

2014

**Michael S. Robinson, Petitioner/Appellant vs. Debra J. Robinson,
Respondent/Appellee**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL S. ROBINSON,

Petitioner/Appellant

VS.

DEBRA J. ROBINSON,

Respondent/Appellee.

APPELLANT'S REPLY BRIEF

Appellate Case No. 20130652

Trial Court No. 074900501

THIS IS AN APPEAL FROM THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
SUMMARY OF ARGUMENT	1
ARGUMENT	
I. THE TRIAL COURT ERRED IN ENTERING A \$1.9 MILLION JUDGMENT AS A PROPERTY DISTRUBUTION BASED ON MICHAEL'S ALLEGED CONTEMPT.	4
II. MICHAEL IS ENTITLED TO RAISE THE ISSUE THAT HE DID NOT HAVE THE ABILITY TO COMPLY WITH THE COURT'S ORDER IN DEFENSE TO HIS ALLEGED CONTEMPT.	7
III. <i>ROBINSON I</i> DOES NOT PRECLUDE MICHAEL FROM RAISING MISTAKE OR IMPOSSIBILITY AS A DEFENSE TO HIS ALLEGED CONTEMPT.	8
IV. MICHAEL SHOULD NOT BE PRECLUDED FROM RAISING FRAUD AS A DEFENSE TO HIS ALLEGED CONTEMPT.	12
V. THE DISTRICT COURT ABUSED ITS DISCRETION BY ENFORCING TERMS THAT WERE OBVIOUSLY NO LONGER FAIR AND EQUITABLE.	13
VI. THE DISTRICT COURT ERRED IN RULING THAT THE LIS PENDENS FILED UNDER A SEPARATE LAWSUIT WERE "WRONGFUL LIENS" UNDER UTAH'S WRONGFUL LIEN STATUTE.	15
VII. THE DISTRICT COURT ERRED IN ITS AWARD OF COSTS AND ATTORNEYS' FEES INCURRED IN THE MATTER.	17
CONCLUSION	19

TABLE OF AUTHORITIES

Utah Cases:

<i>Cabrera v. Cottrell</i> , 694 P.2d 622 (Utah 1985)	18
<i>Colman v. Colman</i> , 743 P.2d 782 (Ut. App. 1987)	3, 14
<i>Connell v. Connell</i> , 2010 UT App 139, 233 P.3d 836	18, 19
<i>Eldridge v. Farnsworth</i> , 2007 UT App 243, 166 P.3d 639	15
<i>Goggin v. Goggin</i> , 2013 UT 16, 299 P.3d 1079	1, 6, 7, 14
<i>Hoymere v. Stagg & Assoc.</i> , 2006 UT App 89, 132 P.3d 684	6
<i>Macris & Associates, Inc. v. Neways, Inc.</i> , 2000 UT 93, 16 P.3d 1214	2, 10, 12
<i>Pearson v. Pearson</i> , 561 P.2d 1080, 1082 (Utah 1977)	3, 14
<i>Pierce v. Pierce</i> , 2000 UT 7, 994 P.2d 193	16
<i>State v. Hurst</i> , 821 P.2d 467 (Ut. App. 1991)	9
<i>State ex rel. A.C.M.</i> , 2009 UT 30, 221 P.3d 185	10, 12
<i>Stonehocker v. Stonehocker</i> , 2008 UT App 11, 176 P.3d 476	14
<i>Van Hake v. Thomas</i> , 759 P.2d 1162 (Utah 1988)	1, 7, 9, 11
<i>Winters v. Schulman</i> , 1999 UT App 119, 977 P.2d 1218.	16
<i>Zufelt v. Haste, Inc.</i> 2006 UT App 326, 142 P.3d 594	2, 11, 13

Cases from other Jurisdictions:

<i>Levinson v. Eighth Judicial District Court of Nevada</i> , 857 P.2d 18 (Nev. 1993)	16
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Utah Rules and Statutes:

Section 30-3-3(1), Utah Code Ann.	3, 17
Section 30-3-3(2), Utah Code Ann.	3, 18, 19
Section 38-9-1(6)(a), Utah Code Ann.	16
Section 38-9-2(2), Utah Code Ann.	3, 15, 16, 17
Section 78B-6-301, Utah Code Ann.	7
Section 78B-6-1303, Utah Code Ann.	3, 15, 17
Section 78B-6-1304(1)(2), Utah Code Ann.	3, 16, 17

Statutes of Central Importance:

Section 38-9-1 & 2, Utah Code Ann.	Addendum, Exhibit A
Section 78B-6-1303 & 1304, Utah Code Ann.	Addendum, Exhibit B
Section 30-3-3, Utah Code Ann.	Addendum, Exhibit C

Addendum:

- A. Utah's Wrongful Lien Statute, Sections 38-9-1 & 2, Utah Code Ann.
- B. Lis Pendens Statute, Section 78B-6-1303 & 1304, Utah Code Ann.
- C. Attorneys' Fee Statute, Section 30-3-3, Utah Code Ann.
- D. Judgment and Order, dated Feb. 25, 2011. (Rec. 1213-1222)

SUMMARY OF ARGUMENT

Michael was not required to pay Debra \$1.9 million under the terms of the Stipulation (or Decree) until Phoenix Plaza was refinanced, which it never was. Also, the \$1.9 million judgment was not entered based on the terms of the Stipulation (or Decree); but rather, as a punishment for Michael's alleged contempt in failing to file an application to refinance Phoenix Plaza within 15 days of the parties' Stipulation. The trial court abused its discretion by imposing such a sanction, beyond any actual injury caused by the alleged contempt, in an attempt to distribute the marital property as a punishment for Michael's alleged contempt. *Goggin v. Goggin* 2013 UT 16, ¶ 52, 299 P.3d 1079.

Furthermore, the Stipulation was entered into on November 2, 2007; but the court order (Divorce Decree) was not entered until December 31, 2008. Therefore, after the court order was entered it was impossible for Michael to comply with its terms and file an application to refinance Phoenix Plaza within 15 days of the Stipulation.

Michael is not trying to reargue the same defense of impossibility to set aside the Stipulation, but rather his inability to comply with the court's order in defense to his alleged contempt. Michael is entitled to raise this issue in defense of his alleged contempt to show that he did not have the ability to comply with the court's order. *Van Hake v. Thomas*, 759 P.2d 1162, 1172 (Utah 1988).

Robinson I was the appeal of the trial court's denial of Michael's earlier motion to have the Stipulation set aside for the contractual defenses of mistake and impossibility. Debra admits that *Robinson I* was decided before contempt was even raised

in this case. (Appellee's Brief pg. 17) Therefore, the Utah Court of Appeals in *Robinson I* did not deal with Michael's alleged contempt; the entry of a \$1.9 million judgment based on his alleged contempt; and did not rule that impossibility would not be available to Michael as a defense to any future allegations of contempt.

Moreover, claim preclusion does not bar Michael from raising mistake, impossibility or fraud, in defense to his alleged contempt, because these claims did not arise until after the divorce action was filed; and therefore, they are not claims that "should have been raised" for res judicata purposes. *Macris & Associates, Inc. v. Neways, Inc.*, 2000 UT 93, 16 P.3d 1214. Moreover since these claims were not raised in *Robinson I*, there has been no final judgment on the merits of these claims.

Issue preclusion does not apply because the identical issues, in defense to Michael's alleged contempt, were never previously raised or litigated. The elements Michael had to prove to set aside the Stipulation based on mistake or impossibility are far different than the requirements Debra needs to prove for a finding of contempt. Also, the burden of proof shifts from Michael to Debra and the level of proof required is a higher clear and convincing standard. Therefore, the identical issues in defense to Michael's alleged contempt were never "completely, fully and fairly litigated;" and there has been not been a final judgment entered on the merits of these defenses for issue preclusion to apply. *Zufelt v. Haste, Inc.* 2006 UT App 326, ¶ 9, 142 P.3d 594.

In *Robinson I* there was no determination made by this Court that the final distribution, to be made in this case, was fair and equitable. Furthermore, the Stipulation

reviewed in *Robinson I* valued Phoenix Plaza at \$7.25 million. Afterwards, it was determined that Phoenix Plaza was not worth \$7.25 million and the divorce court ordered it sold for \$3 million. To keep the division equal between the parties the divorce court should have lowered the parties' equity in Phoenix Plaza accordingly; and lowered the amount Michael owed Debra for her equity in the Plaza, which unjustly remained at \$1.9 million based on the over-estimated value of \$7.25 million. *Colman v. Colman*, 743 P.2d 782, 789 (Ut. App. 1987); *Pearson v. Pearson*, 561 P.2d 1080, 1082 (Utah 1977).

As for the wrongful liens, Utah's Wrongful Lien Statute under §38-9-2(2) has an explicit exception for a lis pendens filed under §78B-6-1303. There was an action pending in the West Jordan court, at the time the lis pendens were filed, which made a claim affecting the real property at issue in this case. Therefore, the lis pendens cannot be defined as "wrongful liens" under Utah's Wrongful Lien Statute. Furthermore, it is the West Jordan court, in the underlying action, that should have decided whether to remove the lis pendens, after making a finding pursuant to §78B-6-1304(2) as to the probable validity of the real property claim contained in the pending action. Such a finding was never made by the West Jordan court or the divorce court in this action.

Finally, in regards to the attorneys' fees, the trial court in its Findings of Fact and Conclusions of Law did not make any findings as to Debra's needs or Michael's ability to pay, to award attorneys' fees under §30-3-3(1). Furthermore, the trial court and did not make any findings as to who the prevailing party was on the enforcement issues heard at the April 2013 trial, to award attorneys' fees either under contract or under §30-3-3(2).

I. THE TRIAL COURT ERRED IN ENTERING A \$1.9 MILLION JUDGMENT AS A PROPERTY DISTRIBUTION BASED ON MICHAEL'S ALLEGED CONTEMPT.

Although Michael was unable to have the Stipulation set aside based on the contractual defenses of mistake and impossibility, according to the terms and language in the Stipulation, Michael was not to pay Debra \$1.9 million until after Phoenix Plaza was refinanced, which never occurred. The consequence set forth in the Stipulation (and Decree) for Michael's failure to refinance Phoenix Plaza was not the payment of \$ 1.9 million to Debra, but rather the payment of interest at 8 % to commence after 120 days. (See Stipulation ¶ 16B, Rec. 18-19; Exhibit B to Michael's initial Brief)

In fact, after Debra filed her Motion for Order to Show Cause to enforce the \$1.9 million payment, Commissioner Evans ruled that the language in the Decree did not trigger the payment or an award for the principal amounts involved [the \$1.9 million], but that the principal amounts are not due and owing until the refinancing of Phoenix Plaza occurs, or perhaps as a sanction following a finding of contempt. (See Trans. of Jan. 13, 2013 hearing, Rec. 7553, pg. 36, lines 5-11, Exhibit C to Michael's initial Brief; and the Judgment and Order, dated Feb. 25, 2011, ¶ 10; Rec. 1213-1217; attached hereto as **Addendum Ex. D**) Therefore, the Commissioner did not rule that a judgment for \$1.9 million should be entered against Michael based on the language in the Stipulation (or Decree) as fashioned by the parties.

The Judgment Judge Iwasaki entered against Michael for \$1.9 million was also not based on Michael's failure to pay Debra \$1.9 million under the language of the

Stipulation (or Decree); but rather was due to Michael's alleged contempt in failing to refinance Phoenix Plaza.

Judge Iwasaki, during the July 26, 2011 hearing, stated that he was going to enter judgment against Michael for \$1.9 million based on Michael's contempt. (See trans. from the July 26, 2011 hearing, Rec. 7554, pgs. 25-26; Rec. 7093; Exhibit D to Michael's initial Brief) At the conclusion of the July 26, 2011 hearing, Judge Iwasaki stated as follows, "[a]ll right, First things first. As to the \$1.9 plus million judgment for that, [the] court finds the defendant [sic] in contempt." (See Trans. July 26, 2011 hearing, Rec. 7554, pg. 31, lines 3-6; Exhibit D to Michael's initial Brief). Therefore, Judge Iwasaki did not enter the \$1.9 million Judgment based on the language in the Stipulation (or Decree) as fashioned by the parties; but rather based on Michael's alleged contempt. (See Trans. July 26, 2011 hearing, Rec. 7554, pg. 25, lines 1-18; Ex. D to Michael's initial Brief). Judge Shaughnessy realized this and had his doubts about whether such a judgment could be entered in a contempt proceeding, but declined to go back and try to fix it. (Trans. May 23, 2012 Ruling, Rec. 7563, pg. 11-16; also Rec. 5623-5628)

Robinson I involved the appeal of the trial court's denial of Michael's earlier attempt to have the Stipulation set aside for the contractual defenses of mistake and impossibility; and occurred, as Debra puts it, "before contempt was even raised as an issue." (Appellee's Brief pg. 17) *Robinson I* was decided before Debra filed her Order to Show Cause Motion and before there were any rulings regarding Michael's alleged contempt. Therefore, *Robinson I* did not deal with Michael's alleged contempt; or the

entry of a \$1.9 million judgment based on Michael's alleged contempt.

The Utah Supreme Court in *Goggin v. Goggin* 2013 UT 16, ¶ 52, 299 P.3d 1079, stated that "although a court has considerable discretion in determining whether to sanction a party, **it does not have discretion to impose a sanction beyond the actual injury caused by the contemptuous behavior. Moreover, it does not have discretion to distribute marital property in a way that is designed to punish a party's contemptuous behavior.**" *Id* at ¶ 52 (emphasis added). This is clearly what happened to Michael in this case; and the \$1.9 million Judgment should be reversed.

The \$1.9 million Judgment entered against Michael, in this case, was for his alleged contempt in failing to timely submit a loan application to refinance a piece of marital property, Phoenix Plaza, which didn't qualify anyway; while in *Goggin*, the husband's contempt was much more egregious, such as concealing marital assets and repeated violations of the court's orders. Yet, the Utah Supreme Court in *Goggin* held that the divorce court exceeded its discretion by imposing sanctions beyond the actual injury caused by the husband's contempt and that while the husband may have engaged in contemptuous conduct, even to the extent of concealing and dissipating marital assets and violating the court's orders; this did not entitle the court to enter a monetary judgment against the husband based on his contempt, beyond the actual injury caused by his contempt, nor did the husband's contempt relieve the court of its equitable duty to see that there was a fair and equitable distribution of the parties' marital property. *Id.* at ¶ 53. *See also Hoymere v. Stagg & Assoc.*, 2006 UT App 89, ¶¶ 7, 9, 132 P.3d 684, where a

monetary judgment for \$116,181.76 was reversed, because damages in a contempt proceeding are limited to the actual loss or injury caused by the contempt, and are not to be used to award damages to satisfy the underlying claim.

In this case, Michael's failure to file a loan application on Phoenix Plaza within 15 days did not cause the loss of the property or damages anywhere near \$1.9 million. The parties retained the property, until it was ordered sold by the divorce court. The \$1.9 million amount is beyond any actual loss caused by Michael's alleged contempt. It was entered as a distribution of marital property designed to punish Michael for his alleged contempt; and should be reversed. *Goggin at ¶ 52.*

II. MICHAEL IS ENTITLED TO RAISE THE ISSUE THAT HE DID NOT HAVE THE ABILITY TO COMPLY WITH THE COURT'S ORDER IN DEFENSE TO HIS ALLEGED CONTEMPT.

Michael is not trying to reargue the contractual defense of impossibility to set aside the Stipulation; but rather, that he did not have the ability to comply with the court's order when it was entered. For a party to be found in contempt there must be a court order in existence, and it must be shown that the party (1) knew what was required of him by the order, (2) **had the ability to comply with the order**, and (3) willfully failed and refused to do so. *Van Hake v. Thomas*, 759 P.2d 1162, 1172 (Utah 1988).

Michael was found in contempt for failing to make a loan application to refinance Phoenix Plaza, within 15 days of the Nov. 2, 2007 Stipulation. However, a stipulation is not a court order and Utah's contempt statute, §78B-6-301, does not authorize

a finding of contempt for breach of contractual obligations. This provision in the parties' Stipulation did not become a court order until over a year later on December 31, 2008, when the Decree of Divorce was entered. (Rec. 676-689) Thus, at the time the Decree was entered on December 31, 2008, Michael did not have the ability to comply with this provision of the court's order because the 15 day period to make the loan application had already passed. As a result, the second requirement necessary for a finding of contempt cannot be met in this case. Thus, the trial court erred in holding Michael in contempt of the Decree entered Dec. 31, 2008, by failing to make a loan application by Nov. 17, 2007.

Again *Robinson I* was the appeal of the trial court's denial of Michael's earlier attempt to have the Stipulation set aside for the contractual defenses of mistake and impossibility; before Debra filed her Order to Show Cause Motion and the issue of contempt was raised in this case. Therefore, the issue of contempt and Michael's ability to comply with the court's order was not ruled on by this Court in *Robinson I*.

III. *ROBINSON I* DOES NOT PRECLUDE MICHAEL FROM RAISING MISTAKE OR IMPOSSIBILITY AS A DEFENSE TO HIS ALLEGED CONTEMPT.

The Court of Appeals in *Robinson I* ruled that the contractual defenses of mistake and impossibility are not applicable under the facts of this case. The issue of contempt was not before the Court of Appeals in *Robinson I*; and the Court of Appeals did not rule that the defenses of mistake or impossibility would not be available to Michael on any future allegations of contempt. Michael is entitled to raise these defenses to show that he did not have the ability to comply with the court's order; the second requirement for a

finding of contempt. *Van Hake v. Thomas*, 759 P.2d 1162, 1172 (Utah 1988)

The Court of Appeals in *Robinson I* did not say that “asking for the deal to be fair ‘in hindsight’ is not a defense to contempt,” as represented by Debra (Appellee’s Brief at pg. 20); rather the Court said that asking for the deal to be fair “in hindsight” is not grounds for rescission. (See Opinion, ¶ 11; Rec. 709) There are different requirements for a finding of contempt than to rescind a contract based on the contractual defenses of mistake or impossibility. For a finding of contempt it must be proven that an order was in existence, and that Michael (1) knew what was required of him by the order; (2) **had the ability to comply with the court’s order**; and (3) intentionally failed or refused to act. *Van Hake v. Thomas*, 759 P.2d 1162, 1172 (Utah 1988). Thus, mistake and impossibility are defenses that should be available to Michael to show that he did not have the ability to comply with the court’s order.

Furthermore, Michael’s burden to prove the contractual defenses of mistake or impossibility, is different than Debra’s burden to prove contempt. The burden of proof shifts from Michael to Debra and is a higher “clear and convincing evidence” standard for a finding of civil contempt. *State v. Hurst*, 821 P.2d 467, 471 (Ut. App. 1991). In short, the elements required for Michael to set aside a contract based on mistake or impossibility are different than what is required by Debra to prove contempt. Moreover, the burden of proof shifts to Debra and is a higher clear and convincing standard.

Res judicata does not prevent Michael from raising these claims as a defense in the contempt proceedings because all the elements for res judicata have not been met. Claim preclusion has three requirements: (1) both cases must involve the same parties or their privies; (2) the claim that is alleged to be barred must have been presented in the first suit or must be one **that could and should have been raised in the first action**; and (3) the first suit must have resulted in a final judgment on the merits. *State ex rel. A.C.M.*, 2009 UT 30, ¶ 17, 221 P.3d 185 (Utah 2009). In regards to the second requirement, the Utah Supreme Court in *Macris & Associates, Inc. v. Neways, Inc.*, 2000 UT 93, 16 P.3d 1214, has ruled that a party is required to include claims in an action for res judicata purposes only if those claims arose **before** the filing of the complaint in the earlier action. *Id.* at ¶ 25. The claims as to Michael's alleged contempt, in this case, obviously arose after the action was filed and the court's order was entered. Therefore, the second element for claim preclusion has not been met.¹

Issue preclusion does not prevent Michael from raising the claims of mistake or impossibility to the contempt charges. Issue preclusion has four requirements (1) the party against whom issue preclusion is asserted must have been a party or privy with a party in the prior adjudication; (2) the issue decided in the prior adjudication must be **identical** to the one presented in the instant action; (3) the issue in the first action must

¹ Michael could not have raised these issues as to the contempt charges before this Court's ruling in *Robinson I* because the issue of contempt had not been raised at that point; therefore, *Robinson I*, is not a final judgment on these issues and the third requirement for claim preclusion has not been met.

have been completely, fully and fairly litigated; and (4) the prior suit must have resulted in a judgment on the merits. *Zufelt v. Haste, Inc.* 2006 UT App 326, ¶ 9, 142 P.3d 594.

Again, the contractual defenses of mistake or impossibility to set aside the Stipulation, which Michael must prove by a preponderance of the evidence, are different than the requirements that Debra must prove by clear and convincing evidence to establish Michael's contempt, which includes Michael's ability to comply with the courts' order.

Therefore, the issues previously decided on Michael's motion to set aside the Stipulation based on the contractual defenses of mistake and impossibility, are not **identical** to the issue that Debra must prove by clear and convincing evidence, that Michael had the ability to comply with the court's order, for a finding of contempt. Furthermore, the defenses to Michael's alleged contempt were not "completely, fully and fairly" litigated; and there has been no final judgment entered on the merits of these defense for issue preclusion to apply.

Robinson I is also not determinative as to whether Michael should have been able to present evidence from Mr. Gotschall and Mr. Wadley to show that he did not have the ability to refinance Phoenix Plaza, in compliance with the court's order, as a defense to the contempt charges; since *Robinson I* involved the contractual defenses of mistake and impossibility and not contempt. Moreover, when the alleged contemptuous conduct occurs outside the presence of the judge (as in this case) due process requires that a hearing be held; and the party accused has the right to counsel, to confront witnesses, and to offer testimony on his behalf. *Van Hake v. Thomas*, 759 P.2d 1162, 1172 (Utah 1988).

IV. MICHAEL SHOULD NOT BE PRECLUDED FROM RAISING FRAUD AS A DEFENSE TO HIS ALLEGED CONTEMPT.

The doctrine of res judicata also does not preclude Michael from raising fraud in defense to the contempt charges. Claim preclusion has three elements: (1) both cases must involve the same parties or their privies; (2) the claim that is alleged to be barred must have been presented in the first suit or must be one **that could and should have been raised in the first action**; and (3) the first suit must have resulted in a final judgment on the merits. *State ex rel. A.C.M.*, 2009 UT 30, ¶ 17, 221 P.3d 185.

Again, in regards to the second requirement, the Utah Supreme Court in *Macris & Associates, Inc. v. Neways, Inc.*, 2000 UT 93, 16 P.3d 1214, has ruled that a party is required to include claims in an action for res judicata purposes only if those claims arose **before** the filing of the complaint in the earlier action. *Id.* at ¶ 25. The allegations of Debra's fraud, particularly in relation to the Stipulation entered into after the case was filed, obviously occurred **after** this action was filed.

Furthermore, Michael could not have raised the issue of fraud as a defense to the contempt charges in *Robinson I*, because Debra did not file her Order to Show Cause and contempt was not raised as an issue until after *Robinson I*. (Appellee's Brief pg. 17) Therefore, it was not an issue that could have been raised to meet the second requirement of claim preclusion; and there has been no final judgment entered on the merits of this claim in relation to the alleged contempt, to meet the third requirement of claim preclusion.

Issue preclusion has four requirements: (1) the party against whom issue preclusion is asserted must have been a party or privy with a party in the prior adjudication; (2) the issue decided in the prior adjudication must be **identical** to the one presented in the instant action; (3) the issue in the first action must have been completely, fully and fairly litigated; and (4) the prior suit must have resulted in a judgment on the merits. *Zufelt v. Haste, Inc.* 2006 UT App 326, ¶ 9, 142 P.3d 594.

Issue preclusion does not bar Michael from raising fraud in defense to the alleged contempt. Debra argues that allegations of fraud were raised after the Stipulation was entered into to set it aside, but were never raised on appeal in *Robinson I*. However, the issue as to whether fraud may be a defense to set aside the Stipulation is not identical to the one presented in the instance action, *i.e.* using fraud as a defense to the contempt charges that were later brought against Michael. Therefore, the issues are not **identical** for issue preclusion to apply. Furthermore, since contempt was not even an issue before *Robinson I*; the defense of fraud to the contempt charges could not have been “completely, fully and fairly litigated” in *Robinson I*; and *Robinson I* is not a final judgment on the merits of this defense for issue preclusion to apply.

V. THE DISTRICT COURT ABUSED ITS DISCRETION BY ENFORCING TERMS THAT WERE OBVIOUSLY NO LONGER FAIR AND EQUITABLE.

The Court of Appeals in *Robinson I* did not make any finding that the terms of the Stipulation were fair and reasonable, but rather assumed from the district court’s enforcement that the lower court had determined that the property division was fair and

equitable. Furthermore, this assessment was according to the terms of the Stipulation in which the parties valued Phoenix Plaza (a major marital asset) at \$7.25 million. The payment amounts provided under the Stipulation were based on Phoenix Plaza having a value of \$7.25 million, giving the parties a substantial amount of equity in the property.

It became apparent after the Stipulation was entered into that Phoenix Plaza was not worth \$7.25 million. It did not qualify for refinancing or loans of \$3.5 million. Although the Stipulation may have failed to provide for such a contingency, the divorce court is not bound by the parties' prior agreement, particularly when it no longer provides for a fair and equitable distribution of the marital property. *Colman v. Colman*, 743 P.2d 782, 789 (Ut. App. 1987); see also *Pearson v. Pearson*, 561 P.2d 1080, 1082 (Utah 1977) (the divorce court is not bound by the terms of the litigant's stipulation; but may make changes, as necessary, for the protection and welfare of the parties). Furthermore, the divorce court has an affirmative duty to assign the proper value to each item of marital property; and to see that the final division is equal, in what it believes to be a fair and equitable distribution.² *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 15, 176 P.3d 476. This is true even if one of the parties has been found to be in contempt. *Goggin v. Goggin*, 2013 UT 16, ¶ 53, 299 P.3d 1079 (husband's contempt did not relieve the court of its duty to see that there was a fair and equitable distribution of the parties' marital property).

² There were no findings entered in this case, as required, or ruling, that the marital property should not be divided equally. *Stonehocker* at ¶ 15

The trial court in this case failed to see that the final division was a fair and equitable distribution of the parties' marital property; or anything that could be considered a fair and equitable distribution. For instance, when Phoenix Plaza, originally valued at \$7.25 million in the Stipulation, was ordered sold by the court for \$3 million (Rec. 1214); an adjustment should have been made accordingly to reduce the parties' equity in the Plaza and to lower the amount Michael was required to pay Debra for her equity in the Plaza.³ This was not done; as a result, the ordered sale of Phoenix Plaza for \$3 million took \$4.25 million away from Michael, while Debra's claim for her equity in the Plaza unjustly remained at \$1.9 million, based on the over-estimated value of \$7.25 million.

VI. THE DISTRICT COURT ERRED IN RULING THAT THE LIS PENDENS FILED UNDER A SEPARATE LAWSUIT WERE "WRONGFUL LIENS" UNDER UTAH'S WRONGFUL LIEN STATUTE.

Utah's Wrongful Lien Statute §38-9-2(2) provides that, "[t]he provision of this chapter shall not prevent a person from filing a lis pendens in accordance with Section 78B-6-1303."

In *Eldridge v. Farnsworth*, 2007 UT App 243, ¶¶ 47-49, 166 P.3d 639, the Utah Court of Appeals held that the filing of a lis pendens did not constitute a wrongful lien because of the explicit exception in §38-9-2(2); and because the lis pendens was expressly authorized by state statute, it fell within the exception of the "wrongful lien" definition in

³ *Robinson I* is not determinative on this issue because *Robinson I* was decided before Phoenix Plaza, originally valued at \$7.25 million in the Stipulation, was ordered sold by the trial court for \$3 million. (Rec. 1214)

§38-9-1(6)(a). The court in this action failed to follow the plain unambiguous language of §38-9-2(2) which specifically exempts the filing of a lis pendens from the scope of Utah's Wrongful Lien Statute.

Furthermore, the validity of the lis pendens should have been decided by the West Jordan court after making a finding pursuant to §78B-6-1304(2) as to the probable validity of the real property claim contained in the pending action. In this case, there wasn't a finding by the West Jordan court, or the divorce court, as to the validity of the real property claim contained in the pending action in West Jordan. (Rec. 4368-4370)

Winters v. Schulman, 1999 UT App 119, 977 P.2d 1218, is not applicable to the facts in this case. *Winters* involved a divorce in California and unlike this case, there was no action currently pending in California at the time the lis pendens was filed; and the divorce action that was filed, did not make any claim to the real property located in Utah. In this case, an action was pending in the West Jordan court, at the time the lis pendens were filed, which did make a claim affecting title to, or the right of possession, of the real property at issue. In Utah, an action for a "constructive trust" can affect title to real property or the right of possession. *Pierce v. Pierce*, 2000 UT 7, ¶ 5, 994 P.2d 193. The Nevada court in *Levinson v. Eighth Judicial District Court of Nevada*, 857 P.2d 18 (Nev. 1993) actually stated that "lis pendens are not appropriate instruments for use in promoting recoveries in actions for **personal injury or money judgments**." *Id.* at 20.

Finally, use of the term "may" in §78B-6-1304(1) is permissive only to the extent that a party "may" but is not required to make a motion. If a person does elect to

make a motion to have the lis pendens removed under §78B-6-1304(1), it should be made to the court in which the action is pending. Regardless, as whether this applies to the judge, or the district; under subsection (2), the court in which the motion is made, is to make a finding by a preponderance of the evidence as to the probable validity of the real property claim contained in the action, and that did not occur in this case by either court. (Rec. 4368-4370)

In short, a lis pendens cannot be a “wrongful lien” as defined under Utah’s Wrongful Lien Statute, because the filing of a lis pendens under §78B-6-1303 is explicitly exempt from Utah’s Wrongful Lien Statute under §28-9-2(2). *Eldridge v. Farnsworth*, 2007 UT App 243, ¶¶ 47-49, 166 P.3d 639

VII. THE DISTRICT COURT ERRED IN ITS AWARD OF COSTS AND ATTORNEYS’ FEES INCURRED IN THE MATTER.

Debra claims that §30-3-3(1) should not be applied in this case because her attorneys’ fees were incurred only to enforce the court’s orders, resulting from Michael’s recalcitrance. However, this is not the case. The Stipulation and Decree provide that the parties shall jointly manage the properties. (Stipulation ¶ 16D; Rec. 19) This was later changed solely to Debra who was to provide Michael a monthly accounting. Furthermore the income from Phoenix Plaza was to be used to pay the expenses on the other properties and the net excess was to be divided as agreed by the parties. The trial held in April 2013 involved more than just enforcement issues against Michael. It included an accounting and reconciliation from Debra in order to reach a final distribution of the parties’ martial

income and properties (Findings of Fact and Conclusions of Law, May, 29, 2013, ¶¶ 17, 18, 19, 20, 21 & 22; Rec. 6879-6883; also attached as Addendum Ex. D to Michael's initial Brief); and resulted in a modification of the court's prior order. (*Id.* at ¶ 20; Rec. 6882) The trial on these issues was not required because of Michael's recalcitrance, but to perform an equalizing function; therefore, the provisions of §30-3-3(1) should apply to the fees incurred on these issues.

Regardless, even under §30-3-3(2) which provides for attorneys' fees upon a determination that "the party substantially prevailed upon the claim or defense;" the trial court in this case, failed to make any finding at the conclusion of the April 2013 trial, that Debra substantially prevailed upon any claim or defense. To allow meaningful appellate review the trial court needs to make detailed findings as to who the prevailing party was on the claims presented.⁴ *Connell v. Connell*, 2010 UT App 139, ¶ 27, 233 P.3d 836.

Debra argues that she substantially prevailed on every issue at the April 2013 trial; however, the trial court did not make such a finding.⁵ Furthermore, the trial court in its July 12, 2013 Minute Entry indicates that Debra was not successful on all the issues at the April 2013 trial. Finally, the trial court failed to make detailed findings as to the matters on which Debra substantially prevailed. In *Connell* the trial court looked at the "overall success" of the wife in awarding her attorneys' fees. This award was reversed

⁴ This is also true when the prevailing party seeks attorneys' fees based on a written contract. *Cabrera v. Cottrell*, 694 P.2d 622, 624 (Utah 1985)

⁵ Actually it can be argued that the April 2013 trial ended more favorable for Michael than Debra, as Debra already had a \$1.9 million judgment entered against Michael, which was reduced after the April 2013 trial, to \$1,128,948.62. (See Rec. 6883-6884)

and the matter was remanded to the trial court, with instructions that if a fee award is based on §30-3-3(2) it should be supported by a finding that the wife substantially prevailed on the motions for which she seeks attorneys' fees. *Id.* at ¶ 32.

The trial court's ruling on post-trial issues, relates to supplemental and post-judgment proceedings after the April 13, 2013 trial, which occurred after this appeal was filed. They do not relate to the April 13 2103 trial or the attorneys' fees awarded in the Final Order and Judgment of May 29, 2013, which are under appeal in this case.

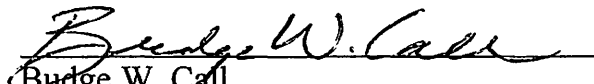
Finally, Michael prevailed on substantially all of the contempt issues at the April 2013 trial. (Findings of Fact Conclusions of Law, May 29, 2013, ¶¶ 3, 4, 5, 6, 7, 8, 11 & 12, Rec. 6875-6878) Therefore, if attorneys' fees are to be awarded under §30-3-3(2) or under contract; it is Michael, as the prevailing party, who is entitled to his attorneys' fees, incurred on defending these issues.

CONCLUSION

Based on the forgoing, the rulings and judgments of the lower court should be reversed; and the case remanded to the lower court, with instructions to see that an equal distribution of the marital property is made, which is fair and equitable, for both parties.


RESPECTFULLY SUBMITTED, this 24 day of September, 2014.

BOND & CALL, L.C.


Budge W. Call
Attorney for Petitioner/Appellant

CERTIFICATE OF COMPLAINE

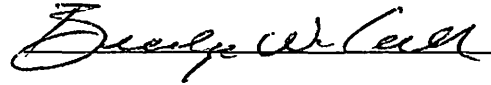
I hereby certify that the forgoing Reply Brief contains 5,583 words, excluding the table of contents, table of citations and addendum, in compliance with Rule 24(f)(1)(A) of the Utah Rules of Appellate Procedure.


Budge W. Call
Attorney for Petitioner/Appellant

MAILING CERTIFICATE

I hereby certify that on the 24 day of September 2014, I did mail, via
U.S. Mail, First Class, postage pre-paid, TWO true and correct copies of the foregoing
APPELLANT'S REPLY BRIEF to the following:

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ADDENDUM

- A. Utah's Wrongful Lien Statute, Sections 38-9-1 & 2, Utah Code Ann.
- B. Lis Pendens Statute, Section 78B-6-1303 & 1304, Utah Code Ann.
- C. Attorneys' Fee Statute, Section 30-3-3, Utah Code Ann.
- D. Judgment and Order, dated Feb. 25, 2011. (Rec. 1213-1222)

Tab A

certified mail, postage prepaid, to the occupant's last known address that states:

- (a) the date the vehicle was towed; and
 - (b) the address and telephone number of the person that towed the vehicle.
- (3) An owner that has a vehicle towed under Subsection (1) is not liable for any damage that occurs to the vehicle after the independent towing carrier takes possession of the vehicle.

2013

38-8-4. Posting of notice.

Each owner acting under this chapter shall keep posted in a prominent place in the owner's office at all times a notice that reads as follows:

"All articles stored under a rental agreement, for which charges have not been paid for 30 days, will be sold to pay charges. If this business does not sell a vehicle stored under a rental agreement, it will be towed from the self-storage facility after 60 days of nonpayment."

2013

38-8-5. Other liens unaffected.

Nothing in this section shall be construed as in any manner impairing or affecting the right of parties to create liens by special contract or agreement, nor shall it in any manner affect or impair other liens arising at common law or in equity, or by any statute of this state.

1981

CHAPTER 9

WRONGFUL LIENS AND WRONGFUL JUDGMENT LIENS

Section	
38-9-1.	Definitions.
38-9-2.	Scope.
38-9-3.	County recorder may reject wrongful lien within scope of employment — Good faith requirement.
38-9-4.	Civil liability for recording wrongful lien — Damages.
38-9-5.	Repealed.
38-9-6.	Petition to file lien — Notice to record interest holders — Summary relief — Contested petition.
38-9-7.	Petition to nullify lien — Notice to lien claimant — Summary relief — Finding of wrongful lien — Wrongful lien is void.

38-9-1. Definitions.

As used in this chapter:

(1) "Interest holder" means a person who holds or possesses a present, lawful property interest in certain real property, including an owner, title holder, mortgagee, trustee, or beneficial owner.

(2) "Lien claimant" means a person claiming an interest in real property who offers a document for recording or filing with any county recorder in the state asserting a lien, or notice of interest, or other claim of interest in certain real property.

(3) "Owner" means a person who has a vested ownership interest in certain real property.

(4) (a) "Record interest holder" means a person who holds or possesses a present, lawful property interest in certain real property, including an owner, titleholder, mortgagee, trustee, or beneficial owner, and whose name and interest in that real property appears in the county recorder's records for the county in which the property is located.

(b) "Record interest holder" includes any grantor in the chain of the title in certain real property.

(5) "Record owner" means an owner whose name and ownership interest in certain real property is recorded or filed in the county recorder's records for the county in which the property is located.

(6) "Wrongful lien" means any document that purports to create a lien, notice of interest, or encumbrance on an owner's interest in certain real property and at the time it is recorded is not:

(a) expressly authorized by this chapter or another state or federal statute;

(b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or

(c) signed by or authorized pursuant to a document signed by the owner of the real property.

2010

38-9-2. Scope.

(1) (a) The provisions of Sections 38-9-1, 38-9-3, 38-9-4, and 38-9-6 apply to any recording or filing or any rejected recording or filing of a lien pursuant to this chapter on or after May 5, 1997.

(b) The provisions of Sections 38-9-1 and 38-9-7 apply to all liens of record regardless of the date the lien was recorded or filed.

(c) Notwithstanding Subsections (1)(a) and (b), the provisions of this chapter applicable to the filing of a notice of interest do not apply to a notice of interest filed before May 5, 2008.

(2) The provisions of this chapter shall not prevent a person from filing a lis pendens in accordance with Section 78B-6-1303 or seeking any other relief permitted by law.

(3) This chapter does not apply to a person entitled to a preconstruction or construction lien under Section 38-1a-301 who files a lien pursuant to Title 38, Chapter 1a, Preconstruction and Construction.

2012

38-9-3. County recorder may reject wrongful lien within scope of employment — Good faith requirement.

(1) (a) A county recorder may reject recording of a lien if the county recorder determines the lien is a wrongful lien as defined in Section 38-9-1.

(b) If the county recorder rejects a document to record a lien in accordance with Subsection (1)(a), the county recorder shall immediately return the original document together with a notice that the document was rejected pursuant to this section to the person attempting to record the document or to the address provided on the document.

(2) A county recorder who, within the scope of the county recorder's employment, rejects or accepts a document for recording in good faith under this section is not liable for damages.

(3) If a rejected document is later found to be recordable pursuant to a court order, it shall have no retroactive recording priority.

(4) Nothing in this chapter shall preclude any person from pursuing any remedy pursuant to Utah Rules of Civil Procedure, Rule 65A, Injunctions.

2010

38-9-4. Civil liability for recording wrongful lien — Damages.

(1) A lien claimant who records or causes a wrongful lien as defined in Section 38-9-1 to be recorded in the office of the county recorder against real property is liable to a record interest holder for any actual damages proximately caused by the wrongful lien.

(2) If the person in violation of Subsection (1) refuses to release or correct the wrongful lien within 10 days from the date of written request from a record interest holder of the real property delivered personally or mailed to the last-known address of the lien claimant, the person is liable to that record interest holder for \$3,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs.

(3) A person is liable to the record owner of real property for \$10,000 or for treble actual damages, whichever is greater,

Tab B

78B-6-1240. Investment of securities by court clerk — Accounting.

The clerk of the court in whose name a security is taken or by whom an investment is made, and his successors in office, shall receive the interest and principal as it becomes due, and apply and invest the same as the court may direct. The clerk shall also deposit with the county treasurer all securities taken, and keep an account, in a book provided and kept for that purpose in the clerk's office, free to inspection by all persons, of investments and money received and their disposition.

2008

78B-6-1241. Equalization.

(1) If a partition cannot be made equally among the parties according to their respective rights without prejudice to the rights and interests of some of them, and a partition is ordered, the courts may order compensation made by one party to another on account of the inequality.

(2) Compensation may not be required to be made to others by unknown owners or a minor, unless the court determines that the minor has sufficient personal property to make the payment and the minor's and the minor's interest will not be negatively affected.

(3) The court has the power in all cases to make compensatory adjustment among the parties according to the principles of equity.

2008

78B-6-1242. Interests of minor — Payment to guardian.

If the share of a minor is sold, the court may order the proceeds of the sale to be paid by the referee making the sale to the minor's general guardian or to the special guardian appointed for the minor in the action.

2008

78B-6-1243. Partition — Payment of costs — Enforcement of judgment.

(1) The costs of partition, including reasonable attorney fees, expended by the plaintiff or any of the defendants for the common benefit, fees of referees and other disbursements shall be paid by the parties entitled to share in the lands divided, in proportion to their respective interests, and may be included and specified in the judgment. The costs shall be a lien on the several shares, and the judgment may be enforced by execution against the shares and against other property held by the respective parties.

(2) If litigation arises between some of the parties, the court may require the expenses of the litigation to be paid by the parties to the litigation.

2008

78B-6-1244. One referee instead of three allowed by consent.

The court, with the consent of the parties, may appoint a single referee instead of three referees in the proceedings under the provisions of this part, and the single referee has all the powers, and may perform all the duties, required of the three referees.

2008

78B-6-1245. Lien for costs and expenses advanced by one for benefit of all.

(1) The court shall allow expenses incurred, including attorney fees, in prosecuting or defending other actions or proceedings by any one of the tenants in common for the protection, confirmation or perfecting of the title, or setting the boundaries, or making a survey or surveys of the estate partitioned to be recovered by the party incurring the expenses.

(2) The court shall determine the amounts with interest from the date the expenditures occurred.

(3) The costs shall be:

- (a) pleaded and allowed by the court;
- (b) included in the final judgment;
- (c) a lien upon the share of each tenant, in proportion to the tenant's interest; and

(d) enforced in the same manner as taxable costs of partition are taxed and collected.

2008

78B-6-1246. Abstract of title — Costs and inspection.

(1) If the court determines that it was necessary to have an abstract of the title to the property to be partitioned created and the abstract has been procured by a party to the proceeding, the cost of the abstract, with interest from the date of its creation and availability for inspection by the respective parties to the action, shall be allowed and taxed.

(2) If the abstract is procured by the plaintiff before the commencement of the action the plaintiff shall file a notice with the complaint that an abstract of the title has been made and is available for the inspection and use of all the parties to the action. The notice shall state where the abstract will be available for inspection.

(3) If the plaintiff did not procure an abstract before commencing the action, and a defendant procures an abstract, the defendant shall, as soon as it has been directed it to be made, file a notice in the action with the clerk of the court, stating who is making the abstract and where it will be kept when finished.

(4) The court may direct who may have custody of the abstract.

2008

78B-6-1247. Interest on advances to be allowed.

Any disbursement made by a party under the direction of the court during the action shall accrue interest from the date it is made.

2008

PART 13**QUIET TITLE****78B-6-1301. Quiet title — Action to determine adverse claim to property.**

A person may bring an action against another person to determine rights, interests, or claims to or in personal or real property.

2008

78B-6-1302. Definitions.

As used in this part:

(1) "Claimant" means a person who files a notice.

(2) "Guarantee" means an agreement by a claimant to pay an amount of damages:

(a) specified by the court;

(b) suffered as a result of the maintenance of a notice;

(c) to a person with an interest in the real property that is the subject of the notice; and

(d) if the requirements of Subsection 78B-6-1304(5) are met.

(3) "Notice" means a notice of the pendency of an action filed under Section 78B-6-1303.

2008

78B-6-1303. Lis pendens — Notice.

(1) Either party to an action affecting the title to, or the right of possession of, real property may file a notice of the pendency of the action with the county recorder in the county where the property or any portion of the property is located.

(2) The notice shall contain:

(a) the names of the parties;

(b) the object of the action or defense; and

(c) a description of the property affected in that county.

(3) From the time of filing the notice, a purchaser or encumbrancer of the property who may be affected by the action is considered to have constructive notice of the pendency of the action.

2008

78B-6-1304. Motions related to a notice of the pendency of an action.

(1) Any time after a notice has been recorded pursuant to Section 78B-6-1303, any of the following may make a motion

to the court in which the action is pending to release the notice:

- (a) a party to the action; or
 - (b) a person with an interest in the real property affected by the notice.
- (2) A court shall order a notice released if:
- (a) the court receives a motion to release under Subsection (1); and
 - (b) the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim that is the subject of the notice.
- (3) If a court releases a notice pursuant to this section, the claimant may not record another notice with respect to the same property without approval of the court in which the action is pending.
- (4) Upon a motion by any person with an interest in the real property that is the subject of a notice, a court may require the claimant to give the moving party a guarantee as a condition of maintaining the notice:
- (a) any time after a notice has been recorded; and
 - (b) regardless of whether the court has received an application to release under Subsection (1).
- (5) A person who receives a guarantee under Subsection (4) may recover an amount not to exceed the amount of the guarantee upon a showing that:
- (a) the claimant did not prevail on the real property claim; and
 - (b) the person seeking the guarantee suffered damages as a result of the maintenance of the notice.
- (6) A court shall award costs and attorney fees to a prevailing party on any motion under this section unless the court finds that:
- (a) the nonprevailing party acted with substantial justification; or
 - (b) other circumstances make the imposition of attorney fees and costs unjust.

78B-6-1305. Disclaimer or default by defendant — Costs.

The plaintiff may not recover costs of the action if:

- (1) the defendant disclaims in his answer any interest or estate in the property; or
- (2) allows judgment to be taken against him by refusing to answer.

78B-6-1306. Termination of title pending action — Judgment — Damages.

If the plaintiff demonstrates a right to recover at the time the action is brought, but his right terminates during the pendency of the action, the verdict and judgment shall be according to the fact, and the plaintiff may recover damages for withholding the property.

78B-6-1307. Setoff or counterclaim for improvements made.

If permanent improvements have been made by a defendant, or persons under whom the defendant claims in good faith, the value of the improvements, except improvements made upon mining property, shall be allowed as a setoff or counterclaim against the damages recovered for withholding the property.

78B-6-1308. Right of entry pending action for purposes of action.

The court in which an action is pending under this part or for damages for an injury to property may, on motion and upon notice to either party, for good cause shown, issue an order allowing a party the right to enter the property and take surveys and measurements including any tunnels, shafts, or drifts, even though entry must be made through other lands belonging to parties to the action.

78B-6-1309. Order for entry — Liability for injuries.

The order shall describe the property, and a copy served on the owner or occupant. The party may enter the property with necessary surveyors and assistants, and may take surveys and measurements. The party shall be liable for any unnecessary injury done to the property.

78B-6-1310. Mortgage not considered a conveyance — Foreclosure necessary.

A mortgage of real property may not be considered a conveyance which would enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale.

78B-6-1311. Alienation pending action not to prejudice recovery.

An action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by the person, either before or after the commencement of the action.

78B-6-1312. Actions respecting mining claims — Proof of customs and usage admissible.

In actions respecting mining claims proof must be admitted of the customs, usages, or regulations established and in force in the district, bar, diggings, or camp in which the claim is located. The customs, usages, or regulations, if not in conflict with the laws of this state or of the United States, shall govern any decision in the action.

78B-6-1313. Temporary injunction in actions involving title to mining claims.

- (1) The court may grant a postponement if:
 - (a) the court is satisfied that the delay is necessary for either or both parties to adequately prepare for trial; and
 - (b) the party requesting the postponement is not guilty of laches and is acting in good faith.
- (2) The court may provide, as part of its order, that the party obtaining the postponement may not remove from the property which is the subject of the action any valuable quartz, rock, earth, or ores. The court may vacate the postponement order or hold the party in contempt if the order is violated.

78B-6-1314. Service of summons and conclusiveness of judgment.

If service of process is made upon unknown defendants by publication, the action shall proceed against the unknown persons in the same manner as against the defendants who are named and upon whom service is made by publication. Any unknown person who has or claims to have any right, title, estate, lien, or interest in the property, which is a cloud on the title and adverse to the plaintiff, who has been served as above, and anyone claiming under him, shall be concluded by any judgment in the action even though the unknown person may be under a legal disability.

78B-6-1315. Judgment on default — Court must require evidence — Conclusiveness of judgment.

- (1) If the summons has been served and the time for answering has expired, the court shall proceed to hear the cause as in other cases.
- (2) The court may examine and determine the legality of the plaintiff's title and the title and claims of all the defendants and all unknown persons.
- (3) The court may not enter any judgment by default against unknown defendants, but in all cases shall require evidence of plaintiff's title and possession and hear the evidence offered respecting the claims and title of any of the defendants. The court may enter judgment in accordance with the evidence and the law only after hearing all the evidence.

Tab C

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

Utah Statutes

Title 30. Husband and Wife

Chapter 3. Divorce

Current through Chapter 437 of the 2014 General Session

§ 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.
- (2) In any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party is impecunious or enters in the record the reason for not awarding fees.
- (3) In any action listed in Subsection (1), the court may order a party to provide money, during the pendency of the action, for the separate support and maintenance of the other party and of any children in the custody of the other party.
- (4) Orders entered under this section prior to entry of the final order or judgment may be amended during the course of the action or in the final order or judgment.

Cite as Utah Code § 30-3-3

History. Amended by Chapter 3, 2008 General Session

Tab D

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FILED DISTRICT COURT
Third Judicial District

FEB 25 2011

SALT LAKE COUNTY

By 33a Deputy Clerk

Attorneys for Respondent

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

MICHAEL S. ROBINSON,
Petitioner,

v.

DEBRA J. ROBINSON,
Respondent.

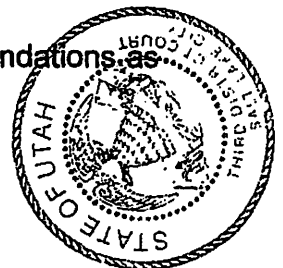
JUDGMENT AND ORDER

Civil No. 074900501

Judge Glenn K. Iwasaki

Comm. Michael S. Evans

On January 13, 2011, the Order to Show Cause of Respondent Debra J. Robinson came on regularly for hearing before Commissioner Michael S. Evans. Petitioner was present and represented by Steven Kuhnhausen. Respondent was present and represented by Dean C. Andreasen and Sarah L. Campbell. Counsel informed the Court that the parties had entered into a partial stipulation to resolve certain issues of the action. The stipulation was read into the record, acknowledged by the parties, and accepted by the Court. With respect to the disputed issues, the Court considered the papers and affidavits filed by the parties, and also the arguments and proffers of counsel. Based thereon, the Court made findings and recommendations as



described in the unofficial transcript of the ruling of the Court, attached hereto as Exhibit A. Based on those findings and recommendations, it is hereby ordered, adjudged and decreed as follows:

1. Respondent's Motion to Strike the affidavits of John Gottschall and Eric Wadley is hereby granted.

2. Respondent shall manage the Phoenix Plaza and Sandy Retail Center, and she shall continue to manage the Deer Valley condo. She shall be the one to interact directly with the tenants, secure the deposits and rents, and deposit all funds from those rental properties into the parties' joint account. From the joint account, Respondent shall pay the expenses for the Phoenix Plaza, the Sandy Retail Center, the St. George home, and the Deer Valley condo. No other expenses shall be paid from the parties' joint account, and Respondent shall provide a monthly accounting to Petitioner.

3. The parties shall immediately list the Phoenix Plaza property for sale with a mutually acceptable agent at a price of \$3,000,000. If and when the Phoenix Plaza is sold, the sales proceeds shall be placed in an escrow account.

4. The Sandy Retail Center shall be listed for sale. Michael Carroll is appointed as listing agent for the Sandy Retail Center and has authority to determine the initial listing price. Any reductions in the listing price shall be agreed to by the parties. In making a decision to reduce the listing price, each party may submit to Mr. Carroll up to two expert opinions as to the property's value.

5. Judgment is entered against Petitioner in favor of Respondent in the amount of \$438,924.43 representing interest at a rate of eight percent (8%) per annum

on the amounts owed under the Decree of Divorce (¶ 11(B): \$1,784,419.00; ¶ 12(B): \$105,777; ¶ 15: \$22,500) from March 2, 2008 (120 days after the parties signed the Agreement) to January 13, 2011.

6. The Court finds there has been a prima facie showing of Petitioner's failure to comply with and breach of the terms of the Decree of Divorce.

7. The Court finds Petitioner never filed an application to refinance.

8. The issue of Petitioner's contempt is certified for evidentiary hearing regarding his failure to comply with the terms of the parties' Decree of Divorce.

9. The issue of attorney fees and costs being awarded to Respondent in connection with this Order to Show Cause hearing is certified for evidentiary hearing and shall be considered at the hearing on the issue of Petitioner's contempt.

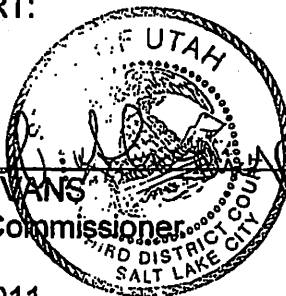
10. The Court finds the language of the Decree of Divorce does not trigger the award of a judgment for the principal amounts involved, which principal amounts are due and owing upon the refinance of the property or perhaps as a sanction following a finding of contempt.

11. Petitioner's motion to require mediation is not required and, therefore, not ordered.

DATED this 24 day of February 2011.

BY THE COURT:

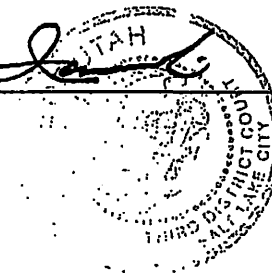

MICHAEL S. EVANS
District Court Commissioner



DATED this 25 day of Feb. 2011.

BY THE COURT:


GLENN K. IWASAKI
District Court Judge



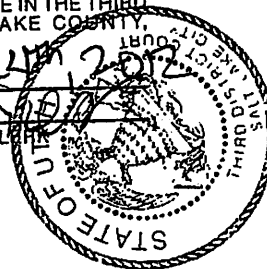
APPROVED this 31 day of
January 2011


STEVEN KUHNHAUSEN
Attorney for Petitioner

I CERTIFY THAT THIS IS A TRUE COPY OF AN
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT, SALT LAKE COUNTY,
STATE OF UTAH.

DATE: January 24, 2012


DEPUTY COURT CLERK



CERTIFICATE OF SERVICE

On this 28th day of January 2011, I hereby caused to be served on the

Petitioner a true and correct copy of the foregoing **JUDGMENT AND ORDER** by having
the same hand delivered to:

Steven Kuhnhausen, Esq.
10 West 300 South, #603
Salt Lake City, UT 84101

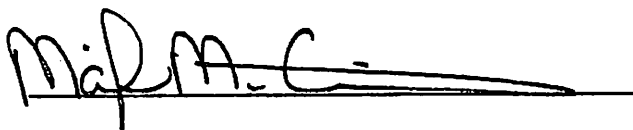
A handwritten signature in black ink, appearing to read "Mark A. C.", is written over a horizontal line.

EXHIBIT A

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SARAH L. CAMPBELL (#12052)
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Attorneys for Respondent

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

MICHAEL S. ROBINSON,
Petitioner,

v.

DEBRA J. ROBINSON,
Respondent.

(UNOFFICIAL) PARTIAL TRANSCRIPT
OF RULING PORTION OF HEARING -
JANUARY 13, 2010

Civil No. 074900501

Judge Glenn K. Iwasaki

Comm. Michael S. Evans

CE: Commissioner Michael S. Evans

SK: Steven Kuhnhausen, Attorney for Petitioner

DCA: Dean C. Andreasen, Attorney for Respondent

DR: Debra Robinson

MR: Michael Robinson

CE: I'll receive and approve the agreement of the parties as has been stated on the record. In regard to the issue of contempt, I will recommend the same be certified for further hearing. It appears to me as though, there's been, in fact, there's no dispute that a prima facia showing of failure to comply with the Decree

of Divorce has occurred. The Decree provides specifically, and you've read it a lot, counsel, but one very specific direction to Mr. Robinson was the "shall file the loan refinance application within 15 days of the date of this Agreement." Mr. Robinson doesn't say he couldn't file the loan refinance application, that it was impossible for him to do that. He says he was dissuaded and that's insufficient. And because he didn't take the first step, of course, the other steps resulting in the refinance have never occurred. So again, I will recommend the issue of contempt be certified. However, given the language of the Decree, I can't find that that would trigger the award of a judgment for the principal amount involved. I will recommend that a judgment for the 8% interest be awarded as that is separate and apart and there's no dispute that that portion of the Decree has been triggered. I'll recommend that the request for fees in connection with this hearing be certified and considered by the Court at the hearing on the issue of contempt. I have reviewed again, in cursory fashion today, the Court of Appeals decision, no mention is made of attorneys' fees there, and it's my understanding that it's appropriate to request an award of fees of the Court before whom you are appearing, so I'll recommend, well, I'll not rule one way or the other, but I'll not award attorneys fees that were incurred on appeal. I'm certainly not certain where that stands, but I'll not recommend any be awarded at this time. I believe I've addressed all the issues. Have I missed anything counsel?

SK: No, I think you're done. Oh, my counter motion to go to mediation on those unclear paragraphs.

CE: I can't find there's, the language is, if a term needs to be interpreted they go to mediation, I can't find there are any unclear terms that would require mediation, not that mediation would be a bad idea to talk about what you do now that everything that was contemplated three years ago is no longer in place, as if selling the home, but I'm not going to require it.

SK: Okay.

DCA: What about payments of amounts coming out as distributions from the rental proceeds, the net rental proceeds after payment of expenses.

CE: That was left within the discretion of the parties, was it not?

SK: Yes.

CE: In the Decree? Well, I've awarded a Judgment for the interest amount and I trust that you'll provide the formula you arrive at to Mr. Kuhnhausen that you apply in arriving at the grand total of the interest accrued from the date of the triggering event to today is my recommendation of, it would appear those proceeds would be available for execution if you can't reach some other agreement.

DCA: May I ask a clarification, then, of the distinction, I'm assuming the Court's going to have me draft the Order, the distinction between no judgment being entered against Mr. Robinson for the principal amounts owing, as compared to the interest. What is the distinction?

CE: The principal amount is due and owing upon the refinance of the property. The interest is due and owing upon the lack of refinance of the property. So, the 8% is a fixed amount. The other amounts aren't due until the refinance occurs or perhaps as a sanction following a finding of contempt.

DCA: And the Court's findings that he has never filed an application to refinance?

CE: That was my finding, yes.

DCA: Thank you.

SK: Thanks again for accommodating my schedule.

CE: Thank you. I appreciate counsel, your cooperating together to allow this hearing to proceed. And I will ask Mr. Andreasen, you prepare the Order. Thank you counsel. Thank you folks. Good luck.