

1992

## Joseph Wiles v. Jean B. Wiles : Brief of Appellee

Utah Court of Appeals

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BRIEF

UTAH  
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AND  
DOCKET NO. 920598

IN THE  
COURT OF APPEALS  
OF THE  
STATE OF UTAH

JOSEPH WILES

Plaintiff-Appellee,

vs.

JEAN B. WILES

Defendant-Appellant.

Case No. 920598-01  
92-0459-CA

APPELLEE'S BRIEF

Appeal from the Judgement of the  
Sixth Judicial Court of Sanpete County  
Honorable Don V. Tibbs, Judge

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Argument Priority: (16) Any  
matter not included within other  
categories.

**FILED**  
Utah Court of Appeals

JAN 26 1993

*Mary T. Noonan*  
Mary T. Noonan  
Clerk of the Court

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## STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Section 78-2a-3(2)(i), Utah Code Ann. (1992 Repl.). The appeal is from a final judgment, dated August 14, 1992, of the Sixth Judicial District Court for Sanpete County, State of Utah. Notice of Appeal was filed September 4, 1992.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF APPELLATE REVIEW

### ISSUE I

CAN THE HOMESTEAD EXEMPTION BE ASSERTED TO DEFEAT THE  
EQUITABLE DIVISION OF PROPERTY ISSUED A DIVORCE PROCEEDING?

### STANDARD OF REVIEW

Whether the lien created in a divorce proceeding is superior to a homestead claim is a question of law. A conclusion of law is reviewed for correctness without any special deference to the decision of the trial court. Western Kane County Special Service District No. 1 v. Jackson Cattle Co., 744 P.2d 1376, 1378 (Utah 1987).

### ISSUE II

IS AN ORDER TO SHOW CAUSE A PROPER PROCEDURE FOR  
ENFORCEMENT OF A LIEN CREATED BY THE PROPERTY DIVISION  
IN THE DIVORCE PROCEEDING?

### STANDARD OF REVIEW

The trial court in a divorce action has considerable



discretion in equitably adjusting the financial and property interests of the parties. The court's distribution of property is endowed with a presumption of validity should not be disturbed on appeal unless it is clearly unjust or a clear abuse of discretion. Gardner v. Gardner, 748 P.2d 1076, 1078 (Utah 1988); Argyle v. Argyle, 688 P.2d 468, 470 (Utah 1984); Rasband v. Rasband, 752 P.2d 1331, 1335 (Utah Ct. App. 1988). To the extent the question whether the nature of the proceeding is proper is a question of law it should be reviewed under the correctness of error standard. Jackson Cattle Co., 744 P.2d at 1378.

## **CONSTITUTIONAL PROVISIONS AND STATUTES TO BE INTERPRETED**

### **Utah Constitution**

#### **Article I, section 7. Due Process of Law**

No person shall be deprived of life, liberty or property, without due process of law.

#### **Article I, section 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.

#### **Article XXII, 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.

### **Utah Code Annotated**

#### **Section 30-3-5 (1). Disposition of property**

(1) When a decree of divorce is rendered, the court may include

in it equitable orders relating to the children, property, and parties. The court shall include the following in every decree of divorce:

- (a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children; and
- (b) if coverage is available at a reasonable cost, and order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children.

Section 30-3-5 (3). Courts to have continuing jurisdiction

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health and dental care, or the distribution of the property as is reasonable and necessary.

Section 78-28-3. 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 shall be exempt in an amount no 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 liens 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 on debts created by failure to provide support or maintenance for dependent children.

(3) The term "head of family" includes a single individual 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 interest, 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 be 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 the 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 property 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.

IN THE UTAH COURT OF APPEALS

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JOSEPH WILES,

Plaintiff-Appellee,

vs.

Case No. 92-0459-CA

JEAN B. WILES,

Defendant-Appellant.

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APPELLEE'S BRIEF

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STATEMENT OF THE CASE

This is an appeal from the final judgment, dated August 14, 1992, of the Honorable Judge Don V. Tibbs of the Sixth Judicial Court for Sanpete County, State of Utah.

Joseph and Jean Wiles were divorced January 29, 1981. ( See Trial Court's Findings of Fact, hereinafter "Findings", at 2.) By its divorce decree, the court made an equitable division of the marital property and awarded Jean, the Defendant, certain property, including real property consisting of approximately 0.6 acres and the mobile home which is located on the real property. (Findings, at 1-2.) As part of the property division, the court also awarded Joseph, the Plaintiff, a lien on the real property in the amount of \$6000.00 plus interest at the rate of 6% from January 21, 1981 until paid. (Findings, at 2.) The Divorce Decree stated that if the obligation was not paid by the Defendant by December 21, 1991, the Plaintiff could foreclose the

lien at his option. (Findings, at 2.)

The Defendant has continued to reside on the property since the time of the divorce but has paid none of the obligation.

(Findings, at 2.) On February 6, 1991, the Defendant filed a declaration of homestead with the Sanpete County Recorder encompassing the property which is subject to the lien.

(Findings, at 2.) On July 15, 1992, the court issued an Order to Show Cause, requesting the Defendant to appear an show cause why the lien awarded in the Divorce Decree should not be foreclosed and the property sold to satisfy the obligation. (See Order to Show Cause, at 1.) At a hearing on the order, the Defendant argued that the lien could not be foreclosed because the property had been claimed as a homestead and was, therefore, exempt from judicial lien and forced sale. The court denied the Defendant's motion to dismiss, finding that this was "not a proper case for the filing of the Homestead Exemption." (Findings, at 2.) The court also found that allowing the Homestead Exemption to defeat this lien "would defeat the purposes of the Divorce Decree and . . . frustrate the Court's ability to divide the property in a divorce proceeding." (Findings, at 2.) Judgment was awarded in favor of the Plaintiff for \$10,140.00, consisting of principle in the amount of \$6000.00 and interest accrued from January 21, 1981 in the amount of \$4,140.00. The court also awarded the Plaintiff a Decree of Foreclosure and ordered the real property sold. (Judgment, at 1-2.)

The Defendant acknowledges that the money judgment is

correct but appeals the foreclosure order. (Appellant's Brief,  
at 6.)

## **SUMMARY OF ARGUMENT**

### **I. THE HOMESTEAD EXEMPTION CANNOT BE USED TO DEFEAT THE PROPERTY RIGHTS AND INTERESTS AWARDED IN A DIVORCE PROCEEDING PURSUANT TO THE COURT'S AUTHORITY TO MAKE AN EQUITABLE DIVISION OF THE MARITAL PROPERTY.**

The trial court in the present case held that the homestead exemption could not be used to defeat the equitable division of property ordered in a divorce proceeding. This issue has never directly been addressed by Utah appellate courts but has been addressed in many other jurisdictions. Several principles, which are consistent with Utah law, emerge from these cases. The principles dictate that property interests awarded to one spouse in a divorce proceeding be superior to the homestead claim of the other spouse.

First, the homestead law is a family shield which should not be employed by either spouse to wrong the other. Second, the homestead exemption cannot be used to frustrate the power of the court to make an equitable division of property in a divorce proceeding. Finally, the situation in this case, where the Plaintiff's homestead interest was conveyed to the Defendant subject to a lien, is analogous to the situation where property is conveyed subject to a lien which secures payment of the purchase price. Purchase price obligations are specifically excepted from the homestead exemption.

### **II. THE ORDER TO SHOW CAUSE WAS A PROPER PROCEDURE FOR ENFORCEMENT OF A LIEN CREATED BY THE PROPERTY DIVISION IN THE DIVORCE PROCEEDING.**

After a decree of divorce is rendered, the trial court has continuing jurisdiction to make new orders for the distribution

of the property as is reasonable and necessary. Therefore, it was not necessary that the Plaintiff file a separate action to enforce the provisions of the Divorce Decree and foreclose on the real property. An order to show cause is a common proceeding to enforce the provisions of a divorce decree.

The Defendant has not been denied access to the courts. She argues in her brief that she was denied the opportunity to request modification by the nature of the proceeding. But it is obvious from the record that the only reason modification was not considered by the court at any time during the pendency of this divorce matter is that the Defendant chose not to request it. The judicial procedure used in this case is based on fairness and equality, and the Defendant has not been arbitrarily deprived of effective remedies designed to protect basic individual rights. She has had her "day in court"; initially at the original divorce trial and subsequently at the hearing on the order to show cause. At the hearing she had the opportunity of being heard and introducing evidence to establish her defenses to the foreclosure. Having freely chosen not to assert her claimed right to modification of the divorce decree she cannot now complain that the opportunity was denied her.



## ARGUMENT

### POINT I

**THE HOMESTEAD EXEMPTION CANNOT BE USED TO DEFEAT THE PROPERTY RIGHTS AND INTERESTS AWARDED IN A DIVORCE PROCEEDING PURSUANT TO THE COURT'S AUTHORITY TO MAKE AN EQUITABLE DIVISION OF THE MARITAL PROPERTY.**

The Utah Constitution requires that the "Legislature shall provide by statute for an exemption of a homestead . . . from sale on execution." Utah Const. art. XXII, § 1. The Legislature's response to this edict, the statutory homestead exemption, is presently codified as part of the Utah Exemptions Act. Utah Code Ann. §§ 78-23-3, 78-23-4 (1992 Repl.). The exemption provides that "[a] homestead shall be exempt from judicial lien and from levy, execution, or forced sale." *Id.* at § 78-23-3(2).

The homestead exemption is not absolute. According to the statute, the homestead is not exempt from lien, execution or forced sale upon three types of obligations: statutory liens for taxes and assessments on the property, security interests or judicial liens for debts created for the purchase price of the property, and judicial liens obtained on debts created by failure to provide support for dependent children. *Id.* at § 78-23-3(2)(a)-(c). The statute has been interpreted to except all consensual security interests, whether they are the result of either purchase money or of non-purchase money obligations, from the scope of the homestead exemption. P.I.E. Employees Federal Credit Union v. Bass, 759 P.2d 1144, 1152 (Utah 1988). Furthermore, it has been held that the homestead exemption does

not protect property from execution where the underlying obligation arose from the debtor's fraud and the fraudulently obtained funds were used to retire delinquencies on the property claimed as a homestead. This is true even though the situation is not an exception provided in the statute. Tabish v. Smith, 572 P.2d 378 (Utah 1977).

The trial court in the present case held that the homestead exemption could not be used to defeat the equitable division of property ordered in a divorce proceeding. This issue has never directly been addressed by Utah appellate courts but decisions in many other jurisdictions have held that property interests granted to a person in a divorce proceeding are superior to the homestead right claimed by the person's former spouse.

The Nebraska Supreme Court has ruled that the homestead exemption cannot be asserted to defeat the claim of a former spouse for alimony, stating:

The husband's right to an exempt homestead cannot, we think, be asserted against the wife, who has been forced by his aggression to leave his domicile, and who, in an action for divorce, has obtained a judgment for alimony against him. The homestead law is a family shield, and cannot be employed by either spouse to wrong the other.

Best v. Zutavern, 53 Neb. 604, 74 N.W. 64 (1898); see also In re Holtzhauser, 117 B.R. 519, 521 (Bankr. D. Neb. 1990) (for the same reasons, a claim for child support is not defeated by a homestead claim).

The Supreme Court of Kansas has stated that "a lien upon a husband's property designed to secure the payment of court-

decreed alimony to his former wife will overcome a homestead claim." Bohl v. Bohl, 670 P.2d 1344, 1347 (Kan. 1983) (citing Blankenship v. Blankenship, 19 Kan. 159 (1877)). The Bohl Court went on to hold that a lien imposed to enforce a division of property will also overcome a homestead claim because "[w]hile the term alimony once represented the husband's common law duty of support and was a distinct concept from property division, modern decisions recognize the distinction has been eliminated over the years. The terminology use to describe the award is no longer significant." Id.

The Oklahoma Supreme Court has ruled that "[t]he homestead law is a family shield, and cannot be employed by either spouse to wrong the other. Accordingly it is generally held that a decree for alimony may be declared a lien on the family homestead, even though title thereof is vested in the husband . . . ." Haven v. Trammel, 193 P. 631 (Okla. 1920). In reaching this decision the Oklahoma Court quoted an early Kansas decision concerning the power of the court to authorize the sale of homestead property to satisfy a lien for alimony:

The power to take the homestead from the husband and assign the same to the wife, is the exercise of greater power than making a sum allowed as alimony a lien upon all the property of the husband, and ordering the same sold to discharge the lien. The greater power included the less; and we find no error as to the sale of the homestead . . . .

Id. (quoting Blankenship v. Blankenship, 19 Kan. 159 (1877)).

In Oklahoma, as in Kansas, the rule applies not only to liens for alimony but also liens that have been established on

homestead property to effect property divisions in divorce proceedings. A Federal Bankruptcy Court in Oklahoma held that "it is clear that under State law, the Oklahoma homestead exemption cannot be used to defeat property rights and interests awarded in divorce proceedings to accomplish fair property divisions between the parties thereto." In re Scott, 12 B.R. 613, 616 (Bankr. W.D. Okl. 1981).

Court decisions interpreting Iowa law have reached results similar to those interpreting the homestead exemptions of Kansas, Oklahoma and Nebraska, but the decisions are based on somewhat different reasoning. The Iowa homestead law provides that a homestead is exempt from judicial sale "where there is no special declaration of statute to the contrary." Iowa Code § 561.16. The Iowa Supreme Court has recognized that Iowa Code § 598.21, the statute which grants Iowa courts the power to make an equitable distribution in a divorce proceeding, "is a 'special declaration of statute' which makes the homestead laws ineffective to bar judicial sale or other disposition of the homestead in adjusting the parties' property rights." Kobriger v. Winter, 263 N.W.2d 892, 894 (Iowa 1978); see also In re Marriage of Tierny, 263 N.W.2d 533, 534 (Iowa 1978); In re Reindeers, 138 B.R. 937, 942 (Bankr. N.D. Iowa 1992); In re Adams, 29 B.R. 452, 454 (Bankr. N.D. Iowa 1982).

Texas courts have concluded that "in a divorce action a lien may be placed upon a spouse's real property homestead to secure the payment of the amount awarded to the other spouse for that

other spouse's homestead interest." Lettieri v. Lettieri, 654 S.W.2d 554, 559 (Tex. Ct. App. 1983) (citing Wierzchula v. Wierzchula, 623 S.W.2d 730, 732 (Tex. Ct. App. 1981)). In Lettieri the spouses were co-owners of the property. The divorce decree awarded the husband title and possession of the home and the wife a money judgment as compensation for her interests in the property. At the moment of divorce the wife's ownership interest in the property was converted to a money judgment and the judgment specifically created her lien on the property. The court stated:

The husband can clear the lien easily by paying the money judgment awarded to the wife. If he elects not to and the wife is forced to foreclose her lien, this in no way would harm the husband nor would it be a violation of the homestead exemption. The homestead exemption was also the wife's entitlement prior to the time that the divorce was granted, a right which she had taken away from her by the court, and for which she was simultaneously awarded a judgment lien as compensation.

Id.

Several principles, which are consistent with Utah law, emerge from these cases. The principles dictate that property interests awarded to one spouse in a divorce proceeding be superior to the homestead claim of the other spouse.

First, the homestead law is a family shield which should not be employed by either spouse to wrong the other. See Best v. Zutavern, 53 Neb. 604, 74 N.W. 64 (1898). The purpose of the homestead exemption is to protect the family from destitution which could result from foreclosure or forced sale by outside creditors. Panagopulos v. Manning, 93 Utah 198, 203, 69 P.2d

614, 617 (1937). The policy considerations in favor of the homestead law do not exist when the obligation which the homestead claimant seeks to avoid is owed to another family member. Utah's homestead statute explicitly acknowledges this concept when it provides that homestead property is not exempt from execution or forced sale to satisfy "judicial liens obtained on debts created by failure to provide support or maintenance for dependent children." Utah Code Ann. § 78-23-3(2)(c) (1992 Repl.). The same rationale which causes the homestead claim of one spouse to be inferior to claim of the other spouse for child support or alimony, dictates that the homestead claim also yield to the property interests which are awarded to the other spouse in a divorce proceeding. See Bohl v. Bohl, 670 P.2d 1344, 1347 (Kan. 1983); In re Scott, 12 B.R. 613, 616 (Bankr. W.D. Okl. 1981); In re Holtzhauser, 117 B.R. 519, 521 (Bankr. D. Neb. 1990). Thus, the trial court correctly ruled that the Defendant could not assert the homestead exemption to defeat the property interests which were granted to the Plaintiff in the Divorce Decree.

Second, the homestead exemption cannot be used to frustrate the power of the court to make an equitable division of property in a divorce proceeding. Under Utah law, the court in a divorce proceeding is "empowered to make such distributions [of marital property] as are just and equitable, and may compel such conveyances as are necessary to that end." Jackson v. Jackson, 617 P.2d 338, 340-41 (Utah 1980); see also Utah Code Ann. §30-3-

5(1) (1989 Repl.). This power includes the authority to grant to one spouse an interest in property which was the separate property of the other spouse prior to the marriage. Workman v. Workman, 652 P.2d 931, 933 (Utah 1982). The power to take the homestead from one spouse and assign the same to the other spouse, is the exercise of greater power than making a sum allowed in favor of the husband a lien upon the property granted to the wife, and ordering the same sold to discharge the lien. The greater power includes the less and cannot be frustrated by a homestead claim. See Blankenship v. Blankenship, 19 Kan. 159 (1877).

The statutory exceptions to the Utah homestead exemption do not include an exception for "special declaration of statute to the contrary" comparable to the exception found in the Iowa statute. See Kobriger v. Winter, 263 N.W.2d 892, 894 (Iowa 1978). It is important to note, however, that the Utah code does grant divorce courts the authority to make divisions of marital property. Utah Code Ann. § 30-3-5(1) (1989 Repl.). The homestead exemption should be inoperative to the extent that it interferes with ability of the courts to exercise this specific grant of authority. To allow the Defendant to assert the homestead exemption in this case would thwart the divorce court's power to divide the marital property and cannot be allowed.

Finally, the document which gave rise to the Plaintiff's lien was the Divorce Decree. It was this same document which operated to convey the Plaintiff's interest in the homestead to

the Defendant. Thus, it may be said that the property was conveyed to the Defendant subject to the Plaintiff's lien to secure payment of the Plaintiff's share of the property settlement. This situation is comparable to the situation where property is conveyed subject to a lien which secures payment of the purchase price. See In re Scott, 12 B.R. 613, 615 (Bankr. W.D. Okl. 1981). According to the Utah statute, a homestead is not exempt from forced sale to satisfy "debts created for the purchase price of such property." Utah Code Ann. § 78-23-3(2)(b) (1992 Repl.).

The Wiles were co-owners of the property, the Divorce Decree awarded the Defendant title and possession of the mobile home and lot and the Plaintiff a money judgment as compensation for his interests in the property. At the moment of divorce, the Plaintiff's ownership interest in the property was converted to a money judgment and the judgment specifically created his lien on the property. As phrased by the Texas Court of Appeals, "the homestead exemption was also the [husband's] entitlement prior to the time the divorce was granted, a right which [he] had taken away from [him] by the court, and for which [he] was simultaneously awarded a judgment lien as compensation." Lettieri v. Lettieri, 654 S.W.2d 554, 559 (Tex. Ct. App. 1983). The Defendant could have cleared the lien by paying the money judgement, the validity of which she does not dispute. She has elected not to pay, forcing the Plaintiff to foreclose his lien. This foreclosure is not a violation of the homestead exemption.



## POINT II

### THE ORDER TO SHOW CAUSE WAS A PROPER PROCEDURE FOR ENFORCEMENT OF A LIEN CREATED BY THE PROPERTY DIVISION IN THE DIVORCE PROCEEDING.

The Defendant contends that the order to show cause proceeding denied her access to the courts. She asserts that an order to show cause is not a proper procedure for foreclosing a lien and that use of the order to show cause denied her the opportunity to petition the court to modify the property provisions of the divorce decree. There is no indication in the record, however, that the Defendant was denied the opportunity, either at the hearing on the order to show cause or before, to assert that her change in health would justify modification of the property division.

After a decree of divorce is rendered, the trial court "has continuing jurisdiction to make subsequent changes or new orders for . . . the distribution of the property as is reasonable and necessary. Utah Code Ann. § 30-3-5(3) (1989 Repl.). Therefore, it was not necessary that the Plaintiff file a separate action to enforce the provisions of the Divorce Decree and foreclose on the real property. An order to show cause is a common proceeding to enforce the provisions of a divorce decree. See, e.g., Kanzee v. Kanzee, 668 P.2d 495, 496 (Utah 1983); Chandler v. West, 610 P.2d 1299, 1300 (Utah 1980).

The Divorce Decree in the present case is dated January 29, 1981 and provides that the lien in favor of the Plaintiff could not be foreclosed until December 21, 1991. During the ten-year

interim, the Defendant made no payments on her \$6000.00 obligation but, on the other hand, never petitioned the court to modify the Divorce Decree. The record does not reveal when the Defendant began to experience health problems. But presumably it was before she filed the homestead exemption on February 6, 1990. Thus, the Defendant's claimed change in circumstance occurred, at the latest, nearly two years before the date designated in the Divorce Decree for foreclosure on the lien and two and one-half years before the Plaintiff requested the order to show cause to enforce the lien in July of 1992. Rather than request that the lien be modified or set aside, however, the Defendant chose instead to rely on her homestead exemption. (See Appellant's Brief, at 12.)

In July 1992, the Defendant was ordered to appear and show cause why the lien granted in the parties' divorce decree should not be enforced and the real property sold to satisfy the lien. The Defendant could have countered with an order to show cause seeking to modify the Divorce Decree based on changed circumstances, but did not. See e.g. Kanzee v. Kanzee, 668 P.2d 495, 496 (Utah 1983). The Defendant had further opportunity to seek the equitable power of the court to modify the lien at the hearing on the order to show cause. The purpose of the order to show cause is to afford the responding party an opportunity to present to the court facts and reasons why the relief sought by the order should not be granted. 56 Am. Jur. 2d Motions, Rules and Orders § 34. At the hearing the Defendant argued her claimed

homestead exemption as a defense to the foreclosure but did not request that the court modify the decree.

The Defendant argues in her brief that she was denied the opportunity to request modification by the nature of the proceeding. But it is obvious from the record that the only reason modification was not considered by the court at any time during the pendency of this divorce matter is that the Defendant chose not to request it.

Although the Defendant has never requested that the decree be modified, she argues in her brief that her affidavit in support of the motion to dismiss made a prima facie case for modification of the property provisions of the Divorce Decree. A trial court sitting in a divorce matter retains continuing jurisdiction to make such modifications in the initial decree of divorce as it deems just and equitable. Nevertheless, any modification must be justified by some change in circumstance of the parties. Foulger v. Foulger, 626 P.2d 412, 414 (Utah 1981); Utah Code Ann. § 30-3-5 (1989 Repl.). Where property settlements are in question the trial court should be more reluctant to grant a modification. The Utah Supreme Court has stated, "property settlements are entitled to a greater sanctity than alimony and support payments in proceedings to modify divorce decrees." Chandler v. West, 610 P.2d 1299, 1300 (Utah 1982) (citing Land v. Land, 605 P.2d 1248 (Utah 1980)).

Even if it is assumed that the issue of modification was properly placed before the trial court it is apparent that the

trial court was not persuaded that the Defendant's change in circumstance justified modification or elimination of the lien. After hearing the evidence the court ordered the lien foreclosed and the property sold. The trial court has considerable discretion in equitably adjusting the financial and property interests of the parties to a divorce and the court's resolution of those interests should not be disturbed on appeal unless it is clearly unjust or a clear abuse of discretion. Gill v. Gill, 718 P.2d 779 (Utah 1986).

The Defendant claims that the actions of the trial court denied her access to the courts as guaranteed by Article I, section 11 of the Utah Constitution. The basis for this argument is unclear. The Defendant has not been denied "access to the courts." Berry v. Beech Aircraft, 717 P.2d 670, 675 (Utah 1985). As explained above, the only reason that the court has not considered modification of the Divorce Decree is that the Defendant has never requested such action. Furthermore, the judicial procedure used in this case is "based on fairness and equality", and the Defendant has not been "arbitrarily deprived of effective remedies designed to protect basic individual rights." Id.

The Open Courts provision is closely related in both historical origin and constitutional function to the Due Process Clause of Article I, section 7. Id. Thus, the "remedy by due course of law" guaranteed by section 11 is similar to the "due process of law" guaranteed by section 7. Utah Const. art. I, §§

7, 11. Due process requires timely notice and an opportunity to be heard. The Utah Supreme Court has explained the due process guarantee as follows:

Many attempts have been made to further define "due process" but they all resolve into the thought that a party shall have his day in court--that is each party shall have the right to a hearing before a competent court, with the privilege of being heard and introducing evidence to establish his cause or defense, after which comes judgment upon the record thus made.

Christiansen v. Harris, 163 P.2d 314, 316 (Utah 1945). There are no decisions to indicate that the specific guarantee of access to the courts found in Article I, section 11 provides any greater protection than the general due process requirement found in Article I, section 7. See Celebrity Club, Inc. v. Utah Liquor Control Comm'n, 657 P.2d 1293, 1296 (Utah 1982).

The Defendant has had her "day in court"; initially at the original divorce trial and subsequently at the hearing on the order to show cause. At the hearing she had the opportunity of being heard and introducing evidence to establish her defenses to the foreclosure. Having freely chosen not to assert her claimed right to modification of the divorce decree she cannot now complain that the opportunity was denied her.

### CONCLUSION

The trial court correctly determined that the Plaintiff's lien is superior to the Defendant's homestead claim. Furthermore, an order to show cause was a proper proceeding to enforce the provisions of the Divorce Decree. Therefore, the

judgment of the trial court should be affirmed.

Respectfully submitted,



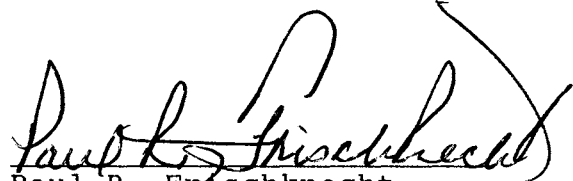
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#### MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy  
of the foregoing Appellee's Brief, postage prepaid thereon  
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