

2010

Liston v. Liston : Brief of Appellant

Utah Court of Appeals

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Clark R. Ward; attorney for appellant.

Todd D. Gardner; attorney for appellee.

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IN THE UTAH COURT OF APPEALS

ANNETTE LISTON,
Petitioner / Appellee,

vs.

SERGAY LISTON,
Respondent / Appellant.

Appeal No. 20100⁶⁶⁶⁶~~455~~-CA
District Court Case No. 084900427
Judge Robert K. Hilder
[ORAL ARGUMENT REQUESTED]

BRIEF OF APPELLANT

APPEAL FROM JULY 15, 2010 ORDER OF THE HON. ROBERT K. HILDER
THIRD DISTRICT COURT, SALT LAKE COUNTY, CIVIL NO. 084900427

Todd D. Gardner (# 5953)
4120 South Highland Drive, # 100
Salt Lake City, Utah 84124
Telephone: (801) 424-3451
Fax: (801) 424-3429
Attorney for Petitioner/Appellee

Clark R. Ward (# 3378)
6925 Union Park Center, Suite 600
Midvale, Utah 84047
Telephone: (801) 561-4400
Fax: (801) 561-4432
Attorney for Respondent/Appellant

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UTAH APPELLATE COURTS

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4120 South Highland Drive, # 100
Salt Lake City, Utah 84124
Telephone: (801) 424-3451
Fax: (801) 424-3429
Attorney for Petitioner/Appellee

Clark R. Ward (# 3378)
6925 Union Park Center, Suite 600
Midvale, Utah 84047
Telephone: (801) 561-4400
Fax: (801) 561-4432
Attorney for Respondent/Appellant

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction to hear this appeal pursuant to Section 78A-4-103(2)(h), as this is a final order involving a domestic relations case. UTAH CODE ANN. § 78A-4-103(2)(h) (2008).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue # 1: 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.

Standard of Review: 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. *Kimball v. Kimball*, 2009 UT App 233, ¶ 14, 217 P.3d 733; *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 9, 176 P.3d 476.

Whether property is marital or separate is "primarily . . . a question of law; therefore, we review the trial court's legal conclusions concerning the nature of property for correctness." *Bradford v. Bradford*, 1999 UT App 373, ¶ 11, 993 P.2d 887 (citing *Jefferies v. Jefferies*, 895 P.2d 835, 836 (Utah Ct.App.1995) (considering whether 401(k) plan is marital property)).

Issue Preserved for Appeal: At trial evidence was presented to show that the trial court abused its discretion by finding that charges made exclusively by Appellee during the marriage should be shared by the Appellant. There was no evidence presented

as to the purpose for Appellee's credit purchases. The only evidence presented was the outstanding balances owing, and Appellee's vague and ambiguous testimony. (Ex. 54-55; R. 118-19, 162, 178, 263, 280-84, 326-27.

Issue # 2: Whether the Court abused its discretion by separating out water shares that were admitted to be "appurtenant" to their marital home on 1835 Gunderson Lane, Salt Lake City, Utah from the parties' mediated settlement contract which provided that the respondent be awarded all of petitioner's interest in the property in exchange for respondent paying petitioner \$ 10,000.

Standard of Review: Although appellate courts give great deference to a trial court's factual findings, conclusions of law arising from those findings are reviewed for correctness and given no special deference on appeal. *Keiter v. Keiter*, 2010 UT App 169, ¶ 16, 235 P.3d 782.

"Trial courts have considerable discretion in determining . . . property distribution in divorce cases, and will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated.'" *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 8, 176 P.3d 476 (quoting *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah Ct. App. 1991)). "[W]e review the trial court's legal conclusions concerning the nature of property for correctness." *Bradford v. Bradford*, 1999 UT App 373, ¶ 11, 993 P.2d 887.

Issue Preserved for Appeal: At trial sufficient evidence was presented that a partial agreement had been reached at mediation whereat each party was represented by legal counsel. Petitioner testified that she was fully aware of the water shares appurtenant to the land acquired during the marriage. Petitioner's attorney drafted the

partial agreement which made no reference to the water shares. The agreement itself specifically provides for a payment of \$10,000.00 to petitioner in exchange for all of her interest in the property which appertained to the water shares.

Issue # 3: 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's premarital accounts lost their identity and character as separate property by temporarily depositing them into a joint account with the Appellee to protect them from seizure by his former spouse.

Standard of Review: the standard of review is abuse of discretion:

“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) (alteration in original) (additional internal quotation marks omitted). 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.*

Kimball v. Kimball, 2009 UT App 233, ¶¶ 4-5, 217 P.3d 733.

Issue Preserved for Appeal: At trial sufficient evidence was presented to show that the parties knowingly and intentionally kept their finances separate. Appellant admitted and bank statements proved that he made marital transactions, but also the evidence was that on one occasion only, did the Appellant make a temporary transfer of

his funds to an account in the sole name of the Appellee, which was for the intended purpose to protect those funds from his former wife. Once his fear of her accessing those funds had passed, he transferred the funds back to himself in an account under his name only.

Issue # 4: Whether the trial court erred as a matter of law and abused its discretion by independently accessing respondent's prior divorce action, and referring to it while conducting its own interrogation of the respondent at trial, and referencing it in the court's memorandum findings of fact, without prior notice to counsel.

Standard of Review: This is a question of law which the court reviews for correctness without deference to the district court. *Spears v. Warr*, 2002 UT 24, ¶ 32, 44 P.3d 742 (questions of law reviewed for correctness).

Issue Preserved for Appeal: At trial sufficient record was made in the transcript that the trial court independently accessed and familiarized itself with the appellant's prior divorce action in the Second District Court. The transcripts show that the trial court referenced appellant's prior divorce action in conducting its own fact finding interrogation of the appellant while he was on the witness stand during trial.

Issue # 5: Whether the Court abused its discretion by awarding Appellee attorney fees and denying Appellant attorney fees.

Standard of Review: “[B]oth the decision to award attorney fees and the amount of such fees are within the trial court’s sound discretion. However, the trial court’s award or denial of attorney fees must be based on evidence of the financial need of the receiving

spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees.” *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 10, 176 P.3d 476 (alteration in original) (citations and internal quotation marks omitted). An attorney fee must be based upon sufficient findings. *Davis v. Davis*, 2003 UT App 282, ¶ 14, 76 P.3d 716.

Issue Preserved for Appeal: At trial, Appellant testified that he incurred attorney fees in successfully defending himself against Appellee’s petition to obtain a protective order. Appellant’s testimony and the evidence was further that he lacks resources to pay attorney fees to Appellee; further that he prevailed on many of the disputed issues at trial. (R. 388-94.)

**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) (2007) 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) (2007) provides:

30-3-3. Award of costs, attorney and witness fees -- Temporary alimony.

(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.

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. Each party testified that they had been married and divorced once before. Each testified that they intentionally kept all of their finances and debts separate and that neither made any contributions to any financial assets of the other.

During the marriage respondent made transfers of premarital funds and funds given him by his mother into accounts in Fidelity Investments that were held under his “Liston Family Trust.” During the marriage a portion of his funds were temporarily transferred into a joint marital account with the Appellee for approximately six months. It was conceded that he alone used and managed these funds. The transfer was for a brief period of approximately six months, and was made to avoid seizure by his former spouse. A separate account at Barnes Bank was used as a depository for respondent’s earnings

derived during the marriage and to pay business operating expenses that were incurred to generate that income.

Also during the marriage, the parties purchased a marital home located at 1835 East Gundersen Lane, Salt Lake City, Utah. In the course of participating in mandatory divorce mediation with their respective legal counsel, the parties and their legal counsel entered into a partial stipulation in which the Appellee agreed to grant respondent a quitclaim deed to convey to him all of her interest therein in exchange for \$10,000.00 in full settlement of any claims she had therein.

Appurtenant to the real property were four water shares issued through Holliday Water Company. Appellee called a witness from the water company, who testified that the number of shares determines how much water the owner can use without incurring an additional fee. At least one share must remain with the land, but a single share would be inadequate for normal water consumption. At trial the Appellee argued that water shares, which specifically state on their face are “appurtenant” to the land, should be segregated out from the mediation contract and that she should be awarded an equitable share of the water shares. The trial court agreed and made a finding of fact as to the value of each share, then made an award thereof to the Appellee.

During the trial the court accessed the docket from Appellant’s prior divorce action in Second District, Davis County, Utah. The court independently and without request or advance notice to either party’s counsel, referred to that docket and conducted its own interrogation of the Appellant while he was under oath. The court made several references to Appellant’s prior divorce action during the trial and in making its findings

of fact and orders under the decree. Appellant asserts that the court exceeded its authority as an impartial finder of fact and improperly conducted its own discovery and became an adversary to the Appellant. The court was biased against the Appellant, which manifested itself in the manner in which it exercised its discretionary authority in determining and dividing the marital estate.

STATEMENT OF FACTS

On June 24 and 25, 2010 a trial was conducted before Third District Court Judge Robert K. Hilder. Each party provided sworn testimony on disputed issues that were certified for trial. The parties were both 73 years old at the time of trial. (Findings, 1.) Each were married and divorced twice before. (R. 272-73, 298.) The parties cohabited approximately in 1999 while Appellant was in the process of obtaining his second divorce and married in May 2002. (R. 21; Findings, 2.)

Appellee testified that her monthly income consists of \$1,055.00 per month in Social Security income. (R. 278.) She pays out approximately \$2,100.00 per month in minimum payments for her five credit card payments in addition to approximately \$950.00 for trailer rent and utilities (R. 278-279), but did not introduce a financial declaration statement as an exhibit (R. 276).

Appellant testified with regards to Appellee's Exhibit 8 that after deducting \$78.20 for Medicare, he receives \$1,368.00 per month in Social Security income and an additional \$200.00 per month from an annuity. He also receives a variable amount of income from a Fidelity annuity that at one time was \$459.00 per month but is impacted

by market conditions. (R. 312, 314-15; Appellee's Ex. 8; Appellant's Ex. 15.) From this income, Appellant paid \$1,254.06 against the mortgage on the Gundersen Lane marital home. (R. 315.) Appellant further testified that his monthly expenses are \$5,068.49. (Appellant's Ex. 15.)

Appellant's Mountain Lion Engineering Business

Sometime between 1999 and 2000, Appellant formed a corporation doing business as "Mountain Lion Engineering." Mountain Lion Engineering was a corporation that Appellant started up prior to the marriage after being laid off. (R. 307-08.) Appellant performed freelance engineering consultation in this business for a time during the marriage. (R. 10, 54, 442.) Appellant deposited monies earned in this business during the course of the marriage into a Barnes Banking account. (R. 54-56, 59, 420-21; Ex. 9, 59.) Some of his earnings were paid for consulting services to Conestoga Cold Storage. (R. 309; Ex. 10.)

The Barnes Bank account was permissibly held under the name of Appellant's mother Lorena K. Liston. (R. 112, 302-03; Ex. 27.) Appellant used the Barnes Bank account to pay for business operation expenses for Mountain Lion Engineering. (R. 311, 421, Ex. 59.) Some of Appellants' earnings received during the marriage were also deposited into his Fidelity Investments account. (R. 422; Exhibits 31-35.)

Appellant's management and transfers of funds in different accounts during marriage

Appellant testified that there never was a joint bank account. (R. 326.) The evidence admitted includes a single financial account held in Appellant's name only.

(Appellee's Ex. 36.) Appellant transferred funds from the Barnes Bank account into his premarital Fidelity Investments Account. (R. 56, 113-14; Ex. 9, 59.) Appellant used his mother's bank account for years. (R. 117.) Appellant also would deposit his social security income, Fidelity Investments income and transferred money from his business into the Barnes Bank account (R. 303.) Appellant employed this method of finance management to avoid further loss of his premarital assets to garnishment procedure by his former wife. (R. 300-02.) This methodology was reaffirmed by the Appellant several times during the trial and was neither secretive nor a fact withheld to Appellee. Appellee testified that the Appellant transferred money through his mother's account and then through his premarital Fidelity Investments accounts. (R. 147, 153.)

Appellee testified that the Appellant had been married twice before and that he was fearful of his ex-wife accessing his money. (R. 156-57, 160.) Appellant did not dispute this testimony. (R. 300-03.) Appellee consented to and did not object to the method by which Appellant managed his banking through the use of his mother's name. (R. 158.) Appellee admitted that she had no ownership in any of Appellant's accounts (R. 174), and never had a joint account with Appellant (R. 175). Appellee made no contributions of her own into Appellant's accounts. (R. 176.) Appellant affirmed her testimony that there were never any joint accounts, that he never signed any of Appellee's checks, and that Appellee had no authority to sign any of his checks. (R. 326.)

Appellant's testimony and evidence as to sources of funds and marital transfers

Appellant's rebuttal testimony and evidence was that he had the following

financial accounts: Exhibits 9, 11, 20, 30, 31, 36, 37, 44, 45, 47.

Capital One Account. (Ex. 20; R. 424.)

This was the depository of funds Appellant received from the decree in his former divorce, Betty Liston, of ½ of her IRA account which was entirely premarital to this case and not in dispute. (R. 364, 366-67.) Appellant stopped contributing to this account in 1998. (R. 367.) Appellant received \$7,700.00 from his portion of his ex wife's Betty Liston's IRA in that divorce action in the Second District Court, and withdrew \$8,160.00 from that same account to comply with a minimum required distribution from the account. (R. 365.) These funds were transferred into account Z83225584 which was closed. (R. 367.)

Fidelity Investments Account Z83225584 (Exhibits 47-50.)

This account was the repository of Appellant's pre-marital Capital One account.

Appellee's expert, Rebecca Schreyer, testified that she made an assumption that the entire portion of Appellant's premarital IRA funds were transferred into the Z83225584 account in making conclusions that transactions made during the marriage involved marital funds. (R. 211.) Appellant rebutted those assumptions and testified that he did not transfer either his premarital IRA accounts (129-182680, 2B923460) into this account. (R. 370.) He testified that a withdrawal was required under what was called a "minimum required distribution" transaction on December 31, 2007. At that time Appellant transferred \$8,160.05 from IRA account 129-182680 into account Z83225584. (R. 370-71.)

On March 28, 2008, the entire account of Z83225584 was transferred into Fidelity

Investments account number Z71675385 which account was under Appellant's name only. This was done to consolidate statements into a single statement and to transfer all funds into Appellant's name. (R. 372.)

Court Exhibit #105 responds to Appellee's Exhibit #28: a letter from Rebecca Schreyer CPA which were her conclusions, based on her assumptions and research of Appellant's financial accounts.

Fidelity Investments account X29175706 Ex. 31-35. Appellant made deposits of \$10,000.00, \$63,000.00 and \$4,500.00 respectively into this account which funds were gifts from his mother. (R. 437; Ex. 32-35.) Appellant testified that his Exhibit 1, the Fidelity Investment Account Z29175706 (Appellee's Ex. 31) originated with a \$10,000.00 deposit which was a gift from his mother, Lorena, in December 2000 over two years prior to the parties' marriage. (R. 333.) He testified that the entire source of funds into this account came from gifts by his mother, Lorena Liston. (R. 347-48, 352.) His testimony was further that earnings were placed in other accounts. (R. 352.)

Fidelity Investments account X-29-253-162 held in Appellee Annette Liston's name only. (Ex. 36.) Appellant freely admitted to transferring funds from all other accounts into this account during the marriage for an approximate six month period to shield and protect those assets from access by his former wife, Betty Liston. He never intended to share any interest therein with Appellee. (R. 345-47, 354.) When the perceived threat no longer existed, he transferred the funds into Fidelity Investments account Z-85-347442 and closed the account ending in 162. (R. 355.)

Fidelity Investments account Z-85-347442. (Ex. 37.) This account was created

on November 29, 2004 with a beginning balance of \$30,000.00 which came from a transfer of funds from the Barnes Bank which Appellant considered his personal account but which was in his mother's name, Lorena Liston. (R. 355-56.) Appellee's witness, Rebecca Schreyer testified that this beginning balance was Appellee's premarital property. (R. 215.)

All funds originally held and transacted in account ending in #706 were eventually deposited into Fidelity Account ending in #442. (R. 360.)

Barnes Bank. (Ex. 59.) Appellant employed this account to deposit earnings from Mountain Lion Engineering and to pay business operating expenses from that business. No cash gifts from Appellant's mother were deposited into this account. (R. 357.)

Appellant established his "**Liston Family Trust**" in 1999 which held all of his accounts and was established for the benefit of his two daughters and grandson (R. 335), and to protect the assets from garnishment by his former wife, Betty Liston. (Appellant's trial exhibit 7; R. 383-84.)

On July 16, 2003 Appellant received \$41,900.05 from his mother which he deposited and, within a few days, transferred to his Fidelity Investments account. (R. 337-38.) The original deposit slip was produced as a part of Appellant's Exhibit 1, but the deposit slip itself did not show the source of the funds. (R. 338.) The only evidence that it sourced from Appellant's mother was his own testimony. (R. 341.)

Appellant received a K-1 IRS form which he used to prepare his mother's tax return. He testified that it was a gift from his mother. (R. 342-43.) Appellant testified that

following his receipt of \$41,900.95 gifted to him by his mother, he gifted the funds to Appellee. (R. 344-45, 347-48.) This had been Appellant's practice ever since 2004. (R. 345.) Appellee made no contributions of any kind deposited into any of Appellant's financial accounts. (R. 348.)

Appellant testified that all of his money and other money earned during the marriage eventually end up in his Fidelity Investments account ending in #442. (R. 349.) When the court inquired if he understood that earnings during the marriage are marital property, and that if marital property went into whatever account, it could be deemed marital property, Appellant stated that he did, but also understood that the parties had a verbal agreement to keep their businesses separate and that the divorce petition pled that each party be awarded their separate businesses. (R. 349.) Appellant's specific purpose and intent in these transfers was to shield and protect the money from his ex wife and anybody else, and not to create an interest in the Appellee. (R. 354. Ex. 1.)

When the perceived threat no longer existed, he transferred the funds from the account that was solely in Appellee's name back to his separate Fidelity Investment IRA account ending in #442. (R. 353-54.) This occurred during the marriage on January 31, 2005 (R. 355), at which time account ending in #162 no longer existed (R. 355).

Liston Family Trust. (Appellant's Ex. 7.) Appellant created this trust in 1999 to protect financial assets from former wife, Betty. (R. 383-84.) All of his financial accounts are held under this trust. (R. 394.)

Water Shares Appurtenant to Gundersen Lane Property

During the marriage the parties purchased a home located at 1865 Gundersen

Lane, Salt Lake City, Utah. (R. 435, Findings, 8-10.) Appellee agreed to execute a quit claim deed and convey “all of her interest” in the Gundersen Lane property to the Appellant in exchange for \$10,000.00. (Ex. 16.) “The Court finds that the \$10,000.00 was consideration for petitioner giving up all interest in the real property on Gundersen Lane.” (Findings, 10.)

Appurtenant to this land were four water shares issued through Holliday Water Company. (Ex. 17; Findings, 10.) The partial mediation agreement (Ex. 16), makes no reference to any water shares. Segregating the water shares from the agreement to deed her interest to Appellant in exchange for \$10,000.00 was never discussed, nor part of the mediation agreement. (R. 68, 79.) Appellee admitted that she was aware of the water shares issue at the time of mediation and that it was not made a part of the partial mediation agreement. (R. 190.) Both the Appellee and her expert Marlin K. Sundberg who is the manager of Holliday Water Company, testified that the value of each water share is \$5,000.00. (R. 70, 247.)

Appellee and her expert Marlin Sundberg both testified that at least one water share must remain with the property but other shares could be sold. (R. 70, 242-43.) They further stated that one water share entitles the owner to 60,000 gallons of free water per year, which represents about twenty percent of the modest requirements of one family. (Findings, 10.) The Court found that only one of the four shares is in fact appurtenant to the property, and that this single share is absolutely necessary to permit the property owner to receive culinary water from Holliday Water Company. (Findings, 10.)

The court then found that the remaining three water shares were undisputedly

valued at \$5,000.00 each (Findings, 10), and that they were non-appurtenant marital property (Findings, 11). The Court awarded Appellee \$7,500.00 for her interest in the three non-appurtenant water shares with Holliday Water Company, or in the alternative, ordered respondent to transfer one share to Appellee and pay her \$ 2,500.00 to equalize the distribution of water shares. (Decree, ¶ 5.)

Appellee's Credit Card Usage

Appellee used a Discover Card and a Chase credit card during the marriage which she testified were in her own name exclusively and presented evidence as to the balances owing on several accounts. No evidence was presented as to the purpose of the debts she incurred, nor was there evidence as to what the purchases were for. (Ex. 54-55; R. 118-19, 284.) The only evidence pertaining to Appellee's credit cards were balances owing and did not set forth what charges were made nor when. (R. 178, Ex. 54-55.) Appellee testified that she has to live on credit cards and that she was \$50,000.00 in debt. (R. 162.)

Appellee further testified that over the course of five years of marriage with Appellant she incurred debt on her Discover Card and \$17,995.70 on her Chase card to pay for meals out, groceries, things for the house, gas for the car, clothing and two trips to see her father, one of which was to attend his funeral. Also that both she and Appellant received benefits through these credit charges. (R. 118-19).

Appellant testified that Appellee's contributions to the marriage were minimal and that he and Appellee had a common understanding that each would manage their finances separately. (R. 326-27.) Appellee testified that it was not always her intention to keep finances separate, but that it was the practice of the parties. (R. 263.) Appellee admitted

that she and Appellant lived together before the marriage during which time they also kept their finances separate. (R. 264.) Appellee testified that her contributions to the marriage included the shirt Appellant was wearing to trial, “creature comforts” and all of their food. (R. 280.) Appellee admitted under oath that the credit cards in question were in her name only, that the Appellant had no access to those cards, and that she was the only person that could make a purchase on those cards. (R. 283-84.)

Appellee testified that between \$ 30,000 and \$ 35,000 of her current debt was incurred during the marriage (R. 281-83), which Appellant, through counsel, argued was her actual “contribution” during the marriage (R. 283). Appellee further testified that she can only afford to make the minimum monthly payments on her Chase Bank of \$550.00, Wells Fargo \$400.00 and Discover Card of \$400.00 per month. (R. 277.) She testified that that recently to the time of trial had incurred \$6,000.00 in additional credit debt through Zion’s: “the payment is running about – I don’t know- \$250 - \$300.00” (R. 278), and that Appellant had no control over her use of her credit cards (R. 176).

The court found that the Appellee “incurred debt related to family expenses in the amount of at least \$30,500.00 which was unpaid debt at the time of separation.” (Findings, 6 at ¶ 13.) “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” (Findings, 6 at ¶ 13.)

Her attorney fees

The Court found that Appellee incurred attorney fees to obtain information and evidence as to Appellant’s purchase of a house located in Farmington, Utah during the

marriage. In that regard the Court awarded Appellee \$500.00 (Decree, ¶ 14), and awarded Appellee an additional \$5,000.00 in attorney fees (Findings, 14).

During the course of this case the parties scheduled mediations which Appellee claimed were cancelled by Appellant. (R. 62-65.) Appellee later admitted that it was done by mutual consent, and that for two years she had been represented by an attorney and had plenty of opportunities to discuss and review all issues brought to court. (R. 189.) The parties were able to settle some of the disputed issues at mediation and reduced those agreements to a partial stipulation. (R. 65; Ex. 16.) The agreement was drafted by Appellant's attorney. (R. 190.)

His Attorney Fees

Appellant incurred attorney fees in successfully defending himself against Appellee's petition to obtain a protective order against him in June 2009 (R. 388-93) and in this action.

Appellee's C.P.A. Witness

Appellee called Rebecca Schreyer, C.P.A. as an expert witness. (R. 203.)

Appellant's attorney Clark R. Ward objected to the witness under Utah Rules of Civil Procedure Rule 26. (R. 125.) The trial court overruled the objection and allowed the witness to testify. (R. 126.)

Ms. Schreyer testified that she prepared a report of her findings from materials provided to her by Appellee in a letter. (R. 207; Ex. 28, 29.) From her findings she formed an opinion as to the marital portion of Appellant's Fidelity Investment account as of the date of separation of the parties – January 15, 2008. (R. 207.)

Barnes Bank Account – Appellee’s Exhibit 59. The witness did not address this account nor did she provide any analysis as to the source from which this account was funded or how it was used during the marriage.

Appellant’s premarital IRA account 2B923460

The witness found that Appellant entered the marriage with a rollover IRA account number 2B923460, and that there were no additions or reductions to this account during the marriage period of May 2002 and January 15, 2008. (R. 208-09.)

Appellant’s Fidelity Investments Account X29175706

The witness also found that Appellant had a Fidelity Investment account number X29175706 with a premarital balance of \$72,065.66. (R. 209.) During the marriage, deposits of \$10,000.00 in 2002, \$63,000.00 in July 2003 and \$4,500.00 in March 2004 were made. (R. 208-10.) All of these deposits were made into the Liston Family Trust. (R. 210.)

The witness opined that the account grew during the marriage to a sum of \$163,219.18 and that during the marriage the entire account was transferred to a Fidelity Investment Account number X29253162 which was in the sole name of Appellee Annette Liston. (R. 211, Ex. 36.) Some of these funds were Appellant’s premarital funds. (R. 211.) All funds were thereafter eventually transferred into another account held under the name of Lorena K. Liston, account number 285347442. (R. 212.)

The witness testified that Lorena Liston opened an account in November 2004 with \$30,000.00 in premarital funds. (R. 213, 215-16.) There were additional deposits totaling either \$90,000.00 or \$115,000.00 during the marriage. (R. 214; Exhibits 40-42.)

This account grew to \$357,334.89. (R. 213-14.) Ms. Schreyer testified that according to her, the marital portion of this account grew to be \$262,375.79 by April 2008. (R. 216-17.) All of these funds were then later transferred into Appellant's Fidelity Investments account number Z85347442. (R. 217.) An additional \$97,959.10 was deemed to be Appellant's separate property. (R. 217.)

There were transfers from Lorena Liston's account number Z85347442 into Appellant's account in the sum of \$357,344.89. (Ex. 44; R. 217.) Appellant's entire account was transferred into Appellees' Fidelity Investment Account number X29253162 during the marriage (R. 211), and account number Z85347442 (R. 212).

Another account, 129-182680 was a retirement account that had a balance on April 1, 2002 of \$123,215.12 (R. 217), which was characterized as Appellant's premarital account and was not factored into Ms. Schreyer's ultimate conclusions regarding what Appellee's marital portion was (R. 218). Appellant affirmed this in his testimony. (R. 367.)

Schreyer testified that during November 2006 one deposit of \$7,764.52 was made into Fidelity Investments account number Z853223584 and a transfer to this same account of \$ 8,160.65 was made in December 2007. She assumed that the entire marital portion of the IRA account was transferred to the Z853223584 account (R. 218), which was the Lorena K. Liston account. The entire balance of \$ 24,924.61 in that account was transferred into a new account number Z71675385 in March 2005. (R. 219-20; Ex. 46-48, 51.)

By April 2008 all funds had been transferred back to the name of the Appellant.

(R. 222.) The value then was \$ 613,577.92. The witness reduced the marital portion by finding \$97,027.00 was Appellant's premarital asset (R. 223), leaving a marital balance of \$293,558.00. She then split that amount into equal halves leaving each party with a share of \$146,779.00. (R. 222.) The court awarded Appellant \$136,525.00 as her marital interest from the parties investment accounts. (Findings, 18; Decree, ¶ 8.)

The witness admitted to difficulty in characterizing the various accounts, but summarized her findings that Appellant started the accounts before the marriage, added funds during the marriage, then made transfers into an account under Appellee's name, then to his mother Lorena Liston, then transferred them all back to himself. (R. 223-24.)

Ms. Schreyer's stated understanding of the differences between premarital and marital assets was that anything done during the marriage was "marital" (R. 225), and that any deposit made during a marriage is by her definition "marital" (R. 231). She further stated that the sales proceeds from a portion of the Gundersen Lane property would have funded a lot of the deposit into the account. (R. 225.)

Ms. Schreyer testified that she did not look at the source of funds into the accounts transferred, only if they occurred during the marriage (R. 232), but concluded that there was a comingling of assets (R. 226), and that \$147,779.00 was a fair distribution of what she defined were marital assets (R. 227-28). She testified that she could "only surmise" the source of funds deposited (R. 229), and that she did not know the source of funds deposited (R. 230). Ms. Schreyer further testified that she had never testified in a divorce setting before (R. 236), that she did not consider herself an expert witness, and that her work is not normally done for divorce cases (R. 234).

Judge Hilder's unsolicited independent access to Appellant's prior divorce action

During direct examination of Appellant, and without any prior notice to or request by counsel for either party, Judge Hilder accessed Appellant's prior divorce action in Davis County, Utah and began to reference its 42-page docket while conducting its own examination of Appellant. (R. 346-47, 444.) The court cited when Judge Jon Memmott invalidated the pre-nuptial agreement Appellant had with his then wife (R. 350), and cited representations made before the Court Commissioner in that case, David Dillon, relating to his sources and amounts of income (R. 445, Findings, ¶ 8-10).

As the trial proceeded the court took an increasing role as an advocate and finder of fact. (R. 444-49, 451-53.)

The Court denied the following requests made by Appellee:

Appellee's request for alimony was denied. (Decree, ¶ 6.)

Appellee's request for an award of compensation in Appellant's violins was denied. (Decree, ¶ 10.)

Appellee's was awarded her wedding ring in its present condition and her claim that the ring had been altered to replace a diamond stone setting with a cubic zirconia was denied. (Decree, ¶ 11.)

Appellee's request for an interest in Appellant's 1963 Chevrolet pick-up, his 1942 Ford and other vehicles, engines and miscellaneous other non-specified items listed at trial was denied. (Decree, ¶ 13.)

SUMMARY OF ARGUMENT

The court abused its discretion when it found that \$ 30,500 of Appellee's credit card debts were a marital obligation where there was insufficient evidence to support the determination that such obligations were incurred for family purposes. Appellant did not have any control over Appellee's credit card usage. Furthermore, it was an abuse of discretion for the court to find that the water shares were not covered by the mediated agreement and that they were not appurtenant to the land. The water shares stated on their face that they were appurtenant.

The court abused its discretion in determining that \$ 273,050 in Appellant's accounts was marital property. Appellant asserts that a substantial portion of these funds were his traceable premarital property and gifts from his mother. The court erred and abused its discretion by taking judicial notice of records in Appellant's prior divorce case and using them to question Appellant where those files were not placed in evidence. Furthermore, the court abandoned its impartial role and infringed on counsel's role of advocacy when it sought out additional evidence in the case and used the records without prior notice.

It was an abuse of discretion to award Appellee attorney fees. The court did not find that Appellee was in need of attorney fees and counsel did not submit an affidavit of attorney fees, which is necessary to determine that attorney fees are reasonable.

ARGUMENT

POINT I. THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING APPELLEE'S DEBTS INCURRED SOLELY BY HERSELF DURING THE MARRIAGE, AND WITHOUT ANY PRIOR KNOWLEDGE, CONSENT, INPUT OR CONTROL OF APPELLANT SHOULD BE SHARED BY APPELLANT.

Appellant asserts that the court abused its discretion when it found that \$30,500 of Appellee's credit card debts were "a marital obligation, to be shared equally." (Findings, 12.) "Findings of fact in divorce appeals are subject to the clearly erroneous standard of review such that due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 44, 176 P.3d 476 (citing *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah Ct. App. 1991)).

Fulfilling Marshalling Requirement

Appellant submits this section in compliance with the marshalling requirement. Utah Rule of Appellate Procedure 24(a)(9) states, "[a] party challenging a fact finding must first marshal all record evidence that supports the challenged finding." U.R.A.P. 24(a)(9). The court in *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct.App.1991) described the marshaling requirement:

The marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct.App.1991); *see also* *Chen v. Stewart*, 2004 UT 82, ¶ 77. Appellant sets forward the following evidence which could support the finding of the District Court:

1. Appellee presented evidence regarding the balances on her credit cards. (R. 178; Ex. 54, 55.)
2. Appellee testified that she has to live on credit cards and was \$50,000 in debt. (R. 162.)
3. 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).
4. Appellee testified she incurred credit card debt to pay for meals out, groceries, things for the house, gas for the car, clothing, and two trips to see her father. (R. 118-19.) She testified she paid for all the parties’ food. (R. 280.)
5. 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.)
6. Appellee testified that both she and Appellant received benefits through these credit charges. (R. 118-19.)
7. Appellant testified that between \$30,000 and \$35,000 of her current debt was incurred during the marriage. (R. 281-83.)

8. The court found that petitioner had established debts of at least \$30,500, which debts constituted “a marital obligation, to be shared equally.” (Findings, 12.)

A. The trial court abused its discretion when it found that \$30,500 of Appellee’s credit card debt was a marital debt.

The parties each testified that they had always practiced keeping their finances separate. At no time did they share a credit card. That notwithstanding, each party admitted to using their credit cards during the marriage for general entertainment and small purchases.

Argument in Favor of Upholding Judgment

Appellee’s testimony that she used her Discover Card and Chase Card for general family purposes that included meals out of the home and things for the house. A presumption should exist that purchases made during the marriage were for general marital purposes that benefitted both parties. The broad discretionary powers of the trial court are intended to resolve this issue because it is virtually impossible and overly burdensome to examine each purchase one-by-one. There was no contrary evidence to rebut petitioner’s testimony. Accordingly the trial court acted appropriately in dividing the marital portion of Appellee’s credit card balances as it did. Appellant was willing to allow Appellee to use her credit cards and benefit from her charges as he produced no testimony of any protest or objection to her use of the cards.

Argument Against Affirming The Judgment

Appellee testified that Appellant had no authority to use her credit card and offered no evidence that the massive credit she had incurred during the marriage was for

joint family purposes. Her bare testimony that she incurred debt for marital purposes was not supported by the statements themselves. The trial court found that with the exception of a disputed purchase of a motor vehicle, there was “no evidence to suggest that any purchases on the account at issue were for petitioner’s individual benefit.” (Findings, 6 at ¶ 13.) This ignores Appellee’s own testimony that she charged two trips to see her dying father in California, bought gas for her car, and purchased clothing. It further ignores the fact that petitioner’s evidence in support of her claim of marital debt completely lacked anything to support it. There were no statements to demonstrate that petitioner’s charges were not actually carry-over premarital charges or that that they were primarily for her clothing and personal entertainment, alluded to in her testimony. The only evidence admitted included balances owing and her testimony.

Appellant testified that he used his own credit card for general purposes and that he was entirely powerless to know or control petitioner’s spending. Appellee testified that she “contributed” to the marriage but the only financial contribution she made was to incur massive and uncontrollable debt. (R. 283.)

An individual in such a powerless and ignorant position should not be held jointly liable for debts incurred during a marriage by a spouse who is concealing the use of their individual credit account. Being completely shut out of how Appellee was using her credit cards, he had no reason to protest and was an innocent bystander while Appellee was withholding her use of credit cards from him. It was a clear abuse of the court’s discretion to penalize Appellant for staying in the marriage while unbeknownst to him his financial penalty for doing so was increasing by the month.

POINT II: THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SEPARATED WATER SHARES THAT WERE APPURTENANT TO THE PROPERTY AT 1835 EAST GUNDERSEN LANE, SALT LAKE CITY, UTAH, FROM THE PARTIAL SETTLEMENT CONTRACT

Fulfilling Marshalling Requirement

Appellant submits the following evidence to comply with his duty under U.R.A.P. 24(a)(9) to marshal the evidence in support of the trial court's finding which he challenges:

1. During the marriage, the parties purchased a home located at 1835 Gunderson Lane in Salt Lake County. (Findings, 8.)
2. The parties entered into a stipulation that provided that "petitioner should receive \$10,000 upon execution of a Quit-Claim Deed." In so doing, petitioner would convey any interest she may have in the real property at 1835 Gunderson Lane. (Findings, 9.)
3. There were four water shares in the Holliday Water Company which were related to the property. (Findings, 10.)
4. The issue of the water shares was not discussed in mediation, nor were the water shares explicitly addressed in the parties' stipulation. (R. 68, 79.)
5. Marlin K. Sundberg, manager of the Holliday Water Company, and Appellee both testified that at least one water share must remain with the property but 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.)

6. “Based on the testimony of the manager of the Holliday Water Company Manager, which the court found to be persuasive, the court [found] that only one of the four shares is in fact appurtenant to the property.” (Findings, 10.)
7. “[F]or 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.” (Findings, 10.)
8. The court valued each share at \$5,000, based on the testimony of Marlin Sundberg. Mr. Sundberg stated that \$5,000 is the market price of water shares for individuals who wish to obtain a new service to a new meter. (*See* R. 70, 247; Findings, 10-11.)
9. “The Court determine[ed] that the three non-appurtenant water shares were not covered by the mediation agreement for satisfaction of petitioner’s interest in the real property.” (Findings, 11.)
10. The court found the three non-appurtenant shares to be “marital property, with a total value of \$15,000,” and divided that \$15,000 interest equally between the parties. (Findings, 11.)
11. Mr. Marlin Sundberg of the Holladay Water Company testified that the company sells water shares for \$5,000.00 each. (R. 247.)

A. The court abused its discretion in determining that the water shares were not appurtenant to the land and that they were not covered by the parties’ mediated agreement.

Under Utah law, a stipulation reached by divorcing spouses regarding property division should be recognized and enforced by the courts. *Sweet v. Sweet*, 2006 UT App

216, ¶ 3, 138 P.3d 63 (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)); *Bayles v. Bayles*, 1999 UT App 128, ¶ 15, 981 P.2d 403 (“Stipulations entered into in contemplation of a divorce ‘are conclusive and binding on the parties unless, upon timely notice and for good cause shown, relief is granted therefrom.’” (quoting *Maxwell v. Maxwell*, 796 P.2d 403, 406 (Utah Ct. App. 1990))); *Colman v. Colman*, 743 P.2d 782, 789 (Utah Ct. App. 1987) (stating that “a parties’ stipulation as to property rights in a divorce action . . . [is] advisory and usually followed”).

“[P]arties to litigation are free – indeed encouraged – to stipulate to the resolution of their disputes and, when they do so, the courts of this state will enforce those agreements as written and will not paternalistically substitute their judgment for that of the parties.” *Sill v. Sill*, 2007 UT App 173, ¶ 23, 164 P.3d 415 (J. Orme concurring). Accordingly, when a party agrees to sign a settlement, he or she “waive[s] the right to claim that such agreement should contain additional or different terms.” *Stone v. Stone*, 2008 UT App 154 at *1 (slip op. May 1, 2008).

There was no evidence to support a finding that deviating from the four corners of the contract was legally supportable. No finding of fraud, undue influence, material non-disclosure of fact was made. None were alleged. Appellee testified that she was aware of the water shares long before the parties mediated, had the benefit of legal counsel for months preceding the mediation and during two mediation sessions. (R.65 -79.) Her attorney drafted the agreement. There was never an argument by Appellee that there was

a “mutual mistake” or any other defense against the validity of the negotiated contract crafted with the assistance of counsel at mediation.

While it is possible to set aside a stipulation or contract on the basis of mistake, “(a) party cannot avoid a divorce decree simply by ‘claiming a mistake in entering into a stipulation on appeal” *Collins v. Collins*, 1999 UT App 187 at *1 (unpublished) (quoting *Maxwell v. Maxwell*, 796 P.2d 403, 406 (Utah Ct. App. 1990) (finding stipulation binding where wife was represented by counsel and took an active part in the negotiations)); *Maxwell v. Maxwell*, 796 P.2d 403, 406 (Utah Ct. App. 1990) (finding stipulation binding even where a mistake existed).

The trial court should not be permitted to cure or rescue Appellee from her own neglect when legally represented and when present on two mediation occasions and when she admitted to personal knowledge of the water shares for a long period of time. To allow the Court to paternalistically and arbitrarily redefine the parties negotiated mediation agreement puts any other negotiated and stipulated term at risk and undermines the purposes of mediation and contract law generally.

Furthemore, the trial court abused its discretion in finding that the shares were not appurtenant to the land where the shares specifically state on their face that they are appurtenant to the land. (*See* Appellee’s Ex. 17.) Because the shares were appurtenant to the land, they were covered by the mediated agreement and the court abused its discretion when it found that the shares were not a part of the agreement.

POINT III: THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING THAT APPELLANT COMMINGLED PREMARITAL FUNDS AND CASH GIFTS MADE DURING THE MARRIAGE BY TEMPORARILY DEPOSITING THEM INTO AN ACCOUNT IN APPELLEE'S SOLE NAME TO PROTECT THEM FROM SEIZURE BY HIS FORMER SPOUSE.

Fulfilling Marshalling Requirement

Appellant submits the following evidence to comply with his duty under U.R.A.P. 24(a)(9) to marshal the evidence in support of the trial court's finding which he challenges:

1. Appellant started a corporation prior to the marriage, in 1999 or 2000, doing business as Mountain Lion Engineering. (R. 307-08.)
2. Appellant performed freelance engineering for his business, Mountain Lion Engineering, for a time during the marriage. (R. 10, 54, 442.)
3. Appellant used an account ("Lorena Liston Account") at Barnes Bank, which was in the name of his mother, Lorena Liston. (R. 112, 302-03; Ex. 27.)
4. Appellant testified he used the Lorena Liston Account to protect his money from his ex-wife (R. 156-57, 160, *see also* Findings, 16), because he was fearful that his ex-wife would access his money.
5. Appellant stated that some of the revenues of Mountain Lion Engineering were deposited into the Lorena Liston Account. (R. 310; *see also* Findings, 16-17.)
6. Appellant stated that operating expenses of Mountain Lion Engineering were occasionally paid from the Lorena Liston Account. (R. 311; *see also* Findings, 16-17.)

7. Appellant deposited income earned working for Mountain Lion Engineering into the Lorena Liston Account. (R. 54-56, 59, 420-21; Ex. 9, 59.)
8. Appellant testified that he paid personal and family expenses from the Lorena Liston Account. (R. 328.)
9. The trial court held that the “Lorena Liston account,” held marital funds where “respondent channeled all of his day-to-day income and expenses, including his marital earnings, which were substantial during this period” into that account. (Findings, 16-17.)
10. Although Appellant argued that at least \$120,000 transferred from the Lorena Liston Account to another account were gifts from his mother, the court stated that it did not have any doubt that the money transferred was marital property. (Findings, 17.)
11. The court stated that “[w]ith respect to the other sums that respondent claims were gifts from his mother, he proffers no documentary evidence or other evidence that would support his claim.” (Findings, 15.)
12. At one point, Appellant transferred funds from all his other accounts to account ending in 162, which was an account in the sole name of Appellee. (R. 345-47, 354; *see also* Findings, 16.) Appellant’s stated purpose for the transfer of the funds to Appellee’s account was to protect the funds from his former wife, Betty Liston. (R. 345-47, 354; *see also* Findings, 16.) The money remained in Appellee’s account for about six months, after which it was “transferred to account ending in 7442, which respondent opened, this time in his mother’s name.” (Findings, 16.)

A. Appellant asserts the trial abused its discretion in determining that \$ 273,050 in his accounts was marital property.

It is conceded that Appellant's earnings during the marriage in his Mountain Lion Engineering business was marital property. Those earnings (\$30,028.68) are clearly traceable and distinguishable from transfers of his pre-marital accounts and marital gifts from his mother. It is requested that this Court find that definable, traceable earnings may be marital property but that the act of merely depositing them into any account during the marriage does not, in itself, render the remainder of the account with additional non-marital funds marital property.

The conveyance by Appellant of separate property in his Fidelity Investments accounts, which also received a transfer of his marital earnings from Mountain Lion Engineering that were deposited into his Barnes Bank account, created a presumption of a gift that transmuted the property to marital property. *Bradford v. Bradford*, 1999 UT App 373, 993 P.2d 887 (Utah 1999).

Appellant asserts that his sole act in placement of his funds into an account under Appellee's sole name did not constitute comingling. Appellant's express intent was to protect the assets from his ex-wife for a short period of six months, and not to create a property interest in the appellee. The funds were not consumed by the parties, nor increased in value by contributions from the Appellee. The presumption is rebutted by the mere fact that the funds were at one time in his name, then for a short period, in his wife's name, then restored again to him.

If the standard by which the act of temporarily transferring accounts to the sole name of a spouse by itself changes the identity and character of those assets from “separate” to “marital” property, then the same standard should apply when the same spouse transfers the same assets back to his sole name, by which act the identity of the property should be restored to its former separate property status.

The trial court first erred by accepting the Appellee’s expert testimony. The witness testified that she had no prior experience as an expert witness in a divorce setting. She testified that she did not consider herself an expert witness. The witness did not file a report as required under Utah Rules of Civil Procedure Rule 26(a)(3). U.R.C.P. 26(a)(3). The trial court abused its discretion by overruling Appellant’s objection to her testimony. This constitutes one of the “fatal flaws” in the evidence upon which the trial court relied in its determination that \$ 273,050 in his accounts was marital property.

The trial court then erred by characterizing Appellant’s accounts as “marital.” The C.P.A. witness Rebecca Schreyer testified that she did not consider the source of funds which were transacted during the marriage. She testified that in her opinion, if transactions occur during a marriage that makes them “marital.” The testimony of the parties was indisputable that the Appellee did not make any contributions into these accounts. They were sourced entirely by the Appellant. It was Appellant’s stated intent to conserve the funds, not commingle them with the Appellee, nor to consume them. The Appellant took painstaking care to keep his finances separate. Appellee did likewise.

Without evidence to identify the source of funds that were deposited during the marriage, other than Appellant’s own testimony that they were sourced from 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, the Appellee did not meet her burden of proof. It is requested that this Court find that the trial court erred in characterizing the accounts as marital, except for the \$30,028.68 which Appellant admits were marital earnings from Mountain Lion Engineering.

Generally, “[p]remarital property, gifts, and inheritances may be viewed as separate property, and in appropriate circumstances, equity will require that each party retain the separate property brought to the marriage.” *Burke v. Burke*, 733 P.2d 133, 135 (Utah 1987) (citing *Preston v. Preston*, 646 P.2d 705, 706 (Utah 1982)). However, this is not an invariable rule. *Id.* “Exceptions to this general rule include whether the property has been commingled, whether the other spouse has by his or her efforts augmented, maintained, or protected the separate property, and whether the distribution achieves a fair, just, and equitable result.” *Dunn v. Dunn*, 802 P.2d 1314, 1320 (Utah Ct. App. 1990) (citing *Burt v. Burt*, 799 P.2d 1166, 1168 (Utah Ct. App. 1990); *Noble v. Noble*, 761 P.2d 1369, 1373 (Utah 1988)). “Particularly, ‘[p]remarital property may lose its separate distinction where the parties have inextricably commingled it into the marital estate, or where one spouse has contributed all or part of the property to the marital estate,’ [citing *Dunn*, 802 P.2d at 1321], or ‘in extraordinary situations where equity so demands,’ [citing *Elman v. Elman*, 2002 UT App 83, ¶ 19, 45 P.3d 176].” *Keiter v. Keiter*, 2010 UT App 169, ¶¶ 22, 235 P.3d 782 (first alteration in original).

In *Kimball v. Kimball*, the court of appeals affirmed the ruling of the trial court that inherited funds received from the sale of stock that were placed in a joint account and then moved to a separate account retained their character as separate property and were appropriately awarded to the spouse who inherited them in the first instance. *Kimball v. Kimball*, 2009 UT App 233, ¶¶ 4-5, 217 P.3d 733. The deposits were simply considered as transfer points, not an ownership conveyance or comingling. David S. Dolowitz, *Conundrum Revisited*, 23 Utah Bar Journal 3, at 14 (May/June 2010) (citing *Kimball*)).

In this case, Appellant made a deposit of funds that were entirely his premarital property and placed funds into an account solely under the name of the Appellee. There was never a dispute that the Appellee made no contributions to any of his accounts. Her only marital financial contribution was to incur more and more credit debt of which Appellant had little, if any knowledge of and had no control over. There was no evidence of consumption as each party used their individual credit cards to pay for general living expenses. There was no evidence of intent to create a joint property interest or to share the funds. It is requested that this Court find that the temporary use of Appellee's name for the preservation and protection of premarital funds does not constitute a transmutation or comingling to change the identity of the funds to a marital asset, and find that the trial court abused its discretion by doing so.

The oft-times confusing and hard to understand history of Appellant's deposits, withdrawals, and creations of financial accounts during the marriage are irrelevant as to the initial finding that must be made and the primary issue, which is the proper identification of the source of those funds. The case law in Utah is clear that premarital

separate property, together with its appreciation, retains its separate character following the marriage unless the exceptions are found. It matters not how many transactions may have been made during the marriage if the funds were separate property to begin with.

The only evidence admitted as to the source of funds in dispute came from:

- a) Appellant's premarital accounts,
- b) Gifts made to Appellant before and during the marriage and,
- c) Earnings during the marriage of \$38,028.68 transferred from Appellant's Barnes Bank into his Fidelity Investments accounts that were held under the name of the Liston Family Trusts.

With the exception of the Mountain Lion Engineering earnings deposited into Barnes Bank, all other monies are clearly discernable, traceable and were from separate or gifted property of the Appellant. Appellee's accountant admitted that she did not consider the source of funds, only focusing on marital transactions with admissions that at least some of the funds were in fact Appellant's premarital funds.

While a trial court has discretion to award "inherited or donated property," such property "as well as its appreciated value, is generally regarded as separate from the marital estate and hence is left with the receiving spouse in a property division incident to divorce." *Burt v. Burt*, 799 P.2d 1166, 1169 (Utah App. 1990) (citing *Mortensen v. Mortensen*, 760 P.2d 304, 308 (Utah 1988); see also *Burke v. Burke*, 733 P.2d 133, 135 (Utah 1987) (declining to award a portion of plaintiff's inheritance to defendant where the appreciation in value was due to inflation, and the defendant had not contributed any effort to increase the value of the property).

A finding that assets have been commingled is not appropriate unless, “the property completely loses its identity and is not traceable because it is commingled with other property (sometimes called transmuted).” *Mortensen v. Mortensen*, 760 P.2d 304, 307 (Utah 1988) (citation omitted).

Another exception to the general rule that “property acquired by gift or inheritance by one spouse should be awarded to that spouse on divorce” is where “the acquiring spouse places title in their joint names in such a manner as to evidence an intent to make it marital property.” *Mortensen v. Mortensen*, 760 P.2d 304, 307 (Utah 1988) (citation omitted). It is of great significance that the transfer by Appellant of his entire financial accounts in question were made to an account held only in the name of the Appellee and not to a jointly held account. This constitutes further evidence of a lack of intent to share the funds as marital. Appellee did not bring forth evidence to support that this case presented an extraordinary situation where equity demands division of Appellant’s separate, non-marital property.

“‘[P]roperty which comes to either party by avenues other than as a consequence of their mutual efforts owes nothing to the marriage and is not intended to be shared.’” *Mortensen v. Mortensen*, 760 P.2d 304, 307 (Utah 1988) (quoting *Hussey v. Hussey*, 280 S.C. 418, 312 S.E.2d 267, 270 (Ct. App. 1984)). Based upon Appellant’s testimony of his intent to protect the assets and not commingle them and the history of both parties in keeping their finances separate, Appellant requests that this Court find that the trial court clearly abused its discretion in characterizing the entire accounts as marital.

POINT IV. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY INDEPENDENTLY ACCESSING APPELLANT’S PRIOR DIVORCE ACTION FILE, REFERRING TO IT WHILE INTERROGATING THE APPELLANT, AND REFERRING TO IT IN MAKING ITS FINDINGS OF FACT WITHOUT PRIOR NOTICE TO COUNSEL.

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)). 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.

A. The trial court erred when it abandoned its role as a neutral arbiter and became an advocate in the judicial proceedings.

The court’s neutrality was impaired when it became a participant in the judicial proceedings by actively seeking out the presentation of additional evidence in this case.

The lack of notice and opportunity to be heard are further aggravated by the fact that a trial court acting sua sponte has abandoned its impartial position and has become an advocate for one party over the other. *See Ricketts v. Midwest Nat. Bank*, 874 F.2d 1177, 1184 (7th Cir.1989). “Preservation of the integrity of the adversarial system of conducting trials precludes the court from infringing upon counsel’s role of advocacy” *Girard v. Appleby*, 660 P.2d 245, 247 (Utah 1983).

Jenkins v. Weis, 868 P. 2d 1374, 1384-85 (Utah App. 1994). The court erred in sua sponte conducting its own discovery into the case by accessing Appellant’s prior divorce records and questioning Appellant concerning them. The court abandoned its neutral role and became an advocate for the Appellee, thus infringing upon counsel’s role of advocacy.

B. It was improper for the court to take judicial notice of Appellant's prior divorce case where the files of that case were not placed in evidence.

A court may take judicial notice of records in its own case. *In re F.M.*, 2002 UT App 340, ¶ 3 n.2, 57 P.3d 1130. Under certain circumstances, a court may also take judicial notice of records in another case. “It is true that notice may be taken of the record of another case. But for this to be done it should be so offered in evidence by a party, or so stated by the trial court, so that it will be known to them what is being relied on.” *Carter v. Carter*, 563 P.2d 177, 177 (Utah 1977). The *Carter* court quoted *State in Interest of Hales*: ““In any case the court should not take notice sua sponte of the proceedings in another case unless the files of the other case are placed in evidence in the matter before the court.”” *Carter v. Carter*, 563 P.2d 177, 177 n.2 (Utah 1977) (quoting *State in Interest of Hales*, 538 P.2d 1034, 1035 (Utah 1975) (citing 29 Am.Jur.2d, Evidence § 58)); *see also State v. Shreve*, 514 P.2d 216, 217 (Utah 1973) (stating that “records of other proceedings in the court cannot be judicially noticed and must be introduced in evidence in order to be considered in the pending case.”).

In the instant case, the records of Appellant's prior divorce case were not placed into evidence. Consequently, it was error for the trial court to use them to question the Appellant and to refer to them in its Findings of Fact.

The trial court erred when it accessed Appellant's prior divorce records and used them in questioning Appellant and in making its findings of fact. This was error because the court abandoned its neutral role and became an advocate, did not provide notice that it would be conducting its own discovery in to Appellant's prior divorce case, and the

records the court relied upon were not placed into evidence. Appellant was prejudiced by the Court's errors, and asks this Court to reverse and remand for a new trial.

POINT V. THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING APPELLEE ATTORNEY FEES WHILE DENYING APPELLANT ATTORNEY FEES.

Fulfilling Marshalling Requirement

Appellant submits the following evidence to comply with his duty under U.R.A.P. 24(a)(9) to marshal the evidence in support of the trial court's finding which he challenges:

1. The court found that "based on the issue 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.)
2. 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.)

A. It was an abuse of discretion for the trial court to award attorney fees to Appellee where the award was not based on sufficient evidence, and the court did not make sufficient findings.

This Court should find that it was an abuse of the trial court's discretion to deny Appellant's request for attorney fees incurred in successfully defending himself against Appellee's petition to obtain a protective order, but awarding Appellee \$5,000.00 in

attorney fees in this case, where it was demonstrated that the Appellant does not have marital financial resources to do so, and there was no affidavit of Appellee's counsel as required under Utah Rules of Civil Procedure 102(a). U.R.C.P. 102(a).

Utah Code section 30-3-3 provides that in a divorce proceeding, a “[trial] 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.” UTAH CODE ANN. § 30-3-3(1) (2007).

“Both the decision to award attorney fees and the amount of such fees are within the trial court’s sound discretion. Significantly, the award [or denial of such fees] must be based on evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees. And, [f]ailure to consider these factors is grounds for reversal on the fee issue.”

Stonehocker v. Stonehocker, 2008 UT App 11, ¶ 10, 176 P.3d 476 (quoting *Oliekan v. Oliekan*, 2006 UT App 405, ¶ 30, 147 P.3d 464) (alterations in original). In this case, the court did not find that the Appellee had a financial need for attorney fees. On the contrary, the court stated that “[b]ased on the awards set forth above, the Court does not find that either party has an inability to pay fees incurred.” (Findings, 23.)

Furthermore, although the court found that awarding Appellee \$ 5,000 was “completely fair and equitable” (Findings, 23), the court did not have a factual basis to determine that \$ 5,000 was a reasonable award of attorney fees where counsel for petitioner did not submit an affidavit of attorney fees. Because the court did not make the required factual finding that Appellee had a financial need for attorney fees and did not have a sufficient factual basis to determine that \$5,000 was a reasonable award of attorney fees, this court should reverse the trial court’s attorney fee determination and

remand. These errors constitute “fatal flaws” in the evidence and factual findings of the court which justify remand.

Instead of basing an award of attorney fees on the factors enumerated in *Stonehocker*, 2008 UT App 11, ¶ 10, as set forth above, the court imposed fees based on the “fault” of the Appellant: The court found that

based on the issue 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.) However, the court did not specifically enumerate any instances of Appellant’s conduct as a basis for imposing fees. (*See id.*) Apparently, the court was imposing attorney fees, at least in part, because Appellant’s shifting of funds between different accounts to protect assets from his former wife made the instant divorce case more complex. Appellant’s conduct in this regard was not motivated by a desire to make the instant case more difficult, and is not an appropriate basis for imposing attorney fees.

By awarding Appellee attorney fees, Appellant is forced to draw from the only available source he has: his separate, premarital funds. The effect is a tacit award to Appellee of a portion of his premarital, separate property that would not otherwise be obtainable. It further diminishes the income producing assets which Appellant spent his lifetime developing and which he is dependent upon.

Appellant asks this Court to find that in the instant case, the trial court did not apply this standard correctly when neither party could afford to pay the attorney fees of the other and, as such, it was an abuse of discretion. An award for attorney fees “must be

based on sufficient findings,” *Davis v. Davis*, 2003 UT App 282, ¶ 14, 76 P.3d 716 (internal quotation marks omitted), “and the failure to make such findings requires remand for more detailed findings by the trial court,” *id.* (internal quotation marks omitted). Appellee gave almost no testimony and no documentary evidence as to her attorney fees. Therefore there is virtually no evidence to sustain the judgment.

Each party testified that their monthly incomes consisted primarily of Social Security income. Each testified that they garnered additional small amounts of income. Appellant prevailed on several disputed issues. Neither party prevailed on all or substantially all trial issues. The court denied Appellee’s request for alimony (Findings, 22; Decree, ¶ 6), and found that neither party, both of whom are retired, have the ability to support the lifestyle they enjoyed during marriage (Findings, 22). Having an inability to pay alimony in any amount, it does not follow that the Appellant either has the ability to pay Appellee’s attorney fees in any amount either.

CONCLUSION

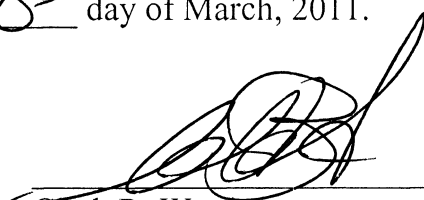
The court abused its discretion when it found that \$ 30,500 of Appellee’s credit card debts were a marital obligation where there was insufficient evidence to support the determination that such obligations were incurred for family purposes. It was also an abuse of discretion for the court to find that the water shares were not covered by the mediated agreement and that they were not appurtenant to the land where the water shares stated on their face that they were appurtenant.

The court abused its discretion in determining that \$ 273,050 in Appellant's accounts was marital property. Appellant asserts that a substantial portion of these funds were his traceable premarital property and gifts from his mother.

The court erred and abused its discretion by taking judicial notice of records in Appellant's prior divorce case and using them to question Appellant where those files were not placed in evidence. Furthermore, the court abandoned its impartial role and infringed on counsel's role of advocacy when it sought out additional evidence in the case and used the records without prior notice.

Finally, it was an abuse of discretion to award Appellee attorney fees. The court did not find that Appellee was in need of attorney fees and counsel did not submit an affidavit of attorney fees, which is necessary to determine that attorney fees are reasonable. Appellant asks this Court to reverse the determinations of the trial court, as set forth above, and remand for further proceedings.

RESPECTFULLY SUBMITTED this  day of March, 2011.

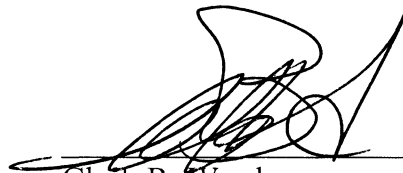


Clark R. Ward
Attorney for Respondent/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March 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:

Todd D. Gardner (# 5953)
BATEMAN, GOODWIN & GARDNER
4120 South Highland Drive, # 100
Salt Lake City, Utah 84124
Attorney for Petitioner/Appellee



Clark R. Ward
Attorney for Respondent/Appellant

ADDENDUM

Findings of Fact, issued July 2, 2010;

Decree of Divorce entered July 15, 2010.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
Third Judicial District

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JUL 02 2010

SALT LAKE COUNTY

By



Deputy Clerk

ANNETTE LISTON,

:

Petitioner,

FINDINGS OF FACT,
RULING AND ORDER

vs.

:

SERGAY LISTON,

CASE NO. 084900427

Respondent.

:

Judge Robert K. Hilder

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 9th 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.

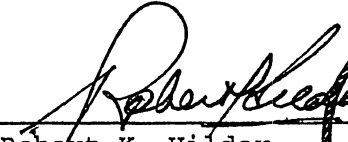
CONCLUSION

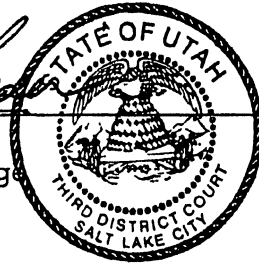
Counsel for petitioner is directed to prepare a final Decree consistent with the Findings and Rulings set forth herein. This document may serve as the Findings of Fact and Conclusions of Law for

that purpose.

Dated this 2nd day of July, 2010.

By the Court:


Robert K. Hilder
District Court Judge

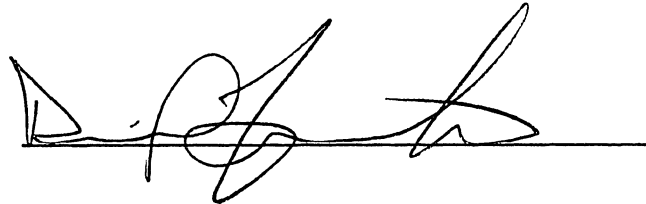


MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Ruling and Order, to the following, this 2 day of ^{July}~~June~~, 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 read "D. Gardner", 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

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

ANNETTE LISTON,
Petitioner,

vs.

SERGAY LISTON,

Respondent.

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DECREE OF DIVORCE

Case No. 084900427

Judge: Robert K. Hilder

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.

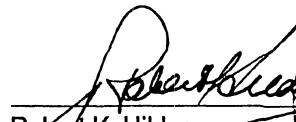
13. Petitioner shall have no interest in the 1963 Chevrolet Pick-Up, the 1942 Ford and other older vehicles and engines, etc. that were listed at trial.

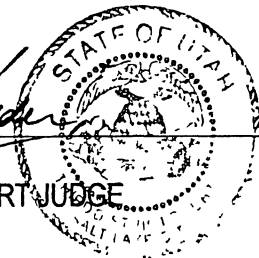
14. An additional award of \$5,000.00 shall be paid by Respondent to Petitioner's attorney as additional compensation for attorney's fees.

IT IS SO ORDERED.

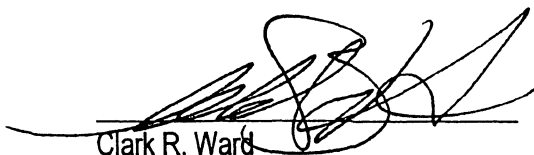
DATED this 13th day of July, 2010.

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 6th 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



Todd D Gardner