevail in the purchase of the marital home, or if no party wishes to purchase the marital home, then the home shall be placed for sale with a qualified real estate agent and sold forthwith.
6. The home, if not purchased by either party, shall be placed on the open real estate market with a qualified real estate agent that both parties agree upon. If the parties cannot decide on a qualified real estate agent then the parties shall hold another hearing to submit names before the court and allow the court to decide. The real estate agent named shall sell the

home at the appraised amount or higher or lower if it is the real estate agent's belief that the amount should be higher or lower due to the prevailing market conditions. The parties will accept the determination of the real estate agent's valuation and marketing skills as reasonable and agree not to oppose the determined value or marketing skills except for good cause as presented to the court. Upon sale of the marital home, the equity, if any, should be divided between the parties on a 50/50 basis, after deducting traditional impounds, liens, mortgage loans, real estate fees, taxes, closing costs and the like.

7. Respondent is ordered to provide to Petitioner's counsel all of his current banking and financial statements including, but not limited to, Bank of America and Fidelity Investments within 14 days of this Order. These statements shall go back to at least July 2009 to the present.
8. Respondent is ordered to provide to Petitioner's counsel all of his agreement's, closing documents, and contracts regarding the purchase of his home in Davis County within 14 days of this Order.
9. Respondent is ordered to provide to Petitioner's counsel a copy of a recent appraisal he had done on the parties Gunderson Lane home. The appraisal is also due within 14 days of this Order.
10. A qualified CPA shall be named by the parties to determine the fair market value the parties investments and banking accounts that are in either of their names, the names of third parties that are marital assets as determined by the CPA, including, but not limited to, Fidelity Accounts, Bank of America Accounts and accounts that are attributable to the marital estate. The Petitioner agrees to pay for the up-front fees of the CPA, but reserves the right to petition the court to apportion fees with Respondent if she determines that to

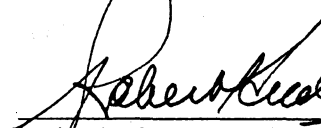
be necessary. The CPA shall be agreed upon and named by the parties no later than 14 days from the date of this Order or the parties will hold another hearing to submit names before the court and allow the court to decide.

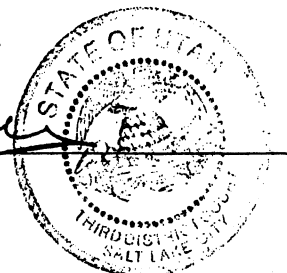
11. The named CPA shall have at his or her disposal all statements, invoices, reports, printouts, or papers, necessary to make his or her determination of the value of the marital estate. The parties shall cooperate fully in this regard and supply the CPA with all requested information.
12. The CPA shall submit a report to the parties after he or she has determined a value of the various investment and banking accounts. The parties agree to accept the determination of the value as indicative of the value and agree not to oppose the value determined by the CPA except for good and reasonable cause before the court.
13. The CPA shall determine the following: 1). The Value of all assets, banking and investment accounts held by each of the parties prior to their marriage 2). The value of all assets, investment/banking accounts held in the various accounts during the course of the marriage 3). The value of the account as of January 15, 2008 and 4) the value of the accounts as of the date of the report issued by the CPA.

IT IS SO ORDERED.

DATED this 27<sup>th</sup> day of Nov, 2009.

BY THE COURT:

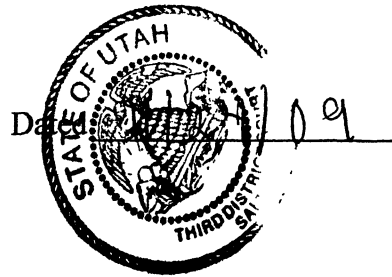
  
Judge Robert K. Hilder  
Third District Court



Recommended By:

Michael Evans

Commissioner Evans  
(On the bench for  
Commission Blomquist)



Approved as to Form:

\_\_\_\_\_  
Clark Ward

Dated: \_\_\_\_\_

### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **ORDER** was served via first class U.S. mail, postage prepaid, on the 5<sup>th</sup> day of November, 2009, to:

Clark R Ward  
6925 Union Park Ave, #600  
Midvale, Utah 84047

Todd D. Gardner  
Todd D. Gardner