

2004

Jerry Houghton, Susan Houghton, Kendall R.
Thomas, Marlene Thomas, and the 1995 Thomas
Family Trust v. Glen E. Miller : Brief of Respondent

Utah Court of Appeals

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Glen E. Miller; Pro Se.

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IN THE UTAH COURT OF APPEALS

JERRY HOUGHTON, SUSAN)
HOUGHTON, KENDALL R. THOMAS,)
MARLENE THOMAS, and the 1995)
THOMAS FAMILY TRUST,)

Plaintiff/Cross-Appellants)

Case No. 20040007CA

vs)

GLEN E. MILLER,)

Defendant/Cross-Appellee)

BRIEF OF THE CROSS-APPELLEE

Cross-appeal from an order of the THIRD DISTRICT Court, Tooele County, Judge Skanchy, declaring the Defendant/Cross-Appellee, GLEN E. MILLER (Miller) was entitled to a homestead exemption in a parcel of real property, even though a prejudgment writ of attachment was previously ordered and recorded at a time the real property could not qualify as a homestead, pursuant to Section 78-23-3, Utah Code Annotated.

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UTAH COURT OF APPEALS
BRIEF

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BRIEF OF THE CROSS-APPELLEE

JURISDICTIONAL STATEMENT

This court has jurisdiction¹ of this matter pursuant to Utah Code Section 78-2a-3(2)(j).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

Issue 1

Whether the real property located at 358 North 100 East, Tooele, Utah qualified for homestead exemption on April 17, 2001, when a prejudgment Writ of Attachment was issued against the property.² (Addendum 8, page 19, line 25; page 20, lines 1-18)

¹Timeliness of Cross-Appellants' appeal is questioned. See Addendum 15.

² Although a hearing was held on March 26, 2001, on the motion for a writ of attachment, (Addendum 1, page 126), the order granting the motion was not signed until April 16, 2001 (Addendum 4). The prejudgment Writ of Attachment was issued the following day, April 17, 2001 (Addendum 3). This is when the contingent lien of the prejudgment Writ of Attachment was established. Miller questions the use of the phrase "judicial lien seized the property" by Houghtons and Thomas' in their opening brief. "judicial lien" is defined in 78-23-2(4) to mean "a lien on property obtained by judgment or other legal process instituted for the purpose of collecting an unsecured debt." There was no judgment against Miller. So for this to qualify as a "judicial lien" as defined in the statute, there must be legal process for the purpose of collecting an unsecured debt. There was no debt, secured or unsecured, owed by Miller to Houghtons and Thomas'. There was no debtor/creditor relationship at all between the parties prior to the judgment granted by the trial court on April 10, 2003. The indebtedness claimed by Houghtons and Thomas' was for promissory notes, to which Miller was not a party, that were issued by LD&B Management, Inc. (LD&B), an entity in which Miller was neither an owner, officer, or employee (Addendum 1, pages 504-505). Houghtons obtained a judgment against LD&B for the amount of their promissory notes on March 13, 2000, in Third District Court, case number 990399712. On that same date, Thomas' obtained a judgment against LD&B for the amount of their promissory notes in Third District Court, case number 990300746. Both Houghtons and Thomas' each received a satisfaction of judgment for the amounts of these judgments. In statements subscribed and sworn by Douglas F. White, attorney for Houghtons and Thomas', they each acknowledged a satisfaction of their judgments. The satisfaction of judgment was filed on September 7, 2001, in their respective cases. (See Attachments B and C of Miller's Appellant Docketing Statement submitted in this case on January 29, 2004.) Therefore, because no unsecured debt or judgment existed against Miller, the prejudgment writ of attachment should not be characterized as a "judicial lien" that "seized the property."

Issue 2

Whether the declaration of homestead filed on March 27, 2003, defeated the prejudgment Writ of Attachment issued against the real property located at 358 North 100 East, Tooele, Utah on April 17, 2001.³(Addendum 8, page 19, line 25; page 20, lines 1-20; page 22, lines 8-13)

Standard of Review⁴: The standard of review in this case for the above stated issues is for correctness of facts as well as correctness of the law. Because this is an appeal of an equity case, “In an appeal of an equity case the [Court of Appeals] may weigh the facts as well as review the law, but will reverse on the facts only when the evidence clearly preponderates against the findings of the trial court.” Crimmins v. Simonds, 636 P.2d 478 (Utah 1981). Also “[s]ince appeal may be had on the facts as well as the law in equity cases, it is our duty, when called upon, to weigh the facts as well as to review the law.” Jensen v. Brown 639 P.2d 152 (Utah 1981).

STATEMENT OF THE CASE⁵

On November 25, 2000, Cross-Appellants, Jerry Houghton, Susan Houghton, Kendall R. Thomas, Marlene Thomas, and the 1995 Thomas Family Trust (Houghtons and Thomas’) filed a complaint alleging fraud (Addendum 1, pages 1-20). Cross-Appellee, Glen E. Miller (Miller)

³ Miller has replaced “nullified the judicial lien ordered” with “defeated the prejudgment writ of attachment issued.” The word “nullified” means “invalidated.” The word “defeated” means “overcome in battle.” The phrase “may defeat a prejudgment writ of attachment,” was used by the court in its legal discussion of the order issued on August 7, 2003 (Addendum 9, page 2, lines 2-3 of the legal discussion). As far as the use of the term “judicial lien”, see the discussion in footnote 2.

⁴ Miller has included facts as part of the standard of review for this case, because it is an equity case. Also, Miller does not agree with some of the “facts” or how some “facts” were presented in Houghtons and Thomas’ opening brief.

⁵ Some of the page numbers that are used from the court transcript at Addendum 1 may contain minor errors. I have attempted to cite the exact pages of the record, but because of my situation of being incarcerated, I have never seen, nor do I have access to the court records to verify the accuracy of the page numbers of the quoted and cited documents. I am certain of the document, but not the court assigned page number.

answered this complaint through his attorney, Blake S. Atkin, denying said allegations (Addendum 1, pages 72-82).

On December 5, 2000, Houghtons and Thomas' moved the court for the issuance of a prejudgment writ of attachment (Addendum 1, pages 23-25). On January 12, 2001, Houghtons and Thomas' amended their previous motion. In this amended motion they stated, "1) That the Defendant [Miller] is not a resident of this state, [and] 6) That the Defendant fraudulently contracted the debt or incurred the obligation respecting the action brought." These were the two reasons given to the court as to why they were entitled to a prejudgment writ of attachment (Addendum 1, page 85; see also Addendum 8, page 18, lines 17-21).

Miller, through his attorney, contested the motion and moved the court to strike the defective affidavits provided by Houghtons and Thomas'. Miller also filed an affidavit clarifying his residency (Addendum 1, pages 89-104).

On April 16, 2001, the trial court granted the motion for a prejudgment Writ of Attachment (Addendum 3). White recorded this order on June 15, 2001 (Addendum 4).

Miller was not privy to any other developments in this case until June 6, 2003. On this date Miller was served a Writ of Execution and Praecipe identifying two of Miller's properties to be sold at execution. The Writ of Execution was issued on May 1, 2003 (Addendum 7).⁶

While reading the Writ of Execution, Miller discovered for the first time that a judgment had been entered against him in this case. The date of the judgment was April 10, 2003 (Addendum 6 and Addendum 7). Because Miller had never received notice of any judgment or

⁶ In an apparent attempt to deprive Miller of his right to be informed of exempt property and his right to request a hearing, no attachments were with the Writ of Execution as required by Rule 69(g) and the advisory committee note to paragraph (g), U.R.C.P. Miller was fortunate that at the time of service of the Writ of Execution, he was reviewing the Utah Code books in the jail (Addendum 1, pages 433-436).

proceedings in this case, he assumed that the judgment was a default judgment (Addendum 1, pages 431-432).

On June 12, 2003, Miller requested an exemption hearing because his property was entitled to a homestead exemption (Addendum 1, page 410; and Addendum 5).

On July 18, 2003, Miller moved the court to stay the Writ of Execution. The stay of the Writ of Execution was ordered on July 22, 2003 (Addendum 1, pages 419-420).

On August 4, 2003, the exemption hearing was conducted (Addendum 8). As a result of this hearing the trial court judge issued his “Order Granting Homestead Exemption” (Addendum 9). The “FINDINGS” section of this order contained five paragraphs. From the “LEGAL DISCUSSION” section of this order came the legal conclusion that “The prejudgment writ of attachment filed on March 26, 2001, is defeated by the filing of a homestead declaration on March 26, 2003 (Addendum 11, page 3, paragraph 13). The final sentence of the order stated, “Mr. White to prepare the order consistent with this decision.” (Addendum 9, page 3)

Mr. White, attorney for Houghtons and Thomas’, prepared an order. However, Miller contested it for errors and for not being consistent with the court’s order dated August 7, 2003. Because Miller was moved from a county jail to the prison, he requested an enlargement of time to prepare his objections. This was granted (Addendum 1, pages 455-460).

Meanwhile, Mr. White ordered the sheriff to conduct the execution sale without a court order lifting the court-ordered stay from July 22, 2003. This was also in violation of the order granting Miller an extension of time to respond to Mr. White’s proposed order. Furthermore, there was no new writ of execution issued as required by U.R.C.P. Rule 69(h)(2) which states,

“If the originally scheduled date of sale for which notice has been given has passed, notice of the new date and time shall be provided as required herein. No sale may be held until the Court has decided upon the issues presented at the hearing.”

Also Rule 69(i)(2) states,

“...if such postponement is for a longer time than 72 hours, notice shall be given in the same manner as the original notice of such sale is required to be given.”

On September 16, 2003, Mr. White filed a “Notice of Cancellation of Sheriff’s Sale (Addendum 1, pages 462-463). He ordered the Sheriff to cancel the sale that he, Mr. White, had ordered.⁷ Subsequently, Miller filed an affidavit of facts constituting contempt of court in this matter (Addendum 1, pages 466-468).

On September 19, 2003, Miller’s objections to the proposed order were filed, (Addendum 1, pages 471-475), and Mr. White responded with a second order. Relatively few changes were made, so again, Miller opposed this order and submitted an order that he considered consistent with the court’s order dated August 7, 2003 (Addendum 1, pages 478-479; and Addendum 13).

On October 14, 2003, Mr. White filed his objections to Miller’s proposed order and requested an Oral argument (Addendum 1, pages 496-499).

On December 4, 2003, a hearing was conducted (Addendum 10). After the hearing, the court signed the order that authorized the homestead property of Miller to be sold (Addendum 11).

STATEMENT OF THE FACTS

On March 27, 2001, the primary residence of Miller and his family was a house located at 891 Upland Drive, Tooele, Utah. They had resided in that house since 1994. In December of 2001, a fire destroyed part of that house and made it uninhabitable. At that time, the house

⁷ The reasons stated for canceling the sale were: “1. There is an error in the property description of Property No. 2, [and] 2. The notice is posted under the heading of the ‘Tooele Valley Justice Court’ and not the Third District Court in and for Tooele County, State of Utah.” It should be noted that the same description of Property No. 2 was used in the Writ of Execution for the sale on July 29, 2004, as was used in the Writ issued May 1, 2003. Also, all writs have been issued by the Third District Court.

located at 358 North 100 East, Tooele, Utah was being rented, so Millers leased another house. The fire-damaged house was not repaired, and in July of 2002, it was foreclosed upon.⁸

When the renters moved out of the property located at 358 North 100 East at the end of February, 2002, the house was left uninhabitable (Addendum 8, page 14, lines 6-16). In Houghtons and Thomas' opening brief (page 4, paragraph 6) they claim that on March 26, 2001, "the old house was then uninhabitable and provided no shelter or income (See Addendum 8, page 14, lines 6-16, and Addendum 11, "Findings" at paragraph 10)." This claim is not correct. Counsel made the above statement and he included it as a "Finding". However, it is not supported by any evidence.

In Miller's objection to the order found in Addendum 11, he stated,

"There are other misstatements of fact made in the Plaintiffs' attorney's additional findings as enumerated 6 through 12. Because the added paragraphs are not consistent with the 'Findings' found in the 'Court Order', they should be eliminated." (Addendum 1, page 478, paragraph 3).

In September, 2003, Miller's wife and family began cleaning up the house and making repairs to make the property located at 358 North 100 East inhabitable for a family residence (Addendum 8, page 22, lines 9-10).

However, in Houghton's and Thomas' opening brief (page 4, paragraph 7), they claim, "In the early part of 2003, Mrs. Miller began to make repairs to the old house at 358 North 100 East, Tooele, Utah in preparation to move in." Again this claim is not correct. At the hearing on August 4, 2003, Mr. White clearly states that Miller told him repairs began in September. So putting "early 2003" as the start date is without foundation, fact, or truth (Addendum 8, page 22,

⁸ Because the foreclosure was a matter of public record, and one of the Plaintiffs, Marlene Thomas, works in the Tooele County Recorder's office, Mr. White could have easily verified this fact, instead of presuming the foreclosure was December of 2002.

lines 9-10; See also Miller's Objections to Findings 6 through 12 in the Order, found at Addendum 1, page 478, paragraph 3).⁹

On March 26, 2003, Miller's wife and family moved into the old house and she prepared a Declaration of Homestead (Addendum 5). This was done without any attempt to defeat any existing lien and to provide protection and stability for the family (Addendum 8, page 29, lines 5-11; Addendum 1, page 450, line 16).¹⁰

In Houghtons and Thomas' opening brief (page 5, paragraph 11) they claim, "Cross-Appellee opposed the sheriff's sale because his wife had subsequently moved into the house and filed a 'Declaration of Homestead' on March 27, 2003." This statement as to why Miller opposed the sale is not supported by any fact.¹¹

In fact, Miller opposed the Sheriff's sale because of Utah Code Section 78-23-3(3), which states in part that, "A homestead is exempt from judicial lien and from levy, execution, or forced sale..."

Because the judgment obtained by Houghtons and Thomas' is a judicial lien, Miller believed that his properly declared homestead was exempt from levy, execution, or forced sale. This belief was held because the judicial lien of Houghtons and Thomas' does not fall within the

⁹ Prior to the hearing on August 4, 2003, Mr. White asked Miller when cleanup and repairs were started. Miller told him September.

¹⁰ Prior to the hearing on August 4, 2003, Mr. White asked Miller when his wife moved into the house. Miller told him March. However, in the hearing, he told the court "May" as the move-in date. Miller caught the error and said "No", but counsel continued to assert May or a later date (Addendum 8, page 22, lines 2-9). It would appear that he was trying to assert May because the judgment was entered April 10, 2003, and the Writ of Execution was issued May 1, 2003. A move-in date after that would show the home was not occupied as a residence when the Writ of Execution was issued. This becomes a moot point as a homestead can be claimed up until time of sale, and occupancy is not necessary. Sanders v. Cassity 586 P. 2d 423 (Utah 1978) and Rich Cooperative Ass'n v. Dustin, 385 P.2d 155 (Utah 1963).

¹¹ This statement seems to wrongly infer that Miller's wife moved into the house and filed the Declaration of Homestead in an effort to prevent the sale.

exceptions listed in 78-23-3(3)(a) through (d) (Addendum 8, page 8, line 8 through page 15, line 1; Addendum 1, pages 445-454).

Furthermore, it is an established fact that another reason Miller opposed the Sheriff sale was the fact that his wife had been awarded the use of the house by the court as Alimony and Support pursuant to Utah Code Section 30-4-5 which states,

“Like rights and remedies [of an abandoned spouse] shall be extended to either husband or wife of the imprisonment of the other in the state prison under a sentence of one year or more when suitable provision has not been made for the support of the one not so imprisoned.”

Additionally, Utah Code Section 78-23-6 states that

“An individual is entitled to exemption of the following property to the extent reasonably necessary for the support of the individual and his dependants: (1) money or property received, and rights to receive money or property for alimony or separate maintenance.”

Wherefore, Miller opposed the Sheriff’s sale for all of these reasons (Addendum 8, page 15, lines 2-14, and Addendum 1, pages 446-447 (Exhibit 2), 449-450).

On August 2, 2003, the court ordered,

“Accordingly, IT IS HEREBY ORDERED that subject property, 358 North 100 East, Tooele, UTAH, is subject to the homestead exemption exercised by the Millers and exempted up to \$40,000.00 per Utah Code Annotated 78-23-3(2)(b)(ii).” (Addendum 9, page 3).

However, in the opening brief (page 5, paragraph 11), Houghtons and Thomas’ claim as an additional fact that the court

“...would not stay the sale of the house because its value exceeded the value of the alleged homestead exemption. (See Addendum 8, page 30, lines 17-22; Addendum 10, page 14, lines 9-14, and page 22, lines 6-8; and Addendum 12).”

Miller takes exception to this fact, because the court never made that statement. While the judge ruled that the homestead exemption amount was \$40,000.00, he never stated in the references

provided by Mr. White above, that he would not stay the sale of the house because its value exceeded the value of the alleged homestead exemption. The references to the record provided by Mr. White merely establish the property tax valuation amount for Tooele County Corporation. This amount was \$200,099 (Addendum 12). It was stipulated by counsel that the value for determining equity in excess of the homestead exemption would be the assessed value by Tooele County (Addendum 10, page 14, lines 11-14). This in no way establishes a fact that the court “would not stay the sale of the house because its value exceeded the value of the alleged homestead exemption.”

There is one more fact of which the court should be aware. On September 24, 2003, the judgment signed on April 10, 2003, was entered into the registry of judgments for Tooele County.

SUMMARY OF ARGUMENT

The Constitution of Utah, statutes, and case law, along with the facts of this case, all clearly affirm that a homestead can be claimed up until the time of sale. It is also clear that the right to declare a homestead is a right that comes with ownership of property. It is also clear that the declaration of a homestead exemption may be made on more than one property. Furthermore, the right to declare a homestead on a primary residence may be changed as the property that is used as the primary residence is disposed of or acquired. Statutes and case law overwhelmingly support the trial court decision to grant Miller a homestead exemption in the property located at 358 North 100 East, Tooele, Utah, and that decision should be affirmed.

ARGUMENT

Argument 1

The legal conclusion that Miller's property qualified for the homestead exemption recorded on March 27, 2003, and that Miller did have the right to declare a homestead exemption on the property when a prejudgment writ of attachment was issued on April 17, 2001, is supported by both evidence and law.

Let's look at the first part of the issue, which is that the property qualified for the homestead exemption on April 17, 2001.

The right to declare a homestead exemption is a constitutional right that is acquired with ownership in property. Sanders v. Cassity 586 P.2d 424,425 (Utah 1978).

It is an established fact that on April 17, 2001, Miller's primary personal residence was located at 891 Upland Drive, Tooele, Utah. It is also an established fact that Miller owned a second house located at 358 North 100 East, Tooele, Utah. The Constitution of Utah recognizes that a homestead "may consist of one or more parcels of lands." This is statutorily set forth in Utah Code Section 78-23-3(2)(c) (Addendum 16). It is clear that the legislative intent was to allow a homestead exemption on several parcels of real property and not just one.

It is also clear that the legislature has created a homestead exemption for two kinds of property, to wit, property which is not the primary personal residence and property which is the primary personal residence. This is found in Code Section 78-23-3(2)(a)(i) and 78-23-3(2)(a)(ii). The language of these statutes is clear.¹² They read as follows:

¹² In Gohler v. Wood 919 p.2d 562, 563 (Utah 1996), the Supreme Court quotes its ruling in Perrine v Kennecott Mining Corp., where it stated, "Thus, we will interpret a statute according to its plain language, unless such reading is unreasonably confused, inoperable, or in blatant contravention of the express purpose of the statute."

78-23-3(2)(a): “An individual is entitled to a homestead exemption consisting of property in this state in an amount not exceeding:

(i) \$5,000 in value if the property consists in whole or in part of property which is not the primary personal residence of the individual; or

(ii) \$20,000 in value if the property claimed is the primary personal residence of the individual.”

Therefore, under Utah law there is a homestead exemption for property that is a primary personal residence, and one for property that is not a primary personal residence. Just because the property located at 358 North 100 East was not the primary personal residence of Miller on April 17, 2001, does not preclude the property, as claimed by Houghtons and Thomas’ in their opening brief, (page 8, lines 16-19), from qualifying for a homestead exemption.

Therefore, on April 17, 2001, the property in question qualified for a homestead exemption under the provisions of 78-23-3(2)(a)(i), a statute which was totally ignored by Mr. White in Houghtons and Thomas’ opening brief where he only cited 78-23-3(2)(a)(ii). (page 7, lines 8-17)

On page 7 of Houghtons and Thomas’ opening brief, reference is made to statutory mandates. They state,

“The Utah Exemption Act¹³, as set forth in Section 78-23-4 et al, Utah Code Annotated, 1953, as amended, sets forth the right to claim a homestead exemption, but only after complying with the statutory mandates.”

As set forth in Miller’s section on Determinative Law, Code Section 78-23-4(1) is dispositive in this case in stating the “statutory mandates”. One of the statutory mandates is to file the declaration of homestead at the office of the county recorder or to serve it upon the sheriff or other officer “PRIOR TO THE TIME STATED IN THE NOTICE OF SUCH EXECUTION.” (Emphasis added)

¹³ The Utah Exemptions Act is not limited to 78-23-4, et al. It includes all of Chapter 23. Therefore, it seems that the correct reference should be 78-23-1, et al. Code Section 78-23-4 covers procedure for declaring the homestead exemption.

April 17, 2001, was not the date of execution. Furthermore, the prejudgment Writ of Attachment was not an execution document. Execution could not take place until after a judgment was entered. The first execution date set for this property after judgment was July 23, 2003. Therefore, according to Utah Code Section 78-23-4(1), this property could have been claimed as a homestead prior to this date, which was done.

Another statutory provision provided by the legislature is the ability of a homeowner to change their primary residence, and therefore, select another homestead. Again, there is dispositive law on this. Utah Code Section 78-23-3(6) states: "The sale and disposition of one homestead does not prevent the selection or purchase of another."

When Millers were forced to leave their home at 891 Upland Drive due to a fire in December 2001, another primary residence was selected. Due to the renters occupying the property at 358 North 100 East, Tooele, Utah, Miller and his family rented another house. After Miller went to prison and it became apparent that it would be for an extended time, it was decided to use the rental property, which had become vacant, as their primary residence. Accordingly, the house was cleaned up, repaired, and occupied as their primary residence.

Thus, as allowed by law, the property at 358 North 100 East, Tooele, Utah, which had previously qualified for a homestead exemption as a non-primary residence, now qualified for a homestead exemption as their primary residence. This property was selected and declared as a homestead prior to any judgment or prior to the scheduling of an execution sale subsequent to the judgment.

If the sale of the property had been conducted on March 26, 2001, then that date would have been determinative as to whether the subject property was the primary residence and properly declared homestead of the Millers. In Houghtons and Thomas' opening brief, there is

nothing presented to refute the plain language of the statutes, as explained above, which allow a homestead to be declared up until the time of the sale of the property.

Additionally, the concluding statement of Argument 1 in Houghtons and Thomas' opening brief on page 8 is, "Therefore, the protections or exemptions set forth in Section 78-23-3(3)(a)(b)(c) and (d) do not apply because they only apply in instances where specific property qualifies as a 'homestead'." This is a totally erroneous statement. A reading of Section 78-23-3(3) (Addendum 16) clearly shows that the subparagraphs (a), (b), (c), and (d) are NOT "protections or exemptions" for the homestead or homestead exemption. But to the contrary, these four subparagraphs state the type of liens that are the exceptions to the homestead exemption and defeat it!

None of these exceptions apply to the Houghtons and Thomas' judicial lien (Addendum 1, page 452, lines 3-12; Addendum 8, page 10, lines 9-24). Therefore, by law, their judicial lien cannot deny Miller of the right to declare a homestead exemption on his property prior to any sale.

None of the positions taken or opinions expressed in Houghtons and Thomas' opening brief to support Argument 1 contained any case law to back them up, except a South Carolina case to define residence, which is already defined in the law.

However, the legal position that supports Miller's claim that a homestead can be selected and declared up until the time of sale is not only supported by the law, but by the case law as well. Let's look at some cases:

In Evans v. Jensen 168 P. 764, 765 (Utah 1917), the Supreme Court stated.

“Courts have frequently held that the exemption may be claimed at any time before the property is sold; and that the right to claim the exemption is determined as of the time when the sale is about to take place.”¹⁴

In Payson Exch. Sav. Bank v. Tietjen 225 P. 599, 600 (Utah 1924), the court held that,

“Indeed in this jurisdiction, it is quite sufficient if the judgment debtor notifies the sheriff or officer holding an execution or order of sale that he claims the premises attempted to be levied upon as his homestead.”

In Brown v. Cleverly 83 P.2d 1009 (Utah 1938), the court stated

“It is a matter of record on the last appeal that the property which appellants seek to have declared subject to their claim was selected by the Cleverly's as their homestead...four days prior to the entering of judgment by the court in the original action. Therefore, at the time appellants obtained a judgment against Cleverly's there was no property against which a judgment lien could attach.”

In Sanders v. Cassity 586 P.2d 425, 426 (Utah 1978), the Supreme Court once again affirmed that:

“...a declaration of homestead may be made at any time after judgment and before sale in order to claim the protection of Section 28-1-1 [currently 78-23-3(3)].”

“The formalities of section 28-1-10 [currently 78-23-4] also have as their purpose that of protecting innocent purchasers...Thus the requirement is that any homestead interest must be declared prior to sale.”

The court further states:

“If the legislature intended otherwise, the statute could have required that the declaration be made prior to judgment or upon conveyance, or devise. It is obvious that the reason this was not done is because it is not necessary to raise the homestead exemption until after a judgment lien has been obtained and the occupant is faced with dispossession due to execution or forced sale.”

Finally, they state:

“...the most reasonable construction is that the homestead is immune from judicial lien, execution, or forced sale providing a formal declaration of the existing exemption is made prior to the time set for sale or execution.”

¹⁴ In earlier cases, such as Kimball v. Salisbury 53 P. 1037 (1898), the declaration of homestead was allowed after sale.

All of these cases are in harmony with the trial court's legal conclusion:

“Under the statutory authority of Utah Code Annotated 78-23-1 et seq. and the Sanders v. Cassity decision, a homestead exemption may be made at any time after judgment and before sale. Plaintiffs argument that a prejudgment writ of attachment, (or judgment for that matter) filed before the homestead exemption, is as unpersuasive today as it was to the Utah Supreme Court twenty five years ago...Furthermore, even though the Millers may not have been in occupancy on the property at the time of the prejudgment writ of attachment, or at the time of judgment, is irrelevant, as the statute neither requires such in order to declare the exemption and Utah case law recognizes that occupancy is unnecessary. Rich Cooperative Ass'n v. Dustin, 385 P.2d 155 (Utah 1963).”

Houghtons and Thomas' provide nothing in their opening brief to show this legal conclusion was in error. Therefore the court ruling should be affirmed.

Argument 2

Whether the Declaration of homestead filed on March 27, 2003, defeated the prejudgment Writ of Attachment issued against the real property located at 358 North 100 East, Tooele, Utah, on April 17, 2001 (Addendum 8, page 19, line 25; page 20, lines 1-20; page 22, lines 8-13).

With it being conclusive in Utah that the property located at 358 North 100 East, Tooele, Utah could be declared a homestead up until time of sale, it now becomes necessary to determine whether the homestead defeats the prejudgment writ of attachment issued April 17, 2001. Let's take a look at the relevant facts for this issue.

On April 16, 2001, the court issued an Order on Motion for Prejudgment Writ of Attachment pursuant to a hearing held on March 26, 2001 (Addendum 4)

On April 17, 2001, a Writ of Attachment was issued to the Tooele County Sheriff (Addendum 3)

On June 6, 2001, the Writ of Attachment was returned to the court (Addendum 1, pages 133-146).

On June 15, 2001, Douglas F. White, attorney for the Houghtons and Thomas', recorded the Order on Motion for Prejudgment Writ of Attachment against the subject property (Addendum 4).

On March 27, 2003, Miller's wife filed a Declaration of Homestead on the subject property (Addendum 5).

On April 10, 2003, a judgment was rendered against Miller in favor of Houghtons and Thomas' by the Third District Court (Addendum 6).

On September 24, 2003, a Notice of Judgment recorded in the Registry of Judgments was filed with the court (Addendum 1, pages 476-477).

The Determinative Law on this matter is Utah Code Section 78-23-3(3) (Addendum 16). This Code section sets forth the types of judicial liens that may defeat a declaration of homestead. If there is a judicial lien that falls within the exceptions listed, it will defeat a homestead declaration made subsequent to it. If it does not fall within the exceptions, the homestead declaration will defeat the judicial lien.

In Houghtons and Thomas' opening brief, page 10, they state "It is the Cross-appellant's contention that no homestead exemption can be claimed in March of 2003 that will defeat the judicial lien ordered against the property in March of 2001." What follows this statement is an array of quotes from different court cases. They never once show why the court erred in their legal conclusion, and they are arranged in a manner to be misleading.

For example, Houghtons and Thomas' claim that the issue in Sanders v. Cassity is different than the issue in the case at bar. They never distinguish how the issue of Sanders v. Cassity, which was determining the question of whether a homestead exemption could be made prior to sale, is different than the issue in this case. They state that the "footnote 4 at page 426"

distinguishes its ruling from this fundamental difference. However, footnote 4 at page 426 is “99 Utah 403, 107 P. 2d163 (1940).” This is the case of McMurdie v. Chugg. Following this statement about “footnote 4” Houghtons and Thomas’ provide a quote consisting of two paragraphs. The omission of the quotation marks after the first paragraph is the indication that the paragraphs are sequential. Even the language of the second paragraph seems to indicate that it follows the first one. However, a look at page 426 of Sanders v. Cassity shows that the paragraphs are not even connected and the second paragraph comes before the first paragraph.

The lien referenced in Evans v. Jensen 168 P. 762 (Utah 1917), was a mechanic’s lien that attached to Jensen’s property prior to his homestead declaration. Mechanic’s liens are exempted under 78-23-3(3)(b) and (d). The judicial lien obtained by Houghtons and Thomas’ is not a mechanic’s lien.

A review of Evans v. Jensen and the court’s application of it in Sanders, which involve Dunham, shows it is evident that the court differentiates between specific types of liens. Some liens (78-23-3(3)) defeat a subsequent declaration of homestead. However, general judicial liens are defeated by a declaration of homestead made before the date of sale of the property. In Sanders the Supreme Court affirmed Dunham’s homestead exemption over the judgment lien, just as the trial court granted Miller a homestead exemption over Houghtons and Thomas’ general judgment lien in this instant case.

As we continue down to the next case quoted on page 10 of the Houghtons and Thomas’ opening brief, we find the case of Evans v. Jensen. Two paragraphs are quoted. However, the first paragraph quoted is not a quote from Evans. It is a quote found in McMurdie v. Chugg 107 P.2d 163, 166, which is also quoted in Sanders v. Cassity at page 426. The lien referenced was the mechanic’s lien from Evans v. Jensen. It was used to support the decision in McMurdie v.

Chugg that a lien for the purchase price of the property could not be defeated by the subsequent declaration of a homestead exemption (78-23-3(3)(b)). Houghtons and Thomas' judgment recorded on September 24, 2003, was not for the purchase price of the home.

The second paragraph quoted refers to the case of Crosby v. Anderson 162 P. 75. In that case, Crosby obtained a judgment against Anderson for a tort. However, before she could execute on Anderson's non-exempt property, he sold it. He then used the proceeds to buy land and build a house for his family, the title of which was placed in his wife's name. They then declared the property exempt as a homestead and it defeated Crosby's judgment lien. It should be noted that the comma near the end of the second line after "exempt" should be a semi-colon. This is the grammatical punctuation in the case, and it is used to separate two complete thoughts, not qualify the first thought with the second. This is important because the reference to the conversion to a homestead before a lien attaches is referring to Jensen trying to defeat a mechanic's lien, and not to Anderson converting non-exempt property to a homestead exemption which defeated a non-excepted judicial lien.

Nowhere among all of these quotes do Houghtons and Thomas' show how or why their lien is the type that can be or should be exempted under Code Section 78-23-3(3).

Waples on Homestead and Exemption (1893), page 306, explains that in states where a homestead exemption can be claimed before the time of sale, a judgment "is rendered subject to the right of the debtor to select his exempt portion. No specific lien rests upon any piece of the defendant's property. So, the particular piece selected after judgment, not exempt at the time of judgment, becomes so by selection before sale."

While Houghtons and Thomas' quote in their opening brief from 40 C.J.S. § 54, the liens that are referenced fall within the exceptions to the homestead found in Code Section 78-23-3(3).

However, Houghtons and Thomas' do not show how their claim or lien falls within the exceptions as the liens in the quoted rule that would show the trial court erred, other than the statement, "Counsel can find no exception to this rule."

If counsel would read in C.J.S. § 54 a little further, the last paragraph of subsection C states, "A homestead is immune from a judgment lien, execution or forced sale if the formal declaration of the existing exemption is made prior to the time set for sale or execution."⁷⁷ This is the same quote used by the trial court in their Order Granting Homestead Exemption to Miller (Addendum 9, page 2). Footnote 77 cites Sanders v. Cassity and states,

"Interest in real property held by judgment debtor, who was entitled to homestead exemption before judgment lien was recorded was immune from such lien, though debtor did not formally claim the homestead exemption until after the judgment was docketed."

As has been previously shown, Miller was entitled to a homestead exemption when property was acquired. Sanders v. Cassity 586 P.2d 236, 238.

In Houghtons and Thomas' opening brief, the assumption, or presumption made, is that the order and subsequent issue of a prejudgment writ of attachment was a perfected lien. However, because it is a prejudgment writ of attachment, it is, at most, only an inchoate or contingent lien. Jensen v. Eames 519 P.2d 236, 238 (Utah 1974). If in fact, this order of prejudgment writ of attachment were a perfected lien as they claim, then why did they not foreclose on the property before it became the primary personal residence of the Millers?

The answer is that they did not have the right of sale. As quoted by Houghtons and Thomas' from Waples on page 11 of the opening Brief, in the first line, "When the law gives the right of attachment for debt, it gives also that of sale, to complete the object: the satisfaction of the debt." So, Houghtons and Thomas' did not have the right of sale until they had the right of attachment. Hence, the prejudgment Writ of Attachment was only a contingent lien.

So, when does this right to sell the property become a vested right? The next sentence of Waples gives the answer. “Such right is, from the time the lien attaches by seizure, a vested right.” The opening Brief of Houghtons and Thomas’ gives no evidence nor provides any argument to show that the prejudgment Writ of Attachment ever attached or that it was ever perfected. Nor did it show that if it were perfected, that it fell under the exceptions found in Code Section 78-23-3(3)(a), (b), (c), or (d) to defeat a declaration of homestead that was made before the sale of the property.

However, the facts of this case show that there was no attachment of the prejudgment Writ of Attachment (Addendum 1, pages 133-146; Addendum 3; Addendum 4; and Addendum 14). Let’s examine why these facts show that there was no attachment.

The date pointed to by the Houghtons and Thomas’ as to the day they attached the property is March 26, 2001. In order for this date to defeat a declaration of homestead, it must be shown that it was of the nature to be excepted from the homestead under either 78-23-3(3)(a),(b),(c), or (d), and that it attached to the property prior to the declaration of homestead. We know there is not exception, but let’s look at why there was no attachment until September 24, 2003.

When the order was given in the hearing on March 26, 2001, there was not attachment.

“A writ of attachment does not become effective until it is levied. Otherwise stated, without a valid levy, an order of attachment is not perfected so as to create a lien of attachment but remains executory until rolled by a judgment in the principal action or until perfected by a levy under the original or an alias order.” (underline added) 6 Am Jur 2d § 319.

Recording of the order (Addendum 4) by Marlene R. Thomas for Douglas F. White (Plaintiff and Attorney for the plaintiff) does not perfect the levy.

In 6 Am Jur 2d § 480 ATTACHMENT, it reads:

“Statutory provisions for an attachment are strictly construed; an attachment does not become a lien until the statutory attachment lien requirements are satisfied. (underline added) *Matson Nav. Co. v. F.D.I.C.*, 916 P.2d 680 (Hawaii 1996); *Maynard v. Phifer*, 286 S.C. 76, 332 S.E.2d 99 (1985).”

This rule of attachment was affirmed by the Utah Supreme Court in *Bank of Ephraim v. Davis*, 581 P.2d 1001, 1006 (Utah 1978), where it stated, “the only way this lien can be established is by strictly following every provision of the statute.” The provisions of Rule 64C were not strictly followed so there was no attachment.

Since an order doesn’t create the lien, a writ of attachment must be issued pursuant to the order. This was done on April 17, 2001. However, a writ of attachment, in and of itself does not create a lien.

“An attachment lien does not become effective merely by the issuance of the writ of attachment or by placing the writ in the hands of the officer. There must be an effective levy on the property itself and such levy is a jurisdictional requisite.” (6 Am Jur 2d § 320)

In C.J.S. § 234 we find a description of the levy process. It says, “In general a levy attachment upon realty, unlike personalty, is perfected by notice and recording without the actual seizure and possession. To constitute a valid levy on land, the officer must do some act which shows that the officer has seized the property and exercised dominion over it and which is sufficient to put the owner or tenant upon notice.” This seizure must be done under the statutory provisions, and strict compliance is required.¹⁵

Rule 64C, U.R.C.P. governs the attachment process¹⁶. 64C(e)(1) establishes the specific actions the officer must take to effect the levy. The officer is required to file with the County

¹⁵ Other authorities that describe the requirements necessary to create a valid lien are C.J.S. § 235 Service of Writ and Description; C.J.S. § 236 Filing and Recording; and 6 Am Jur 2d §325 Notice, and Utah Civil Practice § 13.05.

¹⁶ It should be noted that in Utah Civil Practice 13.05[1] Who May Seek Attachment, it says “The Plaintiff in an action upon a judgment, upon any contract, express or implied, or in an

Recorder a copy of the writ, a description of the property attached, and a notice that it is attached.

Another significant limitation on attachments is that they must be acted upon quickly.¹⁷ Rule 64C(h) requires the sheriff to return the writ, with a certificate of his proceedings thereon within 20 days after receiving the writ. This requirement is further confirmed by the Utah Supreme Court in Bank of Ephraim v. Davis, 581 P.2d 1006 (Utah 1978). Where the court stated, “In the instant case there was a failure to comply with Rule 64C(h), thus plaintiff did not acquire a lien on the attached property.”

Looking at the facts in the instant case, the Writ of Attachment was issued to the Tooele County Sheriff on April 17, 2001 (Addendum 3). It was returned to the court on June 6, 2001 (Addendum 1, pages 133-146). In particular, addendum 1 page 136 shows that the sheriff received the Writ on April 24, 2001, from Douglas F. White. This shows that there was a total of 43 days from receipt until return! This is an obvious failure to comply with Rule 64C(h).

Furthermore, a review by the Tooele County Recorder (Addendum 14) shows that the sheriff did not record the Writ of Attachment, Description of the property, or Notice of attachment against the property. This is a failure to comply with Rule 64C(e).

The only thing recorded against the property that could be a semblance of a lien is the Order on Motion for Prejudgment Writ of Attachment (Addendum 4). However, this was filed by MRT (Marlene R. Thomas, Plaintiff and employee in the County Recorder’s office) for Douglas F. White (Attorney for the Plaintiffs), as agent for Plaintiffs.

6 Am Jur 2d § 321 comments on persons authorized to execute the writ:

action against a nonresident of Utah, may seek attachment.” Action against a nonresident is the only basis Houghtons and Thomas’ could seek attachment. (Addendum 1, page 18, lines 19-21)

¹⁷ See 6 Am Jur 2d § 323 and Utah Civil Practice § 13.05[4](10).

“As a general rule, an attachment can be levied or the writ executed only by the officer to whom it can be levied or the writ executed only by the officer to whom it is directed, who, of course, must by law be duly authorized so to act; an attachment by an officer without authority of law is no attachment at all.” Then as an observation it states, “An officer who executes according to the mandate of a writ for attachment is an agent for neither party but a surrogate of the law.”

The facts of the case bear out that there was a failure to comply with Rule 64C, “thus Plaintiffs did not acquire a lien on the attached property.” (Bank of Ephraim v. Davis) Therefore, with no attachment, there was not lien until the judgment was recorded in the registry of judgments on September 24, 2003 (Addendum 1, pages 476-477). Even if the Houghtons and Thomas’ had a lien that was excepted by 78-23-3(3), the Declaration of Homestead recorded on March 27, 2003 (Addendum 5) is first in time, first in line.

CONCLUSION

The trial court was correct in granting Miller a homestead exemption on property located at 358 North 100 East, Tooele, Utah. As stated by the trial court,

“Plaintiffs’ argument that a Prejudgment Writ of Attachment (or judgment for that matter), filed before the homestead exemption on the subject property was declared, comprised the efficacy of the homestead exemption, is as unpersuasive today as it was to the Utah Supreme Court twenty five years ago.”

Houghtons and Thomas’ have provided nothing to refute this statement, and the facts support the court’s decision.

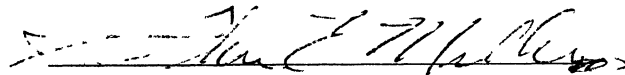
Miller acquired the right to declare the property as a homestead when he obtained title to the property. A declaration of homestead was filed to protect the property for the use of Miller’s family. This was done prior to judgment and prior to the time set for sale.

Because there was a failure to comply with Rule 64C, U.R.C.P., there was no attachment to the property, and therefore, no lien prior to the judgment lien of September 24, 2003. Furthermore, the homestead is immune from judicial liens, provided that a formal declaration of

homestead is made prior to the time set for the sale, unless there is an exception as provided in Code Section 78-23-3(3)(a), (b), (c), or (d). There is no exception to defeat Miller's Declaration of Homestead.

Wherefore, Miller and his property are eligible for the homestead exemption, and the trial court's decision should be affirmed; and that costs be granted to Miller, the cross-appellee, along with any other equitable relief that may be granted.

Respectfully submitted this 30th day of December, 2004.

A handwritten signature in cursive script, appearing to read "Glen E. Miller", written over a horizontal line.

Glen E. Miller

CERTIFICATE OF SERVICE

I, Glen E. Miller, certify that on December 30, 2004 I caused two copies of the attached Cross-Appellee Brief to be served upon Douglas F. White, the counsel for the Cross-Appellant in this matter, by mailing it to him by first class mail with sufficient postage pre-paid to the following address:

Douglas F. White
3282 South Sunset Hollow Drive
Bountiful, UT 84010

By 
Glen E. Miller

Tab 1

MAR - 4 2004

In the Third District Court of Tooele County
State of Utah

JERRY HOUGHTON, SUSAN HOUGHTON, KENDALL R. THOMAS, MARLENE THOMAS, and the 1995 THOMAS FAMILY TRUST, Plaintiff-Appellant, vs. GLEN E. MILLER, Defendant-Appellee,	INDEX OF RECORD ON APPEAL District Ct. Case #000301127 Supreme Ct. Case #20040007CA
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Tab 2

Parcel No. 1: All of Lot 1, Oak View Heights #4, a subdivision of Tooele City.
Serial No 10-8-C-1

Parcel No. 2: Beginning 137 feet West of the Southeast corner of Lot 5, Block 41, Plat "A", Tooele City Survey, running thence West 196.96 feet; thence North 43.5 feet; thence East 196.96 feet; thence South 43.5 feet to the point of beginning. Serial No. 2-57-27

Parcel No. 3: Beginning 303 feet, more or less, South of the Northwest corner of Block 26, Plat "A", Tooele City Survey, Tooele City, said point of beginning being the Southwest corner of the Hawker property; and running thence East 504 feet; thence South 248 feet; thence West 9 feet; thence North 181.5 feet; thence West 495 feet; thence North 66.5 feet to the point of beginning. Serial No. 2-42-14

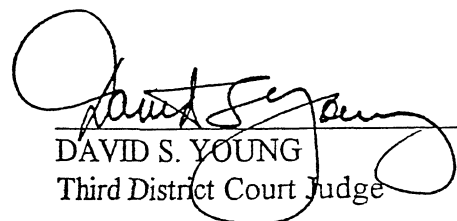
2. The Court orders that any and all interest, right and title of Glen E. Miller in the above-described properties be attached. The Defendant is restrained from transferring his interest to another in anyway.

3. A Writ of Attachment is hereby authorized by this Court pursuant to Rule 64(c) of the Utah Rules of Civil Procedure.

4. The Court orders that in lieu of requiring a bond be set, that the Plaintiffs will appear before the Court, upon motion of the Defendant or others, as the case may be, from time to time during the period of this Writ of Attachment, for the purpose of determining whether the Writ of Attachment should continue based upon the Defendant's circumstances.

DATED this 16 day of April, 2001.

BY THE COURT:



DAVID S. YOUNG
Third District Court Judge


NOTICE TO DEFENDANT'S ATTORNEY

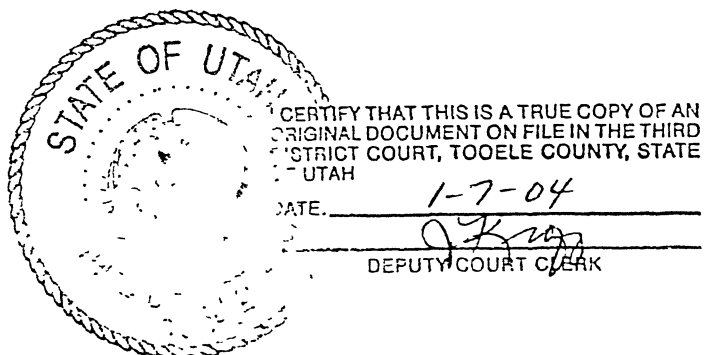
TO: Gregory P. Hawkins

Pursuant to Rule 4-504 of the Code of Judicial Administration, you are hereby notified the undersigned will hold the original hereof for a period of five (5) days from the date this notice is mailed to you to allow you sufficient time to file any written objections to the form of the foregoing with the Court and mail a copy to the undersigned. If no objections to the form are filed within that time, the original hereof will be submitted to the Court for signature and filing.

I do hereby certify I mailed a true and correct copy of the foregoing, postage prepaid, on this 29th day of March, 2001, to the following person(s):

Gregory P. Hawkins
Attorney for Defendant
136 South Main Street, 6th Floor
Salt lake City, Utah 84115


JUDY PETERSON
Legal Assistant



Tab 3

DOUGLAS F. WHITE, #3443
Attorney for Plaintiffs
3282 So. Sunset Hollow Drive
Bountiful, Utah 84010
Telephone: (801) 652-0016
FAX: (801) 296-1754

SERVED PERSONALLY ON Miller U
WITHIN NAMED DEFENDANT AT Tooele
TOOELE COUNTY, UTAH
BY DEPUTY Worland
THIS 21 DAY OF May, 2001
FRANK A. SCHARMANN
Sheriff, Tooele, Utah

IN THE THIRD JUDICIAL DISTRICT COURT

TOOELE COUNTY, STATE OF UTAH

JERRY HOUGHTON, SUSAN)
HOUGHTON, KENDALL R. THOMAS,)
MARLENE THOMAS, and the 1995)
THOMAS FAMILY TRUST,)

Plaintiffs,)

vs.)

GLEN E. MILLER,)

Defendants.)

WRIT OF ATTACHMENT

Civil No. 000301127
Judge David S. Young

THE STATE OF UTAH

To the Sheriff of Tooele County, State of Utah, GREETINGS:

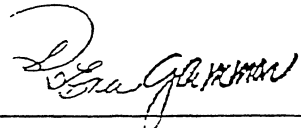
WHEREAS, the above-entitled Court, on the 26th day of March, 2001, granted the Plaintiffs' Motion for Prejudgment Writ of Attachment; and as such, any and all interest, right and title of Glen E. Miller in the below described real property is hereby attached.


WHEREAS, the Sheriff of Tooele County, State of Utah, is hereby directed to attach and keep safe all of the real property set forth below until further order of the Court, pursuant to Rule 64(c) of the Utah Rules of Civil Procedure.

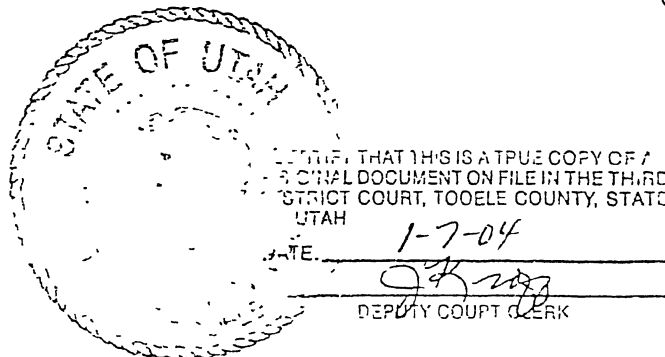
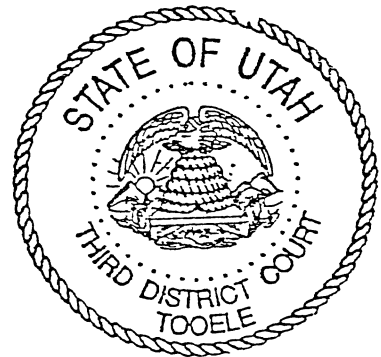
Said real property hereby attached is described as follows:

- Parcel No. 1: All of Lot 1, Oak View Heights #4, a subdivision of Tooele City. Serial No. 10-8-C-1
- Parcel No. 2: Beginning 137 feet West of the Southeast corner of Lot 5, Block 41, Plat "A", Tooele City Survey, running thence West 196.96 feet; thence North 43.5 feet; thence East 196.96 feet; thence South 43.5 feet to the point of beginning. Serial No. 2-57-27
- Parcel No. 3: Beginning 303 feet, more or less, South of the Northwest corner of Block 26, Plat "A", Tooele City Survey, Tooele City, said point of beginning being the Southwest corner of the Hawker property; and running thence East 504 feet; thence South 248 feet; thence West 9 feet; thence North 181.5 feet, thence West 495 feet; thence North 66.5 feet to the point of beginning. Serial No. 2-42-14

Given under my hand and the seal of said Court this 17 day of April, A.D. 2001.


CLERK

By 
Deputy Clerk



Tab 4

DOUGLAS F WHITE, #3443
Attorney for Plaintiffs
3282 So. Sunset Hollow Drive
Bountiful, Utah 84010
Telephone: (801) 652-0016
FAX: (801) 296-1754

FILED
3RD DISTRICT COURT TOOELE
01 APR 17 AM 10:48

FILED BY M

E 164306 B 0687 P 0021
Date 15-JUN-2001 12:00pm
Fee: 18.00 Cash
CALLEEN B. PESHELL, Recorder
Filed By: MRT
DOUGLAS F
TOOELE COUNTY CORPORATION

IN THE THIRD JUDICIAL DISTRICT COURT

TOOELE COUNTY, STATE OF UTAH

JERRY HOUGHTON, SUSAN)
HOUGHTON, KENDALL R. THOMAS,)
MARLENE THOMAS, and the 1995)
THOMAS FAMILY TRUST,)

Plaintiffs,)

vs.)

GLEN E. MILLER,)

Defendants.)

**ORDER ON MOTION FOR
PREJUDGMENT WRIT OF
ATTACHMENT**

Civil No. 000301127
Judge David S. Young

The Plaintiffs' Motion for a Prejudgment Writ of Attachment came before the Court on the 26th day of March, 2001, before the Honorable David S. Young, Judge; the Plaintiffs were present and represented by their attorney, Douglas F. White; the Defendant was not personally present, but was represented by his attorney, Gregory P. Hawkins; the Court having reviewed the pleadings and the evidence by proffer of the attorneys, and good cause appearing therefore, now enters the following Order:

1. The Plaintiffs' Motion for Prejudgment Writ of Attachment against the following described parcels of real property is hereby granted:

Parcel No. 1: All of Lot 1, Oak View Heights #4, a subdivision of Tooele City.
Serial No. 10-8-C-1

Parcel No. 2: Beginning 137 feet West of the Southeast corner of Lot 5, Block 41,
Plat "A", Tooele City Survey, running thence West 196.96 feet;
thence North 43.5 feet; thence East 196.96 feet; thence South 43.5
feet to the point of beginning. Serial No. 2-57-27

Parcel No. 3: Beginning 303 feet, more or less, South of the Northwest corner of
Block 26, Plat "A", Tooele City Survey, Tooele City, said point of
beginning being the Southwest corner of the Hawker property; and
running thence East 504 feet; thence South 248 feet; thence West 9
feet; thence North 181.5 feet; thence West 495 feet; thence North
66.5 feet to the point of beginning. Serial No. 2-42-14

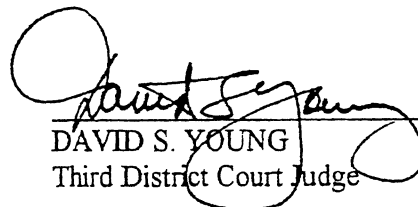
2. The Court orders that any and all interest, right and title of Glen E. Miller in the
above-described properties be attached. The Defendant is restrained from transferring his interest
to another in anyway.

3. A Writ of Attachment is hereby authorized by this Court pursuant to Rule 64(c) of the
Utah Rules of Civil Procedure.

4. The Court orders that in lieu of requiring a bond be set, that the Plaintiffs will appear
before the Court, upon motion of the Defendant or others, as the case may be, from time to time
during the period of this Writ of Attachment, for the purpose of determining whether the Writ of
Attachment should continue based upon the Defendant's circumstances.

DATED this 16 day of April, 2001.

BY THE COURT:



DAVID S. YOUNG
Third District Court Judge

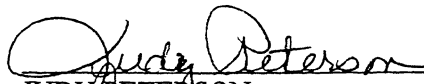
NOTICE TO DEFENDANT'S ATTORNEY

TO: Gregory P. Hawkins

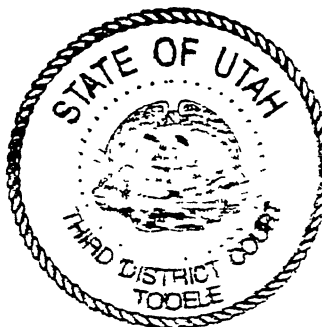
Pursuant to Rule 4-504 of the Code of Judicial Administration, you are hereby notified the undersigned will hold the original hereof for a period of five (5) days from the date this notice is mailed to you to allow you sufficient time to file any written objections to the form of the foregoing with the Court and mail a copy to the undersigned. If no objections to the form are filed within that time, the original hereof will be submitted to the Court for signature and filing.

I do hereby certify I mailed a true and correct copy of the foregoing, postage prepaid, on this 29th day of March, 2001, to the following person(s):

Gregory P. Hawkins
Attorney for Defendant
136 South Main Street, 6th Floor
Salt lake City, Utah 84115


JUDY PETERSON
Legal Assistant

I CERTIFY THAT THIS IS A TRUE COPY OF AN
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT, TOOELE COUNTY, STATE
OF UTAH
DATE: June 15, 2001
Sharon Spence
DEPUTY COURT CLERK



Tab 5

Declaration of Homestead

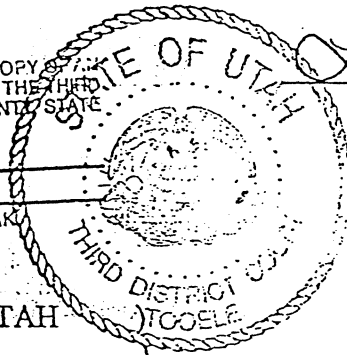
1. I, Lori Lee Thiriot Miller, claimant, a married woman hereby declare that I am entitled to a homestead exemption under Utah Constitution, Article XXII Section
2. Claimant further states that her spouse has not filed a declaration of homestead.
3. The homestead claimed as exempt in this Declaration of Homestead is located at 358 North 100 East, Tooele, Tooele County, Utah and is more fully described to wit:
Beginning 303 feet, more or less, south of the Northwest corner of block 26, Plat "A", Tooele City Survey; Tooele City, said point of beginning being the Southwest corner of the Hawker Property; and running thence East 504; thence South 248 feet; thence West 9 feet; thence North 181.5 feet; thence West 495 feet; thence North 66.5 feet to the point of beginning.
4. The estimated cash value of this real property is \$85,000.

5. The amount of the homestead claimed is \$120,000 as computed as follows:

Lori Lee Thiriot Miller, 47, 358 N. 100 E. Tooele, Utah
Glen Eugene Miller, 48, 358 N. 100 E. Tooele, Utah
Thomas Samuel Miller, 21, 358 N. 100 E. Tooele, Utah
Angela Miller, 18, 358 N. 100 E. Tooele, Utah
Kimberly Miller, 16, 358 N. 100 E. Tooele, Utah
Elizabeth Miller, 14, 358 N. 100 E. Tooele, Utah

RTIFY THAT THIS IS A TRUE COPY OF
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT, TOOELE COUNTY, STATE
UTAH.

TE: 1-7-04
[Signature]
DEPUTY COURT CLERK



STATE OF UTAH

COUNTY OF TOOELE)

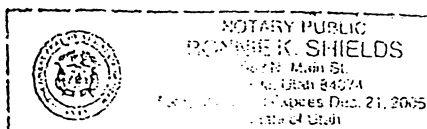
[Signature: Lori Lee Thiriot Miller]
Signature of Claimant

E 198625 B 834 P 51
Date 27-MAR-2003 1:14pm
Fee: 10.00 Cash
CALLEN PESHELL, Recorder
Filed By CBP
For LORI MILLER
TOOELE COUNTY CORPORATION

Acknowledged, subscribed and sworn before me, BONNIE K SHIELDS,

a Notary Public for the State of Utah, this 26 day of MARCH, 2003.

My commission expires 21 DECEMBER 2003.



[Signature: Bonnie K. Shields]
Notary Public

Tab 6

FILED DISTRICT COURT
Third Judicial District

APR 18 2003

By **TOOELE COUNTY**
Deputy Clerk

DOUGLAS F. WHITE, #3443
Attorney for Plaintiffs
3282 So. Sunset Hollow Drive
Bountiful, Utah 84010
Telephone: (435) 843-9399
FAX: (435) 843-9399

IN THE THIRD JUDICIAL DISTRICT COURT

TOOELE COUNTY, STATE OF UTAH

JERRY HOUGHTON, SUSAN)	
HOUGHTON, KENDALL R. THOMAS,)	
MARLENE THOMAS, and the 1995)	JUDGMENT
THOMAS FAMILY TRUST,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
GLEN E. MILLER,)	Civil No. 000301127
)	Judge Randall Skanchy
Defendants.)	

COMES NOW, the Court and having considered the Plaintiffs' Motion for Summary Judgment and Defendant's response to it, and having reviewed the pleadings on file herein and good cause appearing therefore; the Court now hereby enters the following order and JUDGMENT as follows:

1. There is no genuine issue of material facts in dispute; and therefore, the Plaintiffs are entitled to a judgment against the Defendant as a matter of law, pursuant to Rule 56 of the Utah

Rules of Civil Procedure.

2. The Plaintiffs' Motion for Summary Judgment is hereby granted.

3. Jerry Houghton and Susan Houghton are granted a judgment, jointly and severally, against the Defendant, Glen E. Miller, in the amount of \$88,129.00 as of November 30, 2002. Post judgment interest to accrue at the contract rates.

4. Kendall R. Thomas, Marlene Thomas and the 1995 Thomas Family Trust are granted a judgment, jointly and severally, against the Defendant, Glen E. Miller. Post judgment interest to accrue at the contract rates. *in the amount of \$183,269.00 per*

DATED this 10th day of April, 2003.

BY THE COURT:

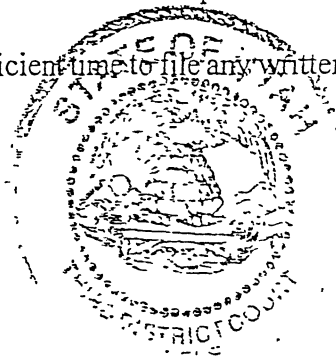


RANDALL SKANCHY
Judge

NOTICE TO DEFENDANT'S ATTORNEY

TO: LONN LITCHFIELD

Pursuant to Rule 4.504 of the Code of Judicial Administration, you are hereby notified the undersigned will hold the original hereof for a period of five (5) days from the date this notice is mailed to you to allow you sufficient time to file any written objections to the form of the foregoing



I CERTIFY THAT THIS IS A TRUE COPY OF AN
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT TOOELE COUNTY, STATE
OF UTAH
DATE April 23, 2003
R. D. Litchfield
DEPUTY COURT CLERK

with the Court and mail a copy to the undersigned. If no objections to the form are filed within that time, the original hereof will be submitted to the Court for signature and filing.

I do hereby certify that I mailed a true and correct copy of the foregoing, postage prepaid, on this 3rd day of April, 2003, to the following person(s):

Lonn Litchfield
ATKIN & HAWKINS
Attorney at Law
136 South Main, 6th Floor
Salt Lake City, Utah 84101


JUDY PETERSON, Legal Assistant

Tab 7

DOUGLAS F. WHITE, #3443
Attorney for Plaintiffs
3282 So. Sunset Hollow Drive
Bountiful, Utah 84010
Telephone: (435) 843-9399
FAX: (435) 843-9399

IN THE THIRD JUDICIAL DISTRICT COURT

TOOELE COUNTY, STATE OF UTAH

JERRY HOUGHTON, SUSAN)
HOUGHTON, KENDALL R. THOMAS,)
MARLENE THOMAS, and the 1995)
THOMAS FAMILY TRUST,)

Plaintiffs,)

vs.)

GLEN E. MILLER,)

Defendant.)

WRIT OF EXECUTION

Civil No. 000301127
Judge Randall Skanchy

THE STATE OF UTAH

To the Sheriff of Tooele County, State of Utah, **GREETINGS:**

WHEREAS, Judgment was rendered in this action by the above Court in said County, on
the 10th day of April, 2003, against said Defendant, Glen E. Miller, and in favor of said Plaintiffs,
in the amount of:

Judgment amount
Estimated costs of this Writ
TOTAL

\$271,398.00

\$ 65.00

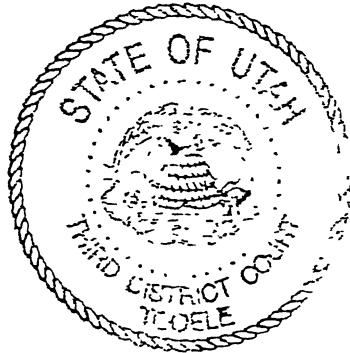
~~\$271,463.00~~

Scanned by _____
Relationship _____
Time _____ Date _____
Address _____ Deputy _____

with interest pursuant to judgment contract rates, from the date of judgment until paid, plus after-accruing costs.

THESE ARE, THEREFORE, to command you to collect the aforesaid judgment, with costs, interest, and fees, and to sell enough of the Defendant's real or personal property to satisfy the same. This shall be your sufficient warrant for so doing. Within sixty (60) days after your receipt of this Writ, return this Writ with a statement and certificate of your doings in completing the service. WHEREOF FAIL NOT.

Given under my hand and the seal of said Court this 1 day of ^{May}~~April~~, A.D. 2003.



CLERK Julie P. Kroff

BY _____
Deputy Clerk

DOUGLAS F. WHITE, #3443
Attorney for Plaintiffs
3282 So. Sunset Hollow Drive
Bountiful, Utah 84010
Telephone: (435) 843-9399
FAX: (435) 843-9399

IN THE TOOELE VALLEY JUSTICE'S COURT

TOOELE COUNTY, STATE OF UTAH

JERRY HOUGHTON, SUSAN)	
HOUGHTON, KENDALL R. THOMAS,)	
MARLENE THOMAS, and the 1995)	P R A E C I P E
THOMAS FAMILY TRUST,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
GLEN E. MILLER,)	Civil No. 000301127
)	Judge Randall Skanchy
Defendant.)	

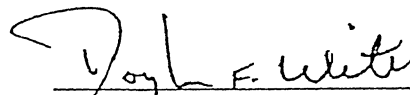
TO THE SHERIFF OF TOOELE COUNTY:

Pursuant to the Writ of Execution herewith handed you, you are required to levy on and sell the following property belonging to the judgment debtor, Glen E. Miller. Said properties are located at 358 North 100 East, Tooele, Tooele County, State of Utah and lot behind 288 North Main (see plat map), Tooele, Tooele County, State of Utah, respectively; and further described as follows:

PARCEL NO. 1: Beginning 303 feet South of the Northwest Corner of Block 26, Plat "A", Tooele City Survey; running thence East 504 feet; thence South 248 feet; thence West 9 feet; thence North 181.5 feet; thence West 495 feet; thence North 66.5 feet to point of beginning, combining T-504 and T-504-1. Containing 0.77 acres. Parcel No. 02-42-14.

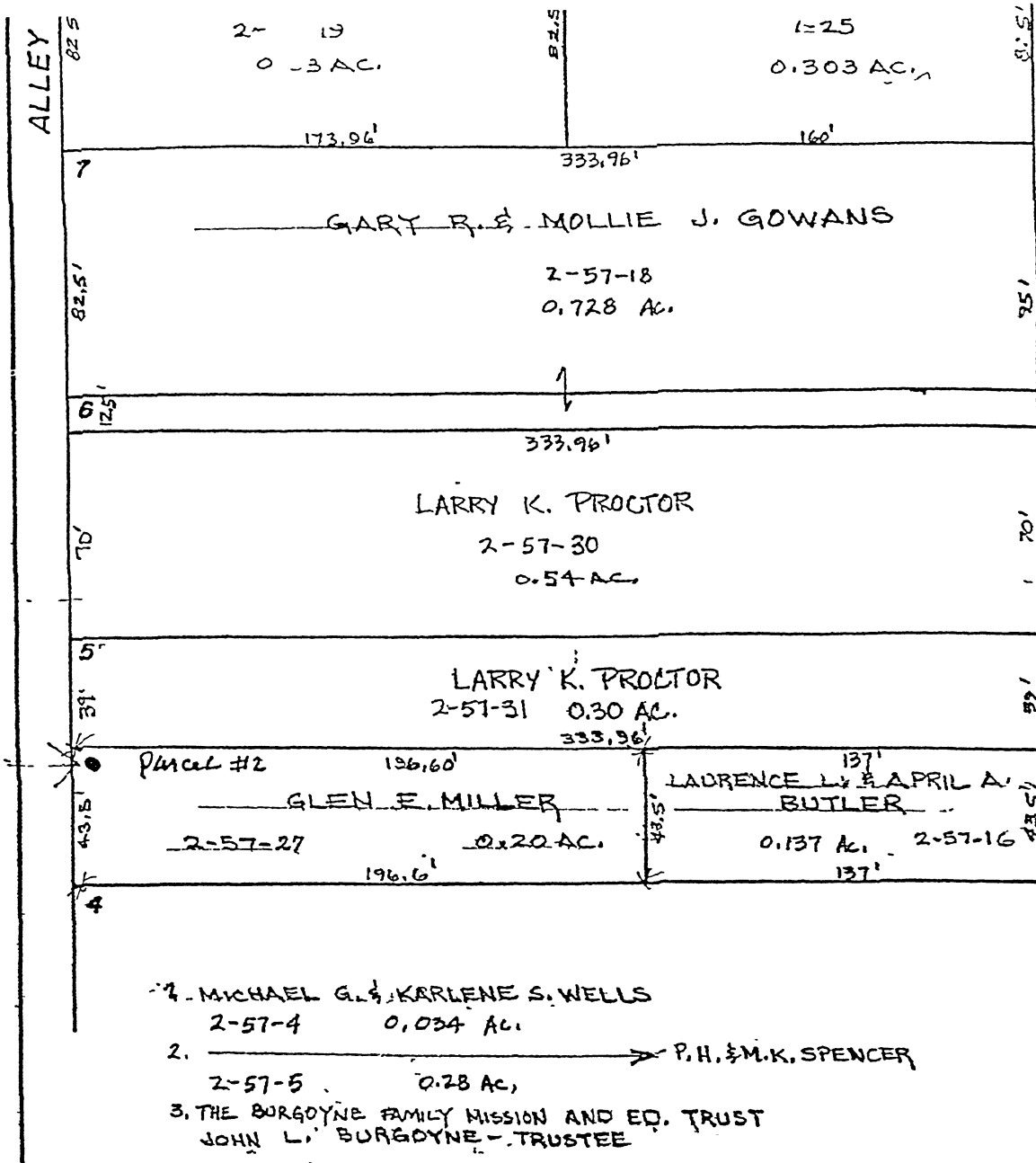
PARCEL NO. 2: Beginning 137 feet West of the Southeast Corner of Lot 5, Block 41, Plat "A", Tooele City Survey; running thence West 196.96 feet; thence North 43.5 feet; thence East 196.96 feet; thence South 435. feet to the point of beginning out of 2-57-17. Containing 0.20 acres. Parcel No. 2-57-27.

DATED this 30 day of April, 2003.

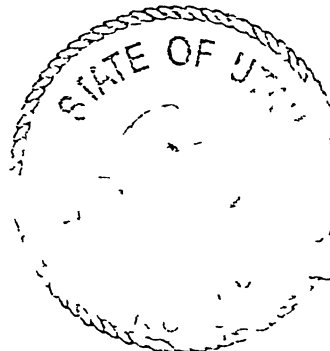


DOUGLAS F. WHITE
Attorney for Plaintiffs

Post Notice Here



208
So
main



CERTIFY THAT THIS IS A TRUE COPY OF A
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT, TOOELE COUNTY, STATE
OF UTAH

DATE 1-7-04
[Signature]
DEPUTY COURT CLERK

Tab 8

IN THE THIRD JUDICIAL DISTRICT COURT
OF TOOELE COUNTY, STATE OF UTAH

_____)	
JERRY HOUGHTON,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 000301127
)	
GLEN E. MILLER,)	
)	
Defendant.)	
_____)	

Hearing
Electronically Recorded on
August 4, 2003

BEFORE: THE HONORABLE RANDALL N. SKANCHY
Third District Court Judge

APPEARANCES

For the Plaintiff: DOUGLAS F. WHITE
3282 South Sunset Hollow Dr.
Bountiful, Utah 84010
Telephone: (435) 843-9399

For the Defendant: GLEN E. MILLER
(Appearing pro se)
(Address not provided)
(Phone number not provided)

Transcribed by: Beverly Lowe, CSR/CCT

1909 South Washington Avenue
Provo, Utah 84606
Telephone: (801) 377-0027

P R O C E E D I N G S

(Electronically recorded on August 4, 2003)

THE COURT: This is the matter of Jerry Houghton versus Glen Miller. It's case 000301127. Mr. Miller's motion to set aside the writ of -- set aside the judgment. So that's where we're at. Go ahead.

MR. MILLER: Your Honor, could I have a pen -- a hand released so that I might be able to use a pen so that I could take notes?

THE COURT: I'll only do that if my security officers indicate that's acceptable.

MR. MILLER: Also, this is a hearing on the writ of execution, or is this a hearing on the motion for dismissal?

THE COURT: It's a hearing on both.

MR. MILLER: Okay. So we'll be discussing both at this time?

THE COURT: I think so.

MR. MILLER: Because -- okay. Because I was not told that we would be having the hearing on both, your Honor.

THE COURT: Well, you've come a long way and it would be nice to have you be able to have everything handled today.

MR. MILLER: Okay. Whatever we -- before I -- we discuss the writ of execution, your Honor, may I ask some questions pertaining to the judgment itself?

THE COURT: No, no. I just want you to present your

1 argument. You know, I've got a busy calendar here. We've got
2 a lot of people that need to be heard.

3 MR. MILLER: Well, this --

4 THE COURT: I need to hear your argument on this
5 particular issue so we can go forward.

6 MR. MILLER: Okay. I have outlined in the motion to
7 dismiss the issues involved. I was never even aware that there
8 was a judgment at all in this case. I had not received any
9 notice until I received the writ of execution on the 6th of
10 June, and so under the summary judgment I had not even been
11 notified that there was a judgment, that I could respond to the
12 judgment or that matter.

13 Also, in the writ of execution there gave an amount
14 of the judgment of \$271,000 that was granted to the plaintiffs.
15 I was wondering where that figure came from in this particular
16 case.

17 THE COURT: You know, the way things work here, you
18 make an argument and I listen to it.

19 MR. MILLER: Okay.

20 THE COURT: I am not here to be questioned. I simply
21 hear your argument. What you may say, then, is the way you'd
22 want to say that is "and I think that's in error," or something
23 like that --

24 MR. MILLER: Okay.

25 THE COURT: -- as opposed to posing some question to me

1 about it (inaudible).

2 MR. MILLER: Okay, your Honor, this is the first time
3 I've ever done this, so --

4 THE COURT: Well, you've done a very nice job in terms
5 of what you've provided the Court. It's been very beneficial
6 and useful. So you're doing great so far. Just --

7 MR. MILLER: Okay, thank you, your Honor. Yes, and I'm
8 scared, too, and it's just --

9 THE COURT: No reason to be scared.

10 MR. MILLER: Okay. Also, the reason I bring that
11 point up is that the plaintiffs had filed a lawsuit in
12 November of 1999, but in January or February of 2000 they
13 received a judgment on the promissory notes, and that was
14 already issued in, like I say, in January or February of the
15 year 2000.

16 This particular lawsuit, as I understand it, as
17 I don't have all the paperwork pertaining to it, is a
18 supplementary one. It's one filed after that against me
19 personally for fraud, and so that one -- and now if this
20 judgment in this second lawsuit filed by the plaintiffs against
21 me is for the amount of the promissory note that has already
22 been resolved under the first lawsuit that was -- they were
23 awarded a judgment of in 2000 against LD&B Corporation.

24 So according to -- under the rules of the res judicata
25 this shouldn't be able to be tried again. So that is a reason

1 for -- another reason not mentioned in my motion as to why this
2 judgment should be set aside.

3 THE COURT: Mr. White, does your client have a judgment
4 against Mr. Miller that precedes this one on these same --

5 MR. WHITE: No.

6 THE COURT: -- issues? All right.

7 MR. WHITE: It is against a company called LD&B.

8 THE COURT: Okay.

9 MR. WHITE: Totally separate.

10 THE COURT: What I'd indicate to you, Mr. Miller, is
11 that parties may sue people in their individual and in their
12 corporate capacities, and maybe that's what occurred. A
13 judgment has been taken against your corporation or whatever
14 it was, and I'm not privy to that, so I don't know.

15 MR. MILLER: Uh-huh.

16 THE COURT: And B, subsequently a judgment was taken
17 against you personally. Maybe in this case based upon --
18 based upon the allegations of self dealing or not maintaining
19 a corporation, that you might be subject to these particular
20 judgments, but regardless of that, the judgment's been entered.
21 So now we understand that they're not -- they're not two
22 judgments taken against you. So res judicata is not going to
23 apply.

24 MR. MILLER: But the promissory notes are exactly the
25 same.

1 THE COURT: It doesn't matter.

2 MR. MILLER: And that would be a -- that would be a
3 defense that would be raised at a trial.

4 THE COURT: You see, res judicata, of course, would
5 mean that you had been sued twice in your individual capacity
6 for the same debt by the same parties.

7 MR. MILLER: I was sued in that first one, and the
8 judgment was issued, though, against LD&B Management.

9 THE COURT: All right. I understand your argument
10 there.

11 MR. MILLER: Okay. Now, I'd like to right now, your
12 Honor, address the homestead issue that I filed --

13 THE COURT: Address the service issue for me, please.
14 That's the most important one.

15 MR. MILLER: The service issue?

16 THE COURT: Yes.

17 MR. MILLER: Okay. The only service which I received
18 was the writ of execution. There was no other service that I
19 received. I was not informed of any judgment. I was not
20 informed of any lawsuit that was pending against me in these
21 proceedings. I had written my attorney on February 13th and
22 asked if there had -- was anything that was going on.

23 THE COURT: Now, your attorney unfortunately withdrew,
24 and so this is where you end up.

25 THE COURT: And he withdrew, as I understood, in April

1 or -- but he never sent me any notification of withdrawal.

2 THE COURT: Withdrew. He withdrew on the 25th of April
3 2003, although I note that no order was entered by a Judge,
4 meaning he hadn't officially withdrawn.

5 MR. MILLER: Yeah, Mr. White informed me today that
6 he had withdrawn. That was the first I had heard. I had
7 written --

8 THE COURT: Well, he believes he's withdrawn, but until
9 an order is executed by the Judge, he hasn't.

10 MR. MILLER: And so I have not -- I had not received
11 anything pertaining to the issues of the case, being able
12 to argue against the summary judgment, motion for summary
13 judgment. I've outlined in my motion other elements pertaining
14 in the -- to have it dismissed as to why it should be dismissed
15 because I was never informed of the judgment and I was never
16 able to provide a defense.

17 THE COURT: Well, let me indicate something for you
18 so you fully understand it. You were served with the initial
19 summons in this case. That is, you were served because you had
20 retained Counsel, and Counsel was representing you. Indeed
21 while Counsel was representing you, this motion for summary
22 judgment was filed. Your Counsel actually filed a response in
23 opposition to that motion for summary judgment, and this matter
24 was heard before your Counsel chose to withdraw.

25 So whether your Counsel was informing you of what's

1 going on, that may or may not have happened, but you had
2 representation, whatever it was, through this lawyer, whomever
3 he was that you retained, but he was representing you through
4 -- up through and including the time this judgment was entered.
5 So service on your lawyer is service on you.

6 MR. MILLER: Okay. There --

7 THE COURT: Go to the homestead issue.

8 MR. MILLER: Okay. Yes, your Honor. Okay. As you're
9 aware, your Honor, the homestead is a Constitutional creation,
10 and as such it's not just a privilege, but an absolute right.
11 It's intended to secure and protect the home against creditors
12 as a means of support to every family, and that's found in
13 Kimball versus Salisbury case.

14 Black's Law Dictionary defines a Constitutional
15 homestead as a homestead along with its exemption from forced
16 sale conferred upon the head of a household by a State
17 Constitution. Article 22, Section 1 of the Utah State
18 Constitution outlines that a homestead law needs to be passed.
19 So therefore the homestead law itself is found in code Section
20 78-23-3.

21 Now, the term "homestead" is not defined itself in the
22 code section. However, according to the terms of statutory
23 construction -- you know, we turn to a dictionary, and again in
24 Webster's and also in Black's Dictionary -- Law Dictionary --
25 homestead is defined as the home, the appurtenances, the out-

1 buildings and the land surrounding the primary residence of a
2 family, a person or his family.

3 The property located at 358 North 100 East is the
4 principal residence of my family. The homestead was recorded
5 in Tooele County Recorder's Office on March 27th, 2003. Now,
6 I do not have a copy of that. If my wife is present in the
7 courtroom, she would have a copy of that if you want to view
8 that as an official document, your Honor.

9 THE COURT: Let's just for this argument assume that it
10 exists.

11 MR. MILLER: Okay. The Utah Supreme Court ruled that
12 the exemption statutes are to be liberally construed in favor
13 of the debtor to protect him and his family from hardship, and
14 that was stated in Russell M. Miller Company versus Given.

15 Also, in the Court case Folson versus Asper they
16 stated that because homestead is a Constitutional creation,
17 all laws thereto must be liberally construed to protect it
18 and make it effective for the dependent and the help -- the
19 dependent and helpless to insure them shelter and support.

20 Again, in Pentagopolis versus Manning, they said
21 that the law should be broadly construed to accomplish its
22 beneficent purpose.

23 In the case of McMurdie versus Chugg, one of the
24 beneficent purposes to the homestead was given when it said
25 that the law was to protect the land which was designated

1 homestead against forced sale for an ordinary judgment lien.

2 Subsection 3 of the law of Section 78-23-3 clearly
3 states, "A homestead is exempt from judicial lien and from
4 levy, execution or forced sale." Applying the definition found
5 in the dictionary about the homestead, it said it would be the
6 house, out-buildings and adjoining land owned and occupied by a
7 person or family as a primary residence is exempt from judicial
8 lien and from levy, execution and forced sale.

9 There are four exemptions that are given to which
10 a homestead could be levied. One is a statutory lien for
11 property taxes and assessments on the property. Plaintiff's
12 judgment is not for those.

13 A security interest in the property and judicial liens
14 for debts created for the purchase price of the property.
15 Again, the plaintiff's judgment is not for that purpose.

16 Three, judicial liens, which is what theirs is,
17 obtained on debts created by failure to provide support or
18 maintenance for dependent children. Theirs is not a judicial
19 lien for the support of dependent children, or maintenance.

20 Four, consensual liens obtained on debts created by
21 mutual contract, and there's nothing consensual about the
22 plaintiff's lien on the property, so that exemption does not
23 apply there. So none of the exemptions as stated in the law
24 cover that -- the plaintiff's judgment.

25 Now, up to this point I've only talked about the

1 beneficent purpose which is to provide security and protecting
2 a family's home against the creditors, but there's another
3 element of the law, and that is that of the homestead amount.

4 While the Courts have ruled that the homestead is
5 protected, they have also stated that a homestead cannot be
6 used to defeat a lien that's already on the property. Okay,
7 and there is a Court case -- and that was in McMurdie versus
8 Chugg.

9 Now, there is also a case where the Utah Supreme
10 Court allowed the a sale of the homestead, but still granted
11 the exemption amount, which -- okay, which tends to make the
12 homestead appear that it is an amount, not the homestead. That
13 was in the Court case of Gilroy versus Lowe, but the facts of
14 that case are totally different.

15 In that case a judgment was awarded against the Lowes,
16 and then eight years later, upon the execution of that judgment
17 and after an order had been issued by the Court to force sale
18 the property, then they filed the homestead claiming that it
19 was exempt, and a judgment which was eight years later --
20 again, after the judgment they filed the homestead simply as
21 a means to defeating that judgment and to preserving their
22 home, but they were still granted the homestead amount because
23 of the homestead law.

24 THE COURT: And how do you balance this homestead
25 amount, which is a small amount -- \$20,000 in the case of the

1 primary residence -- against the rest of what might otherwise
2 be subject to execution? That is, the home itself.

3 MR. MILLER: That is a very valid point, your Honor,
4 and I would like to emphasize that point in this -- at this
5 time, because the Tenth Circuit Court around 1994 in the case
6 David Dorsey Distributing versus Sanders stated that a judgment
7 lien never attaches to the homestead. It never attaches to the
8 homestead under Utah law.

9 Now, there's another case called Gisey Walker Company
10 versus Biggs where again they talk about where the exemption
11 amount is lower than the value of the property and say that it
12 could be sold at a forced sale. However, it referred to the
13 law at that time which was in force, which specifically stated
14 that a homestead could be levied in excess. That wording has
15 been dropped from the present statute that there no longer can
16 be that.

17 Now, the Courts have had to weigh the differences to
18 what is the beneficent purpose of the homestead and what is an
19 actual use of the homestead in protecting a family and a home
20 and the people, and in the particular cases where they have
21 allowed for the execution of the homestead, in each of those
22 cases the homestead was filed after the judgment, and it was
23 filed after the writ of execution had been given, and it was
24 only used as a means to defeat that execution.

25 However, in other Court cases such as -- as I

1 mentioned -- in McMurdie versus Chugg, it talks that -- the
2 Court ruled that the plaintiff could not assert a lien against
3 an existing homestead already vested in the defendant. That he
4 could not do that under the Constitution. Meaning he couldn't
5 assert the lien against an existing homestead.

6 It was later ruled that the right to claim a homestead
7 exemption is a right that the head of family may assert to
8 prevent sale under execution of his homestead at any time
9 before sale of the premises, unless the claim against such
10 property has been previously asserted and actually adjudicated
11 against him. That was found in Utah Builder's Supply Company
12 versus Gardner. So what they have -- the Court has ruled that
13 they can assert that any time prior to the sale as long as it
14 hasn't been adjudicated.

15 Now, as I stated, in all of the cases where the
16 homestead was executed -- and they use it in bankruptcy, as I
17 understand, a lot. I'm not familiar with that, but they have
18 used that, and the Court of Appeals has also said that it's not
19 fair for a person to continue living in their home and enjoy
20 that living, and then declare bankruptcy while all of those
21 other creditors have been left to hang dry out in the wind, and
22 defraud them of that money.

23 Now, finally, the Utah Supreme Court ruled in Payson
24 Exchange Savings Bank versus Teachen that the levy of execution
25 upon a homestead is not voidable, but it's absolutely void.

1 Now, in our case the homestead was prepared and filed prior to
2 any judgment and without any attempt on our part or the part of
3 my wife to defeat any existing lien.

4 THE COURT: When did you say the date of that filing
5 was?

6 MR. MILLER: The date of the filing was the 26th day
7 of March 2003. That was the date that she filed -- or 27th day
8 of March. She signed it on the 26th. She would have done it
9 sooner, but the property was in such bad condition from renters
10 having been in there and left it unsecured and such, that she
11 spent about four, five months trying to prepare the house to
12 make it just habitable. So as soon as it was habitable and
13 she could move in, she filed the declaration of homestead. Not
14 in an attempt to defeat any judgment. Not in an attempt to
15 escape any creditors, but as a protection so that she might
16 have a place to live.

17 We had a house previously. A fire burned it. It was
18 then foreclosed upon, as the insurance company or the bank
19 refused to allow the money to fix the house to be released. I
20 don't know all of the details and the particulars because I was
21 in prison at the time that that occurred, but we did lose that.
22 So after that time, we looked and this house was available
23 for her to move into, and she prepared it to move into. Now,
24 again, as I said, it was not -- it was to provide stability to
25 her, to provide stability for the family, and to provide for

1 her.

2 Then another event has just recently occurred in this
3 Court, your Honor, where this past Thursday I received a copy
4 of an order of separate maintenance from this Court which was
5 for my wife Lori, and it granted to her the use of the property
6 located at 358 North 100 East as an award of alimony for her,
7 and in reviewing the exemption statute, as well as Rule 69 of
8 the Utah Rules of Civil Procedure, property that is necessary
9 for support, such as alimony -- and that is found in 78-23-6 --
10 child support, et cetera is exempt from execution. This home
11 was given to her by the Court as alimony for her to live in.
12 Again, another reason not just for the homestead, but for the
13 alimony as well. Therefore, this also creates an exemption
14 from levy of the property located there at 358 North Main.

15 Now, there is a second piece of property listed in
16 the (inaudible) that was a smaller, little lot that is located
17 at about 280 South Main Street here in Tooele. This is not
18 a primary residence, so therefore the execution amount of
19 homestead, as we had talked earlier, would apply to this, and
20 under the statute it can have a maximum execution -- or not a
21 maximum execution, but a statutory exemption of \$10,000 per
22 household.

23 As stated in my request for the hearing, the tax
24 appraisal that I had last seen on it was for \$4,000. So that
25 the value of that piece of property is sufficiently low that

1 it would also exempt it from levy. If the Court deems that it
2 should be levied under this case and then the homestead granted
3 based under the exemption amount for that, then, you know, I
4 have no objection to having that property sold at that point --
5 at this time, is my --

6 THE COURT: Is there a homestead exemption that's been
7 declared and filed on that property?

8 MR. MILLER: As I understand, your Honor, yes, sir.

9 THE COURT: Okay, thank you.

10 MR. MILLER: So in summary --

11 THE COURT: Okay, thank you. (Inaudible). I will now
12 hear from Mr. White.

13 MR. MILLER: Can I make a summary, your Honor?

14 THE COURT: No.

15 MR. MILLER: Okay.

16 THE COURT: I think you've pretty well (inaudible).

17 MR. WHITE: Thank you, your Honor, and I compliment
18 Mr. Miller for doing his homework on this case. I would like
19 to add a couple of facts that he has left out. In particular
20 he has indicated that the law is that the homestead exemption,
21 as powerful as it might be cannot be used to offset or take
22 preference to a lien that's already recorded on the property.
23 I read most of the cases that he cited. I really don't have
24 much dispute. His interpretation I think is a little off on a
25 few of them, but let me just indicate a couple of facts to the

1 Court, and I think that we can straighten that out.

2 Number one, as to his question about the judgment of
3 \$271,000, if Mr. Miller adds up the amounts owed to my clients,
4 which are in the judgment, Jerry Houghton and Sue Houghton were
5 granted a judgment jointly and severally of \$88,129. Mr. Thomas
6 and Mrs. Thomas, Marlene and Kendall, were granted a judgment
7 of \$183,269, which roughly figured \$271,000 with the interest
8 up to that point in time.

9 Addressing the motion to set aside the judgment, I
10 don't believe anything in there is justification at this point
11 in time to have it set aside. The Court correctly stated that
12 all of the communications and pleadings and whatnot that went
13 on before were sent to Mr. Atkin, his attorney. The Court
14 cited correctly that Mr. Atkin made a response to the summary
15 judgment. The Court granted it under Rule 4.501. There was no
16 irregularities there that I am aware of. Mr. Atkin withdrew
17 about two weeks later and since that time I've been sending
18 everything to Mr. Miller.

19 THE COURT: And I can make that ruling now. That is,
20 I'll deny the motion to set aside the judgment based upon non-
21 service, given the fact that Counsel was present at the time,
22 retained by Mr. Miller, and indeed filed motions in opposition
23 to this question about judgment.

24 MR. WHITE: Thank you. Now, addressing the homestead
25 issues, Mr. Miller has been convicted of defrauding about 200

1 people to the tune of about 8 or \$9,000,000. My judgments are
2 part and parcel of that. The reason the summary judgment was
3 in fact filed in the case originally was because he pled guilty
4 to 10 or 11 counts of fraud.

5 That conviction was entered in this Court through
6 the summary judgment process, and hence, he is personally
7 responsible for those amounts. I'm sure that he may not
8 understand that amount. I think that's the basis of his res
9 juste type of res judicata argument, but I think the Court
10 will note that that is not exactly how that rule works. In
11 fact, the criminal case in that matter has also ordered
12 restitution, and any one of those defendants purportedly at
13 some point in time may go after his property.

14 Here's the facts that the Court ought to know, that
15 I'm sure that Mr. Miller is not aware of. First of all, when
16 we filed -- or I filed the complaint for the Houghtons and the
17 Thomases, we also filed and obtained a motion for a prejudgment
18 writ of attachment because of the allegations of fraud, and
19 because Mr. Miller had filed and recorded with the County
20 Recorder's Office a document indicating that he was no longer
21 to be considered a resident of the State of Utah, and because
22 he was charged with fraud, that gave Judge Young the basis to
23 go ahead and grant a writ of attachment on the property that --

24 THE COURT: When was that writ issued?

25 MR. WHITE: Your Honor, the motion was filed in

1 November of 2000, and the order was actually signed April 17th
2 of 2001. I have a copy of the order.

3 THE COURT: I don't need that.

4 MR. WHITE: Instead of looking through your file, it
5 was signed on April 17th, 2001 by Judge Young.

6 THE COURT: Why don't you give it to the balliff and
7 that way we'll at least have --

8 MR. WHITE: Which includes the house he was currently
9 residing in at 871 East Upland Drive, the 358 North house, and
10 the little piece of property that there's nothing on. It's
11 virtually a weed patch in an alleyway.

12 We know that, and I purport to the Court that those
13 were the properties that I worked with the SEC attorneys to
14 exclude from their case in Salt Lake. They did not trace any
15 funds of his fraud to those properties, and those properties
16 were solely in his name. Not even his wife's name were on
17 them.

18 So we asked the Court in this County to issue that
19 writ. Because of all of the problems that Mr. Miller had,
20 we wanted to make sure that those weren't deeded away or
21 squandered away somehow in between.

22 Now, that becomes of critical importance. I might
23 add, the writ of attachment -- that's the order, the writ of
24 attachment which was filed with the Court as well.

25 THE COURT: You're saying this prejudgment writ of

1 attachment was first in time over a homestead exemption.

2 MR. WHITE: At that --

3 THE COURT: And the homestead exemption is really being
4 filed to defraud creditors.

5 MR. WHITE: Well, I'm not sure that he understood the
6 meaning of that.

7 THE COURT: Sure.

8 MR. WHITE: I'm not saying that he did that, but I am
9 citing a corpus juris secundum in which it states, "Obligations
10 existing prior to the establishment of the homestead right will
11 not be defeated where the debtor subsequently claimed that the
12 premise was his homestead." In fact, that case cited is the
13 Chugg case, which is a Utah case.

14 It further states that the rule -- excuse me -- that
15 the exemption cannot be claimed as against valid liens which
16 have attached to the premises before they are impressed with
17 the homestead character, whether such liens are obtained by
18 contract or by operation of law.

19 I would suggest to the Court, and I have a reference
20 for that, the rules applied in these cases of liens are created
21 by -- liens created by attachment. I have --

22 THE COURT: Of course, this is a post-judgment --

23 MR. WHITE: Yes.

24 THE COURT: -- attachment.

25 MR. WHITE: And I have a case on that as well.

1 THE COURT: Okay.

2 MR. WHITE: The Chugg case, which is an older case,
3 simply states that existing liens on property cannot be
4 defeated by subsequently claiming the property is a homestead.
5 Now, that's important because what Mr. Miller said, he was
6 living, his wife was living, all his dependents were living at
7 891. There was a fire. They never fixed it up. Whatever the
8 -- it was later foreclosed upon.

9 In fact, several months prior to that time he called
10 me and asked me if I would subrogate our preattachment judge
11 -- or lien, so that he could go ahead and refinance the house.
12 I agreed to do that. He tells me today for the first time
13 that that actually never did take place, but we did sign the
14 documents and whatnot, in fact, to do that. So our lien was on
15 that house when he was living there with his wife and with his
16 dependents.

17 He tells me today he was actually incarcerated on
18 March 27th, 2002. Now, that date's important for obvious
19 reasons. Our lien was against the house April 17th, 2001, a
20 year before he even went to jail, and he was still residing in
21 that house. The house caught fire six months later, or seven
22 months later in December, and in fact it was foreclosed on
23 after that.

24 Now, the important part is this. Mrs. Miller -- well,
25 let's make this point first. Mr. Miller has never occupied

1 the premises.

2 THE COURT: Right, and she wasn't occupying the
3 premises.

4 MR. WHITE: And she wasn't occupying the premises and
5 she took occupancy approximately about three months ago, in
6 May.

7 MR. MILLER: No.

8 MR. WHITE: May, June, July, approximately three months
9 ago she took occupancy. He told me that they started fixing it
10 up sometime last September. It doesn't matter which date you
11 take. The lien was still on there two years ago, and that lien
12 trumps the homestead filing of March. There's no doubt about
13 it.

14 THE COURT: Is it the Chugg case that you used for
15 support on this, or is it some other case for a prejudgment
16 writ of attachment?

17 MR. WHITE: That's another case, your Honor.

18 THE COURT: Okay. While -- I'd like to cite one other
19 one before I get to that, on the occupancy, because that is
20 interrelated with it. The Sanders versus Sanders case, which
21 is a Utah case, specifically talks about occupancy and the
22 homestead, and I'm quoting, "It is the occupancy of the
23 premises that gives rise to the homestead claim." They must
24 occupy it in order to make the claim.

25 The prejudgment writ is the case of Ephraim versus

1 Davis, which is a 1978 case, and I'm citing -- and I'm quoting
2 here now. It says, "In the instant case, upon issuance and
3 service of the writ of attachment the defendant creditor was
4 deprived of significant property interest. The constructive
5 seizure by the sheriff encumbered the property with the lien
6 of attachment and inhibited defendant's right to dispose or
7 encumber of its assets."

8 Now, I can tell you in this case they did let the
9 homestead come in, but only because the sheriff didn't do
10 the service correctly, and they got rid of the lien, but the
11 premise -- the principal is the same, that that is a lien that
12 would in fact be first in time, first in right, and that's the
13 basis of that case.

14 Furthermore on that case it says, "The prejudgment
15 remedy of attachment allows the deprivation of the property.
16 The debtor's property is therefore subject to the principals
17 embodied," and it goes on.

18 Now, let me talk about the smaller piece of property.
19 There's a small piece of property over off of Main. It's only
20 access is through a back alleyway. It is 43 feet by 190, I
21 believe. Also in agreement with Mr. Miller that that case or
22 that -- there's not a house on it.

23 Although the code allows people to select in more than
24 one location, the cases are very clear on that, that in fact
25 the property, if it's appurtenant to -- doesn't mean attached

1 to. Could be in different areas -- has to be in some way
2 related to the maintenance or the support of the family.

3 This little piece of property is in the back of an
4 alleyway. It's a weed patch right now. It should have been
5 oiled over. Mr. Miller had an interest in the building that
6 attaches this property that the SEC took and it's behind
7 another person's house right now. It has never been leased
8 for money. It's never been rented for money. There is no way
9 possible to claim in either instance that this comes under the
10 homestead exemptions, and we would ask the Court that it not be
11 included.

12 Now, Mr. Miller in his declaration actually filed by
13 his wife -- the Court have a copy of that with his motion --
14 claims the house is worth \$85,000. Our judgment is \$260,000.
15 Even if the Court found that there was some homestead exemption
16 there, my clients would be entitled to the excess amount. To
17 that there is no question.

18 I do challenge Mrs. Miller's calculation. The current
19 statute which was amended in 2000 allows, and only allows
20 \$20,000 per individual. Now, if individual is defined as the
21 credit -- or the debtor, which Mr. Miller is, not Mrs. Miller,
22 then they're really only entitled in my view to \$20,000, but in
23 fairness and candidness to the Court as well, I found one case
24 that said if she was in possession of it, even though she's not
25 on the title of it, in the liberal construction of it, the

1 Courts would probably grant her an exemption as well, giving
2 them 40, totally maximum, but she did not take possession of
3 the house, and mark it or impress it with the homestead until
4 after that house caught fire and was foreclosed on. Clearly
5 about two years difference.

6 I observed the house before I filed the motion in
7 November of 2000. It was totally dilapidated, had been an
8 older rental house, the doors in the front and the back were
9 totally open on it. No one was residing there, really, at all,
10 and I don't know that anybody's been in there since they've
11 tried to go in and fix it up now for her.

12 The point there being at the time our prejudgment
13 lien was filed, it was not a homestead to the Millers, period.
14 Likewise, the little piece of property in the alleyway was not
15 either, and that should not be considered as a homestead as
16 well.

17 I have with me today and I would proffer as testimony
18 an attorney that deals with these exemptions in bankruptcy
19 Court routinely, and he is Mr. Kurt Morris, he would hear --
20 he is here and he would testify that the exemption is \$40,000
21 max per household.

22 What they did is calculate \$20,000 per individual, but
23 they included in their calculation all the children. Under the
24 new statute amendments of 2000 that's no longer permissible.
25 What they did is increase the exemption from \$10,000 to \$20,000

1 and basically took the kids out. The kids were out actually a
2 little bit before that, but nevertheless, that's the maximum.

3 He's claimed 100 -- or she's claimed \$120,000, and
4 that can't be done under that statute, and I would cite for
5 that 78-23-3(2)(a)(1), which indicates there is a \$40,000
6 maximum exemption there. I would also cite the Homestead
7 versus Miller case, which indicates the maximum would be
8 \$40,000.

9 So all in all, your Honor, we have a very valid
10 prejudgment writ of attachment. It's that which we wish to
11 proceed on when this was started. I have a copy of -- maybe
12 I gave it to you -- the title report. Did you have that, your
13 Honor?

14 THE COURT: Oh, yes, I do. The list of lien holders
15 and --

16 MR. WHITE: Showing that -- yeah. Showing that the
17 writ was filed and recorded with the courthouse about two years
18 before this house ever came on the radar screen as far as being
19 a Homestead Act, and I would suggest to the Court that the
20 Court rule in fact that the prejudgment writ of attachment is
21 not affected by the Homestead Act. My clients have the right
22 to sell this house and the other little piece of property in an
23 attempt to try and recoup some of their \$271,000.

24 I appreciate Mr. Miller's response to this matter, but
25 I think that he just doesn't understand the fact that in

1 Utah, first in time, first in right. I don't see any other
2 reasonable interpretation of the time periods and the way the
3 law works with liens and homesteads that I could suggest to the
4 Court that would construe that statute any other way, and we
5 would ask the Court to permit us to go ahead, readvertise and
6 go ahead with the sell. Thank you.

7 THE COURT: Okay. This is what the Court's going to
8 do, based upon the arguments today.

9 MR. MILLER: Can I get -- your Honor?

10 THE COURT: Yes.

11 MR. MILLER: May I add something to what he has said?

12 THE COURT: How much of a something do you want to add?

13 MR. MILLER: Well, some of the things that he stated as
14 facts that I'd like to clarify and --

15 THE COURT: Okay. Let's make it -- let's make it
16 quick.

17 MR. MILLER: Okay, he stated that I have been convicted
18 of defrauding people. That is not correct, your Honor.

19 THE COURT: Well, you pled guilty to --

20 MR. MILLER: I pled guilty -- I did not plead guilty to
21 defrauding any people. I have an affidavit which I filed in
22 the Court in Salt Lake that I have -- happen to have a copy of
23 it today that I could proffer here as evidence pertaining to
24 the things which he has stated.

25 As far as restitution, there was an order of the Court

1 that said "restitution as necessary." There was no amount
2 of restitution ordered. 38 -- or 78-38 -- or 77-38(a)-302
3 specifies how to determine restitution. I have not agreed to
4 any amount of restitution in that case. There are issues in my
5 affidavit which would address that, if the Court would want me
6 to go over it now or not as far as being responsible.

7 The law states that if the criminal conviction
8 specifically assigns liability that is applicable in a civil
9 case. The things which I pled guilty to, I did not plead
10 guilty, and in my plea I did not agree to pay restitution to
11 all of the victims that had been listed and had been talked to
12 by the prosecutor.

13 In my plea agreement I agreed to state, and it is
14 stated in the plea agreement that I would make restitution
15 to the parties of the lawsuit. The parties in the lawsuit
16 were the State of Utah and Glen E. Miller. I agreed to that
17 restitution for the fact that that is who the parties were.
18 In the preliminary hearing I was questioning Mr. Houghton
19 pertaining to the loss of money and how he had gotten a
20 judgment, and the Judge said, "Mr. Miller, Mr. Houghton is not
21 a plaintiff in that, and you are not to discuss loss of money."

22 THE COURT: Yes, but Mr. Miller, you have to understand
23 that individual parties can't bring criminal actions against
24 people. The State does, and the State represents the people.

25 MR. MILLER: I understand, but this is -- this case,

1 the prosecutor stated that the victim was the State, and I have
2 that in my affidavit.

3 THE COURT: Well, the victim represent -- the victims
4 are represented by the State.

5 MR. MILLER: Okay, and so there's an issue there still
6 pertaining to the restitution amount. The prejudgment writ of
7 attachment, let's -- okay. My wife moved into the house in
8 March, okay? Which was prior to the post-judgment time. The
9 judgment was not awarded until April 10th. I did not even know
10 until, like I said, I received the writ of execution, that
11 there was even a judgment.

12 A prejudgment writ of attachment, while I am not fully
13 versed in title and claims, that is a pre-writ. That is not a
14 lien that has been adjudicated, as was stated in -- against the
15 property until April 10th, when that claim would become official
16 and adjudicated.

17 I would also like to say that, you know, this -- in
18 this case to awarding the execution of the writ of execution,
19 and continuing on with that, is just like having a person who
20 gives up 20 years of her life to have -- raise a family, to
21 raise -- to support her husband, and then all of a sudden he is
22 -- you know, he abandons her, and if he abandons her and then
23 she is left with nothing, and then they come in and sell the
24 house which she has and has been awarded by this Court as
25 alimony, to kicking her out on the street and saying, "Here is

1 \$40,000, whatever, for your inconvenience, and we're sorry "

2 Furthermore, it does authorize that the wife, and the
3 spouse may assert the homestead claim as well, on behalf of the
4 husband and the family, in Section 12. I think I have a copy
5 of the --

6 THE COURT: Well, the statute is quite clear that the
7 maximum amount is \$40,000.

8 MR. MILLER: Yes, but the statute is also very clear
9 -- and the Tenth Circuit Court making it also clear that a writ
10 of -- or that a judgment of judicial lien does not attach to a
11 homestead, and that a homestead, not a homestead amount, is not
12 subject to the levy, as also is the alimony as well.

13 THE COURT: Uh-huh. Okay, thank you, Mr. Miller. As
14 to the motion to set aside the judgment, I've already ruled
15 on that particular issue. Mr. White, if you'll prepare the
16 order.

17 This Court's going to find that the maximum amount
18 per household is \$40,000 in this case. So I'd limit any
19 right of homestead to \$40,000. I'll also find for purposes
20 of findings that the writ of attachment was filed somewhere
21 in the neighborhood of two years prior to the filing of the
22 homestead lien.

23 Be that as it may, the Court's going to take at
24 least the opportunity to look at Eppraim versus Davis and
25 Sanders versus Sanders to see what it says associated with a

1 prejudgment writ of attachment acting as the appropriate lien
2 that might otherwise be reflected in the homestead exemption.
3 So that I might make a determination associated with whether
4 or not a writ of attachment, as you have represented it to be,
5 acts in the case of cutting off any claim for a homestead
6 exemption. I'm going to ask Ms. Walton ultimately to look at
7 that particular issue.

8 So I will give that file to you to check. I know that
9 probably gives you, Mr. White, some heartburn associated with
10 under advisement, since you and I have a matter that's under
11 advisement that we've been attempting to get in touch with you
12 about on that other matter; Iverson versus Iverson.

13 MR. WHITE: Yes.

14 (Court addresses issue unrelated to this case.)

15 THE COURT: I do understand that it is a matter that is
16 still on my desk and it will be off my desk by the end of this
17 week, as well as this one. So Mr. Miller, I appreciate your
18 arguments today. I would also say that I appreciated reading
19 your materials, because it was well done.

20 You've represented yourself better than the lawyer who
21 you asked to represent you, but I held the motion to set aside
22 a judgment, I denied that motion based upon the fact that you
23 had a Counsel representing you. Whether he was communicating
24 or not communicating with you at that time, he was still a
25 lawyer of record who had also filed an objection to this very

1 motion, and simply didn't keep you in that particular loop.

2 On the issue associated with the writ of execution,
3 I've taken that issue under advisement, having limited the
4 upper amount of \$40,000 to it, to simply whether or not the
5 writ of attachment exists.

6 As to the other property, that property is subject to
7 execution, the smaller parcel, based upon the arguments of
8 Counsel today. So the only issue that I have is whether or not
9 having looked at Chugg and Sanders a prejudgment writ of
10 attachment is first in time over a homestead exemption.

11 MR. MILLER: Your Honor, what about pertaining to the
12 exemption for alimony?

13 THE COURT: I've ruled on that. My ruling is it's
14 not appropriate or applicable based upon the way I read the
15 statute. Okay, thank you.

16 MR. MILLER: Thank you, your Honor.

17 (Hearing concluded.)
18
19
20
21
22
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25

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

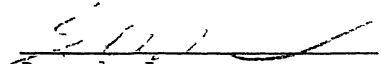
That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

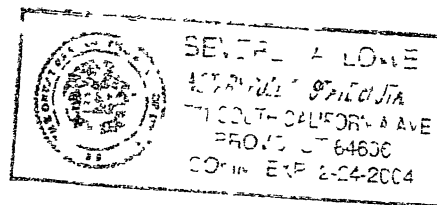
I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 29th day of January 2004.

My commission expires:
February 24, 2004


Beverly Lowe
NOTARY PUBLIC
Residing in Utah County



Tab 9

**IN THE THIRD DISTRICT COURT OF TOOELE COUNTY
STATE OF UTAH**

JERRY HOUGHTON, SUSAN	:	
HOUGHTON, KENDALL R. THOMAS,	:	
MARLENE THOMAS, and the 1995	:	ORDER GRANTING
THOMAS FAMILY TRUST,	:	HOMESTEAD EXEMPTION
	:	
Plaintiff,	:	
	:	Case No. 000301127
vs.	:	
	:	
GLEN E. MILLER,	:	Judge Randall N. Skanchy
	:	
Defendant,	:	

This matter came on for hearing on various motions on August 4, 2003. Mr. Douglas F. White representing plaintiffs and Glen E. Miller appearing pro se. After a review of the pleadings, case law, and argument of the parties, the court finds and orders as follows:

FINDINGS

1. A prejudgment Writ of Attachment was filed against the real property in question and was granted on March 26, 2001.
2. A judgment was entered on April 10, 2003 against Glen Miller in this matter.
3. Lori Miller, the wife of defendant, filed a declaration of homestead on the subject property on March 26, 2003, and she either took occupancy of the property in March or May of 2003.

4. A Writ of Execution was issued on May 1, 2003, and a sale of the property subject to execution was scheduled for July 23, 2003.

5. Defendant filed a request for hearing on the Writ of Execution and the court ordered a stay of execution, pending hearing on July 22, 2003.

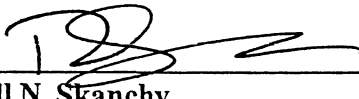
LEGAL DISCUSSION

The court notes that the case of Sanders v. Cassity, 586 P.2d 423 (Utah 1978) is dispositive on the issue of whether a homestead exemption may defeat a pre-existing Writ of Attachment or other judgment on the property claimed under the homestead exemption. Under the statutory authority of Utah Code Annotated 78-23-1 et. seq., and the Sanders decision, a homestead exemption may be made at any time after judgment and before sale. Plaintiff's argument that a prejudgment Writ of Attachment, (or judgment for that matter) filed before the homestead exemption on the subject property was declared, compromised the efficacy of the homestead exemption, is as unpersuasive today as it was to the Utah Supreme Court twenty five years ago. That court opined back then that ". . . the homestead exemption is immune from judgment lien, execution or forced sale, providing a formal declaration of the existing exemption is made prior to the time set for sale or execution." Id. at 426 (emphasis added). Furthermore, even though the Millers may not have been in occupancy on the property at the time of the prejudgment Writ of Attachment, or at the time of judgment, is irrelevant, as the statute neither requires such in order to declare the exemption and Utah case law recognizes that occupancy is unnecessary. Rich Cooperative Ass'n v. Dustin, 385 P.2d 155 (Utah 1963)

ORDER

Accordingly, IT IS HEREBY ORDERED that the subject property, 358 North 100 East, Tooele, Utah, is subject to the homestead exemption exercised by the Millers and exempted up to \$40,000.00 per Utah Code Annotated 78-23-3(2)(b)(ii). Mr. White to prepare the order consistent with this decision.

Dated this 7 day of August, 2003.



Randall N. Skanchy
District Court Judge

Tab 10

JERRY HOUGHTON,

VS .

Case No. 000301127

Defendant.

BEFORE: THE HONORABLE RANDALL N. SKANCHY
Third District Court Judge

For the Plaintiff:

For the Defendant:

1909 South Washington Avenue
Provo, Utah 84606
Telephone: (801) 377-0027

P R O C E E D I N G S

(Electronically recorded on December 4, 2003)

THE COURT: All right. We'll call the matter of Jerry Houghton and others versus Glen E. Miller. It is case 000301127. Counsel, if you'll come forward, make your entries of appearance.

MR. WHITE: Douglas White for the plaintiff.

THE COURT: All right.

MR. PITTS: Judson Pitts.

THE COURT: Mr. Pitts, this is --

MR. PITTS: 9946, for the defendant.

THE COURT: I think this is your motion. So you may proceed.

MR. PITTS: Your Honor, at this time, again, with the understanding that I was retained just a little while ago, and I've looked over the motions, the response to motions, I was unclear as to the scope as to all that would be discussed during the hearing today.

THE COURT: Well, then you're not alone, because so am I.

MR. PITTS: Okay.

THE COURT: But I know that we have voluminous -- I believe what is at issue today is the objection to plaintiff's order.

MR. PITTS: Okay.

1 THE COURT: But I know there are other motions that
2 have been filed, including a motion or request that I take
3 judicial notice of various items.

4 MR. PITTS: Sure.

5 THE COURT: That may simply be a reflection of somebody
6 trying to practice law who has never been through law school
7 training, but having said that, seemed to have done a pretty
8 good job of representing himself so far.

9 MR. PITTS: Your Honor, I'd like to beg the Court's
10 indulgence at this time for my client that he might have one
11 hand free so that he can take some notes.

12 THE COURT: That's not up to me. That's up to the
13 officers in the courtroom today.

14 OFFICER: If it's up to us, the answer is no.

15 THE COURT: What I ask is do you have any objection to
16 that? If you don't, then -- well, let's just do this. Let's
17 free one hand, whichever hand he uses to write with.

18 MR. MILLER: Right.

19 THE COURT: I've always considered the security of the
20 courtroom to be not the province of the Judge but the province
21 of the security officers in the courtroom.

22 MR. PITTS: Your Honor, it appears that my client,
23 the defendant, has issued a motion or made a motion to object
24 to the levy and the execution that has been issued by the
25 plaintiffs in this case, based upon his -- the granting by

1 this Court of the homestead exemption back on August 4th, I
2 believe it was, of this year, in that hearing when that came
3 before the Court. We would like at this time to go ahead and
4 make some oral argument about that to clarify our position.

5 THE COURT: Go ahead, certainly. You might best be
6 served by standing at the lectern so that --

7 MR. PITTS: (Inaudible).

8 THE COURT: -- for purposes of the record it would be
9 better recorded that way.

10 MR. PITTS: My client has gone ahead and moved in
11 this case according to the Utah Constitutional provision on
12 homestead, Article 22, Section 1, your Honor, and also pursuant
13 to Utah Code 78-23-3, that the statutory language in that
14 situation be read liberally -- be construed liberally, to allow
15 him to exclude his homestead.

16 Now, I understand there are more than -- there is more
17 than one parcel of land that is involved in this case that he
18 would like to exclude his homestead and also the other parcel
19 of land using various statutory provisions from forced sale and
20 the execution of levy in this case.

21 Your Honor, we would go ahead and enter in argument
22 at this time that the provisions of the code that provide --
23 apply to the homestead exemption as it is set forth apply in
24 a setting that is for bankruptcy law.

25 We would like to go ahead and move at this time that

1 the homestead definition as it is put forth in statutory
2 language should be interpreted differently in this situation,
3 should be distinguished from the context of a bankruptcy
4 proceeding.

5 That the statutory language should be read more
6 liberally to protect the actual physical structure of the
7 homestead in this situation, as differentiated from the
8 bankruptcy.

9 Now, it's my understanding in a bankruptcy proceeding
10 that it is common practice, your Honor, to go ahead and grant
11 the exemption up to \$20,000 per person in the household, which
12 would give a total monetary exemption on the homestead of
13 \$40,000, and that the rest of the -- the actual physical
14 structure would be subject to a creditor's lien, and would be
15 able to be sold at execution in a sheriff's sale; and that the
16 proceeds from the sale up to \$40,000 would be given over to the
17 defendants or the debtors in that situation.

18 We enter an argument at this time that that does
19 not apply in this proceeding. That this proceeding is a
20 Constitutional proceeding, based on an older law and an older
21 law and an older interpretation of homestead outside of that
22 context of bankruptcy, and that the entire structure at this
23 time is not subject to a forced sale.

24 We use case law, your Honor, to back up and to support
25 our point. First off I'd like to say Russell M. Miller Company

1 versus Given, the citation in that case, your Honor --

2 THE COURT: I have it.

3 MR. PITTS: You have the citation. That exemption
4 statute is to be liberally construed in favor of the debtor
5 to protect he and his family. We also would like to cite
6 Folson versus Asper as one of the first cases to deal with
7 homestead at the beginning of this century, that all laws of
8 the homestead should be liberally construed to protect it and
9 make it effective for the dependent and the helpless, to insure
10 their shelter and their support.

11 Now, defendant recognizes at this point, your Honor,
12 that the exemption as it was created and cut out has changed
13 over time by legislative change, but we would also like to
14 recognize that the amount -- monetary amount of the homestead
15 exemption in times past historically have been enough to cover
16 the value of most homesteads.

17 As that law has evolved, your Honor, we understand
18 that the price most homesteads in equity has exceeded the
19 value of the homestead exemption for Utah. I understand
20 in a national context that this state has one of the lowest
21 thresholds of any state in the country at this time monetarily
22 for a homestead exemption.

23 Regardless of that argument, and also recognizing,
24 your Honor, that the homestead exemption law in this state
25 was altered just six years ago in 1996 by the legislature,

1 that the values were changed, that this was dealt with by the
2 legislature in terms of legislative history, again, the last
3 40 years of homestead law have been almost exclusively caught
4 up in creditor/debtor situations in a bankruptcy proceeding.

5 Now, one of the cases that I wanted to cite as well,
6 your Honor, that I think will help clarify my argument, will
7 be -- well, first off, I wanted to go ahead and ask the Court
8 to take notice of the definition of Black's Law Dictionary on
9 homestead. That is that the house out-buildings and adjoining
10 land owned and occupied by a person or family as a primary
11 residence, Black's Law Dictionary speaks of the house, the
12 out-buildings, the adjoining land as being a part of the
13 homestead.

14 We argue that when the cases and the statutory
15 language that has been set forth in not only Black's Law
16 Dictionary, but also in the statute 78-23-3, when it talks
17 about a homestead being exempted, we contend that the exemption
18 that that statutory language is talking about isn't the
19 monetary value that is exempted from the forced sale.

20 THE COURT: If the statute so designates, it's only
21 exempt up to a certain monetary value.

22 MR. PITTS: We understand that, but we would like to
23 submit that that is in the bankruptcy proceeding. We would
24 like to submit that that applies only to bankruptcy cases and
25 it does not apply to situations where a debtor has not filed

1 for bankruptcy and is not in the course of liquidating his
2 assets to satisfy all lien creditors that have come against
3 him.

4 THE COURT: Has there been any case in the State of
5 Utah limiting this particular statute only to a bankruptcy
6 proceeding?

7 MR. PITTS: The cases that I have, your Honor, to cite
8 in that context -- of course, the older cases that I've already
9 provided for; Folson and I'd also present McMurray versus Chugg
10 as a case that was not in that context. They talked about the
11 beneficent purpose of securing and protecting family's home
12 against creditors.

13 Okay. Now, I would submit to the Court that the
14 language that's used in those cases -- and these are outside
15 of bankruptcy proceeding cases -- talk about securing the home
16 against attack by creditors. It talks about protecting minor
17 children. It talks about giving support to those people.

18 THE COURT: The statute itself has a cap at which that
19 protection ends, and that cap is set forth in a monetary value.

20 MR. PITTS: Okay. Well, Your Honor, the basis of my
21 argument revolves around this being a property interest, as a
22 Constitutional matter, and not being an interest in a monetary
23 value. I would like to make the argument that due process
24 attaches in this kind of a situation. It would be actually a
25 violation of due process in a Constitutional manner to go ahead

1 and take away the physical home, the physical structure, in
2 granting this exemption.

3 My client and his spouse did apply for a homestead
4 exemption in this case, and in that context they were asking
5 for the monetary relief in that situation, but what my client
6 also moved for in that situation, he moved for the protection
7 of a due process protection. A Constitutional protection
8 that's given under the United -- or the Utah Constitution.

9 Now, I understand that there is not a Utah case
10 exactly on point in this situation. It is to be inferred by
11 language in those cases and also through the statutory law
12 that's been given, that it is the physical structure that is
13 protected through due process that he has a right to protect
14 and give shelter to his family and to his minor children that
15 are at home, rather than the money that is associated.

16 It is possible, perhaps, on a forced sale for him to
17 go out and to find a home for his family for \$40,000 in this
18 kind of situation, but I'm contending that that's not what the
19 legislative intent -- not the policy that these legislators had
20 in mind when they passed this Constitutional provision. That's
21 why if in fact it's Constitutional.

22 THE COURT: If I could synthesize your argument,
23 what you're really saying is in the State of Utah under this
24 homestead exemption, if someone claims it, that takes their
25 home, whatever equity, whatever value may exist, and makes it

1 free and clear, despite the caps that have been set forth in
2 the statute of any judgment, of any judgment creditor. If
3 this is a homestead exemption, it would fly against every
4 debtor/creditor relationship that exists in the state.

5 MR. PITTS: You know, your Honor, I --

6 THE COURT: There is an ability for somebody to say,
7 "My home is my castle, and therefore I may do whatever I'll
8 do to incur debt in whatever fashion I do so, but you can't
9 touch this," and that's what I read these caps to be. You
10 can't touch it up to \$40,000, so that at least somebody can
11 use that exemption for purposes of finding suitable alternative
12 habitation.

13 MR. PITTS: Your Honor, I would --

14 THE COURT: No one -- no one -- it's not your argument.
15 It sounds like it is. It sounds like your argument is simply
16 this. A man's home is his castle. It's exempt from judgment
17 creditors if the homestead exemption is declared, and can't be
18 touched whether it has a value of \$10,000 or \$750,000.

19 MR. PITTS: Your Honor, I agree with the Court's
20 summation of my argument with the exception that in the
21 bankruptcy proceeding there are cases that set forth that the
22 exemption that's granted is an allowance for that. In other
23 words, in that context they are allowed to have \$40,000 or
24 \$20,000 a person as an exemption, in liquidating all of their
25 other assets.

1 McMurty versus Chuggs set forth that the homestead is
2 a benefit to those people to protect that castle. In other
3 words it's a reward for those debtors and creditors who do not
4 take the steps in filing for bankruptcy.

5 What I'm -- the policy argument that I'm making,
6 your Honor, is that folks who have the integrity, debtors who
7 remain and keep the integrity of not declaring bankruptcy to
8 their creditors, that is a show of good faith on their part,
9 regardless of the circumstances that they would like to go
10 ahead and repay their debts.

11 Now, in my defendant's particular case that might be a
12 lot of debts, your Honor. I understand you've overseen other
13 cases that my defendant has come before you on, but still --

14 THE COURT: I actually haven't seen anything.

15 MR. PITTS: Regardless -- regardless of that history,
16 your Honor, he has not taken that step. He has shown good
17 faith in his situation. I feel at this time that, you know,
18 as a reward for that, that his wife and his minor children
19 should be granted the opportunity to stay in their home and
20 to not be subject to forced sale, and that the words of the
21 statute should be read as to differentiate between the
22 exemption and the homestead, and that the homestead itself
23 in this situation is a due process Constitutional Right,
24 should be exempt from forced sale.

25 THE COURT: Let me come back and ask this question. Is

1 there any case that you can cite to this Court in the State of
2 Utah that indicates that this exemption merely acts as a lien
3 and the property is not subject, of course, to sale.

4 MR. PITTS: Your Honor, I can submit a case again. It
5 is an older case because I feel that the cases from the last 50
6 years have all been in the bankruptcy proceeding context, but I
7 do go ahead and cite Kimball versus Salisbury. That's 17 Utah
8 381-53-P-1037. It's an 1898 case. I also believe that you
9 could find that we support for that position in the
10 Folson/Asper case.

11 THE COURT: Okay. Well, let's hear from Mr. White.

12 MR. WHITE: By way of clarification I believe the
13 defendant's motion is simply to object to the order --

14 THE COURT: And I understand that, but --

15 MR. WHITE: -- for the record.

16 THE COURT: -- Mr. Miller hasn't been represented
17 by Counsel, and I'm going to give Counsel latitude to make
18 whatever arguments need to be made, including what this is,
19 is in essence a reconsideration of the Court's prior argument
20 -- or prior ruling. So give him some latitude here, based upon
21 the fact that he's not been represented.

22 MR. WHITE: Thank you. I understand Mr. Miller's
23 argument, and I'm looking at the document he submitted on
24 October the 9th, 2003.

25 THE COURT: What's that entitled?

1 MR. WHITE: It's entitled, "Request for judicial notice
2 of homestead," which I take as supplemental to his objections
3 to my order. In addressing Counsel's argument, and I expect
4 Mr. Miller's idea of protecting the residence, the physical
5 structure from the execution, and to redefine what a homestead
6 is, instead of taking Black's Law, we've got to stick with the
7 statutory definition, which is set forth in Title 78-23 --

8 THE COURT: Let me just ask a question. Now, this
9 Chugg case, McMurty case, and the language associated with
10 those cases all suggest that the homestead exemption exists for
11 purposes of protecting it from being subject to judicial sale.
12 Is this statute a subsequent codification of legislature's
13 issues, intent and otherwise?

14 MR. WHITE: Well, I don't believe -- I think they're
15 mutually exclusive. I think the case the Court is looking for
16 is here; 19 -- the Gilroy case versus Lowe. I'm citing from
17 that case, which was exactly the same issue being raised here
18 that I researched --

19 THE COURT: (Inaudible).

20 MR. WHITE: Exactly, as whether or not the physical
21 structure is safe from the sale as opposed to just the value of
22 the exemption, and here's what the case says. "The appellants
23 interest in the home therefore exceeds the value of amount of
24 the homestead exemption. A sale is not prohibited in these
25 circumstances."

1 THE COURT: The appellant in that case was the judgment
2 creditor?

3 MR. WHITE: Yes.

4 THE COURT: So read that language to me again.

5 MR. WHITE: Pardon?

6 THE COURT: Read that.

7 MR. WHITE: "The appellant was the homestead claimant."

8 THE COURT: Okay.

9 MR. WHITE: The appellant's interest in the home --
10 and one of the things that probably should have been done is
11 they have some duty to establish what that is. I've talked to
12 Counsel this morning and by stipulation we're going to submit
13 to the Court the tax assessment, which puts the value at --
14 I've marked this as Exhibit 1 -- \$200,099.

15 Now, the reason for that is somewhat important.
16 Number 1, there is case law that says that if the amount of
17 the homestead exemption is below the value of what might be
18 received out of the house --

19 THE COURT: You're not able to sell it.

20 MR. WHITE: -- you're not able to sell it.

21 THE COURT: That is the one exception. That is not the
22 case here. The homestead exemption is \$40,000; 20 for each.
23 The value of the home, according to that recent tax thing -- we
24 think that's a little high -- is over -- is \$200,000. There is
25 ample equity or value in the house to sell it.

1 Let me continue with the Gilroy case. This Court
2 stated that when a claim of homestead is made, a judgment
3 creditor is entitled -- my clients -- to any excess above the
4 value constituting the homestead right.

5 Furthermore, the homestead exemption is not a bar to
6 execution in the present case. Assignee Federal Leasing, Inc.
7 bid in \$100,000 of the judgment against the appellants and paid
8 to the sheriff on behalf of the appellants the \$8,000 that was
9 their homestead exemption.

10 The Court ruled correctly that appellants were not
11 entitled to claim the protection of the homestead exemption
12 to set aside the execution of the sale. This is the case.
13 This is the ruling. This is a good case. It's never been
14 overturned. It's a 1981 case.

15 The only thing that's been modified in that statute,
16 according to my research, your Honor, is how to calculate what
17 the exemptions were. I found no case that would say that this
18 is simply limited to bankruptcy.

19 Frankly, even in bankruptcy once the exemption is
20 fixed, the property is abandoned, they sell it, with the
21 proceeds going back into the estate -- well, I shouldn't say
22 that, but, they're exempt for the creditor.

23 So even under Counsel's argument of dealing with this
24 differently, that should not work in this Court, because that's
25 not what the law says.

1 The physical structure itself is only exempt from
2 execution of sale unless it is worth less than what the
3 exemption amount is, and in this case that is simply not the
4 case. Looking at the proposed order that I have submitted to
5 the Court --

6 THE COURT: Hang on, let me get that so that I'm
7 looking at it with you.

8 MR. WHITE: Okay.

9 THE COURT: Order on motion to determine homestead
10 exemption; is that what it's entitled?

11 MR. WHITE: It says, "Order on hearing on writ of
12 execution granting homestead exemption" submitted September 22.
13 Has findings and conclusions on it.

14 THE COURT: I have it.

15 MR. WHITE: Going back a couple of months the defendant
16 submitted some other objections, which frankly a few of those I
17 did incorporate into the current order before the Court, but
18 the last round that he submitted, as far as I can tell, did not
19 address anything further in the order, but rather argued, "You
20 can't sell the structure." So I think that's where we're at
21 right now.

22 We would ask the Court to sign the order. I believe
23 it comports with what the Court has said. Unless Mr. Miller
24 has objections that can state to the Court at this time of why
25 certain paragraphs should not be in there, we would like to get

1 this order signed.

2 We believe that my clients are entitled to whatever
3 proceeds there are over \$40,000, and when we were here before,
4 Mr. Miller I believe agreed that the other little piece of
5 property was -- could be sold. Now I hear Counsel arguing
6 today it shouldn't be, but the Court ordered it sold before.
7 There was not a homestead on it. That is in the order in that
8 relationship, and we would submit it based upon that.

9 MR. PITTS: Your Honor, just a few minutes for
10 rebuttal?

11 THE COURT: Uh-huh.

12 MR. PITTS: The case that Counsel -- plaintiff's
13 Counsel relies on, Gilroy versus Lowe, for setting out the law,
14 we believe in this situation may be distinguished, your Honor.
15 The language that plaintiff's Counsel set before the Court did
16 include the language in this case, in terms of allowing the
17 sale of the home.

18 We believe that in Gilroy versus Lowe there was --
19 the facts of that case distinguish it from this one in that
20 it was brought up entirely as a defense in that situation; the
21 homestead exemption from the sale, and there were no -- there
22 was no protection. There was no family to protect.

23 The justification in raising the defense wasn't
24 according to the statutory language, and the earlier case law
25 language that held that the reason in a Constitutional setting

1 that the home should be protected from forced sale is to
2 protect those of the family that's at home, to allow them to
3 stay there. We believe that in the Gilroy setting that that
4 didn't apply to this situation.

5 My client is raising this as an argument for his
6 children, for the best interests of his children. I dare say
7 that in this proceeding that they not only have an interest in
8 this proceeding in terms of this home being sold because of
9 their livelihood, the place where they live. It's possible
10 that they might be able to find an apartment or they may be
11 able to find some other place to live within the area, but I
12 can't see in this proceeding how the best interests of the
13 children cannot be taken into consideration when looking at the
14 forced sale of this structure.

15 Also, I understand that since a homestead exemption
16 has been granted to the defendant's spouse, the defendant's
17 spouse is not represented here as a part of this proceeding,
18 and under Rule 40 of the Utah Rules of -- I'm sorry, 19 of the
19 Utah Rules of Civil Procedure she would be an indispensable
20 party to the order of the forced sale or allowing the executor
21 on this property, because of her interest that's been granted.

22 In other situations where there is an interest that
23 has been granted, I understand that the procedure used to
24 be that the interest of the defendant had been sold in the
25 property in those situations, but not the actual structure, and

1 that the minor children were allowed to live in the structure
2 until the time that they reached the age of majority. All of
3 those rights come from a Constitutional Right in the property.
4 That's -- and that further supports our argument.

5 Now, in the McMurty versus Chugg that we're relying
6 on also has language, your Honor, that we believe supports
7 and bolsters our point as much as the Gilroy case supports
8 plaintiff's Counsel.

9 In McMurty/Chugg it lays out the language, "The Court
10 rules that the head of a family may assert to prevent sale
11 under execution of his homestead at any time before the sale
12 of the premises, unless the claim against such property has
13 been previously asserted and actually adjudicated against him."

14 In that situation it actually talks, your Honor, and
15 uses language that not just the exemption he may exert against,
16 but he may assert to prevent the sale under execution of the
17 entire structure.

18 Your Honor, we really honestly believe in this
19 situation that although this may be a case of first impression
20 before this Court for at least 40 or 50 years, that this is the
21 path that this ought to take. That this case ought to receive
22 a Constitutional consideration along the due process line for
23 property rights, and should not -- that homestead falls under
24 those. We cite the Kimball case.

25 We cite the Utah State Constitution, that this is a

1 Constitutional creation. Homestead simply isn't a mechanism of
2 money that has evolved and come somehow. It has its roots in
3 Constitution. It doesn't have its roots in creditor/debtor
4 relationships. It doesn't have its roots in bankruptcy law.
5 We assert that this is a case where we should go back to those
6 roots.

7 That we should go ahead and split the doctrine at this
8 time on homestead. That there should be a line pertaining to
9 those that declare bankruptcy, and that those are entitled only
10 to keep the exemptions that they claim, and that those who do
11 not declare bankruptcy should be considered outside of that
12 scope, and that there is another body of law that this Court
13 should consider in that situation, and that my defend -- that
14 the defendant's rights fall in that situation in this case,
15 in order to protect his family, to protect his interest in
16 his property, to protect his minor children in their best
17 interests, and that this Court should not allow the forced
18 sale, but should come up with a more creative solution in this
19 situation that would allow my client, the defendant, to retain
20 possession of his home.

21 THE COURT: All right. Thank you, Counsel. It appears
22 from the plain reading of the statute that the exemption has a
23 cap, and I see nothing in the order proposed by Counsel that
24 appears objectionable. Nor have I heard any argument other
25 than really reconsideration of the argument once provided by

1 Mr. Miller in some time past associated with exception to the
2 order itself.

3 Certainly the consequences associated with a number
4 of activities that take place in debtor/creditor relationships
5 accrue to the detriment of the parties who have the debt. This
6 is one of those circumstances, and the legislature has made
7 clear that that homestead exemption doesn't create an enviable
8 castle, but it creates an enviable castle up to a certain
9 interest amount.

10 That interest amount is specifically set forth in the
11 statute, and the Gilroy case seems to be apparent on its face
12 to be applicable to this very case, and that is simply that
13 forced sales may take place of a homestead exemption, with the
14 homestead simply being the amount carved out and any potential
15 equity in the home that's not available for attachment.

16 Accordingly I'll grant the order. I think I have it
17 here, but if you have a new one, I have one that's in my file
18 and I'll sign it today. So this concludes this issue.

19 MR. WHITE: I only have my copy, your Honor. I don't
20 think it's an original. If not, I'll bring one up today.

21 THE COURT: Well, let's see if it is.

22 MR. PITTS: Your Honor, for the record, defense Counsel
23 would like to object.

24 THE COURT: Yeah, I took that by way of your argument
25 that you were objecting.

1 MR. PITTS: Sure, I'm just preserving the record, your
2 Honor.

3 THE COURT: All right. I can take this out. I'm not
4 sure that it's an original either, but -- okay, here's a copy
5 of the order. You may certify it or whatever else you need
6 to do with it. The Exhibit No. 1 has been received as to the
7 value that exists in excess of the homestead exemption. This
8 Court's in recess.

9 MR. WHITE: Thank you, your Honor.

10 (Hearing concluded.)

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REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

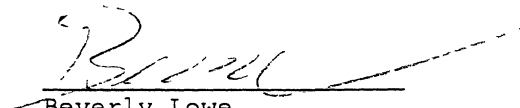
That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

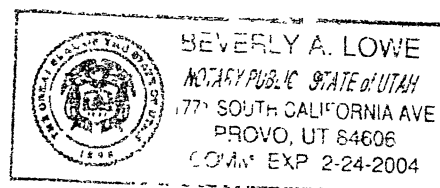
I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 29th day of January 2004.

My commission expires:
February 24, 2004

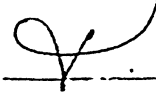

Beverly Lowe
NOTARY PUBLIC
Residing in Utah County



Tab 11

2003 DEC -4 AM 10:07

FILED BY



DOUGLAS F. WHITE, #3443
Attorney for Plaintiffs
3282 So. Sunset Hollow Drive
Bountiful, Utah 84010
Telephone: (435) 843-9399
FAX: (435) 843-9399

IN THE THIRD JUDICIAL DISTRICT COURT

TOOELE COUNTY, STATE OF UTAH

JERRY HOUGHTON, SUSAN)	
HOUGHTON, KENDALL R. THOMAS,)	
MARLENE THOMAS, and the 1995)	
THOMAS FAMILY TRUST,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
GLEN E. MILLER,)	
)	
Defendant.)	

**ORDER ON HEARING ON WRIT OF
EXECUTION GRANTING HOMESTEAD
EXEMPTION**

Civil No.: 000301127
Judge Randall Skanchy

The Defendant's Motion for Hearing on Writ of Execution before the Honorable Randall N. Skanchy, Judge, on the 4th day of August, 2003; the Defendant, Glen E. Miller, was personally present and represented himself; the Plaintiffs were all personally present and represented by Douglas F. White, Attorney; and good cause appearing, therefore the Court enters the following Order:

FINDINGS

1. A prejudgment Writ of Attachment was filed against the real property in question and was granted on March 26, 2001.
2. A judgment was entered on April 10, 2003 against Glen E. Miller in this matter.
3. Lori Miller, the wife of the Defendant, filed a declaration of homestead on the subject property on March 26, 2003, and she either took occupancy of the property in March or May of 2003.
4. A Writ of Execution was issued on May 1, 2003; and a sale of the property, subject to execution, was scheduled for July 23, 2003.
5. Defendant filed a request for hearing on the Writ of Execution, and the Court ordered a stay of execution, pending hearing on July 22, 2003. The matter was continued until August 4, 2003.
6. The prejudgment Writ of Attachment was filed against the two (2) real properties at a time when Defendant did not occupy either property as his residence, nor did any member of his family.
7. On March 26, 2001, when the prejudgment Writ of Attachment became a lien against the following described two (2) parcels of real property, the Defendant's and his family's primary residence was 891 Upland Drive, Tooele, Utah, which is not either of the two (2) real properties subject to this action:

PARCEL NO 1: Beginning 303 feet South of the Northwest Corner of Block 26, Plat A, Tooele City Survey, running thence East 504 feet; thence South 248 feet; thence West 9 feet; thence North 181.5 feet; thence West 495 feet; thence North 66 5

feet to point of beginning. Containing 0.77 acres. Parcel No. 02-42-14.

PARCEL NO. 2: Beginning 137 feet West of the Southeast Corner of Lot 5, Block 41, Plat A, Tooele City Survey, Tooele City, running thence West 196.96 feet; thence North 43.5 feet; thence East 196.96 feet; thence South 43.5 feet to the point of beginning. Containing 0.20 acres. Parcel No. 2-57-27.

8. Defendant was incarcerated in the Utah State Prison on March 27, 2002. Thereafter, Defendant's wife started to repair the uninhabitable house (Parcel No. 1) to live in, and moved in approximately March or May of 2003. The prejudgment lien was taken against Parcel No. 1 on March 26, 2001.

9. Thereafter, Defendant lost his primary residence, that being 891 Upland Drive, Tooele, Utah, through a mortgage foreclosure in approximately December 2002.

10. Parcel No. 1, on March 26, 2001, was an old uninhabitable rental house that was vacant and had had no renters in it for some time.

11. Parcel No. 2 is vacant ground, has no residence on it, and produces no income or support to the Defendant's family.

12. There are no mortgages against either parcel of real property.

LEGAL CONCLUSIONS

13. The prejudgment Writ of Attachment, filed on March 26, 2001, is defeated by the filing of a homestead declaration on March 26, 2003.

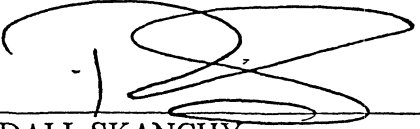
14. The amount of homestead exemption is \$20,000.00 for Glen E. Miller and \$20,000.00 for Lori L. Miller, pursuant to Section 78-23-3(2), U.C.A. as against Parcel No. 1.

12. Parcel No. 2 has no homestead exemption.

13. The Plaintiffs shall renounce the Sheriff's Sale, which was previously stayed by the Court, and proceed with the sale of both parcels of real property, subject to this Order.

DATED this 4 day of December, 2003.

BY THE COURT



RANDALL SKANCHY
Judge

NOTICE TO DEFENDANT

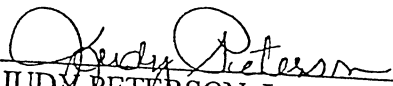
TO: GLEN E. MILLER

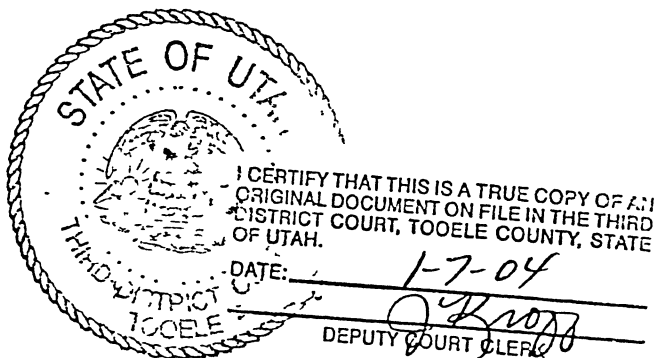
Pursuant to Rule 4.504 of the Code of Judicial Administration, you are hereby notified the undersigned will hold the original hereof for a period of five (5) days from the date this notice is mailed to you to allow you sufficient time to file any written objections to the form of the foregoing with the Court and mail a copy to the undersigned. If no objections to the form are filed within that time, the original hereof will be submitted to the Court for signature and filing.

I do hereby certify that I mailed a true and correct copy of the foregoing, postage prepaid, on

this 22nd day of September, 2003, to the following person(s):

Glen E. Miller, USP No. 33042
Defendant
Utah State Prison
P. O. Box 250
Draper, Utah 84020


JUDY PETERSON, Legal Assistant



Tab 12

1/2001 17:52:42

TOOELE COUNTY CORPORATION

TAXROLL FILE MAINTENANCE

Parcel 02-042-0-0014	2001	Last Yr Tax	1,342.46
Name 1 MILLER GLEN E		Tax Levied	1,316.14
Name 2		Special Tax	0.00
Address 891 UPLAND DR		Abatements	0.00
TOOELE	UT 84074-2419	Payments	0.00
District 001 TOOELE		Uncertified	1,316.14
Mortgage		Back Taxes	Yes \$

2001 VALUES NOT APPROVED			2001		2000	
PROPERTY	ACRES	MARKET	TAXABLE	MARKET	TAXABLE	
R13 MULTIPLE RESID	0.00	144,999	79,749	144,999	79,749	
P LATE PENALTY	0.00	0	0	2,632	2,632	
R01 RESIDENTIAL LA	0.77	55,100	30,305	55,100	30,305	

TOTALS	0.77	200,099	110,054	200,099	110,054
--------	------	---------	---------	---------	---------

M)odify +/- L)egal S)earch B)ack Taxes ' ESC

Built : : Building Type :: Square Footage :0:

ory Description:

SPECIAL NOTE ***

s Rates for 2001 have NOT been set or approved. Any taxes levied
m on this printout for the year 2001 are subject to change!!

al Description for 02-042-0-0014

Rate :0.011959: N 100 E: 358 TOOELE BAKER 01/05/2000

303 FT S OF THE NW COR BLK 26, PLAT A, TCS, RUN TH E 504 FT; TH S 248
TH W 9 FT; TH N 181.5 FT; TH W 495 FT; TH N 66.5 FT TO POB, COMB T-504 &
04-1 0.77 AC

Tab 13

Glen E. Miller
3042
OnePeak E-40
7 Box 250
Alper, UT 84020

IN THE THIRD JUDICIAL DISTRICT COURT
TOOELE COUNTY, STATE OF UTAH

JERRY HOUGHTON, et. al.,
Plaintiffs

v.

GLEN E. MILLER
Defendant

)
) ORDER ON HEARING ON WRIT OF
) EXECUTION GRANTING HOMESTEAD
) EXEMPTION
)

) CIVIL NO. 000301127
) JUDGE RANDALL SKANCHY
)

The Defendant's Motion for an Exemption Hearing on Writ of Execution came before the Honorable Randall N. Skanchy, Judge, on the 4th day of August, 2003, the Defendant, Glen E. Miller, was personally present and represented himself; the Plaintiffs were all personally present and represented by Douglas F. White, Attorney; and pursuant to the Court's "ORDER GRANTING HOMESTEAD EXEMPTION" dated August 7, 2003; and good cause appearing, therefore the Court enters the following Order:

FINDINGS

1. A prejudgment Writ of Attachment was filed against the real property in question and was granted on March 26, 2001.

2. A Judgment was entered on April 10, 2003, against Glen E. Miller in this matter.

3. Lori Miller, the wife of Defendant, filed a Declaration of Homestead on the subject property on March 26, 2003, and she thereafter took occupancy of the property in March or May 2003.

4. A Writ of Execution was issued on May 1, 2003, and a sale of property subject to execution was scheduled for July 23, 2003.

5. Defendant filed a request for hearing on the Writ of Execution and the court ordered a stay of execution, pending hearing, on July 23, 2003.

LEGAL CONCLUSIONS

6. The prejudgment Writ of Attachment, filed on March 26, 2001, is defeated by the filing of a Homestead Declaration on March 26, 2003.

7. The amount of homestead exemption is \$20,000.00 for Glen E Miller and \$20,000.00 for Lori L. Miller, pursuant to Section 78-23-3(2) U.C.A.

8. The Homestead Exemption is immune from judgment lien, execution and forced sale.

9. The property located at 358 North 100 East, Tooele, Utah, is subject to the homestead exemption exercised by the Millers and as stated in Sanders v. Cassity 586 P.2d 423 (Utah 1978), it is immune from judgment lien, execution and forced sale.

ORDER

Accordingly, it is hereby ordered that:

1. The property at 358 North 100 East, Tooele, Utah, as the primary residence and properly declared homestead of the Millers is exempt by law from execution and forced sale under Utah Code Section 78-23-3(3), Rule 69 of the Utah Rules of Civil Procedure, and the Utah Constitution Article XXII, Section 1; and,

2. The Plaintiffs shall renounce the Sheriff's sale which was previously stayed by the court, and proceed with the sale of Parcel No. 2 of the Praeipe attached to the Original Writ of Execution Subject to the homestead exemption amount for property not held as a primary residence as found in Utah Code Section 78-23-3(2)(c).

DATED this _____ day of _____, 2003

BY THE COURT

Randall N. Skancky
Judge

Tab 14

DOUGLAS F. WHITE, #3443
Attorney for Plaintiffs
3282 So. Sunset Hollow Drive
Bountiful, Utah 84010
Telephone: (801) 652-0016
FAX: (801) 296-1754

FILED
3RD DISTRICT COURT TOOELE

01 APR 17 AM 10:48

FILED BY M

E 164906 B 0687 P 0021
Date 15-JUN-2001 12:00pm
Fee: 18.00 Cash
CALLEEN B. PESHELL, Recorder
Filed By: MBT
DOUGLAS F.
TOOELE COUNTY CORPORATION

IN THE THIRD JUDICIAL DISTRICT COURT

TOOELE COUNTY, STATE OF UTAH

JERRY HOUGHTON, SUSAN)
HOUGHTON, KENDALL R. THOMAS,)
MARLENE THOMAS, and the 1995)
THOMAS FAMILY TRUST,)

Plaintiffs,

vs.

GLEN E. MILLER,

Defendants.

ORDER ON MOTION FOR
PREJUDGMENT WRIT OF
ATTACHMENT

STATE OF UTAH)
COUNTY OF TOOELE) ss

I hereby certify that this is a true copy of
Order on Motion for Prejudgment
Entry 164906 Book 687 Page 21
that appears of record in the office of the Tooele County Recorder

Witness My Hand And Seal
29th Day Of December Year 2004
Calleen B. Peshell
CALLEEN B. PESHELL TOOELE COUNTY RECORDER

Civil No. 000301127

Judge David S. Young

The Plaintiffs' Motion for a Prejudgment Writ of Attachment came before the Court on the 26th day of March, 2001, before the Honorable David S. Young, Judge; the Plaintiffs were present and represented by their attorney, Douglas F. White; the Defendant was not personally present, but was represented by his attorney, Gregory P. Hawkins; the Court having reviewed the pleadings and the evidence by proffer of the attorneys, and good cause appearing therefore, now enters the following Order:

1. The Plaintiffs' Motion for Prejudgment Writ of Attachment against the following described parcels of real property is hereby granted:

Parcel No. 1: All of Lot 1, Oak View Heights #4, a subdivision of Tooele City.
Serial No. 10-8-C-1

Parcel No. 2: Beginning 137 feet West of the Southeast corner of Lot 5, Block 41,
Plat "A", Tooele City Survey, running thence West 196.96 feet;
thence North 43.5 feet; thence East 196.96 feet; thence South 43.5
feet to the point of beginning. Serial No. 2-57-27

Parcel No. 3: Beginning 303 feet, more or less, South of the Northwest corner of
Block 26, Plat "A", Tooele City Survey, Tooele City, said point of
beginning being the Southwest corner of the Hawker property; and
running thence East 504 feet; thence South 248 feet; thence West 9
feet; thence North 181.5 feet; thence West 495 feet; thence North
66.5 feet to the point of beginning. Serial No. 2-42-14

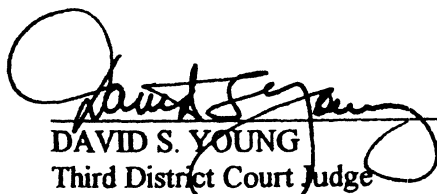
2. The Court orders that any and all interest, right and title of Glen E. Miller in the
above-described properties be attached. The Defendant is restrained from transferring his interest
to another in anyway.

3. A Writ of Attachment is hereby authorized by this Court pursuant to Rule 64(c) of the
Utah Rules of Civil Procedure.

4. The Court orders that in lieu of requiring a bond be set, that the Plaintiffs will appear
before the Court, upon motion of the Defendant or others, as the case may be, from time to time
during the period of this Writ of Attachment, for the purpose of determining whether the Writ of
Attachment should continue based upon the Defendant's circumstances.

DATED this 16 day of April, 2001.

BY THE COURT:



DAVID S. YOUNG
Third District Court Judge


NOTICE TO DEFENDANT'S ATTORNEY

TO: Gregory P. Hawkins

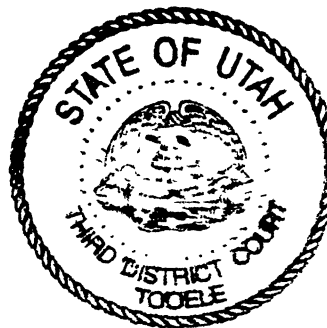
Pursuant to Rule 4-504 of the Code of Judicial Administration, you are hereby notified the undersigned will hold the original hereof for a period of five (5) days from the date this notice is mailed to you to allow you sufficient time to file any written objections to the form of the foregoing with the Court and mail a copy to the undersigned. If no objections to the form are filed within that time, the original hereof will be submitted to the Court for signature and filing.

I do hereby certify I mailed a true and correct copy of the foregoing, postage prepaid, on this 29th day of March, 2001, to the following person(s):

Gregory P. Hawkins
Attorney for Defendant
136 South Main Street, 6th Floor
Salt lake City, Utah 84115


JUDY PETERSON
Legal Assistant

I CERTIFY THAT THIS IS A TRUE COPY OF AN
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT, TOOELE COUNTY, STATE
OF UTAH
DATE: June 15, 2001
Sharon Standlove
DEPUTY COURT CLERK



Tab 15

ADDENDUM 15

The question of jurisdiction was raised because the issues raised in this cross appeal were to a post-judgment order dated August 7, 2003 (Addendum 9). It appears that any objections to that order should have been raised within the 30-day time period allotted by the Utah Rules of Appellate Procedure for post-judgment motions. See Cahoon v. Cahoon, 641 P.2d 140 (Utah 1982) where the Utah Supreme Court said, “The final judgment rule does not preclude review of post judgment orders; such orders were independently subject to the test of finality, according to their own substance and effect.” Where the real issue before the court at the hearing on August 4, 2003, was whether or not Miller’s property qualified for a homestead exemption (Addendum 1, page 410). The order and ruling dated August 7, 2003, decided the issue against Houghtons and Thomas’ and granted the homestead exemption to Miller. “[T]he fact that the court retained jurisdiction to adjudicate further matters [such as whether a homestead was subject to a forced sale] did not leave open for reconsideration the question as to [whether Miller qualified for a homestead exemption], and the decree entered was final and appealable, and became conclusive in the absence of a timely appeal.” In re Vorhees’ Estate 12 Utah 2d. 361, 366 P.2d 977 (1961). Houghtons and Thomas’ did not file a notice to appeal these issues until December 30, 2003. (Addendum 1, Pages 538-539). Timeliness of their appeal is questioned.

Tab 16

DETERMINATIVE LAWS

1. Constitution of UTAH, Article XXII, Section 1:

“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.”

2. UTAH CODE SECTION 78-23-3(2)(c):

“A person may claim a homestead exemption in one or more parcels of real property together with appurtenances and improvements.”

3. UTAH CODE SECTION 78-23-3(3):

“A homestead is exempt from judicial lien and from levy, execution, or forced sale except for:

- (a) statutory liens for property taxes and assessments on property;
- (b) security interests in the property and judicial liens for debts created for the purchase price of the property;
- (c) judicial liens obtained on debts created by failure to provide support or maintenance for dependent children; and
- (d) consensual liens obtained on debts created by mutual contract.”

4. UTAH CODE SECTION 78-23-3(5)(b):

“The proceeds of any sale to the amount of the homestead exemption existing at time of sale, is exempt from levy, execution, or other process for one year after the receipt of the proceeds by the person entitled to the exemption.”

5. UTAH CODE SECTION 78-23-3(6):

“The sale and disposition of one homestead does not prevent the selection or purchase of another.”

6. UTAH CODE SECTION 78-23-4:

“An individual may select and claim a homestead by complying with the following requirements:

- (1) Filing a signed and acknowledged declaration of homestead with the recorder of the county or counties in which the homestead claimant’s property is located or serving a signed and acknowledged declaration of homestead upon the sheriff or other officer conducting an execution prior to the time stated in the notice of such execution.”