

1992

Varna E. Heesch, formerly known as Varna E. Jorgensen v. Victor W. Jorgensen : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 920572CA

IN THE UTAH COURT OF APPEALS

VARNA E. HEESCH, formerly)
known as VARNA E. JORGENSEN,

Plaintiff-Appellant,)

vs.)

Court of Appeals No. 920572-CA

VICTOR W. JORGENSEN,)

Priority No. (16)

Defendant-Appellee.)

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FIRST DISTRICT COURT
IN AND FOR CACHE COUNTY, STATE OF UTAH
HONORABLE GORDON J. LOW, JUDGE

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FILED

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

VARNA E. HEESCH, formerly)
known as VARNA E. JORGENSEN,

Plaintiff-Appellant,)

vs.)

VICTOR W. JORGENSEN,)

Defendant-Appellee.)

Court of Appeals No. 920572-CA

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

VARNA E. HEESCH, formerly)
as VARNA E. JORGENSEN,

Plaintiff-Appellant,)

vs.)

VICTOR W. JORGENSEN,)

Defendant-Appellee.)

APPELLANT'S BRIEF

Court of Appeals No. 920572-CA

JURISDICTION OF APPELLATE COURT

This matter was transferred to the Court of Appeals pursuant to UTAH CODE ANN. §78-2-2(4). The Court of Appeals may also have jurisdiction over this matter pursuant to UTAH CODE ANN. §78-2a-3(i) (1953 as amended).

STATEMENTS OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court fail to construe the complaint and all allegations and reasonable inferences therefrom in light most favorable to the plaintiff?

2. Did the appropriate statute of limitations bar the present action?

3. Does the equitable doctrine of laches or estoppel bar the plaintiff from proceeding with her claim?

STANDARD OF REVIEW

1. When a motion to dismiss is granted, the appellate court must view all allegations of the complaint to be true and liberally construe all reasonable inferences in favor of the plaintiff. Despain v. Despain, 682 P.2d 849 (Utah 1984).

2. The statute of limitations in the State of Utah is either an eight-year period (an action on a judgment) or a six-year period (contract or instrument in writing). Since the present action was commenced on January 11, 1990, under either code section the statute of limitations would not have run. UTAH CODE ANN. §78-12-22, 78-12-23.

STANDARD OF REVIEW ON APPEAL

The correctness of a Rule 12(b)(6) dismissal is a question of law and the trial court's ruling is given no special deference on appeal. St. Benedicts Dev. Co. v. St. Benedicts Hosp. 811 P.2d 194, 196 (Utah 1991). When reviewing a motion to dismiss under URCP Rule 12(b)(6) an appellate court views the facts in a light most favorable to the party against which the motion was brought and accepts the facts alleged in the complaint to be true, including reasonable inferences drawn from these facts.

Debry v. Valley Mort. Co. 192 Utah Adv. Rep. §5 (Utah Ct. App. 1992).

DETERMINATIVE STATUTES AND RULES

1. UTAH CODE ANN. §78-12-22 states:

Within eight years an action:

(1) upon a judgment or decree of any court of the United States, or of any state or territory within the United States.

(2) to enforce any liability due or to become due, for failure to provide support or maintenance for dependent children.

UTAH CODE ANN. §78-12-23 states:

Within six years:

(1) An action for the mesne profits of real property.

(2) An action upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22.

(3) An action instituted under Section 78-11-12.5 regarding distribution of criminal proceeds to any victim.

UTAH CODE ANN. §30-3-5(3) (Sup. 1991)

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 and obligations for debts as is reasonable and necessary.

STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiff filed an action against the defendant, her former husband, on January 10, 1990 alleging that the divorce decree entered on January 11, 1985 failed to divide numerous items of personal and real property, that the defendant fraudulently hid assets at the time of the parties' divorce, that the husband failed to account for and credit to wife certain assets after the divorce, and that the defendant should account to the plaintiff for the assets he took from the marriage which were not provided for in the divorce decree.

B. Course of Proceedings

After filing the verified complaint, the defendant filed a motion to dismiss and later filed an amended motion to dismiss. Discovery had not been completed and depositions had not been filed. The litigants and the trial court did not treat the motion to be a motion for summary judgment. The trial court reviewed the various memorandums of law and granted defendant's motion to dismiss. From that order of dismissal, the plaintiff appeals.

RELEVANT FACTS

A decree of divorce was entered into between the parties on January 11, 1985. (Record, page 2. Hereinafter references to the record will be shown as R.).

The divorce decree was granted pursuant to a Stipulation and Property Settlement Agreement entered into between plaintiff and defendant. (R.2)

At the time of the divorce action, the defendant specifically stated he wanted to keep the settlement simple, and that he would give half of all assets to plaintiff. The defendant, also, did not want child support mentioned in the decree. (R.2)

The plaintiff entered into the Property Settlement Agreement based upon the representation of the defendant that he, Victor W. Jorgensen, had made a full and complete disclosure of all marital assets, debts and obligations, profit and pension plans, investments, savings accounts or other matters which could possibly be constituted to be marital assets. (R.2)

The plaintiff alleged in her complaint that the defendant fraudulently concealed, hid or secreted from her knowledge certain assets acquired during the marriage. Among the assets not accounted for are:

(a) Savings account at Commercial Security Bank, now known as Key Bank, Logan Office, containing approximately \$800.00;

(b) Mountain American Credit Union Account No. 2292278Y with an approximate balance of \$10,000.00;

(c) Miscellaneous life insurance policies;

(d) Morton Thiokol bonus in the approximate amount of \$2,500.00;

(e) Check from Margarita Jorgensen for approximately \$1,500.00 from a loan payment;

(f) Equity on former residences located at 1616 East 1400 North, Logan, Utah, and 4153 Falcon Street, Salt Lake city, Utah;

(g) Silver coins purchased in the spring of 1980, valued at \$500.00. (R.3,4)

The plaintiff alleged there may be other assets which were hid, secreted or undisclosed by the defendant for which she was entitled to a marital interest, and plaintiff requested the right to conduct further discovery as necessary to determine other assets hidden by defendant. To this end the deposition of Victor Jorgensen was taken and he acknowledged some assets were not disposed of by the decree. (R.4)

Plaintiff further requested that the court determine that as a matter of law the plaintiff is entitled to one-half interest in and to any marital assets which were not disclosed in the divorce decree, or which were not fully litigated between the parties.

(R.4)

As a second cause of action, the plaintiff realleged the allegations in the first cause of action and further alleged that the defendant remained in the home located at Cedar Heights, with an understanding the defendant would pay to plaintiff the fair rental value of said home until the home was sold or plaintiff received her share of the assets. (R.4)

The defendant remained in the home for a one-year period of time without paying any rent to plaintiff, and plaintiff had made repeated demands upon defendant and plaintiff is entitled to the amount of \$7,200.00 as fair rental value of said property.

(R.5)

As a third cause of action, the plaintiff realleged paragraphs 1 through 11 of the first and second causes of action and further alleged that the actions of the defendant in failing to disclose and in deliberately hiding assets amounted to contempt of court and an abuse of judicial process, and the defendant's actions were so contrary to public policy, that the defendant should be made to pay all costs, expenses and

attorney's fees incurred by plaintiff in bringing the action. The plaintiff also requested the court to make an equitable resolution of marital assets not divided by the divorce decree. (R.5)

Plaintiff further alleged that the defendant's actions were willful, malicious, or designed to thwart legal process and deny plaintiff her lawful rights, and defendant should be required to pay punitive damages in the amount of \$20,000.00. (R.6)

SUMMARY OF ARGUMENT

1. When a motion to dismiss is filed, the court must view all allegations of the complaint and indulge all reasonable inferences in favor of the plaintiff.

2. The statute of limitations in the State of Utah is either an eight-year period (an action on a judgment) or a six-year period (based upon an instrument in writing). Since the present action was commenced on January 11, 1990, five years from the original divorce decree, under either provision, the statute of limitations would not have run.

3. There are no facts to show estoppel or laches in this case, and therefore under either doctrine the plaintiff's claim should not have been dismissed.

DETAIL OF ARGUMENT

POINT I

**ON A MOTION TO DISMISS THE COURT MUST
CONSTRUE THE COMPLAINT AND ALL ALLEGATIONS
AND REASONABLE INFERENCES THEREOF IN A LIGHT
MOST FAVORABLE TO THE PLAINTIFF.**

Utah Appellate level decisions have uniformly held that when a motion to dismiss is filed, the Court must view all allegations of a complaint and indulge all reasonable inferences in favor of the plaintiff. See Heiner v. S. J. Groves & Sons Company, 790 P.2d 107 (Utah Ct. App. 1990). In determining whether a motion to dismiss should be granted, the trial court can only grant a motion to dismiss if it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proven in support of its claims. See Heiner at 109.

The Utah Supreme Court has stated that a trial court can only dismiss a complaint if it clearly is shown that the plaintiff is not entitled to relief under any state of facts which could be proven to support plaintiff's claim. See Colman v. Utah State Land Board, 795 P.2d 622, 624 (Utah 1990). As the Utah Supreme Court sets forth in the Colman case, a motion to dismiss filed under Rule 12(b) of the Utah Rules of Civil Procedure is not a Rule 56 motion for summary judgment. Therefore, when reviewing a motion to dismiss, a court must

accept the material allegations of the complaint as true, and the trial court can only dismiss if the trial court finds that even if all facts and reasonable inferences as alleged by plaintiff are true, the defendant is entitled to a dismissal as a matter of law.

In Despain v. Despain, 682 P.2d 849 (Utah 1984) the Supreme Court reversed a dismissal of the wife's complaint and stated:

We assume the plaintiff's allegations to be true in reviewing the dismissal of the complaint and liberally construe all reasonable inferences arising therefrom in determining whether a claim for relief has been stated. Heathman v. Hatch, 13 Utah 2d 266, 372 P.2d 990 (1962); St. Pierre, v. Edmonds, Utah, 645 P.2d 615 (1982).

POINT II

THE STATUTE OF LIMITATION DOES NOT BAR THE PRESENT ACTION.

Utah law establishes various lengths of time for statute of limitations, depending upon the type of action which is commenced.

A. Eight Year Period

Utah grants eight years for any action on a judgment or decree from any court, or an action to enforce any liability for failure to provide support or maintenance for dependent children. see UTAH CODE ANN. §78-12-22 (1953 as amended).

Thus, since the plaintiff seeks relief in part under the divorce decree itself, the plaintiff would have eight years minimum time from the entry of the decree, or would have had until January 11, 1993 to file an action dealing with the judgment itself.

B. Six Year Period

Utah has a six-year statute of limitations for any rights founded upon an instrument in writing. see UTAH CODE ANN. §78-12-23 (1953 as amended). Thus, for any claims based upon written documents, the plaintiff would have had until January 11, 1991 to have begun her action. The present action was commenced on January 11, 1990.

C. Three Year Period

Utah law provides a three-year statute of limitations for an action based upon the grounds of fraud or mistake, and further provides that the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake. UTAH CODE ANN. §78-12-26 (1953 as amended).

D. Commencement of Statute of Limitation Period

The plaintiff has alleged that she did not become aware of the property unaccounted for until late in calendar year 1989,

(R.97) and, therefore, would have had until January 11, 1992 to have commenced the action for fraud or mistake.

On a motion to dismiss the court must view all allegations and reasonable inferences in favor of plaintiff. Therefore, under any factual test the statute of limitations did not run on appellant.

POINT III

**THE PLAINTIFF IS NOT GUILTY OF
LACHES AND IS NOT ESTOPPED FROM
ASSERTING HER CLAIMS.**

Paragraph 8 of the trial court's Findings of Fact states that "plaintiff's knowledge of the assets of the parties at the time of divorce makes plaintiff guilty of laches and should consequently be estopped from asserting any claims to reopen, relitigate or retry the issues of the property settlement in the divorce action." (R.109)

As previously point out, all factual issues and any inferences therefrom must be resolved in favor of the plaintiff. Additionally, the claim that the plaintiff is "estopped" fails because estoppel requires various factual determinations to be made. The elements of estoppel were set forth in Colman v. Colman, 743 P.2d 782, 790 (Ut. Ct. App. 1987)

"Estoppel arises when there is (1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of the facts; (3) made to a

party who is without knowledge or the means of knowledge of the real facts; (4) made with the intention that the representation be acted upon; and (5) the party to whom the representation was made relied or acted upon it to his prejudice. Kelly v. Richards, 95 Utah 560, 83 P.2d 731, 734 (1938); Morgan v. Board of State Lands, 549 P.2d 695, 697 (Utah 1976). See also City of Mercer Island v. Steinmann, 9 Wash. App. 479, 513 P.2d 80, 82 (1973). If any of these elements are missing, there can be no estoppel. Kelly v. Richards, 83 P.2d at 734. Further, estoppel cannot be inferred from facts of which the party to be estopped had no knowledge. Grover v. Garn, 23 Utah 2d 441, 464 P.2d 598, 602 (1970).

Estoppel is not applicable under the present facts."

There has been no factual determination made by the trial court, therefore estoppel would not apply.

Laches normally requires three elements: (1) knowledge or reasonable opportunity to discover a cause of action, (2) an unreasonable delay in commencing that cause of action; and (3) damage to defendant resulting from the unreasonable delay. see Marsh v. Messick, 622 P.2d 787, 28 Wash. App. 156 (1981).

Both "estoppel" and "laches" require a factual hearing, and so it was reversible error for the trial court to dismiss plaintiff's cause of action on the Rule 12(b)(6) motion.

Utah law provides that the trial court retains continuing jurisdiction to make "subsequent changes" or "new orders"

regarding the distribution of the marital property. UTAH CODE ANN. §30-3-5(3) (1953 as amended) states:

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 and obligations for debts as is reasonable and necessary.

Other courts have, also, ruled that if there are marital assets which were not disposed of in a divorce decree, then the court has continuing equitable proper to make a division of those assets. See Ellsworth v. Ellsworth, 423 P.2d 365 (Ariz. App. 1967); In Re Marriage of Brown, 544 P.2d 561 (Cal. 1976); Cribbee v. McDermott, 521 P.2d 1023 (Idaho 1974); Harris v. Harris, 493 P.2d 407 (N.M. 1972); Pittman v. Pittman, 393 P.2d 957 (Wash. 1964).

The plaintiff's allegations that many assets were not divided by the court, possibly as the result of fraud, misrepresentation and nondisclosure by the defendant requires that the plaintiff be given a full evidentiary hearing. Therefore, even though five years passed before the complaint was filed, this case can not be dismissed by a Rule 12(b) motion.

For these reasons, plaintiff requests that the trial court's order granting defendant's motion to dismiss be reversed.

CONCLUSION

The appellant seeks a complete reversal of the trial court decision, and an order that the trial court set the matter for discovery and trial on the merits of the case.

RESPECTFULLY SUBMITTED this 22 day of October, 1992.

15/
JEFF R. THORNE
MANN, HADFIELD & THORNE
Attorney for Plaintiff-Appellant

CERTIFICATE OF MAILING

I hereby certify that four copies Appellant's Brief were mailed to Miles Jensen, 56 West Center, P. O. Box 525, Logan, Utah 84321, as counsel for the Appellee on the 22 day of October, 1992.

15/
JEFF R. THORNE

ADDENDUM

Complaint

Memorandum Decision

Findings of Fact and Conclusions of Law and Order

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IN THE FIRST DISTRICT COURT, CACHE COUNTY, STATE OF UTAH

VARNA E. HEESCH, formerly) VERIFIED COMPLAINT
known as VARNA E. JORGENSEN,

Plaintiff,) Civil No. 90000013

vs.)

VICTOR W. JORGENSEN,)

Defendant.)

The plaintiff, Varna E. Heesch, formerly known as Varna E. Jorgensen, being first duly sworn deposes and says:

JURISDICTION AND VENUE

1. The plaintiff, Varna E. Heesch, is a resident of Vancouver, Washington.

2. The defendant, Victor W. Jorgensen, is a resident of Logan, Cache County, State of Utah.

3. The plaintiff and defendant were formerly husband and wife and lived and resided in Cache County, State of Utah. The parties were divorced pursuant to a decree of divorce entered in

NUMBER 1
FILED

Heesch vs Jorgensen, #23514
Complaint

the above-entitled court as Civil No. 23514 said decree of divorce having been entered on January 11, 1985.

4. The divorce decree was granted pursuant to a Stipulation and Property Settlement Agreement entered into between the plaintiff and defendant.

5. At the time of the divorce action the defendant specifically stated he wanted to keep the settlement simple, and that he would give one-half of all assets to plaintiff. The defendant, also, did not want child support mentioned in the decree.

6. The plaintiff entered into the Property Settlement Agreement based upon the representation of the defendant that he, Victor W. Jorgensen, had made a full and complete disclosure of all marital assets, debts and obligations, profit and pension plans, investments, savings accounts, or other matters which could possibly constitute marital assets. Copies of the executed Property Settlement Agreement and Divorce Decree are attached hereto as Exhibits 1 and 2 respectively.

Heesch vs Jorgensen, #23514
Complaint

FIRST CAUSE OF ACTION

Plaintiff realleges paragraphs 1 through 6 as if fully and completely set forth herein.

7. Based upon information and belief, the plaintiff alleges that the defendant fraudulently concealed, hid or secreted from her knowledge certain assets acquired during the marriage. Among the assets are:

(a) Savings Account at Commercial Security Bank (now known as Key Bank), Logan Office, containing approximately \$800.00.

(b) Mountain American Credit Union, Account No. 229227-8Y with an approximate balance of \$10,000.00;

(c) Miscellaneous life insurance policies;

(d) Income from Morton Thiokol in the approximate amount of \$2,500.00;

(e) A check from Margarita Jorgensen for approximately \$1,500.00 from a loan repayment;

(f) Equity on former residences located at 1626 East 1400 North, Logan, Utah and 4153 Falcon Street, Salt Lake City, Utah;

Heesch vs Jorgensen, #23514
Complaint

(g) Silver coins purchased in the spring of 1980
valued at \$500.00.

8. The plaintiff believes there may be other assets which were hid, secreted or undisclosed by the defendant for which she was entitled to a marital interest, and requests the right to conduct such further discovery as is necessary to determine other assets hidden by said defendant.

9. Plaintiff further requests that the court determine that as a matter of law the plaintiff is entitled to a one-half interest in and to any marital assets which were not disclosed in the divorce decree, or which were not fully litigated between the parties.

SECOND CAUSE OF ACTION

Plaintiff realleges paragraphs 1 through 9 as if fully and complete set forth herein.

10. Following the divorce decree, the defendant remained in the home located at Cedar Heights, with an understanding that the defendant would pay to plaintiff the fair rental value of said home until said home was sold or plaintiff received her share of assets.

Heesch vs Jorgensen, #23514
Complaint

11. The defendant remained in the home for a one year period of time without paying any rent to plaintiff, and plaintiff has made repeated demands upon defendant and plaintiff is entitled to the amount of \$7,200.00 as fair rental value of said properties.

THIRD CAUSE OF ACTION

Plaintiff realleges paragraphs 1 through 11 as if fully and completely set forth herein.

12. The actions of the defendant in failing to disclose and in deliberately hiding assets amount to a contempt of the court and an abuse of judicial process and defendant's actions are so contrary to public policy, that the defendant should be made to pay all costs, expenses and attorney's fees incurred by plaintiff in bringing this action and the court should grant an equitable resolution of any marital assets not divided by the divorce decree.

13. The actions of the defendant were willful and malicious and were designed to thwart the legal processes and deny to

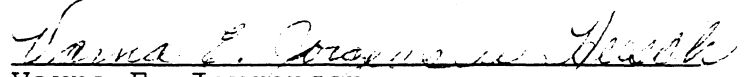
Heesch vs Jorgensen, #23514
Complaint


plaintiff her rightful assets. Accordingly the defendant should be made to pay punitive damages in the sum of \$20,000.00.

WHEREFORE, plaintiff prays judgment as follows:

1. For a determination of the court that the divorce decree failed to divide numerous items of personal and real property, and that the court award said items of property in a fair and equitable manner.
2. That the defendant be made to pay fair rental value for the use of the home during the one year period of time in which the defendant had possession of the home before the equity was divided, in the sum of \$7,200.00.
3. For costs of court, legal expenses and attorney's fees in the amount of \$2,000.00.
4. For punitive damages in the sum of \$20,000.00.
5. For such other and further relief as to the court shall seem meet and equitable.

DATED this 8 day of January, 1990.


Varna E. Jorgensen


Jeff R. Thorne
MANN, HADFIELD & THORNE
Attorney for Plaintiff

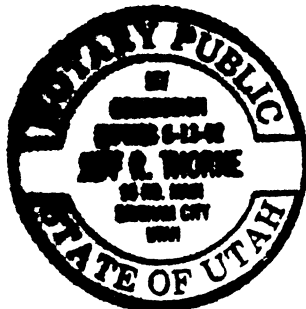
Heesch vs Jorgensen, #23514
Complaint

STATE OF UTAH)
 : ss
COUNTY OF BOX ELDER)

Varna E. Jorgensen being first duly sworn deposes and says:
That she is the plaintiff in the foregoing action; that she has
read the within Verified Complaint and the contents therein are
true and correct to her best knowledge, information and belief.

Varna E. Jorgensen
Varna E. Jorgensen

Subscribed and sworn to before me this 8 day of
January, 1990.



W. R. Thorne
Notary Public
Residing at Brigham City, Utah

Robert . Gutke - 1281
HARRIS, PRESTON, GUTKE & CHAMBERS
Attorneys at Law
31 Federal Avenue
Logan, UT 84321
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IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

| | | |
|----------------------|---|--------------------------|
| VARNA E. JORGENSEN, | * | |
| Plaintiff, | * | |
| vs. | * | STIPULATION AND PROPERTY |
| | | SETTLEMENT AGREEMENT |
| VICTOR W. JORGENSEN, | * | Civil No. _____ |
| Defendant. | * | |

Comes now the Plaintiff and the Defendant, the Plaintiff being represented by ROBERT W. GUTKE of the firm of Harris, Preston, Gutke & Chambers, and the Defendant having been fully advised of his right to retain counsel for the protection of his rights, and it being his own action not to retain counsel and to accept the terms of the property settlement as set forth herein, and it appearing between the parties that there are unresolvable conflicts, which have manifested themselves in the marriage between the Plaintiff and the Defendant and that each party realizes these conflicts endanger the mental and physical health of the parties and by reason thereof desire to make a Stipulation in agreement of their difference and agree as follows:

1. That Defendant hereby acknowledges receipt of the Complaint and Summons in this matter and after having read the same hereby agrees to waive his time in which to answer the Complaint of the Plaintiff and agrees that the Plaintiff may enter the default of the Defendant and proceed to obtain a decree

residence, including but not limited to taxes, upkeep, remodeling, assessments and the like, and to indemnify Plaintiff therefor. At the time, Defendant vacates the residence, sells the same or upon his death, whichever event may first occur, Plaintiff, or her heirs if Plaintiff has predeceased, shall be paid one-half of the sale amount of the residence or one-half of the appraised fair market value of the property in the event the property has not been sold and the distribution is triggered by the Defendant's vacating of the premises or his death.

5. The parties further agree that Plaintiff shall be awarded as her sole and separate property the 1977 Chevrolet automobile, the five (5) gold Kruggerand coins valued for purposes of this property settlement at \$1,700.00 and the money market account number 01-60109347 at First Federal Savings and Loan in Logan, Utah which has a balance as of December 11, 1984 in the sum of \$4,406.66.

6. As a further property settlement and as consideration for Plaintiff's waiver of alimony, Defendant agrees to pay to the Plaintiff the sum of \$3,250.00. That the settlement shall be in a cash payment of \$1,000.00 at the time the divorce is granted and the remaining balance of \$2,250.00 in six (6) equal monthly installments commencing on the First day of the month immediately following the entry of the Decree of Divorce.

7. The Plaintiff upon payment of the property settlement described in paragraph six hereof agrees to and does hereby waive her claim to alimony.

8. The parties agree that the piano shall be the separate property of the daughter of the parties, and that with the

exception of the said piano all household furnishings shall be awarded to the Defendant. Similarly, the Defendant shall be awarded the 1978 Volkswagen automobile, the checking account of the parties and the escrow payments as they accrue on the promissory note payable to the parties for the sale of real property situated in Salt Lake County, Utah which was formerly owned by the parties.

9. The Defendant agrees to provide medical, health and accident insurance for the benefit of Erik Jorgensen during the minority of the said child so long as such insurance is available through Defendant's employment and to pay those medical and dental expenses incurred in behalf of the said Erik Jorgensen.

10. The parties agree to a waiver of the waiting and interlocutory periods otherwise provided by law, and agree that the Decree of Divorce may become final upon signing.

11. Each party agrees to pay his or her separate attorney's fees and costs incurred herein.

12. The parties hereby acknowledge that the property settlement as set forth herein is fair, reasonable and equitable, and that each of them has entered into and executed the foregoing Stipulation and Property Settlement Agreement with full understanding of the contents thereof.

DATED THIS 30 day of DECEMBER, 1984.

Varna E. Jorgensen
VARNA E. JORGENSEN, Plaintiff

Victor W. Jorgensen
VICTOR W. JORGENSEN, Defendant

Robert W. Gutke - 1281
HARRIS, PRESTON, GUTKE & CHAMBERS
Attorneys for Plaintiff
31 Federal Avenue
Logan, Utah 84321
Telephone: (801) 752-3551

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

| | | |
|---------------------|---|-------------------|
| VARNA E. JORGENSEN | * | |
| Plaintiff, | * | |
| vs. | * | DECREE OF DIVORCE |
| VICTOR W. JORGENSEN | * | |
| Defendant. | * | Civil No. 23514 |

THIS MATTER came on regularly for hearing on the 7th day of January, 1985, before the Honorable VeNoy Christoffersen, District Judge; the Plaintiff appeared personally and was represented by her attorney, ROBERT W. GUTKE, of Harris, Preston, Gutke & Chambers; and the Defendant, whose default had been entered herein, failed to appear; and evidence was presented including a certain Stipulation and Property Settlement Agreement signed by the Plaintiff and the Defendant, and upon conclusion of the hearing and the Court having heard the testimony and having examined the evidence, and having heretofore entered its Findings of Fact and Conclusions of Law in which Judgment was ordered in favor of Plaintiff and against the Defendant, and being fully advised in the premises, now, therefore, it is

ORDERED, ADJUDGED and DECREED:

Number

23514-47 ^{law}

FILED JAN 11 1985

1. That the Plaintiff be and she is hereby granted a decree of divorce from the Defendant, the same to become final upon the signing of the same by the Court.

2. That Plaintiff be and she is hereby awarded the care, custody and control of ERIK JORGENSEN, subject to right of reasonable visitation on the part of the Defendant.

3. That the family residence located at 1170 Cedar Heights Drive in Logan, Utah, shall remain the property of the above named parties. That the joint tenancy shall be severed and the parties shall retain a tenancy in common interest as to the property. In this regard it is hereby ORDERED that the parties execute and record a quit claim deed in the office of the Cache County Recorder, State of Utah, thus establishing the parties as tenants in common with respect to the said property.

4. It is hereby ORDERED that the Defendant shall be awarded possession of the family residence subject to Plaintiff's tenancy in common and Plaintiff's ownership of one-half of all equity in the said property. The Court further ORDERS that the residence shall not be sold, pledged, mortgaged or otherwise encumbered without the mutual written consent of both parties. The Court ORDERS that the Defendant shall pay all obligations concerning the residence, including but not limited to taxes, upkeep, remodeling assessments and the like and that he shall indemnify Plaintiff therefor.

5. In the event Defendant vacates the residence located at 1170 Cedar Heights Drive, Logan, Utah, if the Defendant sells the

same or upon his death, whichever event may first occur, Plaintiff or her heirs if Plaintiff has predeceased shall be paid one-half of the sale amount of the residence or one-half of the appraised fair market value of the property at the time the foregoing shall occur in the event the property has not been sold and the distribution is triggered by the Defendant's vacating of the premises or his death.

6. The Court hereby awards to the Plaintiff the following items of personal property:

(a) The 1977 Chevrolet automobile;

(b) The five gold Kruggerand coins valued for purposes of this decree at \$1,700;

(c) The money market account no. 01-60109347 at First Federal Savings & Loan in Logan, Utah, which has a balance as of December 11, 1984, in the sum of \$4,406.66.

7. As a further property settlement and as consideration for the Plaintiff's waiver of alimony, Defendant is hereby ORDERED to pay to the Plaintiff the sum of \$3,250.00.

Therefore, judgment is hereby entered against the Defendant in the sum of \$3,250.00. That a stay of execution shall be imposed upon the collection of the said judgment upon the condition that the Defendant pay to the Plaintiff the sum of \$1,000.00 in reduction of the judgment upon receiving notice that the Decree of Divorce has been entered and upon the further condition that the Defendant pay to the Plaintiff the remaining balance of \$2,250.00 in six equal monthly installments commencing

on the first day of the month immediately following the entry of the Decree of Divorce. That the said judgment may be prepaid without penalty.

8. That upon a full and complete payment of the judgment entered against the Defendant in the preceding paragraph, Plaintiff's right to alimony shall terminate pursuant to her waiver filed by the Stipulation and Property Settlement Agreement.

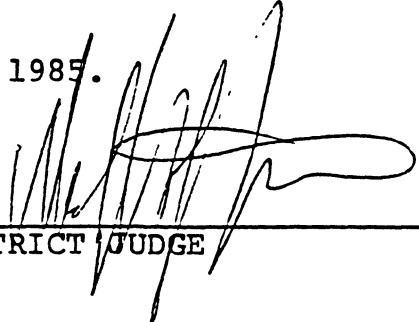
9. That the piano presently owned by the above named parties shall be the separate property of the daughter of the parties. That with the exception of the said piano which shall be awarded to the daughter of the parties, all household furnishings shall be awarded to the Defendant. Similarly, Defendant shall be awarded the 1978 Volkswagon automobile, the checking account of the parties and the escrow payments as they accrue hereafter on the promissory note payable to the parties for the sale of real property situated in Salt Lake County, Utah, which was formerly owned by the parties.

10. The Defendant is hereby ORDERED to provide medical, health and accident insurance for the benefit of ERIK JORGENSEN during the minority of the said child so long as such insurance is available through Defendant's employment. The Defendant is further ORDERED to pay the medical and dental expenses incurred by the Plaintiff in behalf of the said ERIK JORGENSEN and to indemnify Plaintiff and hold her harmless with respect thereto.

11. It is ORDERED that each party pay his or her separate attorney's fees and costs incurred herein.

12. It is hereby ORDERED that the above named parties execute such documents of title as may be required to convey the real and personal property described herein so as to conform to the order of the Court.

DATED this 11th day of January, 1985.


DISTRICT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing DECREE OF DIVORCE to the Defendant, Victor W. Jorgensen at 1170 Cedar Heights Drive, Logan, Utah 84321 on this 10 day of January, 1985.


Robert W. Smith

(IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CA
STATE OF UTAH

VARNA E. HEESCH, formerly
as VARNA E. JORGENSEN,

Plaintiff

vs.

VICTOR W. JORGENSEN,

Defendant

MEMORANDUM DECISION

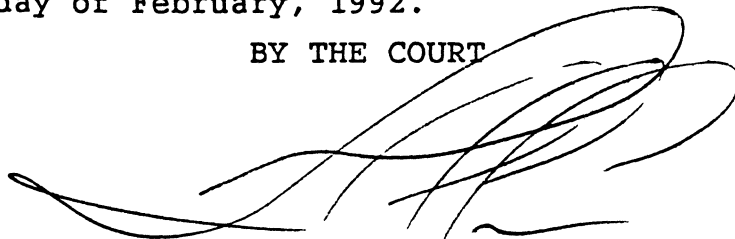
CASE NO. 900000013

THIS MATTER IS before the Court upon an Amended Motion to Dismiss. The Court having reviewed the Motion together with the supporting Affidavits and Memorandum, along with Plaintiff's Response. For reasons set forth in the Defendant's Memorandum the Motion is granted.

Counsel for the Defendant is directed to prepare a formal Order in conformance herewith.

Dated this 3rd day of February, 1992.

BY THE COURT



Gordon J. Low
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the forgoing MEMORANDUM DECISION, postage prepaid, to the attached list of attorneys at the addresses set forth, this 7 day of February, 1992, at LOGAN, UTAH.

Sharon L. Hancey
DISTRICT COURT CLERK

BY: 
Deputy Clerk

MICRO FILMED

DATE: 2-7-92

FILED

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A T T A C H M E N T

THORNE, JEFF R.

Attorney for Plaintiff
ZION'S BANK BUILDING
98 N. MAIN P.O. BOX "F"
BRIGHAM CITY UT 84302

JENSEN, MILES P.

Attorney for Defendant
56 WEST CENTER STREET
P. O. BOX 525
LOGAN UT 843210

LOGAN DISTRICT

MAR 6 4 17 PM '92

Miles P. Jensen (#1686)
OLSON & HOGGAN, P.C.
Attorneys for Defendant
56 West Center
P. O. Box 525
Logan, Utah 84321
Telephone (801) 752-1551

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

VARNA E. HEESCH, formerly known)
as VARNA E. JORGENSEN,)

Plaintiff,)

vs.)

VICTOR W. JORGENSEN,)

Defendant.)

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

Civil No. 900000013CV

Defendant, by and through his Attorneys, Olson & Hoggan, P.C., Miles P. Jensen, having previously made a Motion To Dismiss and filing said Motion with the Court, along with a Memorandum In Support Of Motion To Dismiss Affidavit Of Victor W. Jorgensen; and Plaintiff, by and through her Attorneys, Mann, Hadfield & Thorne, Jeff R. Thorne, having replied to the Defendant's Motion To Dismiss, and the Court having reviewed the Motion, Affidavits and Memoranda, and the Court having issued its Memorandum Decision dated February 3, 1992, the Court makes the following:

OLSON & HOGGAN P.C.
ATTORNEYS AT LAW
56 WEST CENTER
P.O. BOX 525
LOGAN, UTAH 84321
(801) 752-1551

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiff's Divorce Decree was granted and signed January 11, 1985.

2. In the divorce action Plaintiff was represented by legal counsel and had opportunity to conduct all discovery which she so chose; the Defendant was not represented by legal counsel.

TREMONTON OFFICE
123 EAST MAIN
P.O. BOX 115
TREMONTON, UTAH 84337
(801) 257-3885

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3. Plaintiff's Complaint alleging fraud and other allegations against the Defendant in the above captioned matter was filed January 8, 1990.

4. Plaintiff has alleged no fraud with the specificity required under the statute.

5. Defendant has filed verified information concerning assets which the Plaintiff claimed to not be disclosed to her, which verified claims of Defendant remain unrefuted.

6. The statute of limitations applicable to Plaintiff's allegations and causes of action has expired.

7. A reasonable time in which Plaintiff should have discovered or become aware of fraud is less than the five (5) years which elapsed from the time of the divorce to the time of the attempt to overturn the divorce.

8. Plaintiff's knowledge of the assets of the parties at the time of the divorce action makes Plaintiff guilty of laches and should consequently be estopped from asserting any claims to reopen, relitigate or retry the issues of the property settlement in the divorce proceeding.

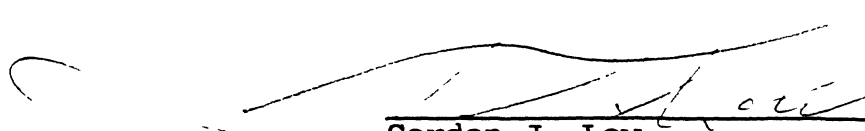
ORDER

Based on the foregoing Findings Of Fact And Conclusions Of Law, it is hereby

ORDERED, ADJUDGED AND DECREED:

That Plaintiff's Complaint be and is hereby dismissed.

DATED this 20th day of February, 1992.


Gordon J. Low
District Court Judge

3-10-92

N & HOGGAN P C
TORNEYS AT LAW
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(801) 752 1551

MONTON OFFICE
23 EAST MAIN
P O BOX 115
MONTON UTAH 84337
(801) 257 3885

MAILING AND RULE 4-504 CERTIFICATE

I hereby certify that I mailed an exact copy of the foregoing Memorandum in Support of Motion to Dismiss, to Plaintiff's

Attorney, Jeff R. Thorne, at P. O. Box "F", Brigham City, Utah 84302, postage prepaid in Logan, Utah, this 20th day of February, 1992.

If no objection is made to this Order within the time provided in the above-cited Rule, the original Order will be filed with the Court for the Court's signature.


Miles P. Jensen

wpd/mpj/jorgen.fof
N-4382F

ION & HOGGAN, P.C.
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