

1992

# Wiles v. Wiles : Brief of Appellant

Utah Court of Appeals

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Paul R. Frischknecht; Attorney for Appellee.

C. Robert Collins; Attorney for Appellant.

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## Recommended Citation

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BRIEF

920598

IN THE UTAH COURT OF APPEALS

JOSEPH WILES,

Plaintiff and Appellee.

vs.

JEAN B. WILES,

Defendant and Appellant.

92-0598-CA

Case No. ~~920459~~ CA

APPELLANT'S BRIEF

Priority No. 4

Attorney for Appellant

Attorney for Appellant

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*Appellant's Brief*

NOV 13 1992

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Utah Constitution, Section 11, Article 1

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Utah Code Annotated §78-23-3  
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Utah Code Annotated §78-37-1

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Dixon v. Dixon, 240 P.2d 1211 (1954)  
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### JURISDICTION & NATURE OF PROCEEDINGS BELOW

. The Court of Appeals has appellant jurisdiction in this matter pursuant to Utah Code Annotated 78-28-3(2)(a) since this is an appeal from a final judgment of the Sixth District Court in and for Sanpete County. The judgment was decided upon affidavits at a hearing on Defendant's motion to dismiss and Plaintiff's order to show cause. (Record 34-37)

### STATUTES INVOLVED

This appeal involves the meaning, intent and interpretation of Utah's Homestead Exemption law found in the Utah Constitution and Utah Code Annotated §78-23-2 & 3. (Record 41-44)

Further, this appeal addresses whether the procedures used by the trial court denied Appellant access to the courts under the Utah Constitution. (Record 41-44) The constitutional provisions and statutes involved are reproduced in the appendix of this brief as required by Rule 24 (f) of the Rules of Appeal to the Utah Court of Appeal. (See Page 12 of this Brief)

### ISSUES PRESENTED FOR REVIEW

a. When a trial Court allows the foreclosure a judicial lien on real property by use of an order to show cause, does such a procedure violate a party's right to access to the Courts under the Utah Constitution?

b. Can Plaintiff foreclose a judicial lien when the value of the property is less than the homestead exemption in favor of Defendant?

### STATEMENT OF THE CASE

This appeal arises out of an Order to Show Cause signed by the Honorable Judge Don V. Tibbs of the Sixth Judicial District Court (Record 32-33) and Defendant/Appellant's motion to dismiss the Order to Show Cause. (Record 38-39) The issues in both involved a piece of real property upon which Defendant's mobile home is located. (Record 45-49)

The parties were divorced January 29, 1981. (Record 17-20) The decree of divorce awarded to Plaintiff a lien against the real property which belonged to Defendant prior to the marriage of the parties in the sum of \$6,000 together with interest at the rate of 6% per annum and awarded to Defendant her mobile home which remains on the real property. (Record 45-49)

After entry of the decree, Defendant suffered serious heart problems and retired on social security disability retirement. She never filed an action to modify the decree as to alimony or property which could have done due to her health. (Record 45-49) Instead, on February 6, 1990, Defendant filed a Homestead Declaration against the real property with the Sanpete County Recorder. (Record 49)

The lien was due under the decree on or before December 21, 1991, with the interest. (Record 29-30) The total amount due at the time of hearing before the trial court was about \$10,000. (Record 29-30) Defendant has been unable to pay the lien. (Record 45-49) Plaintiff sought foreclose of the lien by use of an Order

to Show Cause rather than a separate suit for foreclosure. (Record 31-33) The present value of the property which Plaintiff seeks to foreclose is approximately \$4395. (Record 45-49)

#### FINDINGS OF THE COURT

The Court found the facts set forth above and found that at Plaintiff's option he was entitled to foreclose the lien for nonpayment. The Court further found that:

1. Defendant had continuously resided on the property since entry of the decree of divorce.

2. Defendant was not entitled to file a homestead exemption as "...this is not a proper case for the filing of a Homestead Exemption.

3. The Homestead Exemption was not filed while the parties resided together.

4. "....to allow the Homestead Exemption to defeat Plaintiff's lien would defeat the purposes of the Divorce Decree and specifically would frustrate the Court's ability to divide the property in a divorce proceedings." Record 50=51)

#### TRIAL COURT'S ACTIONS

From its finding the Court made no conclusions of law which are found on the record, however, the trial court did deny Defendant's Motion to Dismiss and entered judgment against Defendant and in favor of Plaintiff for \$6,000 principle and \$4,140 in interest. (Record 53-55)

The trial Court also awarded a "Decree of Foreclosure" and ordered that the property should be sold "according to law". (Record 53-55) From the foreclose order and judgment, Defendant appeals. (Record 61) The money judgment is probably proper under the decree.

#### SUMMARY OF ARGUMENT

Appellant believes that she was denied access to the Courts because the trial Court held a summary proceeding when it decided these important issues at an order to show cause and denied Appellant an opportunity to counter-claim to modify the property provisions of the decree based on a substantial change in circumstances.

Appellant also believes that her Homestead Exemption filed pursuant to Utah Code Annotated §78-23, prohibits foreclosure of the lien against the real property in this case.

The action by the Court violates two (2) provisions of the Utah Constitution.

#### ARGUMENTS

1. DENIAL OF ACCESS TO THE COURT: When a trial Court allows the foreclosure a judicial lien on real property by use of an order to show cause, does such a procedure violate a party's right to access to the Courts under the Utah Constitution?

The normal procedure for foreclosure of real property liens is by an independent action at law or by the declaration and



enforcement of a lien. Summary of Utah Family Law, B.Y.U. Journal of Legal Studies, 1990, §11.23.

Utah Code Annotated §78-37-1 states in pertinent part:

"There can be one action for the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate which action must be in accordance with the provisions of this chapter."

Plaintiff does not hold a mortgage on Defendant's real property, but his interest is in the nature of a mortgage and he should be required to file an independent action to foreclose that interest or execute on the property under Rule 64 of the Utah Rules of Civil Procedure by posting a proper bond and following the procedures of the rule.

The purpose of procedural rules is to insure that all parties to litigation are treated fairly. Rule 3 of the Utah Rules of Civil Procedure states that a civil action is commenced by the filing of a complaint. It may be argued that Plaintiff complied with this rule in 1981, however, Rule 15(d) of the Utah Rules of Civil Procedure provides that a supplemental pleading must be filed when events supplemental to the original pleading have occurred which make further pleading necessary.

It may further be argued that the Order to Show Cause method got the issues before the Court, so what difference does it make whether or not compliance with the Civil Rules occurred. This is the bases for rules. Because the Court proceeded to decide the issues of this litigation in a summary proceeding, it denied

Defendant an opportunity to make her counter-claims as permitted by Rule 13 of the Utah Rules of Civil Procedure.

Hansen V. Hansen, 537 P.2d 491 (1975), makes it clear that a party has the right to petition the court to modify a previous decree as to property issues. The Hansen court held that it has jurisdiction to modify property distributions upon proof of changed circumstances and conditions. The changed circumstances or conditions must be shown, however, before modification can occur. Dixon v. Dixon, 240 P.2d 1211 (1954). Property settlement are not "sacrosanct" and are within the power of the court to modify. Chandler v. West, 610 P.2d 1299 (1980).

In Glover v. Glover, 242 P.2d 298 (1952), the Utah Supreme Court held that the Court has jurisdiction to allow modification of the property provisions of a decree of divorce when the other party brings an order to show cause before the court based on changed circumstances. In this case, Defendant did not have any knowledge of Plaintiff's whereabouts until he sought his order to show cause.

In this case, Defendant's affidavit made a prima facie case for a substantial change in circumstances. The original decree did not anticipate that Defendant would suffer serious health problems and be unable to work. It did not contemplate that she would be receiving only a small income a few years later when she was receiving only social security disability payments.

The court has the equitable jurisdiction necessary to modify the decree in this case and to discharged the lien which was

established in the 1981 decree. Defendant should have been given the opportunity to plead her case for modification. The procedure used by the trial Court denied her this right.

The rights of the Defendant were compromised and ignored by the Show Cause nature of this foreclosure. No prejudice would have occurred to Plaintiff had the trial Court dismissed the Order to Show Cause. He could still have filed either a supplemental pleading in the divorce action or a separate action to enforce and foreclose the lien. This would have preserved the Defendant's right to petition the trial Court to modify the decree of divorce as to alimony and as to the property division.

Since the trial court refused to dismiss the Order to Show Cause, it gave Plaintiff an unjust advantage over Defendant who is now faced with a foreclosure and who no longer has the ability to petition the Court for modification since the foreclosure issue is now res' judicata, but for this appeal.

But more importantly, the actions of the trial Court has denied Defendant access to the Courts as guaranteed by Section 11, Article 1, of the Utah Constitution. It must be assumed that access includes the right to have issues properly placed before the court and the right to fully litigate controversies.

In Berry by and through Berry v. Beech Aircraft, 717 P.2d 670 (1985), the Supreme Court held:

"The clear language of the [Open Courts Section] guarantees access to the courts and a judicial procedure that is based on fairness and equality.... A plain reading of Section 11 also

establishes that the framers of the Constitution intended that an individual could not be arbitrarily deprived of effective remedies designed to protect basic individual rights".

The homestead right that Defendant seeks to enforce is a basic right secured by the Constitution and laws of the state of Utah.

2. HOMESTEAD vs. JUDICIAL LIEN: Can Plaintiff foreclose a judicial lien when the value of the property is less than the homestead exemption in favor of Defendant?

Any time a court address the issue of a homestead exemption, it must do so with the purpose of the exemption fully in mind which is to protect the helpless and to insure them shelter and support. Folsom v. Asper, 71 P.2d 315 (1903) The homestead laws should be liberally construed by the Courts. In re Mower's Estate, 73 P.2d 967 (1937).

Although, the trial court found that the Homestead Exemption would ".... defeat the purposes of the Divorce Decree and specifically would frustrate the Court's ability to divide the property in a divorce proceedings", almost all statutes limit the power of Courts. For example, the bankruptcy statutes make enforcement of almost all judicial impossible. In this case, the Court's jurisdiction may have been limited as to the homestead exemption, but it was not limited as to modification of the original decree as previously shown.

The Court's statement that its power is limited by the Homestead Exemption is like saying that the Fourth Amendment that

the U.S. Constitution limits the power of police officers to enforce the law. Both statements are true, however, in a free society, we often made such conscious decisions. There can be little doubt that the framers of the Utah Constitution understood that the Court's power in divorce proceedings as well as other proceedings would be limited by Homestead Exemptions.

. The Homestead Exemption provides that Defendant's property is exempt from execution for up to \$8,000 from judicial action or execution under Utah Code Annotated §78-23-3. Defendant filed her claim of homestead when she learned of her health problems.

She could have filed a petition to modify the decree to seek alimony from Plaintiff, but she deemed her homestead as sufficient protection. The value of the property was \$4395 in 1991, much less than the \$8,000.

Plaintiff's "lien" is defined by Utah Code §78-23-2(6) as ".....a judicial or statutory lien, in property securing payment of a debt or performance of an obligation."

. A homestead may be claimed at anytime between the time the judgment lien is docketed and before sale or execution. Sanders v. Cassity, 586 P.2d 423 (Utah 1978) When the property has a value less than the fair market value of the property, the homesteader takes the property free and clear of the judgment lien. See Sanders, supra.

The homestead exemption applies to Plaintiff's lien since his lien is not a "lien for taxes", is not a lien for "debts created or

the purchase price" of the property and is not a lien for "failure to provide support for....minor child". See Utah Code Annotated 78-23-3(2)

As early as 1900, the Utah Supreme Court held that a homestead right could not be waived in advance of the right being asserted. Bunker v. Coons, 60 P.2d 549 (1900) Defendant did not assert a homestead right until 1990. The 1981 decree could have waive or disregard this undeclared claim in 1981.

The right to claim a homestead exemption is a right that Defendant, as head of her family, may assert to prevent sale under execution at any time before sale, unless the homestead claim had been previously asserted and held not be a valid homestead. Utah Bldrs' Supply Co. v. Gardner, 39 P.2d 327 (1934)

#### CONCLUSIONS

The use of an order to show cause to foreclose a lien on real property denied Defendant access to the courts as guaranteed by the Utah Constitution. She is now barred from litigating the need in equity to modify the original decree as to the line. On the other hand, dismissal of the order to show cause would have not harmed Plaintiff in any way.

Defendant could have filed a petition to modify for alimony or to set aside the lien, but choose instead to rely on her homestead rights. Plaintiff's order to show cause should have been dismissed.

In addition, Plaintiff has no cause action against Defendant since he is barred from foreclosing his lien because of the right

given to Defendant by the Utah Constitution to exempt her homestead from execution and because the value of the property is less than the homestead exemption.

Respectfully Submitted

A handwritten signature in cursive script, appearing to read 'C. Robert Collins', followed by a horizontal line.

C. ROBERT COLLINS  
Attorney for Plaintiff

## APPENDIX

This appendix contains copies of the following documents:

- A. Judgment.
- B. Findings of Fact.
- C. The Notice of Appeal.
- E. Copy Utah Code Annotated §78-23-2 & 3
- F. Copy of Article 1, Section 11, Constitution of Utah



PAUL R. FRISCHKNECHT (1129)  
Attorney for Plaintiff  
50 North Main Street  
Manti, Utah 84642  
Telephone: 835-4391

FILED  
SANPETE COUNTY, UTAH

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KRISTINE F. CHRISTIANSEN  
CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR DEPUTY  
SANPETE COUNTY, STATE OF UTAH

-----oo0oo-----

JOSEPH WILES,	:	JUDGMENT
	:	
Plaintiff,	:	
	:	
vs	:	
	:	
JEAN B. WILES, aka	:	Civil No. 8109
JEAN B. BAXTER	:	Judge: Don V. Tibbs
	:	
Defendant.	:	

-----oo0oo-----

This matter came on regularly on the 23rd day of July, 1992 at 10:00 a.m. on Plaintiff's Order to Show Cause and Defendant's Motion to Dismiss. The Plaintiff was present and represented by his attorney Paul R. Frischknecht, Manti, Utah. The Defendant was present and represented by her attorney, C. Robert Collins, American, Fork, Utah.

The Court having heard evidence presented by the Plaintiff and the Defendant and being fully advised in the premises, made and entered its Findings of Fact.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

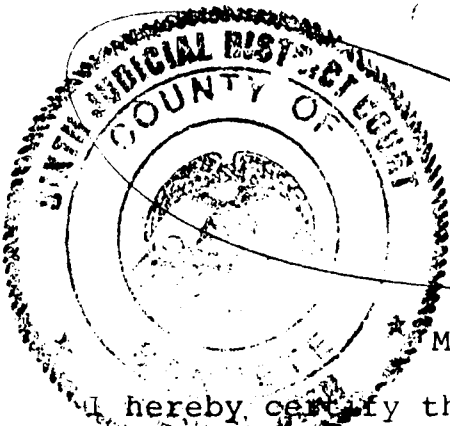
1. Plaintiff is awarded judgment against the Defendant in the principle sum of \$6,000.00 together with interest at the rate of 6% per annum from the 21st day of January, 1981 to the present in the sum of \$4,140.00.
2. That Plaintiff is awarded a Decree of Foreclosure and the

above referred to lien on the hereinafter described real property  
is ordered foreclosed and should be sold according to law, to-wit:

Real property located in Sanpete County, State of Utah

Beginning 7.30 chains East, North 1° 45', East 12.465  
chains, South 88° 45', East 217.60 feet of the Southwest  
Corner of the Southeast Quarter of the Southeast Quarter  
of Section 29, Township 19 South, Range 1 East of the  
Salt Lake Meridian, thence South 88° 45', East 92  
feet, North 1° 45', East 3.72 chains, North 88° 30'  
West 110.28 feet, South 1° 45', West 85.80 feet, South  
89° 30', East 18.28 feet, South 1° 45', West 159.93  
feet to beginning. Containing 0.636 acres.

DATED this 14 day of August, 1992.



Don V. Tibbs  
District Court Judge

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of  
the foregoing judgment, postage prepaid thereon this 6<sup>th</sup> day of  
August, 1992 to the following:

C. Robert Collins  
Attorney for Defendant  
P.O. Box 243  
405 East State Rd.  
American Fork, Utah 84003

Maria Hansen  
Secretary

PAUL R. FRISCHKNECHT (1129)  
Attorney for Plaintiff  
50 North Main Street  
Manti, Utah 84642  
Telephone: 835-4391

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR  
SANPETE COUNTY, STATE OF UTAH

-----oo0oo-----

JOSEPH WILES,	:	FINDINGS OF FACT
	:	
Plaintiff,	:	
	:	
vs	:	
	:	
JEAN B. WILES, aka	:	Civil No. 8109
JEAN B. BAXTER	:	Judge: Don V. Tibbs
	:	
Defendant.	:	

-----oo0oo-----

This matter came on regularly on the 23rd day of July, 1992 at 10:00 a.m. on Plaintiff's Order to Show Cause and Defendant's Motion to Dismiss. The Plaintiff was present and represented by his attorney Paul R. Frischknecht, Manti, Utah. The Defendant was present and represented by her attorney, C. Robert Collins, American Fork, Utah.

The Court having heard the parties arguments on Defendant's Motion to Dismiss and being fully advised in the premises denied Defendant's Motion to Dismiss. The parties having stipulated that the Decree of Divorce between Plaintiff and Defendant was entered on the 29th day of January, 1981, that Plaintiff was awarded a lien against the parties real property in the sum of \$6,000.00 carrying interest at the rate of 6% per annum from the 21st day of January, 1981 until paid. Further that in the event the lien

was not paid by the 21<sup>st</sup> day of December, 1991, Plaintiff could foreclose the lien at his option. The Court being fully advised in the premises:

NOW THEREFORE, makes the following Findings of Fact,

1. That the parties were divorced on the 21st day of January 1981 and the Decree was entered on the 29th day of January, 1981.

2. That pursuant to said Decree of Divorce Plaintiff was awarded a lien against the parties real property in the sum of \$6,000.00 together with interest at the rate of 6% per annum from the 21st day of January, 1981 until paid in full.

3. That in the event the said lien was not paid by Defendant to Plaintiff by the 21st day of December, 1991 Plaintiff could foreclose the lien at his option.

4. That Defendant filed a Homestead Exemption on the real property with the Sanpete County Recorder on the 6th day of February, 1990.

5. That Defendant has resided in the real property since the time of the Divorce.

6. That none of said lien has been paid by the Defendant to the Plaintiff.

7. That this is not a proper case for the filing of the Homestead Exemption.

8. That the Homestead Exemption was not filed while the parties were residing together.

9. That to allow the Homestead Exemption to defeat Plaintiff's lien would defeat the purposes of the Divorce Decree and specifically would frustrate the Courts ability to divide the property in a divorce

proceeding.

DATED this \_\_\_\_ day of August, 1992.

---

Judge Don V. Tibbs  
District Court Judge

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact, postage prepaid thereon this 6<sup>th</sup> day of August to the following:

C. Robert Collins  
Attorney for Defendant  
P.O. Box 243  
405 East State Rd.  
American Fork, Utah 84003

Maria Hansen  
Secretary

FILED  
SANPETE COUNTY, UTAH  
2002 8 PM 3 02

COPY

C. ROBERT COLLINS  
Attorney Defendant  
Utah State Bar #5455  
405 East State Road  
P.O. Box 243  
American Fork, Utah, 84003  
(801) 756-0554

KNOWLEDGE OF CHRISTIANSEN  
CLERK  
BY                      DEPUTY

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IN THE SIXTH JUDICIAL DISTRICT COURT OF UTAH  
IN AND FOR THE COUNTY OF SANPETE

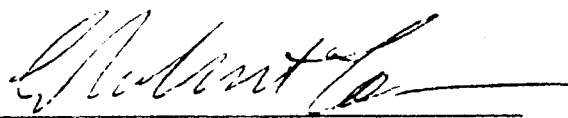
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JOSEPH WILES,	)	
	)	
Plaintiff,	)	NOTICE OF APPEAL
	)	
vs.	)	Civil No. 8109
	)	
JEAN B. WILES,	)	Judge Don V. Tibbs
	)	
Defendant.	)	

=====

NOTICE IS HEREBY GIVEN that Defendant appeals to the Utah Court of Appeals the final judgment of the Honorable Judge Don V. Tibbs, entered in this matter on the 14th day of August, 1992, and entitled Findings of Fact. The appeal is taken from the judgment of the Court in its entirety.

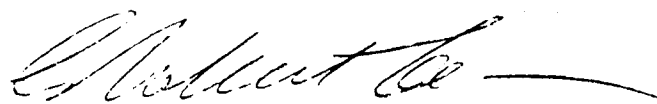
Dated this 4th day of September, 1992.

  
C. ROBERT COLLINS  
Attorney for Defendant

CERTIFICATE OF MAILING

This is to certify that on the 21<sup>st</sup> day of September, 1992,  
a true and correct copy of the foregoing was mailed, postage  
prepaid, to the following:

PAUL R. FRISCHKNECHT  
Attorney for Plaintiff  
50 North Main Street  
Manti, Utah, 84642

A handwritten signature in cursive script, appearing to read "C. Robert Collins", written over a horizontal line.

C. ROBERT COLLINS

... means a legal obligation or liability of an individual, whether arising out of contract, tort, or otherwise.

(2) "Dependent" means the spouse of an individual, and the grandchild or the natural or adoptive child of an individual who derives support primarily from that individual.

(3) "Exempt" means protected, and "exemption" means protection from subjection to a judicial process to collect an unsecured debt.

(4) "Judicial lien" means a lien on property obtained by judgment or other legal process instituted for the purpose of collecting an unsecured debt.

(5) "Levy" means the seizure of property pursuant to any legal process issued for the purpose of collecting an unsecured debt.

(6) "Lien" means a judicial, or statutory lien, in property securing payment of a debt or performance of an obligation.

(7) "Liquid assets" means deposits, securities, notes, drafts, unpaid earnings not otherwise exempt, accrued vacation pay, refunds, prepayments, and other receivables.

(8) "Security interest" means an interest in property created by contract to secure payment or performance of an obligation.

(9) "Statutory lien" means a lien arising by force of a statute, but does not include a security interest or a judicial lien.

(10) "Value" means fair market value of an individual's interest in property, exclusive of valid liens.

1981

**23-3. Homestead exemption — Excepted obligations — "Head of family" defined — Water rights and interests — Conveyance of homestead — Married homestead claimant — Sale and disposition of homestead — Property right for federal tax purposes.**

1) A homestead consisting of property in this state all be exempt in an amount not exceeding \$8,000 in value for a head of family, \$2,000 in value for a spouse, and \$500 in value for each other dependent. A homestead may be claimed in either or both of the following:

- (a) one or more parcels of real property together with appurtenances and improvements; or
- (b) a mobile home in which the claimant resides.

(2) A homestead shall be exempt from judicial lien and from levy, execution, or forced sale, except upon the following obligations:

- (a) statutory liens for taxes and assessments on the property;
- (b) security interests in the property and judicial liens for debts created for the purchase price of such property; and
- (c) judicial liens obtained by debtors created by

dividual with or without dependents or a husband or wife when the claimant is married; but in no case are both husband and wife entitled each to claim a homestead except as otherwise provided by this chapter.

(4) Water rights and interests, either in the form of corporate stock or otherwise, owned by the homestead claimant shall be exempt from execution to the extent that such rights and interests are necessarily employed in supplying water to the homestead for domestic and irrigating purposes; but such rights and interests shall not be exempt from calls or assessments and sale by the corporations issuing the stock.

(5) When a homestead is conveyed by the owner of the property, the conveyance shall not subject the property to any lien to which it would not be subject in the hands of the owner; and the proceeds of any sale, to the amount of the exemption existing at the time of sale, shall be exempt from levy, execution, or other process for one year after the receipt of the proceeds by the person entitled to the exemption.

(6) If the homestead claimant is married, the homestead may be selected from the separate prop-

erty of the husband, or with the consent of the wife from her separate property.

(7) A sale and disposition of one homestead shall not prevent the selection or purchase of another.

(8) For purposes of any claim or action for taxes brought by the Internal Revenue Service, a homestead exemption claimed on real property in this state is considered to be a property right.

1990

**Section 1. [Homestead exemption.]**

The Legislature shall provide by statute for an exemption of a homestead, which may consist of one or more parcels of lands, together with the appurtenances and improvements thereon, from sale on execution.

1990

**Sec. 11. [Courts open — Redress of injuries.]**

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

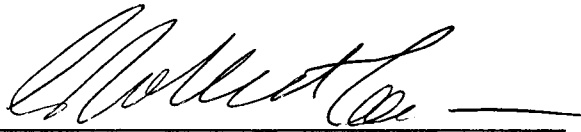
1896



CERTIFICATE OF MAILING

This is to certify that on this 11<sup>th</sup> day of November, 1992,  
four (4) true and correct copies of the foregoing was mailed,  
postage prepaid to the following:

PAUL R. FRISCHKNECHT  
Attorney for Plaintiff  
50 North Main Street  
Manti, Utah, 84642

A handwritten signature in cursive script, appearing to read "C. Robert Collins", written over a horizontal line.

C. ROBERT COLLINS