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# Kylee J. Sandusky, Petitioner/Appellee v. George A. Sandusky Respondent/Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS

STATE OF UTAH

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**KYLEE J. SANDUSKY,**

Petitioner/Appellee

v.

Case No. 20160131

**GEORGE A. SANDUSKY**

Respondent/Appellant

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY, UTAH, HON. KARA L. PETTIT

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# BRIEF FOR APPELANT


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UTAH APPELLATE COURTS

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## STATEMENT OF JURISDICTION

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

## STATEMENT OF ISSUES

**I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO BIFURCATE THE TRIAL** -- *Abuse of discretion*

Regardless of convenience, an order to bifurcate trial "is an abuse of discretion if it is unfair or prejudicial to a party" or if "the issues are [not] clearly separable." Angelo v. Armstrong World Indus., 11 F.3d 957, 964 (10th Cir. 1993) (citation omitted (interpreting Fed. R. Civ. P. 42, which is identical to the Utah rule); See also Parker v. Parker, 2000 UT App 30; 996 P.2d 565; 389 Utah Adv. Rep. 5 (Utah Ct. App. 2000)

## II. WHETHER THE DISTRICT COURT COMMITTED ERROR IN THE INTERPRETATION OF THE SEPARATION AGREEMENT -- *Interpretation of a contract as a matter of law for correctness and Abuse of discretion.*

Questions of contract interpretation confined to the language of the contract itself are questions of law, which the Court reviews for correctness. Hillcrest Investment v. Sandy City, A Municipal Corporation, 238 P.3d 1067 (UT App. 2010). Interpretation of a contract resents a question of law reviewed for correctness. Green River Canal Company v. Thayn, 84 P.3d 1134 (2003). See also Levin v. Carlton, 2009 UT App 170, ¶ 9, 213 P.3d 884 (Utah 2009); Jacobsen v. Jacobsen, 2011 UT App 161, ¶ 13 (Utah Ct. App. 2011).

When ambiguity exists in a contract, the intent of the parties becomes a question of fact, which is reviewed for clear error. Hillcrest Investment v. Sandy City, A Municipal Corporation, 238 P.3d 1067 (UT App. 2010).

A contract interpretation that will produce an inequitable result will be adopted only where the contract expressly and unequivocally so provides that there is no other reasonable interpretation to be given it. Green River Canal Company v. Thayn, 84 P.3d 1134 (2003). See also Levin v. Carlton, 2009 UT App 170, ¶ 9, 213 P.3d 884 (Utah 2009); Jacobsen v. Jacobsen, 2011 UT App 161, ¶ 13 (Utah Ct. App. 2011).

## III. WHETHER THE SEPARATION AGREEMENT WAS CLEAR IN TERMS AND INTENT REGARDING SEPARATE PROPERTY -- *Interpretation of a contract as a matter of law for correctness and Abuse of discretion.*

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**IV. WHETHER THE TRIAL COURT ERRED IN THE INTERPRETATION OF THE SEPARATION AGREEMENNT ON THE ISSUE OF ALIMONY AND PAST DUE ALIMONY** -- *Interpretation of a contract as a matter of law for correctness and Abuse of Discretion*

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## V. WHETHER THE TRIAL COURT ERRED IN RENDERING THE SEPARATION AGREEMENT UNENFORCEABLE -- *Interpretation of a statute as a matter of law for correctness and Abuse of discretion.*

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**VI. WHETHER THE TRIAL COURT COMMITTED LEGAL ERROR IN DENYING A NEW TRIAL** -- *Abuse of discretion*

Promax Dev. Corp. v. Mattson, 943 P.2d 247, 253 (Utah Ct. App.), cert. denied, 953 P.2d 449 (Utah 1997).

**VII. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN NOT AWARDING ATTORNEY'S FEES TO RESPONDENT** -- *Abuse of discretion*

Connell v. Connell, 2010 UT App 139, P6 (Utah Ct. App. 2010), citing Jensen v. Jensen, 2008 UT App 392, P 8, 197 P.3d 117 (Utah Ct. App. 2008).

## STATEMENT OF THE CASE

The parties were married in California on November, 10, 1986. Their only son was born on October 27, 1992. Respondent retired in 1997 at the age of forty-two (42). They moved to Hawaii one year prior to Respondent's retirement in 1996. In 2007 the parties moved to Park City, Utah. A separation agreement was signed by the parties on February 10, 2010. On June 3, 2011, Petitioner filed a petition for Divorce pursuant to Utah Code §30-3-1 on the grounds of irreconcilable differences. Respondent answered and filed a counter petition for Divorce and Breach of Contract based on the Separation Agreement, the provisions under which they had been living for more than 18 months.

A trial was held from April 28 to April 30, 2015. On July 23, 2015, Judge Kara Pettit, Third Judicial District Court, entered the Findings of Fact and Conclusions of Law, Decree of Divorce and Judgment. On August 8, 2015, both parties filed timely post-trial motions pursuant to Rules 52, 59, and 60 of the Utah Rules of Civil Procedure. A hearing was held on the post-trial motions on November 2, 2015. At the hearing, the Court admitted errors had been made, specifically regarding the allotment of cash proceeds for the 10 lots identified in the Separation Agreement and awarded to Respondent as separate property ($335,000) and other property distributions. Confusion of the Court's July order was obvious and proliferated. Additional Supplemental briefing was permitted and Rule 60 Motions were filed by Respondent. [1]

The Court found under Rule 62(j)(2)(A) the presumptive bond amount to be $487,106.14, which Respondent has posted in a trust account with the Summit County Court. The Original Notice of Appeal was filed on December 15, 2015, and the Amended Notice of Appeal filed on February 3, 2016.

## STATEMENT OF FACTS

George Sandusky and Kylee Sandusky were married on November 10, 1986 (Findings of Fact No. 1). They have one adult child (Findings of Fact No. 9). They moved to Park City, Utah in 2007 (Findings of Fact No. 47 at p.26). George was retired and neither party worked while living in Park City (Findings of Fact No. 36 and 47, p.26).

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[1] 11/05/2015 Ex Parte Motion for Expedited Ruling Pursuant to Rule 60(b) for Relief from Judgment and Order.
12/4/2015 Rule 60(b) Motion.

On February 10, 2010, the parties executed a Separation Agreement and Addendum (Findings of Fact No. 10, 13 and 21). Petitioner and Respondent spent time discussing the specifics to input into the form Separation Agreement (Findings of Fact No. 16). The Agreement was clear on its face describing the document and its purpose, a desire to confirm separation of the parties and settlement of their property rights growing out of their marital relationship (Findings of Fact No. 19).

For approximately 16 months after execution of the Separation Agreement, the parties complied with the terms all the way up until the time Petitioner retained and attorney and filed for divorce wherein she sought to declare the separation agreement void on the grounds that she was "duped into signing the Agreement by Respondent misleading her that it was only for the purpose of financial aid for their son" (Findings of Fact Nos. 22, 23 and 24). Both Petitioner and Respondent understood the Separation Agreement was for purpose of their separation. It was undisputed that both parties were aware of the assets of each other and the financial account statements were accessible to each of them had they wanted to verify how much was in the accounts as of the date they executed the Separation Agreement (Findings of Fact No. 31).

The Separation Agreement awarded each party their bank accounts, specifically for Petitioner "checking and savings accounts and 401K" and for Respondent, "checking and savings accounts and retirement pension" (Findings of Fact Nos. 35 and 36). Neither party argued or testified that they did not understand which checking and savings accounts were being referenced. Respondent testified in detail about the parties' finances including their individual checking and savings accounts (Transcript April 29, page 134 L 6-11 and L 23-

25, page 171, L 6-22 and Transcript April 30, page 83, L 2-19). Petitioner offered no contrary evidence. She testified that she did not know the legal analysis that is applied to determine whether property is marital or separate (Findings of Fact No. 33).

Respondent testified in detail about the understanding and intent of the parties in outlining the property division as they did in the Separation Agreement, specifically that the parties had 1.2 million and change; Respondent would retain $400,000 of the equity from the Dover property, a duplex, half of which was purchased by Respondent prior to the marriage and ½ purchased after the marriage, but which Petitioner singed a quit claim deed to Respondent after the marriage, and they would split the rest [approx. $800,000] equally. The monthly payments characterized as "alimony" were a calculation of 6% interest on the $400,000 lump sum amount identified in the Addendum (Transcript April 29, page 191, L 9-19 and April 30, P. 163-164). Respondent's testimony as to their discussion was uncontroverted. Petitioner is highly educated, having a master's degree in Education and Respondent is a highly sophisticated business man, so to attribute a lack of knowledge [re: Separation Agreement] is not consistent with whom they are (Findings of Fact at p.28). During the pendency of the divorce matter, Respondent placed the balance of the $400,000 lump sum payment pursuant to the Addendum in a trust account (Transcript April 30, page 47, L 12-18 and Transcript April 29, page 44, L 9). Petitioner had taken $90,000 from the Hawaii bank account (Findings of Fact P.37), (Transcript April 28, page 262, L4-6), and (Transcript April 29, page 87, L 6-12).

Petitioner filed a verified petition for divorce on June 3, 2011, pursuant to Utah Code §30-3-1 on the grounds of irreconcilable differences. (Findings of Fact Nos. 2 and

30). Prior to and during the marriage, Respondent purchased properties, fixed them up, and then sold them. By the time he retired in 1997, he had accumulated approximately $400,000 from these investments (Transcript April 29, page 196, L 10-12; 23-25 and page 198, L 21-25, and Transcript April 30, page 163, L 3-9) Respondent testified that he always had a separate account with sister that was established prior to marriage and that they [Petitioner and Respondent] maintained separate bank accounts throughout marriage (Transcript April 29, page 118, L 4-12). Petitioner did not dispute Respondent's testimony.

Respondent also entered into "hard money loans" as part of his investments (Transcript April 29, page 176, L 24 through page 182, L 9). None were outstanding at the time of trial, including loans to his sister and Mike Anderson (G. Sandusky Depo 94, L 10-18)[2]. Respondent also received $42,000 in settlement proceeds from a motorcycle accident (G. Sandusky Depo. Volume II, page 53, L 17-18), Transcript, April 30, page 35, L 22 through page 36, L25), (Transcript April 30, Page 51 lines 18-23), and (Transcript April 30, Page 52 lines 14-18).

## SUMMARY OF ARGUMENTS

### I. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO BIFURCATE THE TRIAL

The validity of the Separation Agreement was central to the case. Failure to divide the issues to determination of the validity of the separation first caused confusion and mistake that was prejudicial to Respondent.

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[2] Admitted into evidence, Judge Pettit said "Are you moving to publish [Mr. Sandusky's deposition]?" Mr. Morken said "Yes, please." (April 30, 2015 Trial CD 13:59:05-13:57:43).

## II. THE TRIAL COURT COMMITTED ERROR IN THE INTERPRETATION OF THE SEPARATION AGREEMENT REGARDING SEPARATE PROPERTY

The Separation Agreement executed by the parties was clear in its intent and division of assets. Specifically, it was understood and agreed that Respondent would maintain his pre-marital property, accumulated and appreciated from the Dover property, half acquired prior to the parties' marriage and with funds kept separate and apart from marital assets. The distribution made by the Court was not consistent with the Separation Agreement and was inequitable.

## III. THE SEPARATION AGREEMENT WAS CLEAR IN TERMS AND INTENT

The Intent of the property division pursuant to the Separation Agreement was clear and the distribution equitable and as a result the property division agreed to by the parties should not have been disturbed. The Court found the Separation Agreement Valid and therefore should have been enforced in its entirety and as agreed to by the parties and under which they lived.

## IV. THE DISTRICT COURT COMMITTED LEGAL ERROR IN FAILING TO PROPERLY RULE ON THE ISSUE OF ALIMONY AND PAST DUE ALIMONY.

The Court's order is inconsistent with the purpose and intent of the Separation Agreement and results in an inequitable distribution. The Separation Agreement was valid and clear in its intent. It was equitable. The Court's order is not consistent with the Separation Agreement and the understanding of the parties. The court's order disregarded evidence of additional income in determining need and ability to pay.

## V. THE TRIAL COURT ABUSED ITS DISCRETION IN RENDERING THE SEPARATION AGREEMENT UNENFORCEABLE.

The Separation Agreement was not ambiguous to warrant the Court's re-disposition of property already agreed-upon by the parties. The court incorrectly identified and referenced in its Orders assets, approximately double the amount of assets in the estate. The distribution of the assets by the Court did not conform to the Separation Agreement and were overstated and resulted in an inequitable distribution.

## VI. THE DISTRICT COURT COMMITTED LEGAL ERROR IN DENYING A NEW TRIAL.

The Court's ruling was inconsistent, inaccurate and confusing. The Separation Agreement was found valid and accurately described the property distribution but was not followed. The Court had significant miscalculations and disregarded the intent of the parties' agreement. The property distribution was inequitable even though the court intended it to be equitable (50/50). Respondent was prejudiced by the mistakes and confusion and a new trial to fairly adjudicate the issues was required.

## VII. THE DISTRICT COURT ABUSED ITS DISCRETION IN NOT AWARDING ATTORNEY'S FEES TO RESPONDENT

The parties' entered into a valid Separation Agreement that they lived by for 16 months. Petitioner decided to challenge the Agreement after consulting with her counsel. She was found not credible (Findings of Fact No. 13), including her arguments to void the Separation Agreement. Respondent was required to defend the validity of the Separation Agreement for more than 5 years and even after the Separation Agreement was ruled valid, he was required to engage in significant post trial motions to enforce its provisions.

## ARGUMENTS

### I. FAILURE TO BIFURCATE THE PROCEEDINGS WAS PREJUDICIAL AND THUS ERROR.

Rule 42(b) permits a trial court, "in furtherance of convenience or to avoid prejudice," to order a separate trial of "any claim" or "any separate issue." Regardless of convenience, an order to bifurcate trial "is an abuse of discretion if it is unfair or prejudicial to a party" or if "the issues are [not] clearly separable." Here, clear distinction between issues. A determination of the Separation Agreement being valid and enforceable allowed the parties to tailor issues to those left to be determined. Angelo v. Armstrong World Indus., 11 F.3d 957, 964 (10th Cir. 1993) (citation omitted (interpreting Fed. R. Civ. P. 42, which is identical to the Utah rule); Lutron Elecs. Co. v. Crestron Elecs., Inc., 2013 U.S. Dist. LEXIS 69207, 8-9 (D. Utah May 14, 2013). See Parker v. Parker, 2000 UT App 30; 996 P.2d 565; 389 Utah Adv. Rep. 5 (Utah Ct. App. 2000) (Rule 42 of the Utah Rules of Civil Procedure gives trial courts discretion to bifurcate proceedings in appropriate situations.). In this case, the trial court's refusal to bifurcate the proceedings caused undue prejudice to the Respondent. The Court's ruling on this issue caused confusion, mistakes, and prejudice to Respondent. The complexity of the issues did not allow Respondent to present complete evidence on all issues in the time set for trial. This confusion is particularly evident by the court's erroneous interpretation of evidence concerning the intent of the Separation Agreement, the distribution of the property, and the bank accounts of the parties as identified in the Separation Agreement and the Court calculating loans made to individuals by the Respondent that were undisputedly previously repaid. The

original Judgement identified assets of the marital estate two times larger than was supported by evidence and testimony. Order of Honorable Judge Kara L. Pettit, Case No.: 114500103, January 05, 2016, p.4, ¶ 7(ii) ("[T]he Court agrees that it made a mistake by not excluding the lot proceeds...The Court awarded such proceeds...but it mistakenly did not separate those proceeds from the balance of the funds in account #7833400."). Further, the Court identified and referenced assets of more than $2.2 million dollars, double the amount of the actual assets of the marital estate testified to by the parties.

Rule 42(b) of the Federal Rules of Civil Procedure, which is identical to Utah's rule, permits a district court to bifurcate claims and counterclaims "[f]or convenience, to avoid prejudice, or to expedite and economize." Fed. R. Civ. P. 42(b). The rule gives trial courts broad discretion to determine whether bifurcation is appropriate. United States ex rel. Bahrani v. ConAgra, Inc., 624 F.3d 1275, 1283 (10th Cir. 2010). See Angelo, supra, at 964 ("'While separation of issues for trial is not to be routinely ordered, it is important that it be encouraged where experience has demonstrated its worth.'") (quoting Fed. R. Civ. P. 42(b) advisory committee's note).

Utah decisions suggest that a court should consider these determining bifurcation: (1) judicial economy, (2) convenience to the parties, (3) expedition, and (4) avoidance of prejudice and confusion. Sensitron, Inc. v. Wallace, 504 F. Supp. 2d 1180, 1186 (D. Utah 2007) (footnotes and citations omitted). However, the most significant factor for the court is the complexity of the case where substantive differences and the potential for confusion are appreciable. Lutron Elecs. Co., supra, at 8-9. See also, Unger v. Ralph Smith Co.,

2010 U.S. Dist. LEXIS 107470 (D. Utah Oct. 7, 2010). Claims may be bifurcated, however, only when "the issues are clearly separable." Mandeville v. Quinstar Corp., 109 Fed. Appx. 191, 194 (10th Cir. 2004) (quotations and citation omitted). Here, the validity of the Separation Agreement was clearly separable. The asset distribution pursuant to the Separation Agreement was simple but the asset determination and distribution of marital and separate property without such an agreement was complex and required a separate trial itself. The trial court clearly did not fully understand that bank accounts were owned separately by the parties or that certain loans by Respondent were previously repaid and cleared, as evidenced by Respondent's testimony and the evidence. (Transcript April 30, Page 51 lines 18-23), (Transcript April 30, Page 52 lines 14-18) (G. Sandusky Depo 94, L 10-18, also included Exhibit 6 filed as pleading tiled Exhibits 6-10 on May 5, 2014).

## II. THE TRIAL COURT ERRED IN ITS INTERPRETATION OF THE SEPARATION AGREEMENT REGARDING RESPONDENT'S PREMARITAL SEPARATE PROPERTY.

The premarital property in question, specifically, the $400,000 the parties contemplated in the signed Separation Agreement, Respondent accumulated in appreciation from property owned by him prior to the marriage. Respondent had significant assets and a pension before marriage. Petitioner had little. Respondent testified thoroughly on this matter, and Petitioner offered no contrary evidence. (Transcript April 29, page 196, L 10-12 and page 198, L 21-25, and Transcript April 30, page 163, L 3-9) (Transcript April 29, page 196, L 23-25).

The Utah Supreme Court has stated that a district court is required to conduct the following analysis prior to the distribution of marital assets: (1) "identify the property in dispute and determine whether [it] is marital or separate property," (2) "consider whether there are exceptional circumstances that overcome the general presumption that marital property be divided equally," (3) "assign values to each item of marital property so that [a] distribution strategy . . . can be implemented," and (4) distribute the marital assets "consistent with the distribution strategy." Stonehocker v. Stonehocker, 2008 UT App 11, ¶ 15, 176 P.3d 476. See Preston v. Preston, 646 P.2d 705, 706 (Utah 1982) (divorce decree affirmed awarding each party the real and personal property he or she brought to the marriage or inherited during the marriage). In this case the trial court erred in failing to determine that certain assets were separate property of Respondent purchased prior to the marriage or from his separate bank account, rather than constituting marital assets. The Utah Supreme Court held that district courts must enter findings of fact which establish that the court's "judgment or decree follows logically from, and is supported by, the evidence." Gardner v. Gardner, 748 P.2d 1076, 1078 (Utah 1988). Further, the appellate court will not set aside findings of fact, "whether based on oral or documentary evidence, unless they are clearly erroneous." Here, there was undisputed evidence that certain assets—namely the lots and the LAFCU account #400 bank account were the property of Respondent acquired before the marriage and maintained separately from any comingled marital assets. See Dahl v. Dahl, 2015 UT 23, ¶ 121 (Utah 2015) (Utah Code § 30-3-5(1) gives the courts authority to issue "equitable orders" concerning marital property in divorce cases); Burke v. Burke, 733 P.2d 133, 135 (Utah 1987). In making this determination, the

Burke Court suggested that the court consider a variety of factors, one of which is "whether the property was acquired before or during the marriage..." Id. Further, "[i]n appropriate circumstances [,] equity requires that each party recover the separate property brought into or received during the marriage." Id., at 135. Further, this court has held that "[e]ach party is presumed to be entitled to all of his or her separate property and fifty percent of the marital property." Hall v. Hall, 858 P.2d 1018, 1022 (Utah Ct. App. 1993) (internal quotation marks omitted). See also Preston, supra, at 706 (holding that the husband was entitled to a credit for costs he paid for the construction of the marital home, because "the evidence was uncontradicted that [the amount] came from the husband's sale of assets he owned prior to the marriage, and only the balance from his earnings during the marriage"). The appropriate distribution of property rests on the overriding consideration that the ultimate division be equitable, or fairly divided between the parties, 'given their contributions during the marriage and their circumstances at the time of the divorce." Newmeyer v. Newmeyer, 745 P.2d 1276, 1277-78 (Utah 1987).

## III. THE SEPARATION AGREEMENT WAS CLEAR IN ITS TERMS AND INTENT.

Utah law stipulates that the governing principle is that "contracts between spouses are enforceable and 'generally subject to ordinary contract principles' so long as they are negotiated 'in good faith . . . and do not unreasonably constrain the [divorce] court's equitable and statutory duties.'" Ashby v. Ashby, 2010 UT 7, ¶ 21, 227 P.3d 246 (Utah 2010) (alteration and omission in original) (citations omitted). See Land v. Land, 605 P.2d 1248, 1251 (Utah 1980) ("Where possible, the underlying intent of a contract is to be

gleaned from the language of the instrument itself; only where the language is uncertain or ambiguous need extrinsic evidence be resorted to.").

The trial Court did not find Petitioner credible and did not agree with her position in the case that the only purpose for the separation agreement was to obtain financial aid for the couple's son's college expenses. (Judgment and Findings of Fact by the Court, p.3, no.13). The parties lived under the terms of the agreement for 16 months, and the terms were understood by the parties as evidenced by their ratification and conduct following the agreement execution. See Order of Honorable Judge Kara L. Pettit, Case No.: 114500103, January 05, 2016, p.3, ¶ 6 (Trial court confirmed "that the evidence demonstrated that Respondent paid Petitioner $2,000 per month in alimony from March 2010 through June 2011 (total of $32,000)."). Petitioner accepted the monthly payments of $2,000, filed tax returns indicating that the payments were alimony—until as she admitted on cross-examination at trial that she was advised by counsel to amend the tax returns (Trial Transcript, April 29, page 84, lines 6-19; Trial Transcript, April 29, page 101, lines 2-22). Petitioner filed for divorce following the separation. See Clausen v. Clausen, 675 P.2d 562, 564 (Utah 1983) (Defendant agreed to the terms of the settlement and did not raise objection for nearly three years; it was then unfair to claim she has equal interest in the present value of the home and force ex-spouse to sell residence); Land, supra, at 1250-1251 ("Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made.").

This Court in 1990 held that in order to resolve a husband and wife's disagreement as to the scope and meaning of a postnuptial agreement, it would apply "normal rules of contract construction." D'Aston v. D'Aston, 808 P.2d 111, 113-114 (Utah Ct. App. 1990). The Court in D'Aston went on to state that "[t]he core principle is that in construing this contract, we first look to the four corners of the agreement to determine the parties' intentions." Id. In this case, the trial court's interpretation and modification of the settlement agreement were due, in large part, to its misclassification and misunderstanding of the owner of separate property and assets.

## A. BANK ACCOUNTS

The Court erred in determining that the bank accounts were not sufficiently identified to justify that provision of the separation agreement unenforceable and deeming them marital property. The bank accounts as of April, 2015 are as follows:

| | | |
|---|---|---|
| LAFCU acct ending #400 | $345,020 | Respondent and Sister Liz Chambers opened *prior to* the marriage, and Petitioner never named owner. |
| LAFCU acct ending #401 | $860.50 | Checking account corresponding to acct #400 |
| Chase Account | $2,400.22 | Petitioner |
| MACU | $250.00 | Petitioner |
| Hawaii Credit Union | $166,694 | Respondent |
| EAS Attorney Trust | $310,000 | Petitioner lump sum set aside less $90,000 |
| **Total** | **$865,224.72** | |

The bank accounts maintained roughly the same balances at time of separation agreement (~$892,000) when compared to the time of trial (~$833,000). Overwhelming evidence showed that the parties had identified the specific bank accounts as their separate accounts. Despite the fact that they were titled jointly—a notion only argued by Petitioner after she was advised by her counsel to refuse to remove the monthly payments that were being deposited by Respondent in accordance with the separation agreement. (Transcript, April 29, page 71, L 10 through page 72, L 2) (Trial Transcript, April 29, page 84, lines 6-19; Trial Transcript, April 29, page 101, lines 2-22).

Petitioner did not argue ambiguity as to the owner of certain funds and accounts. Nor did she claim not to know the identity of the accounts. Nonetheless, the activity in the accounts remained the same after the separation agreement, showing that they have been used in the same manner during and after the execution of the separation agreement. At trial, Respondent testified about the banking activity and that Petitioner never used the bank accounts that were referred to as Respondent's his. See Transcript April 29, page 134 L 6-11 and L 23-25, page 171, L 6-22 and Transcript April 30, page 83, L 2-19). (Transcript April 29, page 118, L 4-12). Petitioner testified that she did not write checks from the bank account or use the accounts. Utah precedent stipulates that in making this assessment, the court "look[s] to a party's actions as a manifestation of a spouse's intent to contribute separate property to the marital estate." Keyes v. Keyes, 2015 UT App 114, ¶ 28 (Utah Ct. App. 2015), citing Dahl, supra, at ¶ 143.

The purpose of property division, the Utah Supreme Court held, "is to allocate property in the manner which 'best serves the needs of the parties and best permits them to pursue their separate lives.'" Noble, supra, at 1373, quoting Burke, supra, at 135. Indeed, it is appropriate for the trial court and for the court on appeal "to survey the total situation of both parties; and to arrive at such arrangement as the interests of justice require, and with the objective in mind of minimizing difficulties and providing the soundest possible foundation for the parties to re-adjust their lives on a happy and useful basis." Ehninger v. Ehninger, 569 P.2d 1104, 1105-1106 (Utah 1977). See Goggin v. Goggin, 2013 UT 16 (Utah 2013) (court erred in declining to consider a credit to the husband for separate property). However, the trial court failed to accurately contemplate the total circumstances of the parties and to result in an arrangement that was equitable in the interest of justice. The trial Court held that the parties did not specify how to divide their financial accounts and that the provision regarding the division of the checking account was ambiguous. However, both parties agreed to the settlement and lived under it for sixteen (16) months.

## B. PROPERTY DIVISION PER THE SEPARATION AGREEMENT.

There was no dispute as to the personal property, including the financial accounts in the possession of the parties. (Findings of Fact No. 31) The parties also identified the lots as the separate property of Respondent; the trial Court acknowledging this, made this finding in the original judgment. Nonetheless, the Court failed to recognize the fact that the lots were sold, and the money deposited into Respondent's bank account. This was corrected in the post-trial orders, and Respondent was credited with the proceeds of

$335,000. Petitioner agreed to receive $2,000/month for life or a $400,000 lump sum. Nonetheless, the Court substituted its own contractual terms that the $400,000 lump sum payment was "alimony" awarded to Petitioner on top of the Court's distribution of the estate. This was not the intent of the parties. The court also found that the $2,000 per month was to last for the length of the marriage. In addition, the bank accounts, including funds were to be awarded to each party. The LA Fireman's Credit Union account ending in #400 belonged separately to Respondent name and was only established prior to the marriage with his sister as the joint account holder. (Transcript April 29, page 112, L 9-18) (Transcript April 29, page 118, L 4-12). Each party was awarded his or her own pension plan. Respondent's pension plan.

The trial Court improperly ruled that $305,000 was part of the marital estate as "loans," which in essence created a marital estate larger than it was in fact. This inflation of the estate's value resulted in an inaccurate distribution of the estate. Testimony was presented that evidenced the loans were paid back, and that these funds were lent and repaid quickly. (Transcript April 30, Page 51 lines 18-23), (Transcript April 30, Page 52 lines 14-18) (G. Sandusky Depo 94, L 10-18, also included Exhibit 6 filed as pleading tiled Exhibits 6-10 on May 5, 2014). This testimony by Respondent was not contradicted. Further, the trial court also required Respondent to pay Petitioner the amount equal to one-half of these "loans"—loans that were already repaid to the account. The Court's mandate to pay Petitioner caused an incorrect and inequitable distribution to Petitioner. This should be corrected to reflect the true nature of the assets and the financial arrangements agreed to

by the parties. The Utah Supreme Court stated that a property settlement agreement is not binding upon the trial court in a divorce action. "such agreement should be respected and given considerable weight in the court's determination of an equitable division." Clausen, supra, at 564, citing Jackson v. Jackson, Utah, 617 P.2d 338 (1980).

## C. INEQUITABLE DIVISION OF PROPERTY

Utah has a long-established policy in favor of the equitable distribution of marital assets in divorce cases. Utah Code § 30-3-5(1) authorizes Utah courts to enter "equitable orders relating to the children, property, debts or obligations, and parties" in a divorce. Id. In Englert v. Englert, 576 P.2d 1274, 1276 (Utah 1978), the Supreme Court stated that "[t]he import of our decisions implementing [section 30-3-5] is that proceedings in regard to the family are equitable in a high degree; and that the court may take into consideration all of the pertinent circumstances." Id. See Noble v. Noble, 761 P.2d 1369, 1373 (Utah 1988). See Dahl, supra, at ¶ 25 (Utah 2015) ("Thus, by legislative enactment and our long-standing precedent, Utah has an interest in ensuring that marital assets are fairly and equitably distributed during divorce and that divorcing spouses both retain sufficient assets to avoid becoming a public charge."). Indeed, the Noble Court stated that "[t]he overarching aim of a property division, and of the decree of which it and the alimony award are subsidiary parts, is to achieve a fair, just, and equitable result between the parties." Id., at 1373. Here it is clear that the decision of the trial court does not conform with the Separation Agreement, prior Utah precedent or any notion of equity.

Finally, in the alternative, if the Court of Appeals adheres to the lower Court's ruling that the bank accounts were marital property rather than separate property (as Respondent believes was sufficiently identified to and understood in the separation agreement) those funds were not divided equitably. [See chart above as to how they should be divided] (Nov. 2, 2015 hearing court calculations). At the November 2, 2015 hearing, Judge Pettit erroneously added in a fictional $90,000 (monies already spent by Petitioner that she testified to (Transcript April 29, page 87, L 6-12). By initially adding in a fictional $90,000 as if it exists to the sum of the existing marital assets, it inflates the existing assets resulting in an unequal division of the assets. Sequentially, this domino effect continues creating miscalculations throughout the division of the financial accounts to the parties, as each new sum continues to be inaccurate from the fabricated starting balance of what exists. To correct this mistake and to accurately account for the $90,000 that Petitioner took and spent, the Respondent receives a $45,000 "credit" during the division of the financial accounts, whereas Petitioner receives a $45,000 "debit" during the division of the financial accounts, as she has already spent her share and Respondent's share of this marital money. Judge Pettit's calculations "$865,224.72 deduct the $335K from that, takes you down to 532,224.72, add the 90K back in, that gets you to $622,224.72, divide that by 2, which is $310,112.36, take off $45K that she already has used, or taken, and that gets her to 265,112.36" (11/2/15 Hearing CD, second file, SILVERCRT03, 17:27:26-17:28:07)

The trial court is required to provide adequate factual findings which reveal how the court reached its conclusions, Rappleye v. Rappleye, 855 P.2d 260, 263 (Utah Ct. App.

1993), and to "establish[] that the court's judgment or decree follows logically from, and is supported by, the evidence," Dahl, supra. This Court noted that "the touchstone of adequate findings is that they are "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." Hall, supra, at 1021 (citation and internal quotation marks omitted). Adequate findings of fact "enable 'meaningful appellate review'" because an appellate court can understand the trial court's reasoning and assess its compliance with governing law. Keyes, supra, at ¶ 29, citing Neff v. Neff, 2011 UT 6, ¶ 61, 247 P.3d 380 (Utah 2011) (quoting Willey v. Willey, 951 P.2d 226, 230 (Utah 1997)). This Court will find the reasoning of the trial court confused and difficult to understand. Although the trial court found the Separation Agreement valid, it did not follow its intent and distribution. The trial court did not show how the "loans" could possibly be part of the calculations, but instead just deemed them to be so. The Court below based its reasoning and conclusions on inaccurate information and miscalculations, which included as part of the division of assets, some that do not exist and/or had been converted to cash in the financial accounts, including also $90,000 petitioner spent prior to trial. In either event, such a conclusion "works such a manifest injustice or inequity as to indicate a clear abuse of discretion." Turner v. Turner, 649 P.2d 6 (Utah 1982).

## IV. THE TRIAL COURT INCORRECTLY INTERPRETED THE SEPARATION AGREEMENT ON THE ISSUE OF ALIMONY AND PAST DUE ALIMONY.

Foremost the Court's ruling did not follow the parties' agreement with regard to the monthly payments and/or lump sum award. The Court used its award of alimony as a trump card in Petitioner's favor to an inequitable distribution of the parties' assets. This is contrary to the Separation Agreement. The Court ruled the Separation Agreement and Addendum valid (Findings of Fact Nos. 19-21) but contradictorily interpreted the Agreement inequitably against its purpose. The Court found that Respondent's testimony as to the intent and basis for the property distribution in the Separation Agreement was in direct conflict with the language of the agreement, specifically Article 4. (Findings of Fact No. 39). However this language refers to "the property settlement of the parties" which is incorporated in and accounted for in the agreement itself, particularly in the parties' bank account distributions. The property distribution of the Separation Agreement considered the entire marital estate. The Court disregarded the parties' agreement regarding the distribution of the financial accounts allowing for funds to pay the $2,000 monthly payment or terminating such monthly payments for a lump sum payment which represented Petitioner's property distribution. Instead the Court re-distributed the financial accounts and then awarded alimony in addition, against the intent of the Separation Agreement. This reallocation and interpretation resulted in an incorrect and inequitable distribution, despite the Court's recognition that an "equitable distribution" under Utah law is required.

Notwithstanding, as the party seeking an award of alimony, Petitioner bore the burden of providing the district court with sufficient credible evidence of each factor listed in the Alimony Statute. Dahl v. Dahl, 2015 UT 23, ¶ 108 (Utah 2015). See Dority v. Dority, Utah, 645 P.2d 56, 59 (1982) (citations omitted) ("Court will not disturb trial court's distribution of property and award of alimony in a divorce proceeding unless a clear and prejudicial abuse of discretion is shown.").

Again, the parties complied with separation agreement for 16 months. (Findings of Fact Nos. 23 and 27). Petitioner did not raise any issue with the agreed-upon arrangement. In Utah, the decree must be determined "upon the facts, the conditions, and the circumstances of the parties in each particular case..." Hendricks v. Hendricks, 91 Utah 553, 559 (Utah 1936). Further, if, after examination of the record, the court is "convinced that the award in the trial court is inequitable and unjust," it must modify the decree "as it finds to be just and equitable." Id. "The amount of alimony is measured by the wife's needs and requirements, considering her station in life, and upon the husband's ability to pay." Id.

As the party seeking an award of permanent alimony, Petitioner bore the burden of providing the district court with sufficient credible evidence of each factor listed in the Alimony Statute. Dahl v. Dahl, 2015 UT 23, ¶ 108 (Utah 2015). See Dority v. Dority, Utah, 645 P.2d 56, 59 (1982) (citations omitted) ("Court will not disturb trial court's distribution of property and award of alimony in a divorce proceeding unless a clear and prejudicial abuse of discretion is shown."). In this case, Petitioner did not argue for alimony, did not

prove any of factors (See Court Findings of Fact and Conclusions of Law at Section Conclusions of Law, subsection D, Pages 33-35). In her financial declaration, Petitioner declared a $1500/month deficit, however, the evidence at trial did not support the deficit. The trial court gave no weight whatsoever and completely disregarded the evidence: Petitioner's testimony on loan from sister 40K AND 65K inheritance (Transcript April 29, page, 45 L 20 and page 84, L 20 through page 8, L 11). Petitioner's testimony that she took 90K (Transcript April 28, page 262, L 4-9)of additional income that Petitioner possessed and spent from June, 2011 to the time of trial. This was supported by tax returns and her testimony of a $26,500 income, $90,000 taken from Respondent's bank account, and a $65,000 inheritance. This breaks down over period of 2011 when she filed for divorce to the trial, to an excess of $53,000 annually or over $4,400/month. This is more than Petitioner was accustomed to during the marriage, when she received $2,000 per month plus $1800 month rent for her and the parties' son (Transcript April 30, page 72, L 4-13 and page 212, L 17-18). Petitioner made no claim for alimony, as it was readily apparent to the court from the evidence that no need existed, and that Respondent did not have the ability to pay such alimony from his retirement income of approximately $3,000/month. The Utah Supreme Court stated that it was "the duty and prerogative" of this Court in equity matters, where the occasion warrants, and after a review of both the facts and the law, to fashion its own remedy as a substitute for the judgment of the trial court, but that court's actions should only be disturbed to prevent manifest injustice." Penrose v. Penrose, 656 P.2d 1017, 1019 (Utah 1982). The trial court's rulings on alimony and past alimony, based on the record, clearly show an abuse of discretion.

Assuming *arguendo*, that this Court was to accepts the trial court's ruling that past due alimony in the amount of $96,000 (since July 2011) was owed, the calculation of the trail court is in error. The number of months such "alimony" or monthly payments was due was in excess of what would be required, as Petitioner withdrew $90,000 from the bank account in June 2011. This was the date on which she filed for divorce and withdrew this sum as prepaid "alimony"—or a portion of her lump sum payment due to her under the separation agreement. Respondent placed the remaining $310,000 balance of the lump sum due to Petitioner per the Separation Agreement, in trust per her request and Motion in May 2013. At that time only 22 months of payments were due. An amount beyond this was excess and a windfall to Petitioner.

Finally, Petitioner's election of the lump sum per the Separation Agreement resulted in her receiving what amounted to half of the marital estate having a value of $800,000. Alimony must be considered in total distribution in determining need. The Court's order in this case, classifying essentially everything marital awarded Petitioner half of the marital estate and alimony. This is not what was intended in the Separation Agreement. The Utah Alimony Statute, Utah Code § 30-3-5(8), lists seven factors that a court must consider in making an alimony determination. The first three are: (i) the financial condition and needs of the recipient spouse; (ii) the recipient's earning capacity or ability to produce income; and (iii) the ability of the payor spouse to provide support. Utah Code § 30-3-5(8)(a). These first three factors are a codification of the Supreme Court's analysis in Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985), and are often referred to as the Jones factors. A party seeking

alimony bears the burden of demonstrating to the court that the Jones factors support an award of alimony. Dahl, supra, at ¶ 95. In order to satisfy this burden, Petitioner must provide the court with "a credible financial declaration and financial documentation to demonstrate that the Jones factors support an award of alimony." Bakanowski v. Bakanowski, 2003 UT App 357, ¶ 9, 80 P.3d 153 (Utah 2003). Clearly Petitioner did not satisfy these factors based on the evidence on the record. Further, a Court's failure to consider the Jones factors when determining an appropriate alimony award "constitutes an abuse of discretion." Dahl, supra, at ¶ 9, citing Paffel v. Paffel, 732 P.2d 96, 101 (Utah 1986). Here alimony was included in and not an additional component to the parties understanding. Further, Petitioner has not demonstrated a need, and Respondent does not have the ability to pay.

## V. THE TRIAL COURT ERRED IN RENDERING THE SEPARATION AGREEMENT UNENFORCEABLE.

A divorcee decree is reviewed for ambiguity under a correctness standard. Eyring v. Fairbanks, 918 P.2d 489,491 (Utah Ct. app. 1996); Allen v. Hall, 2005 UT App 23,¶8 (Utah Ct. App. 2005). Here the trial court found inconsistently "that "there are no instances of material non-disclosure; both parties were well aware of the financial situation throughout the marriage" that renders the Agreement unenforceable. The trial court in its ruling outlined what it described as an "equitable disposition of property" in conjunction with the Separation Agreement. However, the Court identified and referenced in its Findings of Fact and Decree of Divorce assets that exceed $2.2 million dollars—approximately double the amount of the actual assets of the marital estate presented by the

evidence. In light of this fact, the distribution of the martial assets was overstated and not equitable, with Petitioner receiving excess of $950,000 more than ¾ of the total marital estate. Based on the evidence in the record, the trial court committed legal error and improperly ruled on the property included in the marital estate. The separation agreement was not sufficiently ambiguous as to warrant the court's re-disposition of property already agreed-upon by the parties. The court's calculations were in error, and it relied upon those incorrect results to modify the parties' settlement.

In order to determine the proper interpretation of the divorce decree, the court must determine whether the document is "sufficiently ambiguous that extrinsic evidence is necessary to interpret it." Draper Bank & Trust v. United States, 1994 U.S. Dist. LEXIS 16446 (D. Utah Oct. 25, 1994). Where a divorce decree that is ambiguous and incomplete, the trial court may use extraneous evidence to determine the meaning of the language in the decree. Lyngle v. Lyngle, 831 P.2d 1027 (Utah Ct. App. 1992). Ambiguity exists, the Utah Supreme Court held, if a provision "is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies." WebBank v. Am. Gen. Annuity Serv. Corp., 2002 UT 88, ¶ 20, 54 P.3d 1139 (Utah 2002) (internal quotation marks omitted). See Redd v. Hill, 2013 UT 35, ¶ 18 (Utah 2013), citing Ward v. Intermountain Farmers Ass'n, 907 P.2d 264, 268 (Utah 1995) (stating that an ambiguous interpretation must be "reasonably supported by the language of the contract"). However, that was not the case with the parties' agreement. The bank accounts were clearly understood as to the party's ownership. Assuming *arguendo* that there was

sufficient ambiguity, Respondent presented undisputed evidence as to the meaning (Transcript April 29, page 134 L 6-11 and L 23-25, page 171, L 6-22 and Transcript April 30, page 83, L 2-19).

## VI. THE TRIAL COURT COMMITTED LEGAL ERROR AND IMPROPERLY RULED IN DENYING A NEW TRIAL.

Utah R. Civ. P. 59(a)-(a)(1) provides that a court may grant a new trial, amend or make new findings of fact and conclusions of law, or direct the entry of a new judgment based on "[i]rregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial"), or because of accident or surprise. The court will reverse "...if there is no reasonable basis for the decision." Crookston v. Fire Ins. Exch., 817 P.2d 789, 805 (Utah 1991). [Denial of the grant of a new trial is usually reviewed for abuse of discretion. Promax Dev. Corp. v. Mattson, 943 P.2d 247, 253 (Utah Ct. App.), cert. denied, 953 P.2d 449 (Utah 1997). See Jensen v. Jensen, 555 P.2d 1207, 1208 (Utah 1976]. Standard of review

However, where the trial court relied on its interpretation of a contract provision as grounds for denying the motion, the legal decision is reviewed under a correctness standard. Booth v. Booth, 2006 UT App 144, ¶ 10 (Utah Ct. App. 2006), citing Crookston v. Fire Ins. Exch., 860 P.2d 937, 938 (Utah 1993); Horrell v. State Farm Bureau Ins. Co., 909 P.2d 1279, 1280 (Utah Ct. App. 1996); Corbett v. Seamons, 904 P.2d 229, 232 (Utah Ct. App. 1995). Standard of Review. Further, the Utah Supreme Court has held that "in a divorce proceeding, which is sometimes said to be equitable in the highest degree, the granting of a motion for a new trial need not involve setting aside the resolution of all

issues, but can be limited to reopening the case to just whatever extent the court deems necessary and desirable in the interests of justice." Watson v. Watson, 561 P.2d 1072, 1074 (Utah 1977). In this case, the interests of justice are served by a fair adjudication on accurate and correct calculations, as well as an acknowledgement of the facts on the record which show the true ownership of the banking accounts. The separation agreement accurately provided this information, and the trial judge should be instructed to adhere to this agreement and base any adjustments on the undisputed facts on the record.

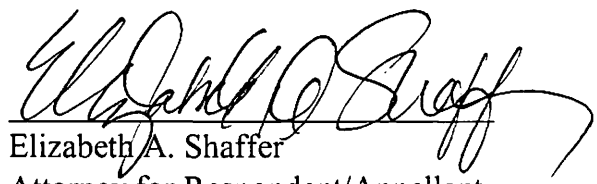
## VII. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT AWARDING ATTORNEY'S FEES.

Based on the actions of Petitioner, the trial Court should have awarded attorney fees to Respondent. The Utah Supreme Court has held that, in divorce cases, "an award of attorney fees must be supported by evidence that it is a reasonable amount and reasonably needed by the party requesting the award." Huck v. Huck, 734 P.2d 417, 419-420 (Utah 1986), citing Beals v. Beals, 682 P.2d 862 (Utah 1984). And just this year, this Court noted that a court failed to make the requisite finding of reasonableness and remanded the case to allow the district court to address the issue of reasonableness and to enter related findings. NOTES: case law and argument regarding attorney fees in contract. Bhongir v. Mantha, 2016 UT App 99, ¶ 24 (Utah Ct. App. 2016). This Court has reversed an award of attorney fees and costs when either financial need or reasonableness has not been shown. Haumont v. Haumont, 793 P.2d 421, 426 (Utah Ct. App. 1990). The Court found no basis to support Petitioner's challenge of the Separation Agreement valid and therefore it was reasonable to award attorney fees to Respondent.

## CONCLUSION

Based on the foregoing, Respondent requests that this Court reverse the decision of the trial court; direct that the court to modify its Findings of Fact and Conclusions of Law to correct its errors in the interpretation of the Separation Agreement, its miscalculations of the assets and inequitable distribution. Specifically, interpret and enforce the terms of the Separation Agreement as the parties' had lived by for 16 months; Distribute the assets including the financial accounts equally after distribution of the $400,000 funds are attributed to Respondent as his separate property and the lump sum payment of $400,000 is attributed to Petitioner as her separate property and Distribute the assets equitably in order for the Respondent to have a fair resolution of this matter.

DATED this 18th day of July, 2016



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*/s/ Elizabeth A. Shaffer*
Elizabeth A. Shaffer

Dated: 7/18/2016

## CERTIFICATE OF SERVICE

I certify that on this the 18th day of July, 2016, a true and correct copy of the foregoing **RESPONDENT'S OPENING BRIEF** was filed via the Court's electronic filing system which automatically delivered service to the following:

Paul J. Morken
P.O. Box 980691
Park City, UT 84098

*/s/ C.Kramer*