

2006

James Lewis Kimball v. Merae Kimball : Brief of Appellee

Utah Court of Appeals

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Wendy J. Lems; Lems Law Office PC; Attorney for Petitioner/Appellant.

Thomas R. Blonquist; Attorney for Respondent/Appellee.

Recommended Citation

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IN THE UTAH COURT OF APPEALS

JAMES LEWIS KIMBALL,)	ADDENDUM TO BRIEF OF APPELLEE
	)	and CROSS-APPELLANT
Petitioner/Appellant,)	
v.)	
	)	Appellate Court No. 20060263-CA
MERAE KIMBALL,)	
	)	Trial Court No. 024901659DA
Respondent/Appellee)	
and Cross-Appellant.)	

MERAE P. KIMBALL,)	
)	
Plaintiff/Appellee,)	
v.	)	Appellate Court No. 20070858
)	
JAMES L. KIMBALL,	)	Trial Court No. 030902885
)	
Appellant/Defendant.)	

CONSOLIDATED CASES
 APPEAL FROM THE THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY.
 JUDGE JOSEPH C. FRATTO, JR.

Wendy J. Lems #7409
 LEMS LAW OFFICE, P.C.
 7050 South Union Park Center, Suite 350
 Midvale, Utah 84047
*Attorney for Petitioner/Appellant
 and Defendant/Appellant*

Thomas R. Blonquist #0369
 40 South 600 East
 Salt Lake City, Utah 84102
*Attorney for Respondent/Appellee
 and Cross-Appellant and Plaintiff/
 Appellee, Merae Kimball*

IN THE UTAH COURT OF APPEALS

JAMES LEWIS KIMBALL,	)	ADDENDUM TO BRIEF OF APPELLEE
		and CROSS-APPELLANT
Petitioner/Appellant,)	
v.		
	)	Appellate Court No. 20060263-CA
MERAE KIMBALL,		
	)	Trial Court No. 024901659DA
Respondent/Appellee)	
and Cross-Appellant.)	

MERAE P. KIMBALL,)	
Plaintiff/Appellee,)	
v.		
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JAMES L. KIMBALL,		
)	Trial Court No. 030902885
Appellant/Defendant.)	

CONSOLIDATED CASES
APPEAL FROM THE THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY.
JUDGE JOSEPH C. FRATTO, JR.

Wendy J. Lems #7409
LEMS LAW OFFICE, P.C.
7050 South Union Park Center, Suite 350
Midvale, Utah 84047
*Attorney for Petitioner/Appellant
and Defendant/Appellant*

Thomas R. Blonquist #0369
40 South 600 East
Salt Lake City, Utah 84102
*Attorney for Respondent/Appellee
and Cross-Appellant and Plaintiff/
Appellee, Merae Kimball*

ADDENDUM

Divorce Case:

- A. Findings of Fact and Conclusions of Law
- B. Amended Decree of Divorce
- C. Ruling Hearing
- D. Minute Entry
- E. Order Re: Custody and Related Matters
- F. Memorandum in support of Rule 60 (B) motion

Fraud Case:

- G. Findings of Fact and Conclusion of Law
- H. Judgment
- I. Amended Judgment

ADDENDUM “A”

FILED DISTRICT COURT
Third Judicial District

SEP 20 2005

SALT LAKE COUNTY

Deputy Clerk

Thomas R. Blonquist, (0369)
Attorney for Respondent
40 South Sixth East
Salt Lake City, UT 84102
Telephone: (801) 533-0525

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

JAMES LEWIS KIMBALL,	)	FINDINGS OF FACT and
	)	CONCLUSIONS OF LAW
Petitioner,)	
v.)	
MERAE KIMBALL,	)	Civil No. 024901659 DA
)	
Respondent,	)	Judge Joseph C. Fratto, Jr.
	)	Commissioner Susan C. Bradford

The above entitled matter came on for trial before the Honorable Joseph C. Fratto, Jr., District Court Judge, sitting without a jury, on November 30, 2004, December 2nd, 3rd, 6th, 7th, 8th, 10th and 14th, 2004, and April 13th, 14th and 15th, 2005. Respondent was present represented by her attorney of record, Thomas R. Blonquist, and the Petitioner was present with his attorney of record, Wendy J. Lems. The guardian *ad litem* did not participate in the trial because custody matters were not at issue. After hearing the testimony presented by the parties, reviewing the exhibits that were received in evidence and considering the statements and arguments of counsel

and memoranda submitted and otherwise being fully advised in the premises and good cause appearing therefor, the Court now makes and enters the following:

FINDINGS OF FACT

1. The parties were married each to the other on February 11, 1987.
2. Petitioner filed a complaint for divorce on March 18, 2002.
3. The parties' marriage was dissolved by a decree of divorce dated August 7, 2003, reserving for trial the custody and financial issues.
4. The custody issues were resolved by stipulation approved by the Court and set forth in an order dated March 10, 2005, entitled Order Re: Custody and Related Matters.
5. The bench trial involved issues related to Petitioner's claims for one half of the Respondent's inheritance, enhancement of Respondent's inheritance, attorney's fees and other matters.
6. On or about June 22, 1988, Respondent received 913 shares of Utah Bearing and Fabrication, Inc., a Utah corporation founded by her father, Frank Pardoe, the "Family Business" herein.
7. Respondent's father died on August 9, 1993, and under the terms of agreements between Respondent, her mother, her brothers and her sister, she received 1,005 shares of stock in the Family Business.

8. On or about March 24, 1995, after negotiations with the then management of the Family Business concluded, Respondent agreed to sell her 1,005 shares for \$2,500,000.

9. Respondent received a down payment of \$500,000 during March of 1995, and a ten year trust deed note for \$2,000,000 payable at the rate of \$25,335.15 per month.

10. Respondent received the monthly payments through the month of June 1997, and on July 1, 1997, received \$1,697,039.70, the balance owed to her under the trust deed note.

11. It is reasonable that all funds received by the Respondent from the sale of her shares of the Family Business be characterized as an inheritance.

12. Respondent's practice was to deposit the monthly payment in her individual account at Zions Bank, deducting a portion for her use.

13. Respondent opened an account at Fidelity Investments, the "Fidelity Account" herein, on February 26, 1996, as an individual account, with Respondent's social security number as the only tax identification number.

14. With a portion of the funds Respondent received from the sale of her stock in the Family Business, she purchased treasury bills, issued in her name only, which totaled \$224,000.

15. Every action on Respondent's part thereafter shows that her inheritance was her sole and separate property.

16. On occasion, in 1996 and 1997, the trust deed monthly payment was deposited in the parties' joint account and checks were subsequently written by Respondent to the Fidelity Account.

17. A SeaRay boat was purchased in June of 1996 for \$34,000.

18. The entire purchase price was paid by the Respondent from funds in the Fidelity Account.

19. When the boat was destroyed, the \$30,000 insurance check was deposited in the Fidelity Account.

20. The boat that was destroyed was replaced by the boat purchased in May of 2001 for \$35,805.72, the "Replacement Boat" herein.

21. The entire purchase price was paid by the Respondent from funds in the Fidelity Account.

22. The parties invested at least \$55,000 with Jay Rice, the "Jay Rice Account" herein, during the year 2000.

23. The entire investment was paid by the Respondent from funds in the Fidelity Account.

24. Substantially all funds were withdrawn from the Jay Rice Account by Petitioner.

25. Petitioner did not disclose to Respondent that he had taken substantially all funds out of the Jay Rice Account.

26. During 2001, Petitioner told Mr. Rice that Respondent did not know that he had withdrawn funds from the Jay Rice Account and to stall discussing the account with her until he could borrow money to replace the funds.

27. Petitioner did not replace the funds he withdrew from the Jay Rice Account

28. A 1997 Suburban automobile was purchased in October of 1999 for \$28,570.94.

29. The entire purchase price of the 1997 Suburban was paid by the Respondent from funds in the Fidelity Account.

30. The parties were in an automobile accident that destroyed the said 1997 Suburban beyond repair.

31. To replace said vehicle, the parties selected and agreed to purchase a used 1997 Suburban for \$26,300 from Larry H. Miller, Bountiful Chrysler Jeep, the "Replacement Suburban" herein.

32. Petitioner told Respondent that the entire purchase price of the Replacement Suburban would be paid by insurance proceeds from the 1997 Suburban that had been destroyed.

33. Without Respondent's knowledge or consent, Petitioner forged her name on a \$30,510.95 check drawn on the Fidelity Account and made payable to Larry H. Miller Bountiful to pay for the Replacement Suburban.

34. Said check was returned by Fidelity Investments marked "signature does not match."

35. The insurance proceeds did not cover the entire purchase price of the Replacement Suburban.

36. In order to pay the balance on the Replacement Suburban after the insurance proceeds were applied, Petitioner applied for a loan from Zions Bank.

37. Petitioner completed and signed a credit application on December 26, 2000, stating that he earned \$60,000 per month.

38. Petitioner did not inform Respondent that he borrowed \$12,555.95 from Zions Bank to purchase the Replacement Suburban.

39. Petitioner did not inform Respondent that he wrote checks payable to Zions Bank to make payments on the Replacement Suburban loan by forging Respondent's name on Fidelity Account checks.

40. During September of 1997, the parties purchased a home on Lori Kay Drive, Holladay, Utah, the "Lori Kay Home" herein, and a vacant lot hereinafter referred to as the "Odd Piece of the Lori Kay Property", for \$379,964.67.

41. The entire purchase price was paid by the Respondent from funds in the Fidelity Account.

42. The Lori Kay Home was remodeled and the entire cost of remodeling was paid by the Respondent from funds in the Fidelity Account.

43. The Lori Kay Home was sold in October of 1998 for \$406,142.55 after real estate commissions and closing costs were paid.

44. The Odd Piece of the Lori Kay Property was not sold and, at the time of trial, was held jointly by the parties.

45. The net proceeds of the sale of the Lori Kay Home were deposited in the Fidelity Account and every action taken thereafter shows that the funds were the Respondent's sole and separate property.

46. Petitioner made no objection that the funds received from the sale of the Lori Kay Home be placed back into the Fidelity Account nor did he make a claim on the said funds, in fact, he assented that it was the Respondent's funds that had purchased and remodeled the Lori Kay Home and that, when the Lori Kay Home was sold, Respondent was entitled to the proceeds.

47. It is reasonable that the funds received from the sale of the Lori Kay Home, \$406,142.55, be the Respondent's sole and separate property.

48. The Respondent intended that her inheritance be handled separately, not as a marital asset.

49. Every act of the Respondent manifested her intent that her inheritance be handled separately.

50. Respondent's inheritance was placed in a separate account accessible through the writing of checks by the Respondent only.

51. Respondent's inherited funds were placed in the Fidelity Account that was in the Respondent's name at all times.

52. Respondent's inherited funds were not commingled either in the way they were used or by their deposit into joint accounts.

53. Joint accounts were used as conduits for Respondent's inherited funds, not as repositories in which they became commingled.

54. To the extent that Respondent's inherited funds remained in a joint account, they were commingled, but when they came out of the joint account they resumed their character as Respondent's inherited funds and as such they became the sole and separate property of the Respondent.

55. To the extent that Respondent's inherited funds were placed in joint accounts, such as the Jay Rice account, this was done as a convenience and did not have the legal, the factual or the intended legal affect of either commingling the funds or making them marital property.

56. Petitioner did not enhance Respondent's inheritance.

57. No act of the Petitioner increased the amount of shares of the Family Business that the Respondent received, caused Respondent's holdings in the Family Business to have a greater value or resulted in the Respondent receiving a greater price for her holdings.

58. It is reasonable the Odd Piece of the Lori Kay Property, titled in the name of the Petitioner and the Respondent as joint tenants, remain marital property.

59. It is reasonable that said Odd Piece of the Lori Kay Property be sold and the net proceeds equally divided between the Petitioner and the Respondent.

60. Petitioner did not report any of the income earned in the Fidelity Account in his 1998, 1999, 2000 or 2001 tax returns.

61. Petitioner earned an adjusted gross income in the year 1998 of \$2,391.

62. Petitioner earned an adjusted gross income in the year 1999 of minus \$61.

63. Petitioner earned an adjusted gross income in the year 2000 of \$600.

64. Petitioner earned an adjusted gross income in the year 2001 of \$1,624.

65. Petitioner misrepresented to Respondent his 1998, 1999, 2000, and 2001 income and failed to disclose collection actions and lawsuits filed against him.

66. When the parties separated in February and March of 2002, the amount remaining in Respondent's Fidelity Account was \$1,042,840.72.

67. Respondent withdrew \$1,000,000 from the Fidelity Account in April of 2002, and the balance was withdrawn in June of 2002.

68. Respondent filed an individual tax return for 1998 and reported all earnings, \$64,927, from the Fidelity Account.

69. The Village Point Way home is held jointly by Petitioner and Respondent, and, at the time of trial, had a value of \$205,000.

70. Respondent paid the balance owing on the Village Point Way home, \$86,128.24, on June 6, 1995, from her inheritance.

71. It is reasonable that Petitioner be granted a \$102,500 equitable lien in the Village Point Way home to be received by him when the youngest child reaches eighteen years of age or graduates from high school, whichever occurs last.

72. Petitioner, without authorization, forged Respondent's name on Fidelity Account checks totaling \$142,467 made payable to himself or cash that he converted to cash.

73. Petitioner did not inform Respondent what he did with the \$142,467 nor did he give her an accounting of his use of said funds, other than to state in court that the cash he received was used for family purposes.

74. Petitioner did not substantiate his testimony by producing receipts, cancelled checks or other documentation.

75. Petitioner, without authorization, altered 6 checks given to him by the Respondent by increasing them from \$1,000 to \$4,000.

76. The alterations reduced Respondent's balance in the Fidelity Account \$18,000 more than Respondent intended when she wrote the checks and gave them to the Petitioner.

77. Petitioner has not given Respondent an accounting of his use of the said \$18,000.

78. It is reasonable that the money so obtained by the Petitioner was used for family purposes for the benefit of all members of the family, including the Petitioner.

79. Petitioner presently earns \$2,900 per month.

80. Respondent graduated from the University of Utah with a Bachelor of Science degree in Elementary Education.

81. It is reasonable that Respondent be imputed income of \$2,900 per month.

82. It is reasonable that the Petitioner pay the Respondent child support based upon the fact that he has physical custody of one child, Brooke, and that said child's primary residence is

Petitioner's residence and earnings of \$2,900 per month and Respondent has physical custody of three children, Amanda, Ryker and Daniel, and said childrens' residence is Respondent's residence and has imputed income of \$2,900 per month, in the amount of \$408 per month to be paid, according to the split custody worksheet attached hereto as Exhibit A, until the youngest child reaches eighteen years of age or graduates from high school, whichever occurs last, and that each party take the tax exemption for the child or children in his or her custody and primary residence as set forth at paragraph 2 of the Order Re: Custody and Related Matters entered in this cause on March 10, 2005.

83. It is reasonable that Respondent not receive alimony from the Petitioner because she does not have a need and he does not have the ability to pay.

84. It is reasonable that all personal property be awarded to the party who had possession of that property at the time of trial.

85. It is reasonable that the Replacement Boat be sold and the net proceeds divided equally between the parties.

86. There exists a debt for unpaid taxes for the years 2000, 2001 and 2002.

87. It is reasonable that the Respondent be solely responsible for the debt owed for unpaid taxes based upon earnings received from the investment of funds she inherited.

88. During the course of this litigation, the Court appointed as Special Master, Lisa Reading, the custody evaluator, Dr. Matthew Davies, and the childrens' therapists, Jim Hottinger, CSW and Dr. Haydee Mas, and it is reasonable that they be paid equally by the parties hereto.

89. In addition, it was ordered that the parties undergo psychological evaluations - Petitioner to be evaluated by Dr. Phillip W. Esplin and the Respondent to be evaluated by Dr. Donald Strassberg.

90. The fees charged by Court appointed experts were as follows:

Lisa Reading, Esq.	\$7,000
Matthew Davies, Ph.D.	\$11,355.57
James Hottinger, Ph.D.	\$840
Haydee Mas, Ph.D.	\$3,561
Phillip W. Esplin, Ph.D.	\$3,300
Donald Strassberg, Ph.D.	\$1,912.50

91. The parties paid the following amounts:

	<u>Respondent</u>	<u>Petitioner</u>
Lisa Reading, Esq.	\$1,500	\$3,500
Matthew Davies, Ph.D.	\$8,192.32	\$5,074.75
James Hottinger, Ph.D.	\$840	\$0

Haydee Mas, Ph.D.	\$2,065	\$1,062
Phillip W. Esplin, Ph.D.	\$3,300	\$0
Donald Strassberg, Ph.D.	\$1,912.50	\$0
Total	\$17,809.82	\$9,636.75

92. The Court appointed professionals have been paid in full except Lisa Reading, Esq who is owed \$2,000.

93. Based upon the disproportionate payments made by the parties to Court ordered professionals, it is reasonable that Petitioner pay the Respondent \$5,086.53.

94. It is reasonable that the Respondent pay the balance owed to Lisa Reading, Esq and that she hold the Petitioner harmless therefrom.

95. It is reasonable that any balance owed at December 1, 2004, to others who provided services for the parties in connection with this litigation, be paid by the Respondent and that she be required to hold the Petitioner harmless therefrom.

96. It appears that there will be additional costs incurred by the parental coordinator, Dr. Jill Sanders, and others and it is reasonable that the parties pay these expenses on an equal basis.

97. It is reasonable that to the extent there is a debt owing for unpaid taxes, the party who owes the tax pay the debt and in the terms of joint debts, it is reasonable that if the debt is joint but for the benefit of one party, then the debt be paid by that party.

98. It is reasonable that the parties maintain health insurance for the use and benefit of the children, if available through their employment, with each party to pay one-half of medical expenses not covered by insurance.

99. If health insurance for the parties and their children is not available through employment, it is reasonable that a policy of insurance be purchased with each party to pay one-half of the monthly premium.

100. It appears that the Respondent failed to provide information about the childrens' activities, removed the children from school, interfered with parent-time, changed the children's enrollment, interfered with phone calls and prevented visitation that should have occurred.

101. Respondent knew of the order applicable to these matters, had the ability to comply and willfully and knowingly refused to do so.

102. Consequently, it appears that Respondent is in contempt and because make-up visitation is not possible in this situation, it is reasonable that Respondent purge her contempt by paying Petitioner the sum of \$3,500.

103. Petitioner has not prevailed on the main issues of this case which were his claims for one-half of Respondent's inheritance and enhancement of Respondent's inheritance.

104. The attorney's fees that were charged by the Petitioner's counsel were neither reasonable nor necessary and represent a situation where this matter got out of hand.

105. The fees connected with the child custody and related matters have been paid, consequently, there is no financial need to reimburse them.

106. It is not reasonable for the Petitioner to be awarded fees and costs because they were neither reasonable nor necessary and because they were paid by others, specifically his parents.

107. It appears that the Petitioner's parents helped him pay the fees, that the fees are already paid and that the Petitioner does not have to pay back those who helped him pay the fees.

From the foregoing findings of fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. All funds received by Respondent from the sale of her shares of the Family Business should be characterized as an inheritance.

2. At no time did Respondent's inherited funds lose their character or identity.

3. Petitioner's claim for one-half of the funds received by the Respondent from the sale of her stock in the Family Business should be denied.

4. Petitioner's claim that he should be awarded a portion of the Respondent's inheritance because, through his efforts, Respondent received an increased amount of shares of the Family Business and was paid more when she sold them, should be denied.

5. Respondent should be awarded as her sole and separate property all funds that were in the Fidelity Account at the time of the parties' separation.

6. All funds in the Jay Rice Account at the time of the parties' separation should be awarded to the Respondent.

7. The Odd Piece of the Lori Kay Property should be sold and the net proceeds of the sale divided equally between the parties.

8. Petitioner should receive a \$102,500, non-interest bearing, equitable lien on the home and real property located at 2087 Village Point Way, Sandy, Utah, payable when the youngest child reaches eighteen years of age or graduates from high school, whichever occurs last, or when the Respondent remarries or no longer utilizes said home and real property as her primary residence.

9. Petitioner should not be punished in this proceeding for, without authorization, forging Respondent's name on Fidelity Account checks and altering the amount of checks written by the Respondent on the Fidelity Account.

10. Respondent should be imputed income of \$2,900 per month.

11. Based upon Petitioner's present earnings of \$2,900 per month and the Respondent's imputed income of \$2,900 per month and based upon the fact that Petitioner has the physical custody and the primary residence of one child, Brooke, and the Respondent has the physical custody and the primary residence of three children, Amanda, Ryker and Daniel, Petitioner

should pay the Respondent \$408 per month as child support until the youngest child reaches eighteen years of age or graduates from high school, whichever occurs last.

12. Each party should take the tax exemption for the child or children in his or her custody and primary residence.

13. The Respondent should not receive alimony from the Petitioner.

14. All personal property should be awarded to the party who had possession thereof at the time of trial.

15. The Replacement Boat should be sold and the net proceeds divided equally between the parties.

16. Any debt for unpaid taxes for the years 2000, 2001 and 2002, should be paid by the Respondent and she should hold the Petitioner harmless from said debt.

17. Respondent should be solely responsible for the debt owed for unpaid taxes based upon earnings received from the investments of the funds she inherited.

18. Respondent should be ordered to pay the outstanding debt to Lisa Reading, Special Master, in the sum of \$2,000 and hold the Petitioner harmless therefrom.

19. Respondent should be awarded a judgment against the Petitioner in the sum of \$5,086.53 based upon his failure to pay 50% of the fees of professionals appointed by the Court during the course of this litigation.

20. The Respondent should pay any balance owed at December 1, 2004, to those who provided services for the parties and their children in connection with this litigation and she should hold the Petitioner harmless therefrom.

21. Any additional costs incurred by the parental coordinator, Dr. Jill Sanders, and others, should be paid by the parties on an equal basis.

22. Any joint debts incurred by the parties during their marriage should be paid by the party who received the benefit of that debt.

23. The parties should maintain health insurance for the use and benefit of their children, if available through their employment, with each party to pay one-half of the premium and medical expenses not covered by the insurance.

24. In the event health insurance for the parties and their children is not available through employment, a policy of insurance should be purchased with each party to pay one-half of the monthly premium and medical expenses not covered by the insurance.

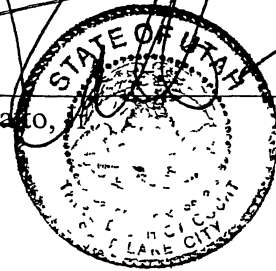
25. The Respondent should be held in contempt of court for her failure to comply with orders of this Court and be allowed to purge said contempt by paying the Petitioner the sum of \$3,500.

26. The Petitioner's claim for an award of attorney's fees and costs should be denied.

DATED this 19th day of September, 2005.

BY THE COURT

Joseph C. Fratto,
Judge



ADDENDUM “B”

FILED DISTRICT COURT
Third Judicial District

SEP 20 2005

SALT LAKE COUNTY

ny _____ Deputy Clerk

Thomas R. Blonquist, (0369)
Attorney for Respondent
40 South Sixth East
Salt Lake City, UT 84102
Telephone: (801) 533-0525

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 09/21/05

MAGED

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

JAMES LEWIS KIMBALL,	)	AMENDED DECREE OF DIVORCE
Petitioner,)	
v.)	
MERAE KIMBALL,	)	Civil No. 024901659 DA
Respondent.	)	Judge Joseph C. Fratto, Jr.
		Commissioner Susan C. Bradford

Having heretofore made and entered its finding of facts and conclusions of law, now, in accordance therewith, and upon motion of the Respondent and good cause appearing therefor, it is

ORDERED, ADJUDGED AND DECREED as follows:

1. All funds received by the Respondent from the sale of her shares of the Family Business, as described in the findings of fact, are characterized as an inheritance.
2. Petitioner is not entitled to any portion of the funds received by the Respondent from the sale of her shares of the Family Business.

Amended Decree of Divorce @J



JD17455703

024901659 KIMBALL, JAMES LEWIS

3. Respondent is awarded as her sole and separate property all funds that were in the Fidelity Account, as described in the findings of fact, at the time of the parties' separation.

4. All funds remaining in the Jay Rice Account, as described in the findings of fact, are awarded to the Respondent.

5. The Odd Piece of Lori Kay Property, as identified in the findings of fact, at the time of the parties' separation, shall be sold and the net proceeds of the sale divided equally between the parties.

6. Petitioner is hereby granted a \$102,500, non-interest bearing, equitable lien on the home and real property located at 2087 East Village Point Way, Sandy, Utah, to be paid when the youngest child reaches eighteen years of age or graduates from high school, whichever occurs last, or when the Respondent remarries or no longer utilizes said home and real property as her primary residence.

7. Petitioner shall not be punished in this proceeding for, without authorization, forging Respondent's name on Fidelity Account checks and altering the amount of checks written by the Respondent on the said Fidelity Account.

8. Respondent is hereby imputed income of \$2,900 per month.

9. Petitioner is ordered to pay Respondent the sum of \$408 per month as and for child support to continue until the youngest child reaches eighteen years of age or graduates from high school, whichever occurs last.

10. Each party shall be allowed the tax exemption for the child or children in his or her custody and primary residence.

11. The Respondent shall not receive alimony from the Petitioner.

12. All personal property is hereby awarded to the party that has possession thereof at the time of trial.

13. The Replacement Boat, as identified in the findings of fact, shall be sold and the net proceeds divided equally between the parties.

14. Any debt for unpaid taxes for the years 2000, 2001 and 2002, shall be paid by the Respondent and she shall hold the Petitioner harmless therefrom.

15. Respondent is solely responsible for any debt owed for unpaid taxes resulting from earnings received from the investment of funds she inherited.

16. Respondent is ordered to pay the outstanding debt to Lisa Reading, Esq., in the sum of \$2,000 and hold the Petitioner harmless therefrom.

17. In addition to the debt owed to Lisa Reading, Esq., set forth above, the Respondent shall pay the balance owed at December 1, 2004, to any persons who provided services for the parties and their children in connection with this litigation and she shall hold the Petitioner harmless therefrom.

18. Respondent is awarded judgment against the Petitioner in the sum of \$5,086.53.

19. Any additional costs incurred by the parental coordinator, Dr. Jill Sanders, and others, shall be paid by the parties on an equal basis.

20. Any joint debts incurred by the parties during their marriage shall be paid by the party who received the benefit of said debt.

21. The parties shall maintain health insurance for the use and benefit of their children, if available through their employment, with each party to pay one-half of the premium and medical expenses not covered by the insurance.

22. In the event health insurance for the parties and their children is not available through employment, a policy of insurance shall be purchased with each party to pay one-half of the monthly premium and the medical expenses not covered by the said insurance.

23. Respondent is hereby held in contempt of court for her failure to comply with orders of this Court and she is allowed to purge said contempt by paying the Petitioner the sum of \$3,500.

24. Petitioner is not entitled to receive compensation from the Respondent in the form of attorney's fees and costs.

25. Each party shall sign any and all documents required to complete the distribution, sale or transfer of property as ordered herein.

DATED this 19th day of September, 2005.

BY THE COURT

Joseph C. Fratto, Jr.
Judge

ADDENDUM “C”

02490-659

-1-

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

JAMES LEWIS KIMBALL,

Petitioner,

vs.

MERAE KIMBALL,

Respondent.

ORIGINAL

Case No. 024901659

FILED DISTRICT COURT
Third Judicial District

JUN - 6 2005

SALT LAKE COUNTY

Ruling
~~Sentencing~~ Hearing
Electronically Recorded on
May 24, 2005

By *bn* Deputy Clerk

BEFORE: THE HONORABLE JOSEPH FRATTO
Third District Court Judge

APPEARANCES

For the Petitioner:

Wendy J. Lems
LEMS LAW OFFICE
7090 South Union Park Avenue
Suite 540
Midvale, Utah 84047
Telephone: (801)256-9500

For the Respondent:

Thomas R. Blonquist
40 South 600 East
Salt Lake City, Utah 84102
Telephone: (801)533-0525

Transcribed by: Beverly Lowe, CSR/CCT

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

4401

P R O C E E D I N G S

(Electronically recorded on May 24, 2005)

THE COURT: We have on the matter of Kimball vs. Kimball. The purpose --appears to me everyone is here that needs to be here. The purpose for this hearing is for me to announce my decision on the issues presented by the trial that was conducted.

The protocol for the hearing is that I'll tell you my ruling, give you some of the reasons I make my ruling, make some findings and so forth. I anticipate that probably have full findings. Things will have to be added, but my effort here is to tell you why I ruled as I'm ruling.

Let's begin with the main issue that was presented by this trial. The characterization and award of the proceeds from the sale of the stock in the family business. I would note that in going through the record that there is an order of April 10th, 2003 in which the Court found that \$340,000 was clearly inherited money; but that \$460,000 -- that is, the proceeds from the sale of the Lori Kay home -- was in question.

Now, I don't know that that established the law of the case. I have not taken it as such; but I do make that note that there is that order and that finding in that order.

I'm going to award the respondent the remaining funds she now holds. These are the reasons. That is, she holds from Fidelity -- from the Fidelity account, the Jay Rice account, if

1 any, and the sale of the Lori Kay property.

2 These are the reasons. The funds initially were
3 received as an inheritance. The respondent intended that they
4 be handled separately. Every action manifested that intent;
5 and the money was handled separately.

6 It was placed in a separate account, accessible
7 through checks, if you will, the writing of checks. Those
8 remained in the respondent's name at all times. The funds
9 were not comingled either in the way they were used or in its
10 deposit into joint accounts.

11 The joint accounts were used as conduits for these
12 funds; not as repositories in which they became comingled.
13 Which the law of comingling is that they lose their character
14 and so forth.

15 I suppose to the extent that they remained in the
16 joint fund they might be characterized as comingled; but they
17 came out of that account. In coming out of that account, I
18 assume their character is what they were for what they were;
19 and that is inheritance proceeds that they're the sole and
20 separate party of the respondent.

21 To the extent that they were placed in joint accounts,
22 the Jay Rice account, or -- for example, or petitioner had the
23 ability to withdraw -- that is, Mr. Kimball had the ability to
24 withdraw or to trade within the account, I find that this was
25 done as a convenience; and did not have either the legal, the

1 factual or intended effect of characterizing the funds or
2 accomplishing of the char -- accomplishing the legal effect of
3 either comingling or making them marital property.

4 I find that the petitioner did not enhance this asset.
5 The asset, of course, is the stock in the first instance and
6 then the price of the stock and selling the stock in the second
7 instance. His efforts I find were to at best encourage seeking
8 brief replacement stock; but there is no evidence that his
9 efforts directly resulted in a greater price being paid, or
10 that the stock had a greater value because of his efforts.

11 I find that the funds from the Lori Kay sale -- that
12 is, the \$460,000 -- is respondent's sole and separate property.
13 These are my reasons. The funds used for the purchase, the
14 remodeling of the property were the respondent's. It wasn't
15 based in joint tenancy.

16 If it had remained property -- that is, (inaudible)
17 Lori Kay, and had not been taken out, then indeed it would have
18 been a marital asset, because it would then have properly been
19 characterized as using an inheritance to purchase an asset -- a
20 marital asset.

21 When it was sold the funds went back to the respondent
22 and every action taken certainly thereafter is that the funds
23 were hers. Petitioner made no objection that they be placed
24 back into her account, made no claim on the funds; and in fact
25 it appears to me that he acceded to the fact that these were

1 her funds that had purchased and remodeled the property; and
2 that on the sale she was entitled to the proceeds back. To the
3 extent that the money was used to purchase property jointly,
4 the property so purchased is marital property.

5 I find that the petitioner, without authorization,
6 signed the respondent's name to checks; and he without
7 authorization altered the amount on checks -- on certain
8 checks. I find from a preponderance of the evidence that
9 the money so obtained was used for family purposes.

10 The only evidence that appears to be in front of me,
11 which was basically Mr. Kimball's testimony, is that those
12 funds were used for family purposes, seemingly interpreted
13 for the benefit of all the members of the family, including
14 Mr. Kimball.

15 I cannot draw -- I cannot reasonably draw from the
16 evidence the inference that the respondent wants me to draw
17 from the amount of -- the total amount that was obtained in
18 this way, or in the way it was drawn.

19 Consequently, the odd piece of Lori Kay property at --
20 well, I'll call it "the odd piece," is what I called it -- is
21 to be sold, because that still remains as marital property;
22 property purchased through the inheritance, but remaining as
23 such, has to be sold; and the net proceeds equally divided.

24 The marital property at Village Pointe, whose fair
25 market value appears to be \$205,000, is awarded to the

1 respondent. She is to assume, pay and hold whatever debt --
2 I don't believe there is a debt on it, but whatever debt is
3 on that property; and to pay the taxes and fees and so forth
4 connected with that property.

5 I award the petitioner an equitable lien for one-half
6 of the \$205,000, which is to be paid to him when the youngest
7 child reaches 18 years of age or graduates from high school,
8 whichever is last.

9 Now, let me go back here one moment in terms of these
10 unauthorized checks and the increasing the amount on checks.
11 I decline the respondent's invitation to award all the equity
12 in that home, the Village Pointe home, to her because of the
13 plaintiff's -- or the petitioner's altering of the checks.

14 I see this as a penalty which you're asking me to
15 impose; but if there had been evidence that I had seen to a
16 preponderance that the money taken in this manner, used in
17 this manner was used solely for his benefit, then I believe
18 the penalty that you suggest, Mr. Blonquist, would have been
19 appropriate.

20 Because I do not -- because I found otherwise in
21 terms of the evidence that was presented in front of me, and
22 I'm not drawing the inferences that you're suggesting from the
23 evidence, I see this then becoming really just a penalty for
24 having altered checks and signed the respondent's name when he
25 was not authorized to do that.

1 I don't believe in these proceedings that such a
2 penalty would be appropriate. I think I need to identify the
3 kind of property, how it was used and so forth, and make my
4 division and awards accordingly, and avoid punishments for bad
5 conduct.

6 I find that both the petitioner and the respondent
7 make \$2,900 per month. The petitioner, I make this finding, as
8 a matter of history. Although he has had a history of making
9 more than \$2,900 a month, and present earnings or at least at
10 the time the evidence was presented.

11 I make this finding in relation to the respondent as
12 a matter of imputation. Temporary orders had a set income of
13 \$892 and \$893, which is minimum wage; but the evidence I had in
14 front of me was that -- and really the only evidence on this
15 point was that the respondent had in the past taught school.
16 I believe it was elementary school; and her testimony was that
17 in terms of what she was capable of earning, that it would be
18 something less than \$35,000 per year. So I've taken that
19 amount, divided it by 12, and that's \$2,900 a month.

20 I find that each party has a need, if you will, for
21 \$3,200 a month. With those findings, I make these orders. The
22 child support award is to take the number of the children and
23 so forth in the appropriate worksheet, with \$2,900 per month
24 for each child -- I mean, for each party; and as a mathematical
25 computation and as a matter of the chart that would give you

1 the amount resulting from the mathematical computation, that
2 will be the award of child support one to the other.

3 I'm not certain how that comes out, because you'll
4 have to -- at least in terms of current arrangements here,
5 draw those worksheets. In any event, however it comes out,
6 that's the award; and the child support is to be paid pursuant
7 to that certain award until the child reaches 18 years of age
8 or graduates from high school, whichever event occurs last.

9 In terms of alimony, the standard for awarding alimony
10 is to evaluate the recipient's need, the payer's ability to
11 pay, and the recipient's ability to support themselves. That
12 is the standard.

13 Petitioner, it appears to me, through work, and
14 respondent, with the sizeable assets, that have been -- that
15 she has and that have been awarded to her, are able to support
16 themselves. There is not the need. Also, petitioner, it
17 appears to me, has an inability, if you will, to pay the
18 respondent alimony. Consequently, as I say, there is no award
19 of alimony.

20 In terms of the property, in terms of the personal
21 property, furniture, fixtures, appliances, so forth, that
22 property is awarded to the party which is in possession of
23 that property. Subject to any addendums thereon that they
24 should pay, hold and hold the other party harmless therefrom.

25 In terms of debts, taxes that are owed, the party

1 whose income is taxed must pay the tax and any penalties and
2 so forth associated with that. There may have been some
3 joint returns where this applies; but it's the mathematical
4 computation in terms of the tax, the income, the tax and so
5 forth, and what taxes are owing.

6 So what I see here and what I'm ordering is that to
7 the extent that there's a debt regarding unpaid taxes, then the
8 party who owes the tax should pay the debt. In terms of joint
9 debts, if the debt is joint but for the benefit of one party,
10 then the debt is to be paid by that party.

11 In terms of the debts that I saw were debts for the
12 children's therapy and so forth in that area, it appears to me
13 the respondent's in a better position to pay that debt, and is
14 ordered to pay those debts and discharge all other joint debts.
15 So if it's your debt, you have to pay it. If it's a joint debt
16 or a debt incurred for the children, respondent pays those
17 debt.

18 In the caveat I would add to this is if there is an
19 order, not a temporary order, that modifies this -- that is,
20 one party was ordered to pay it -- and it was not reserved for
21 my further determination, even though it may fall into some
22 category that the respondent is now required to pay, then that
23 order is the one to be followed.

24 That includes -- now, let me add further so there's
25 no misunderstanding. Although in terms of the reviewing -- I

1 hesitate here, because as I say, I tried to determine whether
2 there were other orders that were not considered temporary
3 orders, that might impact this, and I am not clear.

4 So that's why I'm adding that caveat; but I'm
5 including in this the debts for the special master, the
6 therapists for the children, and these sort of things.
7 Hereafter, the fees for the special master and coordinator
8 and the therapists for the children are to be paid equally by
9 both parties.

10 I'll tell you why I do that. I think there's some
11 importance that each party participate in these -- in this
12 process in terms of the children and in terms of the special
13 master and the coordinator, both as a check, if you will, one
14 on the other, in terms of the use of these things; and I think
15 there's some importance that there be a financial stake in
16 these matters to both parties.

17 Insurance, health insurance for the children is what
18 I will deal with. The petitioner and respondent are ordered
19 to maintain health insurance for the use and benefit of the
20 children, if available through any employment. Then each would
21 pay one-half of the uninsured. If it is not available through
22 employment, then a policy of insurance is to be purchased.
23 Each party is to pay half, and half of the uninsured.

24 In terms of contempt, the standard in terms of finding
25 contempt is that the parties must know what the duty imposed by

1 the Court, have the ability to comply with the order, and
2 willfully and knowingly refuse to comply. I have examined
3 the evidence fairly closely on this, and there's quite a bit.
4 I don't know if I'm going to be able to sort it out more
5 particularly than this, in terms of this hearing.

6 I find that the respondent has been in contempt,
7 because she's failed to provide information about the
8 children's activities, removed the children from school,
9 interfering with parent time, changed the children's school
10 enrollment, interfered with phone calls and prevented
11 visitation that should have occurred. That she knew of the
12 order. She had the ability to comply; and she willfully and
13 knowingly refused to comply.

14 Consequently I find the respondent is in contempt.
15 Make-up visitation which is anticipated, but I don't think
16 it's possible in this situation. So I'm not going to try to
17 do anything in that regard. However, respondent is to pay to
18 petitioner as in the form of attorney's fees a sum of \$3,500
19 for prosecuting the contempt and to purge the contempt.

20 Finally, attorney's fees. The standard in terms of
21 review -- of awarding attorney's fees, this is discretionary
22 on my part in terms of the award of attorney's fees. It is not
23 a penalty; and I don't view it as such, and it is not viewed
24 as such a penalty that one should pay attorney's fees of the
25 others.

1 If the fees are awarded, they must be based on the
2 spouse's financial need, the payer spouse's ability to pay,
3 and the reasonableness of the requested fees. Another phrase
4 I think that's used often is "reasonable and necessary."

5 From the petitioner's side of it, on the main issue
6 he's not prevailed. I think I could and should take that
7 into account. I'm also not convinced that all of the fees
8 are reasonable and necessary.

9 We have \$250,000 in fees in this case; and I've gone
10 through the accountings, and one cannot pick out, I suppose,
11 one particular entry or group of entries, and identify those
12 as unnec -- or not reasonable, not necessary. It appears to
13 me that \$250,000 in attorney's fees represents pretty well a
14 matter that got out of hand, and is not reasonable.

15 Also from the petitioner's side, it appears that the
16 fees connected with child custody and related matters have been
17 paid. Consequently I don't see that there's a financial need
18 to reimburse those.

19 So it appears to me that the fact that the petitioner
20 did not prevail and was not the prevailing party on really what
21 was the main issue, and apparently so much devoted to that,
22 both in terms of -- certainly in terms of what was presented
23 here and so forth, did not prevail.

24 I can take that into account, coupled with the other
25 reasons, is not entitled to a fee; and because he's paid --

1 already paid the fees. Although I understand that these were
2 paid by others, is what it may have amounted to, and probably
3 did amount to it because of the size of the fees, I don't know
4 that he's legally bound to pay back those debts in terms of the
5 fees.

6 Consequently I don't see where there's a -- he has a
7 need -- a legal need, as anticipated by our standard here, from
8 the respondent to help him pay the fees. In other words, the
9 fee's already been paid; and I don't see that he legally has to
10 pay back those who helped him pay the fee.

11 From the respondent's side, she hasn't -- because of
12 the assets, that I can take that into account and should take
13 it into account, she has no financial need. Petitioner,
14 appears to me, has no ability to pay it, in any event.

15 Are there any other issues that I have not addressed
16 in this determination?

17 MS. LEMS: A couple of them, Judge, on my notes.

18 THE COURT: Yes.

19 MS. LEMS: The award of the parties' vehicles, do you
20 want me to go through them one-by-one or just --

21 THE COURT: Well, let me ask you this. Was there any
22 -- what I intended when I said, "Each one in possession gets
23 what they have in possession," would that cover it; or is there
24 one -- is there a vehicle --

25 MS. LEMS: Remember there's a boat that's supposedly

1 sitting somewhere at the respondent's mother's home.

2 THE COURT: Is that the boat that there was some
3 dispute as to who purchased it or bought it?

4 MR. BLONQUIST: I don't think there's any dispute about
5 that. The money came out of the Fidelity account for the boat.
6 Remember there was a boat that was demolished in the accident?

7 THE COURT: I remember that, but is there another boat
8 -- I don't remember the witness. The friend, Ms. Kimball's --
9 Ms. Pardeaux's friend who was -- the question was whether a
10 boat had been purchased?

11 MR. BLONQUIST: No, that --

12 THE COURT: That's not the boat you're talking --

13 MR. BLONQUIST: The boat they have was the one that was
14 replaced when the insurance proceeds came in on the boat that
15 was -- and my client's had possession of that since the --
16 well, it's at her mother's, but she has control of it.

17 THE COURT: All right.

18 MR. BLONQUIST: So I assume that that's what you meant.

19 MS. LEMS: Well, and the boat was certainly in dispute,
20 Judge, and you had several (inaudible).

21 THE COURT: No, when I made the -- no, and that's
22 covered I think by my ruling; but I just wanted to clarify,
23 because we had another boat in there that there was some
24 evidence presented. I guess I don't remember Ms. Pardeaux's
25 friend who had testified that she had purchased the boat, and

1 Ms. Pardeaux was really just storing for her.

2 MS. LEMS: So I'm clear, is the Court awarding the
3 respondent the boat?

4 THE COURT: No, no. Now I'm getting to the boat --

5 MS. LEMS: Oh.

6 THE COURT: -- now, which you apparently both agreed
7 which is the boat that was purchased; and I think that falls
8 under the category; and I intended that to fall into the
9 category of an asset purchased for the family by the proceeds
10 of the inheritance. That appears to me where that boat falls
11 into that spot.

12 That was also the boat in which there was an altered
13 check connected with that boat. Here again, it appears
14 to me that it has the character of a marital asset, because
15 although it was purchased with the inheritance money, it
16 remains as the boat for the family. As such, a marital asset,
17 it's to be sold. Proceeds are to be divided in half.

18 MS. LEMS: On the vehicles, Judge, just so I'm clear,
19 each party is awarded any vehicle that are currently in their
20 possession?

21 THE COURT: Yes, and all other property that -- you
22 pointed -- the boat was an exception to that. That was in
23 dispute. I don't know if there's anything else that fits into
24 that kind of category that we need to deal with.

25 MS. LEMS: I'm not aware of any right now, Judge.

1 THE COURT: But any property they have in their
2 possession is theirs subject to the debt -- to any debt.

3 MS. LEMS: Next issue, Judge, is tax exemptions, the
4 house, the Lori Kay lot, and the children.

5 THE COURT: Well, that Lori Kay lot, I think I've
6 disposed of, which is that it's to be sold because it again
7 is a marital asset. It remains purchased by the inheritance
8 money; but purchased for the family, and we already disposed
9 of that. I think it's that it's to be sold and -- I know there
10 may be some trouble doing that; but I don't know of any other
11 way to dispose of -- to resolve that, other than to order it
12 sold and divide it in half.

13 MS. LEMS: And in the interim of the sale, Judge, if we
14 have property taxes due, what would the Court's order be on
15 that?

16 THE COURT: Well, if it's marital assets, then they
17 should participate equally in any taxes and so forth, the fees,
18 and so forth that may be assessed on that property.

19 MS. LEMS: The minor children, the award of dependency
20 tax deduction? If the Court could make a finding concerning
21 whether maybe one parent over another may not be filing a tax
22 return?

23 THE COURT: Let me ask you both in terms of the tax
24 exemption, and I know that had been raised, but let me retain
25 just for -- I've got an idea, but I haven't considered this.

1 Let me consider it now, but let me first take it -- have you
2 take really just a minute or two and suggest what you think
3 might be fair on that.

4 MS. LEMS: Would you like me to start, Judge?

5 THE COURT: Yes.

6 MS. LEMS: What I believe would be fair is in the event
7 one parent or the other is filing a tax return, and the other
8 parent is not, then of course the parent filing a tax return be
9 awarded all four minor children as dependency deductions.

10 In the event that the parties are both filing for tax
11 returns, presently Mr. Kimball has sole physical custody of
12 child Brooke. Presently the respondent has sole physical
13 custody of the three remaining children. Presuming that
14 they're both filing tax returns, I believe it would be
15 reasonable that they be awarded the child currently in their
16 sole physical custody.

17 The third option, Judge, which would be absolutely
18 equalizing and making it fair, is that they're awarded one-half
19 each of the children. Currently we have four kids that can be
20 claimed as a dependency deduction. Mr. Kimball's awarded two.
21 Merae Kimball is awarded two, presuming that they're both
22 filing tax returns.

23 MR. BLONQUIST: My client will, of course, be filing a
24 tax return; and I think that the suggestion made is that they
25 claim the child that they have physical custody of. I would

1 think that with Mr. Kimball's income, as it's been stated, if
2 he claimed his own deduction of that one child, he wouldn't
3 need any more.

4 THE COURT: Well, apparently this -- I see this as an
5 agreement. If you file a tax return, then you're entitled to
6 take the exemption for the child or children that you have the
7 physical custody of.

8 MR. BLONQUIST: Thank you, your Honor. The one point
9 that I wanted to raise relative to the family home that my
10 client resides in, you'd mentioned the 50/50. I think it's
11 only reasonable with the Court's ruling, that Mr. Kimball be
12 required to pay 50 percent of all of the income -- or of the
13 real property taxes that my client has been -- had to pay each
14 year, including the delinquent taxes that were paid after he
15 left the home. We could get an accounting on that.

16 THE COURT: Well, I'm going to decline to do that.
17 The usual, and I see no reason to vary from this, given
18 the financial situation of either -- of both parties, that
19 Ms. Pardeaux has the home, was given the -- awarded the home,
20 that she pays all the taxes and fees associated with that home.

21 In terms of the arrearages, here again I think it's
22 mainly a matter of who's in a better financial position to pay
23 a debt incurred on joint property. Who has the money to pay it
24 on joint property? He doesn't have a greater obligation than
25 she does. She has a better -- I agree to find that she has a

1 greater financial ability. So I'll have her pay it.

2 MS. LEMS: One last thing on my notes, if I may, Judge.
3 We had requested -- and at the time of argument, this well have
4 been our responsive, post-trial brief -- that the Court make
5 finding regarding the date of valuation at the time of the
6 parties' separation, rather than at the time the bifurcated
7 divorce. Does the Court have a finding on that issue?

8 THE COURT: Tell me again, please.

9 MS. LEMS: We had requested that the Court make a
10 finding regarding the date for valuation of the parties'
11 marital estate at the time of the parties' separation.
12 Remember, Judge, they separated on or about latter part of
13 February, first part of March of 2002, versus the date of
14 valuation, which would have been at the time of the bifurcated
15 divorce. That occurred, Judge, on August 8th of 2003.

16 THE COURT: What would be the need to make such a
17 finding, the way I've approached it and awarded the property?
18 Is there a need to make that kind of a finding?

19 MS. LEMS: I believe that there is, Judge; and I
20 believe it's for purposes of determining the debt (inaudible)
21 and asset values; and for purposes of any type of appeal that
22 either party may make.

23 THE COURT: Well, I'm not -- I don't know that I have
24 -- you didn't present me with enough evidence in terms of that
25 kind of asset evaluation; but I don't know that I need to make

1 that finding in order to reach the conclusions that I reach. I
2 think that's the findings that I need to make, that support the
3 conclusions that I reached. I don't see that I need to do
4 that.

5 Anything further?

6 MR. BLONQUIST: Yes, your Honor, one other item. You
7 may have covered it, and excuse me if you have, but I don't
8 think that you have. When we settled the custody issue, we
9 reserved for your Honor an allocation of costs of our expert
10 witnesses; and I believe that that should be addressed.

11 We have set -- provided to the Court by affidavit what
12 we have paid and what we still owe on those. I think that it's
13 appropriate for your Honor to allocate whether each side should
14 total it and pay half, 50/50; or whether the party incurring
15 the debt should pay the debt. I just raise that point because
16 it was something that was not resolved, and was specifically
17 referred -- reserved to your Honor.

18 Now, as I understand your ruling, you have mentioned
19 the special master's fees; and you've talked about therapists;
20 and you've talked about ongoing therapy that you think would be
21 beneficial to the family. Therefore, there would be a 50/50
22 split.

23 I believe that none of those categories touch the
24 issue of -- well, for example, the custody evaluator is
25 separate. That was something directly related to the child

1 custody issue. There was a fee to -- well, I think it's
2 appropriate that you address each of the costs of each of the
3 experts that were identified in the witness lists. I would
4 suggest that that be a matter that be divided 50/50 between the
5 parties. I'll submit it.

6 THE COURT: Thank you. Ms. Lems, do you want to --
7 wish to comment about that? I might indicate that I didn't
8 say anything, but I have considered that and -- in terms of the
9 costs of litigation. Go ahead -- let me --

10 MS. LEMS: If I may, Judge.

11 THE COURT: Yes.

12 MS. LEMS: My concern would be, as we indicated in
13 our memorandum in response to the respondent's affidavit of
14 attorney's fees and costs, it appears that the respondent had
15 at least four different non-Court appointed experts lined up.

16 Off the top of my head, Judge, and please don't
17 quote me on it, because I don't remember what it was; but I
18 believe she had expert fees totaling well over 30 to \$40,000.
19 As indicated in our responsive brief, I believe it's very
20 unreasonable that Mr. Kimball have to bear any of the burden
21 of the respondent's non-Court appointed experts.

22 Mr. Kimball, as the Court notes from his own affidavit
23 of attorney's fees and costs, had incurred his own rebuttal
24 expert, Dr. Donna Strassberg. We had requested in our affidavit
25 of attorney's fees and costs that Ms. Kimball pay one-half of

1 his fees. He certainly was a whole lot less than the 30 to
2 \$40,000 for her four other non-Court appointed experts.

3 THE COURT: May I ask this question. In terms of what
4 might fit into the category of "Court appointed experts," the
5 custody evaluator would fit into that category. I don't know
6 if there's any others here that would fit into that category.
7 Is there?

8 MS. LEMS: I believe maybe Jill -- Dr. Jill Sanders,
9 who was appointed by this Court, if you remember, Judge, by
10 stipulation of the parties, as a special master, as and for
11 the best interests of the children.

12 What I understand from what was testified to, is that
13 the parties were paying one-half of the special master fees.
14 Your findings today reflect that. However, the Court hasn't
15 yet made findings on Dr. Davies.

16 If I recall the testimony, Judge -- and again please
17 don't quote me, because I don't have my notes on that --
18 but I believe that Mr. Kimball had paid an extra \$2,000 to
19 Dr. Davies.

20 THE COURT: Do you want to say anything further,
21 Mr. Blonquist?

22 MR. BLONQUIST: Well, just briefly, and here again, I
23 don't want you to quote me either, but I think if you look at
24 the accounting, we've paid more than half of Dr. Davies' fees;
25 and I think that in analyzing it, you're correct. There is

1 only one Court appointed custody -- or expert.

2 I think that it's fair that the parties equally share
3 that expense. If we've paid our half, then that takes care of
4 it; but if we've paid more than our share, then that should be
5 an adjustment.

6 THE COURT: Was there any -- this also would fit into a
7 category, I think, of is there an order not anticipated to be a
8 temporary order or reserving the issue for the trial, that any
9 of these people, including the custody evaluator, that their
10 fees were to be paid by one party or the other?

11 MR. BLONQUIST: No, that is --

12 THE COURT: That was either left up in the air or
13 reserved?

14 MR. BLONQUIST: It was reserved.

15 THE COURT: Reserved.

16 MR. BLONQUIST: It was reserved at the time of our
17 settlement of the issues related to custody.

18 MS. LEMS: If I may, Judge, on that question. If
19 the Court were to look at the order regarding custody and
20 related matters as entered by this Court on or about March 10th
21 of this year, you reserved the issues of the costs of the
22 special master. You reserved the issues concerning the custody
23 evaluator, Court appointed evaluation, including the costs for
24 any and all experts from both parties concerning the custody
25 portion of this matter are hereby reserved.

1 THE COURT: Well, let me make this determination.
2 It would be my intention -- (inaudible) say I glossed over
3 it in some way here -- is that the costs of litigation, which
4 included the expert fees and any depositions and any costs of
5 litigation are to be born by the party incurring those costs.

6 In terms of the custody evaluator, Court appointed
7 evalu -- Court appointed experts, those fees are to be paid in
8 equal share by the parties. Let me clarify again, so there's
9 no misunderstanding.

10 In terms of the special master and the coordinator
11 and the therapists, I'm having Ms. Pardeaux, unless there's an
12 order, as I say, to the contrary -- apparently there isn't, but
13 if there's a dispute about that then we'll have to sort that
14 out -- but Ms. Pardeaux paying their fees. So these are --
15 these are Court appointed people, but -- to be certain, but
16 I'm having her pay the fees up to this point. Then hereafter
17 it's to be divided in half. I've given you the reasons why I
18 do that.

19 In terms of the custody evaluator, it seems to me that
20 that's also Court appointed, but for such an evaluation I think
21 it appropriate that the fee be divided in half and each pay
22 one-half. That's how I'll decide it.

23 MR. BLONQUIST: Let me just say this, and we may have
24 to look into it, but from the time of the appointment of the
25 special master, which was Lisa Reading, each of the parties

1 have been presented a bill. We've each paid our half. As far
2 as the parental coordinator is concerned, that's been the same
3 also. We've received bills/ and each of the parties have paid
4 half. So we're talking about Lisa Reading, and we're talking
5 about Jill Sanders.

6 THE COURT: Very well.

7 MS. LEMS: Whether the parties have paid one-half,
8 Judge, if you recall, that was the subject of many temporary
9 hearings. In fact, the Court's file is awash with letters from
10 Dr. Davies, from Lisa Jones Reading and so forth that Merae
11 Kimball had not paid her one-half.

12 THE COURT: Well, and I'm not -- as I say, I'm giving
13 you a formula; and if there is an order that's a permanent
14 order that is otherwise, I'm going to state it again, then
15 that is the governing order.

16 Absent that, the special master, the coordinator,
17 the therapists, I'm having Ms. Pardeaux pay whatever is the
18 outstanding balance. The reason I'm doing that is because she
19 has the assets to be able to do that. Those are debts that
20 need to be paid. They were -- they're debts I think that are
21 incurred by and for both parties, and for the children for both
22 parties.

23 That's the -- a special master is not a special master
24 for the economic issues. There's the children's issues. These
25 people need to be paid; and I'm looking to the party that's in

1 the financial position to be able to pay these.

2 MR. BLONQUIST: As in what --

3 THE COURT: And I think that's -- the reason I think
4 that's fair and appropriate and I think legally sound also is
5 that, as I say, these are debts for the children, and to assist
6 in terms of the children, and should be paid by -- from here on
7 out, one-half each; but there's been a debt incurred. Those
8 need to be paid, and respondent has the assets to do that.

9 MR. BLONQUIST: As of what date, your Honor? You said
10 if there's an outstanding balance owed, she's to pay it?

11 THE COURT: I'm willing to take it back. I'm willing
12 to take it back to the time of the first day of trial.

13 MR. BLONQUIST: First day of trial? Remember, that was
14 November.

15 THE COURT: Whatever date it is.

16 MR. BLONQUIST: Okay, I just --

17 THE COURT: I think that's the --

18 MR. BLONQUIST: I wanted to remind you that it was
19 November, not April. If you have that in mind and that's your
20 order, I respect that.

21 THE COURT: The first day of trial. Anything further?

22 MS. LEMS: No, thank you, your Honor.

23 THE COURT: Appreciate it.

24 MR. BLONQUIST: Thank you.

25 THE COURT: We'll be in recess.

1 MR. BLONQUIST: All right.

2 THE COURT: Let me -- but let me resolve one other
3 thing. That is the drawing of the findings and conclusions
4 and the decree. That incorporates, I suppose, all that was
5 agreed upon in terms of the custody and related matters, all
6 that I had decided, and (inaudible) covers all of it.

7 MR. BLONQUIST: It does, yes.

8 THE COURT: Mr. Blonquist, I think I'll look to you to
9 do that.

10 MR. BLONQUIST: I will do it.

11 THE COURT: We'll be in recess.

12 MS. LEMS: Thank you.

13 (Hearing concluded)

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.

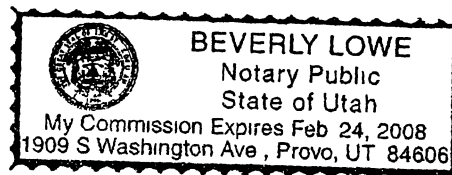
I further certify that I am not interested in the outcome thereof.

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 6th day of June 2005.

My commission expires.
February 24, 2008


Beverly Lowe
NOTARY PUBLIC
Residing in Utah County



ADDENDUM “D”

JAMES LEWIS KIMBALL

V.

MERAE KIMBALL

MINUTE ENTRY

Case No. 024901659

Judge Fratto

The matter is before the court to consider a series of post-trial motions. For the reasons given, these motions are denied.

Petitioner's Rule 60(b) Motion to Set Aside Amended Decree and Findings of Fact And Conclusions of Law

With this motion, petitioner objects to certain written findings as contrary to the court's in-court declarations. Respondent's argument that use of Rule 60(b) to raise petitioner's objections is well taken. Nevertheless, the court's has substantively reviewed the objections and, although expressed with different terminology from that used in court, the amended findings submitted by respondent correctly capture the court's findings. Specifically, the court found that petitioner altered checks obtained from respondent without her permission. The term "forgery" correctly characterizes this activity.

Respondent's Motion to Amend Findings of Fact and Conclusions of Law and Amended Decree of Divorce

With this motion, respondent urges the court to reconsider the determination that petitioner used proceeds obtained through forgery for "family purposes," and that respondent is in

contempt of court. The argument is that the evidence does not support the findings and the determination thereon when the correct standards and burden of proof are applied.

It is petitioner's burden to show that he used the proceeds from forgery for family purposes. The court may consider his testimony and give it the weight and credibility it deserves. The reasonable inferences that are drawn from all the evidence may be considered; the dearth of evidence to the contrary weighed. There may be differing views of the evidence, the credibility of the witness' and the inferences that may be reasonably drawn therefrom, but the court is not convinced that it either used an incorrect standard of proof or erred as to the evidence to be applied to that standard.

Respondent's Motion for Sanctions Under Rule 11 of the Utah Rules of Civil Procedure

With this motion, respondent requests sanctions for having to respond to petitioner's motion to extend the time to file a memorandum. Petitioner's request was considered by the court as properly made *ex parte*; no response from respondent was anticipated. The extension was granted.

Although the timeliness of petitioner's request may be questioned, sanctions pursuant to Rule 11 are not appropriate because the court has not been intentionally misled or the request made for an improper purpose.

Respondent's Motion for Rule 11 Sanctions

With this motion, respondent requests sanctions against petitioner because of

misrepresentations in their Rule 60(b) motion. There was evidence that petitioner had applied for credit in connection with an auto sale and inflated his income on the application. Whether petitioner intended to inflate his monthly or yearly income is unclear and open to different views of the evidence on that point. Consequently, petitioner's representations about the evidence that take one view to the exclusion of the other is appropriate. There does not appear to be an intention to mislead or misrepresent.

Respondent's Motion to Strike (Affidavit of Michelle Burk)

This motion begs the question: Can the court consider a transcript of court proceedings not produced by an "official court transcriber," as defined by Rule 3-305 *Rules of Judicial Administration*?

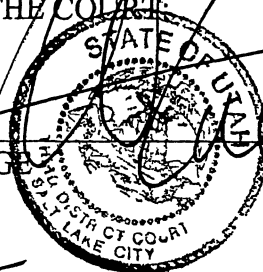
The rule is silent on this question, and there does not otherwise appear to be a prohibition on the trial court's consideration of an unofficial transcript. There was no misrepresentation of the transcribers status, and no allegation that the transcript that was produced had material errors.

This minute entry constitutes the order regarding the matters addressed herein. No further order is required.

Dated this 21st day of February, 2006

BY THE COURT:

JUDGE



11815

ADDENDUM “E”

FILED DISTRICT COURT
Third Judicial District

MAR 10 2005

SALT LAKE COUNTY

Deputy Clerk

Revised 2/28/05

Wendy J. Lems, #7409
Christopher J. Rogers, #10104
LEMS LAW OFFICE, P.C.
7050 South Union Park Center, Suite 350
Salt Lake City, Utah 84047
Telephone (801) 256-9500
Facsimile (801) 255-2442
Attorneys for Petitioner

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

JAMES LEWIS KIMBALL,

Petitioner,

vs.

MERAE KIMBALL,

Respondent.

**ORDER RE: CUSTODY AND RELATED
MATTERS**

Civil No: 024901659 DA

Judge Joseph C. Fratto
Commissioner Susan C. Bradford

Trial having been scheduled in the above-entitled matter from November 29, 2004, through December 8, 2004, and based upon partial stipulation of the parties entered on the record at time of trial scheduled on November 30, 2004, before the Honorable Judge Joseph C. Fratto, Jr.; Petitioner, James Kimball along with his counsel of record, Wendy J. Lems and Christopher Rogers of Lems Law Office, P.C. being present; Respondent, Merae Kimball being present with her counsel of record, Thomas R. Blonquist; and Guardian Ad Litem, Robert Steele being present as and for the minor children, the Court having heard and accepted the partial stipulation

of the parties regarding custody of the minor children and related matters thereto; having considered the pleadings on file, and for good cause shown, does hereby enter the following:

IT IS HEREBY FOUND AND ORDERED:

1. Custody:

- a. The Court does hereby find that it is in the best interests of the minor children that the parties will share equally in the joint legal and joint physical custody of the children, to-wit: Amanda, Daniel, and Ryker Kimball shall be under the primary physical custody of Respondent, with Petitioner exercising parent-time pursuant herein; Brooke Kimball shall be under the primary physical custody of Petitioner, with Respondent having therapeutic parent-time visitation with Brooke as detailed herein.

2. Primary Residence of the Children:

- a. The primary residence for Amanda, Daniel, and Ryker Kimball is with the Respondent, Merae Kimball.
- b. The primary residence for Brooke Kimball is with the Petitioner, James Kimball.

3. Parent-Time Planning Meeting and Parent-Coordinator:

- a. On a monthly basis, the parties shall meet with parent-coordinator, Dr. Jill Sanders, to discuss parent-time for the parties (hereinafter "Parent-Time Planning Meeting"). As part of the parties' Parent-Time Planning Meetings, the parties under the direction of Dr. Jill Sanders shall plan their respective parent-time with the minor children in advance for at least sixty (60) days. At the direction of Dr.

Sanders or as may be reasonably necessary, the parties may be required to meet more or less often than a monthly basis for their respective parent-time meetings with Dr. Sanders.

- b. At the Parent-Time Planning Meetings, Dr. Sanders shall discuss the parent-time with the parties, assist the parties in planning the parent-time schedule, make suggestions concerning the same, including but not limited to the scheduling of extra curricular activities, events, holidays, summertime parent-time, vacations, or trips. Dr. Sanders shall also suggest therapist(s) for any of the minor children, suggest therapy or other parenting classes for any party, make suggestions concerning any and all child care, suggest any modifications concerning parent-time, and shall be able to write correspondence to the Court provided Dr. Sanders submits copy of the correspondence to all counsel in this matter.
- c. Dr. Jill Sanders shall have “dual” roles as: (1) the family therapist and (2) the parent-coordinator. Further, Lisa Jones-Reading shall continue as the “Special Master” in this matter. The parties agree that two separate orders shall be prepared, drafted and entered for Dr. Jill Sanders and Lisa Jones-Reading concerning their respective powers and responsibilities in this matter.
- d. The parties will follow any and all suggestions and recommendations of the parent coordinator, Jill Sanders subject to the appeal process as described herein.
- e. Dr. Jill Sanders has a very broad role as described herein and as more fully memorialized in Order of Parent Coordinator, to be filed herewith. However, the

parent coordinator cannot, absent Court order, modify either parent's custody of
the minor children as set forth herein.

4. Appeal Process:

- a. In the event of impasse or disagreement between the parties pursuant to the Parent-Time Planning Meeting, any party may submit the issue to Special Master Lisa Jones-Reading for decision. Within a reasonable period of time, the Special Master shall issue her decision to the parties. The decision of the Special Master shall be effective when issued whether in writing or orally.
- b. If either party desires to appeal or otherwise object to the decision of the Special Master, either party may submit the issue to the Court for decision by filing a Motion for Order to Show Cause.

5. Extra-Circular Activities and Events:

- a. The Parties agree that each child shall be involved in no more than one (1) sport per season.
- b. Music practice and lessons for the children concerning the same shall be ongoing and shall continue, excluded from the provisions of paragraph 5(a).
- c. Both parties may attend any extra-curricular activity or event of any of the children, if the party so desires.
- d. Neither party shall have any contact or communication with the other party, including direct face-to-face or indirect non-verbal communication.

- e. During the extra-curricular activity or event, the children shall have ability to freely contact or communicate with any parent. The parties shall not discourage the children from contacting or communicating with the other parent at extra-curricular activities or events.
- f. For any and all extra-curricular activities and events of the children, whichever parent is exercising parent-time according to the Parent-Time Planning Meeting and direction of Dr. Sanders, is responsible for transportation to and from the extra-curricular activity and/or event.
- g. If activities are not scheduled during the Parent-Time Planning Meeting with Dr. Sanders as identified above, the extra-curricular activity and/or event shall not occur.

6. Holidays, Vacations and Trips:

- a. If either party desires to take any of the children out of the Salt Lake Valley for one or more overnights, the requesting party shall provide at least thirty (30) day advance written notice to both the other party and Dr. Jill Sanders. The notice shall include but not limited to the itinerary, reservation confirmation numbers, any and all dates and times of arrival and departure, addresses and phone numbers where the children can be reached.
- b. Any and all trips or vacations shall be planned in conjunction with the Parent-Time Planning Meeting and Dr. Sanders. Every effort should be made to plan any and all trips or vacation on the requesting parents' parent-time.

- c. Any and all holidays pursuant to UTAH CODE ANN. § 30-3-35, attached hereto as Exhibit "1," shall take precedence over the parent-time schedule of either party, unless directed otherwise by Dr. Sanders.
- d. The parties' respective Summer time, extended or otherwise parent-time with the children will be addressed and coordinated with the parent coordinator, Dr. Jill Sanders.

7. Parent-Time:

- a. Petitioner shall be entitled, at least as a default provision, to a specific parent-time schedule with children Amanda, Daniel, and Ryker Kimball. This schedule may be modified during the Parent-Time Planning Meeting by Dr. Jill Sanders.
- b. Petitioner monthly parent-time schedule for Amanda, Daniel, and Ryker Kimball shall be as follows:
 - i. For the first week of each month, Petitioner shall have overnight weekend parent-time visitation from Friday at 7:00pm to Sunday at 7:00pm.
 - ii. For the second week of each month, Petitioner shall have mid week visitation every Thursday from 5:30pm to 9:00pm.
 - iii. For the third week of each month, Petitioner shall have overnight weekend parent-time from Friday at 6:00pm to Monday morning in which Petitioner shall take/facilitate the children's attendance at school, if in session. If school is not in session, the Petitioner shall facilitate the return of the children to the Respondent by 9:00 a.m.

iv. For the fourth week of each month, Pctitioner shall have mid-week parent-time from 5:30pm to 9:00pm.

- c. With respect to Amanda Kimball, Petitioner agrees to be flexible in his scheduling and exercise of parent-time as Amanda Kimball is entering her teenage years.
- d. All parent-time, whether holiday or non-holiday, is subject to change or modification by the parent-coordinator, Dr. Jill Sanders.
- e. Petitioner, James Kimball, shall provide transportation for any of the children during the exercise of Petitioner's parent-time.

8. School:

- a. The parties' minor children, Daniel Kimball and Ryker Kimball, shall remain in their current school and shall not be transferred to Oakridge Elementary.

9. Brooke Kimball:

- a. Brooke Kimball shall continue therapy with Dr. Patricia Hopps, as needed or suggested by Dr. Sanders and/or Dr. Hopps. The purpose of therapy between Brooke Kimball and Dr. Hopps is to facilitate relationship and therapeutic parent-time visitation between Brooke Kimball and Respondent, Merae Kimball.
- b. Petitioner agrees to provide, within a reasonable period of time, the use of an automobile and cellular phone for Brooke Kimball. As a result, the parties agree that Brooke Kimball may use the automobile and/or cellular phone to freely, at

the discretion of Brooke Kimball, to contact, communicate or visit any of the parties at any time.

10. Disparaging:

- a. Neither party shall disparage and/or slander the other party, or allow or permit other parties in their direct control to do the same, in the presence of any of the minor children.
- b. Neither party shall allow or permit any third parties in their direct control to disparage and/or slander either party in the presence of any of the minor children.

11. Therapy:

- a. The parent coordinator, Dr. Jill Sanders can recommend and suggest additional, alternate or modified therapy as and for any of the minor children, and the parents. The parties will reasonably and timely cooperate in any and all suggestions of the parent coordinator for the same.

12. Reserved Issues:

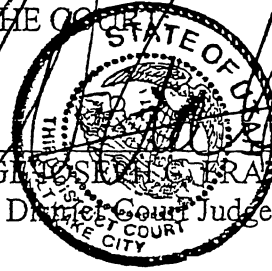
- a. The issue of the costs of Special Master are reserved, if no settlement of the same.
- b. The issue of costs concerning the custody evaluator, court-appointed evaluation, including the costs for any and all experts from both parties concerning the custody portion of this matter are hereby reserved.
- c. The issue of child support is reserved, if no settlement of the same.

13. The parties will pay one-half (1/2) each of any and all costs associated with Parent Coordinator, Dr. Jill Sanders in a timely and reasonable manner.

DATED THIS 10 day of March, 2005.

BY THE COURT

JUDGE STEPHEN A. TRAISTO
Third District Court Judge



**NOTICE PURSUANT TO RULE 7
OF UTAH RULES OF CIVIL PROCEDURE
OF THE STATE OF UTAH**

TO THE RESPONDENT AND HER COUNSEL, THOMAS R. BLONQUIST:

Notice is hereby given that pursuant to Rule 7 of the Utah Rules of Civil Procedure, that this Proposed Order prepared by the Petitioner shall be the Order of the Court unless you file an objection in writing within five (5) days from the date of the service of this notice.

ADDENDUM “F”

FILED 10 11:01

WJL

Wendy J. Lems, #7409
LEMS LAW OFFICE, P.C.
7050 South Union Park Center, Suite 350
Salt Lake City, Utah 84047
Telephone (801) 256-9500
Facsimile (801) 255-2442
Attorneys for Petitioner

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

<p>JAMES LEWIS KIMBALL,</p> <p>Petitioner,</p> <p>vs.</p> <p>MERAË KIMBALL,</p> <p>Respondent.</p>	<p>MEMORANDUM IN SUPPORT OF RULE 60(B) MOTION TO SET ASIDE AMENDED DECREE OF DIVORCE AND FINDINGS OF FACT AND CONCLUSIONS OF LAW</p> <p>Civil No: 024901659 DA</p> <p>Judge Joseph C. Fratto Commissioner Susan C. Bradford</p>
--	--

COMES NOW Petitioner, James Kimball, by and through counsel of record, Wendy J. Lems of Lems Law Office, P.C., respectfully submits this Memorandum in Support of Petitioner's Rule 60(b) Motion to Set Aside Amended Decree of Divorce and Amended Findings of Fact and Conclusions of Law entered in this matter on September 21, 2005, based upon the ruling of the Honorable Judge Joseph C. Fratto at divorce hearing held May 24, 2005. The Petitioner respectfully requests that certain provisions of the Amended Decree of Divorce and Findings of Fact and Conclusions thereon as signed by the Court on September 19, 2005, and as entered on September 21, 2005, be set aside, as such orders do not accurately reflect Judge

Fratto's Findings and Orders as made at the time of hearing on May 24, 2005. Rule 60(b) provides that a Court may upon motion reverse the finality of a judgment or order for reasons including mistake, inadvertence, surprise, or excusable neglect; fraud, misrepresentation or other misconduct of an adverse party; or any other reason justifying relief from the operation of the judgment.

FACTS

1. The Court held trial in the above-entitled matter on November 30, 2004, December, 2, 3, 6, 7, 8, 10 and 14, 2004, and April 12 and 13, 2005. The Court took the matter under advisement and issued Ruling from the bench on May 24, 2005. At the time of such Ruling, the Court directed counsel for the Respondent to submit a proposed Decree of Divorce and proposed Findings of Fact and Conclusions of Law. Counsel for the Respondent on September 19, 2005 submitted proposed "Amended Decree of Divorce" and proposed "Findings of Fact and Conclusions of Law" to the Court without the Petitioner's counsel's approval to form, and the Court entered the same on September 21, 2005.
2. On or about September 29, 2005, Respondent, by and through counsel, submitted a second set of orders as entitled "Motion to Amend Findings of Fact, Conclusions of Law and Amended Decree of Divorce." Such documents were not titled properly as "Second Amended Decree of Divorce" and "Second Amended Findings of Fact and Conclusions of Law." Additionally, the mailing certificate to the Respondent's counsel is dated September 29, 2005; however the post-mark for such mailing to counsel for the Petitioner is dated October 3, 2005.

ARGUMENT

The Petitioner hereby requests that this Court set aside the Amended Decree of Divorce and Findings of Fact and Conclusions of Law entered on September 21, 2005 pursuant to Utah Rules of Civil Procedure 60(b) as such orders do not accurately reflect Judge Fratto's Findings and Orders as made at the time of hearing on May 24, 2005. Rule 60(b) provides that a Court may upon motion reverse the finality of a judgment or order for reasons including: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; or (6) any other reason justifying relief from the operation of the judgment. Furthermore, the Utah Supreme Court has held that a Utah Court may "vacate, set aside, or modify its orders or judgments entered by mistake or inadvertences which do not accurately reflect the result of its judgment" and that "the authority of a court to cause its proceedings and its judgments and orders to be correctly set forth in its records is necessarily inherent in its powers for the purpose of administering justice." *Meagher v. Equity Oil Co.*, 299 P.2d 827, 830 (Utah, 1956). The provisions of the Amended Decree of Divorce and Findings of Fact and Conclusions of Law which do not accurately reflect the Court's ruling of May 24, 2005, should be set aside pursuant to Rule 60(b)(1)(3) and (6). Such provisions are as follows:

I. ALLEGED UNAUTHORIZED CHECKS

Paragraph 7 of the Amended Decree of Divorce and corresponding paragraph 9 in the Conclusions of Law do not accurately reflect the order of this Court. The Amended Decree of

Divorce reads, "Petitioner shall not be punished . . . for . . . **forging** Respondent's name. . . and altering the amount of checks written." Emphasis added. The Court made no such finding. In fact, the Honorable Judge Fratto said that contrary to finding a preponderance that the Petitioner took money to use solely for his benefit, "I found otherwise in terms of the evidence that was presented in front of me, and I'm not drawing the inferences that [the Respondent is] suggesting from the evidence." (See Transcript of Court's Ruling of May 24, 2005, attached hereto as Exhibit "1," page 3, lines 113 through 115.) Judge Fratto specifically declined to accept the Respondent's "invitation to award all the equity in the Village Point home to her because of the Petitioner's altering of the checks" because such ruling would be a penalty upon the Petitioner. The Judge refused to impose such penalty, finding that the money was used for the family's benefit. (Exhibit 1, page 3, lines 110 through 121. See also Exhibit "1," page 2, lines 79-90).

Therefore, paragraph 7 of the Amended Decree should be set aside and modified omitting the term "forging" therefrom and corresponding paragraph 9 of the Conclusions of Law should also be set aside and modified to remove such terminology which was not found or used by the above-entitled Court at the time of the Court's Ruling on May 24, 2005.

II. FINDINGS OF FACT NUMBER 5

Based on the reasoning above and the Court's findings, the Court also considered at time of trial Petitioner's allegations of "co-mingling" of the stock purchase agreement monies, (as identified by Respondent, as "shares of the family business") in the Amended Decree of Divorce.

Therefore, paragraph 5 of the Findings of Fact should address not only claims of “inheritance and enhancement” but also “co-mingling.”

Additionally, nowhere in the Findings of Fact did it identify that the Respondent acquired on or about 1976, prior to the parties’ marriage, approximately 1005 shares of stock in Utah Bearing and Fabrication, Inc. (hereafter, “Utah Bearing”). Additionally, nowhere in the Findings of Fact does it identify that on or about 1994, dispute ensued between Respondent and Utah Bearing concerning the value of Respondent’s stock and the potential purchase of Respondent’s stock from Utah Bearing.

Furthermore, nowhere in the Findings of Fact does it identify the findings and evidence presented to the Court at time of trial as follows:

a. At the time of the parties’ marriage, the Petitioner was employed at Jorgensen Appraisal and Respondent was employed as a teacher for Granite School District.

b. On or about February 1988, Petitioner was employed with Utah Bearing, Respondent’s father’s family business.

c. On or about June 1990, Petitioner began work for Cate Equipment, also known or other subsidiary of Utah Bearing, Respondent’s father’s family business. At about this same time, Respondent quit her job at Granite School District.

d. The parties’ relationship deteriorated and Petitioner and Respondent separated on or about late February, 2002 or early March, 2002.

e. After the death of Respondent’s father, Frank Pardoe on August 9, 1993, Frank Pardoe had a will that left everything via a residuary clause, including all of Mr. Pardoe’s stock

interest that he possessed, to the James Franklin Pardoe Trust. Respondent, Merae Kimball, then Merae Pardoe, was one of the beneficiaries to the trust along with Respondent's mother and other siblings.

f. On or about November 1993, Frank Pardoe's heirs including Respondent, specifically agreed to alter the terms of the Will to have all testamentary devises and bequests in the Will go outright to Respondent's mother, Cherie Pardoe, instead of to the Trust as specified in the residuary clause of the Will.

g. On or about November 1, 1993, approximately three (3) months after Frank Pardoe died, Respondent received stock from resolution of the Board of Directors of Utah Bearing canceling all previously issued shares of the Corporation and issued new 1005 Class A voting stock to Respondent, during her marriage to the Petitioner.

h. On or about 1994, Respondent received an initial offer from Derek Pardoe, Respondent's brother and former President of Utah Bearing, for purchase of Respondent's 1005 stock shares in an approximate amount of \$1,700,000.00.

i. Thereafter, after discussions between the parties, Petitioner and Respondent, and in discussions and advise with family friend, Robert Rice and Petitioner's uncle, Kay Lewis, Respondent was referred to attorney Thomas KLC/Kelch.

j. On March 24, 1995, Respondent sold her 1005 shares of stock in Utah Bearing pursuant to Stock Purchase Agreement dated March 24, 1995, for \$2,500,000.00.

k. On or about March 24, 1995, Respondent received the five hundred thousand dollars (\$500,000.00) down payment from the Stock Purchase Agreement.

l. On or about March 24, 1995, shortly after Respondent received the five hundred thousand dollars (\$500,000.00) down payment from the Stock Purchase Agreement, Respondent deposited the entire \$500,000.00 down payment into the parties' joint money market account at Zions Bank.

m. From March 24, 1995, to July 1, 1997, the parties received monthly payments in the amount of twenty-five thousand three hundred thirty-five dollars and fifteen cents (\$25,335.15) pursuant to the Stock Purchase Agreement of March 24, 1995. These monthly payments were deposited into several of the parties' accounts including but not limited to the parties' joint Zions Bank account, the parties' joint Bank One account and the parties' Fidelity account.

n. On or about July 1, 1997, Utah Bearing decided to pay off the remaining principle balance owed to Respondent under the Stock Purchase Agreement. On or about July 1, 1997, Respondent received \$1,691,963.99 for the remaining principle balance owed to Respondent under the Stock Purchase Agreement and the entire amount was deposited in the parties' joint Bank One account. Based on the above, the parties incurred tax debt on the Stock Purchase Agreement settlement proceeds. The parties' tax obligation, on their joint tax return on such proceeds approximated \$398,614.00 which the parties' paid on or about 1997 from the Fidelity account.

o. During the parties' marriage, the parties deposited, withdrew, and transferred monies in accounts held with Fidelity Investments, Zion's Bank, Bank One, First Security Bank,

Wells Fargo Bank, and Jay Rice investment accounts for household, family, joint tax obligation and marital expenses.

p. Both parties freely signed each others name on checks, which is common practice among married couples.

WHEREFORE, the above-referenced Findings should be included in the Court's Findings of Fact and were an integral part of the evidence submitted and found by the above-entitled Court.

III. OUTSTANDING DEBT OWED TO COURT APPOINTED EXPERTS, LISA READING, DR. HAYDEE MAS AND JIM HOTTINGER

In the Amended Decree of Divorce, paragraph 16 and the corresponding paragraphs contained in the Findings of Fact and Conclusions of Law, paragraphs 88, 90, 91, and 92 should be revised to reflect that "Respondent is ordered to pay the outstanding debt to Lisa Reading, Esquire and hold the Petitioner harmless therefrom." The Court identified the Court appointed experts as Lisa Reading, Dr. Haydee Mas and Jim Hottinger which the Court directed the Respondent to pay any and all costs incurred therewith up until the time of the Court's Ruling of May 24, 2005, as the Respondent has better financial ability to pay such costs. Hereafter, the parties will pay one-half (1/2) of such costs as and for the benefit of the children. (See transcript, Exhibit "1," page 12, lines 522 through 538). Likewise paragraphs 90 and 91 as well as 92 of the Findings of Fact and paragraph 18 of the Conclusions of Law should be set aside as such provisions do not accurately reflect the evidence before the Court nor the Court's Ruling thereon. In regards to paragraph 16 and paragraph 92 of the Amended Decree of Divorce, Respondent

was ordered to pay the outstanding debt owed to Lisa Reading up through the date of the Court's Ruling, May 24, 2005. The actual sum of such debt was not entered into evidence nor provided by the Respondent. Therefore, the paragraphs as identified should be set aside and the language modified to correctly reflect the true orders of this Court.

IV. MONETARY JUDGMENT

Paragraph 18 of the Amended Decree of Divorce and paragraph 19 and paragraph 93 of the Conclusions of Law award "judgment against the Petitioner in the sum of \$5,086.53." Yet neither the Court's docket of the hearing nor the transcription of the Judge's order awards the Respondent such sum of money. It appears that the Respondent's counsel, in drafting the Amended Decree of Divorce and Findings of Fact and Conclusions of Law, has awarded his client monies not authorized to her as reimbursement for her payments to Court-appointed experts. In reality, the Judge ordered that the Respondent, not the Petitioner, pay all the expert "fees up to this point, and then hereafter it is to be divided in half. . . . In terms of the Custody Evaluator . . . I think it appropriate that the fees be divided in half." (Exhibit 1, page 12, lines 533 through 537.) [Therefore, fees incurred up until the date of the hearing, May 24, 2005, are to be paid by the Respondent, but future fees are to be split by the parties.] However, the cost of the Custody Evaluator, Dr. Matthew Davies, who according to the Court's Findings of Fact is to be equally divided by the parties.

The Respondent, however, is asking for \$5,086.53, an amount reflecting half of the outstanding balance owed to the Special Master plus half of the difference in amounts which allegedly, the Respondent and the Petitioner have paid for the fees owed to Court-appointed

professionals. The Respondent's counsel misrepresents the Judge's actual order on May 24, 2005. In paragraph 93 of Findings of Facts, counsel for Respondent writes "Based upon the disproportionate payments made by the parties to Court ordered professionals, it is reasonable that the Petitioner pay the Respondent \$5,086.53." Yet the Court explicitly ordered a disproportionate payment because the Respondent "has the assets to be able to do that." (Exhibit 1, page 13, line 558.) The Amended Decree of Divorce should have reflected the Judge's order and should read, "The Respondent is to pay any and all outstanding debts owed to Court-appointed experts from the date of trial to today's date, with the exception of the Custody Evaluator whose fee is to be split by the parties. All expenses incurred hereafter are to be split by the parties." Such phrasing would accurately represent Judge Fratto's order.

V. ATTORNEYS' FEES AND COSTS

Paragraph 24 of the Amended Decree of Divorce and Paragraph 26 of the Conclusions of Law do not accurately represent the complete order of this Court. The Amended Decree of Divorce reads "Petitioner is not entitled to receive compensation from the Respondent in the form of attorney's fees and costs." Judge Fratto in his order addressed the request of attorney's fees and costs by *both* parties and explained why he denied such request by both parties. (Exhibit 1, pages 5 and 6, lines 225 through 261.) The Respondent's counsel's inclusion in the Amended Decree of Divorce only denial of fees and costs to the Petitioner indicates that the Judge considered only a request from Petitioner, when in fact both parties were denied such request. The Order should reflect the Judge's full consideration on the matter. The Amended Decree of Divorce and the Conclusions of Law should reflect that neither party is entitled to

receive attorney's fees and costs from the other party as follows, "Neither the Respondent nor the Petitioner has proven the need to be awarded attorney's fees and costs. Further, since Petitioner did not prevail on financial issues and therefore is not entitled to an award of his attorney's fees.

Paragraph 104 through paragraph 107 of the Findings of Fact should be modified in this matter to truly reflect the Court's Findings and Ruling as entered at the time of hearing held May 24, 2005. Specifically such paragraphs should be omitted and revised as follows: "The Court does hereby find that it has discretion in an award of attorney's fees and costs. The Court will not award fees or costs as a penalty that either party should pay. However, if the Court is to award fees, the Court must base the same on financial need, ability to pay and the reasonableness of requested fees. After reviewing the Petitioner's request for fees, the Court does hereby find that the Petitioner has not prevailed. The Court further finds that it is not convinced that all fees incurred by the Petitioner were reasonable or necessary as requested in the sum of \$250,000.00. The Court has reviewed the accountings provided and cannot discern one particular entry or group of entries to identify what fees if any may not be reasonable or not necessary. The Court does hereby find however that the amount of \$250,000.00 in attorney's fees represents that the case got out of hand and is not reasonable. Further, in reviewing the Petitioner's request for fees it appears that the fees requested that were connected to the child custody and related matters have been paid by the Petitioner's family. Based on the same, the Court does not find a financial need to reimburse the Petitioner and the Court is not convinced that Petitioner is legally bound to pay back those fees as those fees have in large part been paid already by his parents. After reviewing the Respondent's request, the Court does hereby find that the Respondent has

considerable assets which the Court needs to take into account based on her need. In any event, the Court finds that the Petitioner has no ability to pay any portion of the Respondent's fees. Therefore, the Court finds that both parties will pay their own attorney's fees." (See transcript of proceedings, Exhibit "1," pages 5 and 6, lines 225 through 261).

WHEREFORE, Petitioner respectfully requests that paragraph 24 of the Amended Decree of Divorce as well as paragraph 26 of the Conclusions of Law be modified and the language of the Court as identified above, be adopted by this Court pursuant to the Court's Ruling of May 24, 2005.

VI. FORGED/FORGERY

The Respondent's proposed Findings as contained in paragraphs 33, 39 and 72, are not consistent with the Court's orders. Pursuant to the Ruling of the Court at hearing held May 24, 2005, the Court specifically found that "Petitioner, without authorization, signed the Respondent's name to checks, without authorization, altered the amount on certain checks. The Court further found that pursuant to a preponderance of the evidence, that the money so obtained was used for family purposes and that the only evidence before the Court was Mr. Kimball's testimony that the funds were used for family purposes, including all members of the family and Mr. Kimball." (See transcript, page 2, lines 79 through 87). Therefore, the Court's Findings and Conclusions of Law should be modified to reflect the true representation and findings of this Court. At no time did this Court find that the Petitioner had "forged" any checks.

VII. LORI KAY HOME

As proposed by the Respondent in the Findings of Fact, paragraph 41, 42, and 46 was not found by the Court and should therefore be stricken. The Court addressed the Lori Kay Home in its Ruling of May 24, 2005, as found at transcript, page 2, lines 62 through 77; and page 8, lines 332 through 337 and nowhere in the Court's Ruling or Findings therefore, does the Court find as referenced by the Respondent in the Findings number 41, 42 or 46. Therefore, such added Findings which do not correctly reflect the Rulings of this Court nor the evidence presented at time of trial, should be stricken.

Additionally, paragraph 58 of the Findings of Fact should include the language "because purchased for the family." (See transcript, page 8, lines 332 through 337).

Lastly, the Court ordered that if there were any taxes related to the Lori Kay property, specifically property taxes, during the pendency of the sale of the Lori Kay lot, that both parties were to equally pay any taxes owed. (See transcript, page 8, lines 332 through 343).

Therefore, such provisions should be added to the proposed Findings of Fact to truly reflect the Court's May 24, 2005 Ruling.

VIII. CREDIT APPLICATION

Respondent has inserted paragraph 37 alleging Petitioner's credit application referenced \$60,000.00 "per month." The Court in its Findings of May 24, 2005, did not address such credit application in any manner, nor is such Finding necessary nor a true reflection of the evidence presented. At time of trial, Petitioner testified that the "per month" reference on his credit

application meant “per year” and such was a mere inadvertence. Therefore, paragraph 37 should either be stricken in its entirety or correctly reflect the testimony provided at time of trial.

IX. INHERITANCE

Paragraphs 50 and 51 were not found by the Court nor addressed in any manner in the Court’s Ruling of May 24, 2005. Such provisions in the Findings of Fact, do not correctly reflect the evidence presented at time of trial and therefore, such provisions should be stricken.

X. TAXES/COLLECTION

At no time during the Court’s Ruling of May 24, 2005, did the Court find the Findings of Fact as identified in paragraphs 60 through 65 of the Findings of Fact as proposed by the Respondent. Further, evidence speaks for itself and any of the tax returns filed by either party and admitted into evidence, correctly reflect their adjusted gross income and the reporting of any income earned, whether from Fidelity accounts or otherwise. Therefore, paragraph 60 through 65 regarding the Petitioner’s reported income, interest earnings, or collection actions, is not a true reflection of the evidence presented in the trial in this matter nor did the Court make Ruling regarding the same at the time of the May 24, 2005 hearing. Therefore such provisions should be stricken.

XI. FIDELITY ACCOUNT

Paragraph 66 of the Findings contains mistake in the amount remaining in the Respondent’s Fidelity account. The amount as identified in the exhibits presented and admitted by the Court was \$1,050,603.63. Therefore paragraph 66 should be amended to accurately reflect the amount in the Fidelity account at the time of the parties’ separation.

Additionally, paragraph 73 through paragraph 77 of the Findings of Fact contains inaccuracy which was neither found or ruled upon by the Court in any manner and as such, paragraphs 73 through 77 should be stricken from this Court's orders.

XII. ALIMONY

Paragraph 83 should be revised to correctly reflect the Court's findings and ruling as made at the time of the hearing held May 24, 2005, as follows: "The Court does hereby find that both parties make \$2,900.00 per month. Although the Petitioner has had a history of making more than \$2,900.00 a month, at present and based on the evidence presented, Petitioner's gross monthly income is \$2,900.00. The Court does hereby impute income to the Respondent of \$2,900.00 based on the Respondent's having taught school in the past and based on her testimony of her capability of earning somewhere less than \$35,000.00 a year. The Court further finds that each party has a need of \$3,200.00 a month. Evaluating the recipient/Petitioner's need, the payor's ability to pay and the recipient's ability to support themselves, pursuant to the Jones v. Jones factors, the Court does hereby find that the Respondent has ability to meet her reasonable needs and the Petitioner, has ability through employment to meet his reasonable needs. Therefore, the Court does not award alimony as both parties are able to support themselves. The Court further finds that the Respondent does not have ability to pay alimony to the Petitioner." (See transcript, pages 3 and 4, lines 123 through 156).

Therefore, paragraph 83 of the Findings should be revised accordingly to reflect the Court's Ruling of May 24, 2005.

XIII. MISCELLANEOUS

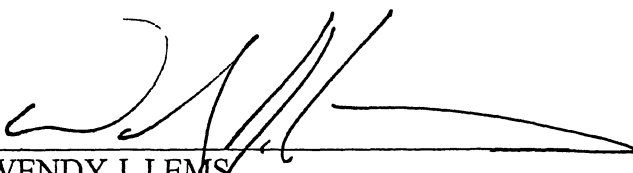
Paragraph 103 of the Findings should be modified to include the language “and co-mingling of Respondent’s inheritance.” This omission by the Respondent does not truly and accurately reflect the trial proceedings before this Court nor the Court’s Ruling of May 24, 2005.

PRAYER FOR RELIEF

WHEREFORE, the Petitioner urges this Court to consider the above errors and omissions in the forms of the Orders prepared and submitted by counsel for Respondent and that the Amended Decree of Divorce and Findings of Fact and Conclusions of Law thereon as entered by this Court on September 21, 2005, be set aside; and that revised and corrected Decree of Divorce and Findings be entered consistent with this Court’s Findings, admitted evidence and the Court’s Ruling of May 24, 2005. Additionally, this Court should award the Petitioner his reasonable attorney fees and costs for having to file motion for these corrections.

DATED THIS 10th day of November, 2005.

LEMS LAW OFFICE, P.C.


WENDY J. LEMS
Attorney for Petitioner

ADDENDUM “G”

FILED DISTRICT COURT
Third Judicial District

APR 27 2007

SALT LAKE COUNTY

By _____

Deputy Clerk

Thomas R. Blonquist, (0369)
Attorney for Plaintiff
40 South Sixth East
Salt Lake City, UT 84102
Telephone: (801) 533-0525

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

MERAE KIMBALL,	) FINDINGS OF FACT and
Plaintiff,	CONCLUSIONS OF LAW
)
v.)
)
JAMES L. KIMBALL,	) Case No. 030902885
	) Judge Joseph C. Fratto, Jr.
)
Defendant.)

The above entitled matter came on for trial before the Honorable Joseph C. Fratto, Jr., District Court judge, sitting without a jury, on August 22nd, 23rd, and 24th, 2006, and February 28th and March 1st of 2007. The Plaintiff was present represented by her attorney of record, Thomas R. Blonquist, and the Defendant was present represented by his attorney of record, Wendy J. Lems. After hearing and considering the testimony from the parties and other witnesses, reviewing and considering the exhibits received into evidence and considering the statements and arguments of counsel and otherwise being fully advised in the premises and good cause appearing therefor, the Court now makes and enters, relative to the Plaintiff's claim of unjust enrichment, the following:

FINDINGS OF FACT

1. The parties were married and during the course of the marriage, the Plaintiff came into a large amount of money, through the sale of stock in her family's business, the "Inheritance Money" herein.

2. Although the Plaintiff intended to use the Inheritance Money for the benefit of her family, she both considered and treated it as her sole property.

3. The Plaintiff placed the Inheritance Money with Fidelity Investments in her name with sole check writing authority.

4. The Defendant was employed during the parties' marriage.

5. For a time, he worked for the Plaintiff's father in sales and held similar subsequent jobs.

6. It was the Plaintiff's expectation, even though she had a large amount of money, that the Defendant would continue to support the family through his employment income, leaving the Inheritance Money for travel, large purchases, and as a blanket of financial security.

7. Among other things, the parties' children were active in tennis and the Plaintiff approved using the Inheritance Money to finance that activity.

8. Historically, the Defendant had been the sole support of the family and assumed the day-to-day control and management of the family finances.

9. Believing that the Defendant was supporting the family through his income, the Plaintiff took little interest in managing the family finances even after receiving the Inheritance Money.

10. The Plaintiff neither interfered with, nor participated in the Defendant's active role in the investment account at Fidelity Investments.

11. There came a time, unbeknown to the Plaintiff, when the Defendant no longer earned an income through his employment, although he was still expected to financially support the family.

12. The Defendant began to engage in a pattern of activity, also unbeknown to the Plaintiff, that included altering, to higher amounts, checks from the Fidelity Investments account given to him by the Plaintiff and signing the Plaintiff's name to checks, with the Defendant or "Cash" as the payee.

13. The Defendant does not deny he engaged in this activity, but maintains that he acted consistent with his role as manager of family finances and that the custom of writing checks and signing the Plaintiff's name thereto was established during the course of the marriage.

14. The Defendant contends that the altering and signing of the Plaintiff's name occurred with at least the tacit approval of the Plaintiff.

15. The Defendant further maintains that the proceeds from these checks was used for unspecified "family expenses" or "family purposes".

16. The Plaintiff intended that her Inheritance Money be kept separate and apart from joint assets, and that she control its use and disbursement.

17. The Defendant was given no authority to alter or sign the Plaintiff's name to Fidelity checks, although there may have been infrequent, specific instances to the contrary.

18. Such authority is not inherent in managing the family finances and the customs of the parties' marriage did not establish this precedent.

19. The Defendant's claim that the proceeds from the altered checks or proceeds from checks made payable to "Jim Kimball" or "Cash" were used to satisfy "family expenses" is not corroborated by any credible evidence.

20. These checks were negotiated by the Defendant although the bank records do not show a deposit in the household account as would be expected, if the funds were to be expended to support the family.

21. The Defendant, without the consent or knowledge of the Plaintiff and without any right so to do, took the Plaintiff's money by either altering check amounts, as shown by Exhibits P1-P7, inclusive, or drawing checks with the Defendant or "Cash" as the payee, by the forged signature of the Plaintiff, as shown by Exhibits P18-P33, excluding P24 and P27, and P41, P45, and P46.

22. The Defendant has been unjustly enriched in that he has taken money in which he was not entitled.

23. The Defendant's actions constitute theft and forgery and he deceived the Plaintiff into believing he was working.

24. The Plaintiff relegated administration of the family finances and investments to the Defendant and she did not participate in their day-to-day management.

25. The Defendant took improper advantage of his managerial position and the Plaintiff's minimal participation and oversight.

26. At least for the altered checks and those made payable to the Defendant or "Cash", the proceeds were not used to financially support the Defendant's family.

27. These are the circumstances and the "misleading act" that would make it inequitable for the Defendant to retain proceeds.

28. It is reasonable that the Plaintiff be awarded a judgment against the Defendant in the sum of \$56,800 together with pre-judgment interest on each check from the date thereon, if the date is visible, to the date of judgment and, thereafter, at the legal rate.

29. Accordingly, it is reasonable that a judgment be awarded based upon the following checks and pre-judgment interest, from the date shown until April, 20th, the anticipated date of the judgment:

<u>Exhibit</u>	<u>Amount</u>	<u>Date</u>	<u>Prejudgment Interest to April 20th, 2007</u>
P1	\$4,000	Oct. 4, 1999	$6.513 \times 8.5 \text{ years} = \$2,214.42$
P2	\$4,000	June 1, 1999	$6.513 \times 8.83 \text{ years} = \$2,300.39$
P3	\$4,000	April 6, 1999	$6.513 \times 8 \text{ years} = \$2,084.16$
P4	\$4,000	Jan. 12, 2000	$7.67 \times 7.25 \text{ years} = \$2,224.30$
P5	\$4,000	Jan. 29, 2000	$7.67 \times 7.25 \text{ years} = \$2,224.30$
P6	\$4,000	Mar. 27, 2000	$7.67 \times 7.083 \text{ years} = \$2,173.06$

P7	\$4,000	Aug. 12, 2000	7.67 x 6.667 years=\$2,045.44
P18	\$3,000	Mar. 8, 2000	7.67 x 7.083 years=\$1,629.79
P19	\$3,000	May 2, 2000	7.67 x 6.92 years=\$1,592.29
P20	\$2,000	May 10, 2000	7.67 x 6.92 years=\$1,061.53
P21	\$3,000	June 26, 2000	7.67 x 6.83 years=\$1,571.58
P22	\$2,000	July, 18, 2000	7.67 x 6.75 years=\$1,035.45
P23	\$2,000	July 29, 2000	7.67 x 6.75 years=\$1,035.45
P24	\$1,399	Aug. 1, 2000	7.67 x 6.667 years=\$715.39
P25	\$2,000	Aug. 28, 2000	7.67 x 6.667 years=\$1,022.71
P26	\$2,000	Sept. 7, 2000	7.67 x 6.583 years=\$1,009.83
P27	\$1,000	Sept. 27, 2000	7.67 x 6.583 years=\$504.92
P28	\$3,000	Sept. 27, 2000	7.67 x 6.583 years=\$1,514.75
P29	\$2,000	Oct. 11, 2000	7.67 x 6.5 years=\$997.1
P30	\$2,000	Nov. 8, 2000	7.67 x 6.416 years=\$984.21
P31	\$2,000	Nov. 13, 2000	7.67 x 6.416 years=\$984.21
P32	\$2,000	Nov. 22, 2000	7.67 x 6.416 years=\$984.21
P33	\$2,000	Nov. 30, 2000	7.67 x 6.416 years=\$984.21
P41	\$1,800	Oct. 26, 2001	7.34 x 5.416 years=\$715.56
P45	\$1,000	Dec. 19, 2001	7.34 x 5.334 years=\$391.52

P46 \$1,000 Dec. 31, 2001 7.34 x 5.334 years=\$391.52

30. Based upon the foregoing, it is reasonable that judgment be entered for pre-judgment interest in the sum of \$34,392.30.

From the foregoing findings of fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. The Plaintiff's claim for unjust enrichment should be granted.
2. The evidence supports the three required elements of an unjust enrichment claim,

which are:

- A. The Defendant received a benefit from altering and forging the Plaintiff's checks.
- B. The Defendant had knowledge of the benefit he received.
- C. The Defendant committed misleading acts that would make it inequitable for him to retain the proceeds that he received from altering and forging the Plaintiff's checks.

3. The Plaintiff is entitled to a \$56,800 judgment against the Defendant, pre-judgment

X

X

X

X

X

interest from the date of each check, if visible, and post-judgment interest at the legal rate.

DATED this 26 day of April, 2007.

BY THE COURT

Joseph C. Fratto, Jr.
District Court Judge

A large, stylized handwritten signature in black ink is written over a circular embossed seal. The signature is fluid and cursive, with a long horizontal stroke extending to the right. The seal is partially obscured by the signature but is clearly visible as a circular stamp.

ADDENDUM “H”

Judgment @J



JD21314170
030902885 KIMBALL, JAMES L

Thomas R. Blonquist, (0369)
Attorney for Plaintiff
40 South Sixth East
Salt Lake City, UT 84102
Telephone: (801) 533-0525

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 04/30/07

FILED DISTRICT COURT
Third Judicial District

APR 27 2007

SALT LAKE COUNTY

3y

Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

MERAE KIMBALL,	) JUDGMENT
Plaintiff,)
v.)
	Case No. 030902885
JAMES L. KIMBALL,)
	Judge Joseph C. Fratto, Jr.
)
Defendant.)

In this action, a bench trial was held and thereafter the court entered its findings of fact and conclusions of law, now, based thereupon, judgment is hereby entered against James L. Kimball, the above named Defendant.

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid,

IT IS ORDERED ADJUDGED AND DECREED that the Plaintiff, Merae Kimball, recover from the Defendant, James L. Kimball, the sum of fifty-six thousand eight hundred dollars (\$56,800) together with pre-judgment interest of thirty-four thousand three hundred ninety-two dollars and thirty cents (\$34,392.30) and with said Plaintiff's costs in this action amounting to the sum of one

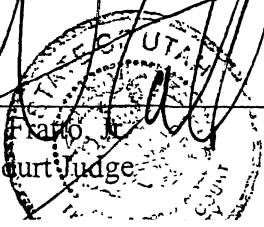
hundred sixty dollars (\$160), for a total judgment of ninety-one thousand three hundred fifty-two dollars and thirty cents (\$91,352.30), with interest thereon at the rate of 6.99% per annum from the date hereof until paid.

Judgment rendered this 26 day of April, 2007.

Attest my hand as Clerk and the seal of the said Court this ____ day of April, 2007.

BY THE COURT

Joseph C. Franco, Jr.
District Court Judge



ADDENDUM “I”

IMAGED

Amended Judgment @J



JD21755749

pages:

030902885 KIMBALL,JAMES L

Thomas R. Blonquist, (0369)
Attorney for Plaintiff
40 South Sixth East
Salt Lake City, UT 84102
Telephone: (801) 533-0525

FILED
DISTRICT COURT
FILED DISTRICT COURT
Third District

SEP 17 2007

SALT LAKE COUNTY

Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

MERAE KIMBALL,	)	AMENDED JUDGMENT
Plaintiff,)	
v.)	
	)	Case No. 030902885
JAMES L. KIMBALL,)	
	)	Judge Joseph C. Fratto, Jr.
)	
Defendant.)	

In this action, a bench trial was held and thereafter the court entered its findings of fact and conclusions of law and a judgment. The Defendant filed a timely motion to alter or amend the judgment and the Court heard and considered arguments thereupon on August 6th, 2007. Following the hearing, the matter was taken under advisement and the Court, on August 20th, 2007 entered its memorandum decision denying the Defendant's motion with the exception of excluding the Plaintiff's Exhibits 45 and 46. Based upon the foregoing, the judgment entered in this cause on the 26th day of April, 2007 be and the same is amended as follows:

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid,

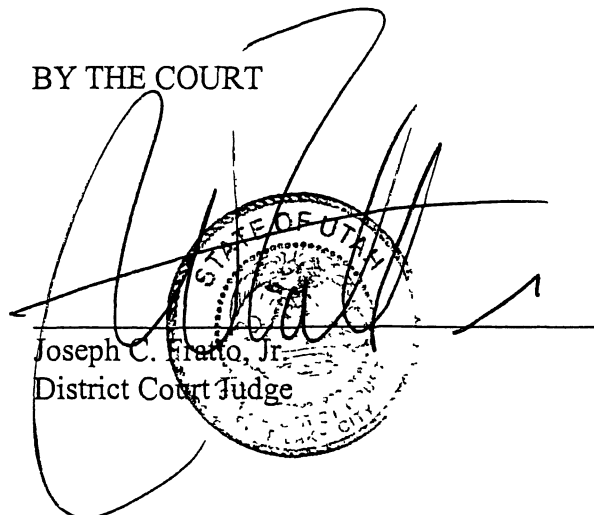
IT IS ORDERED ADJUDGED AND DECREED that the Plaintiff, Merae Kimball, recover from the Defendant, James L. Kimball, the sum of fifty-four thousand eight hundred dollars (\$54,800) together with pre-judgment interest of thirty-three thousand six hundred nine dollars and twenty-six cents (\$33,609.26) and with said Plaintiff's costs in this action amounting to the sum of one hundred sixty dollars (\$160), for a total judgment of eighty-eight thousand five hundred sixty-nine dollars and twenty-six cents (\$88,569.26), with interest thereon at the rate of 6.99% per annum from the date hereof until paid.

Judgment rendered this 17 day of September, 2007.

Attest my hand as Clerk and the seal of the said Court this ____ day of September, 2007.

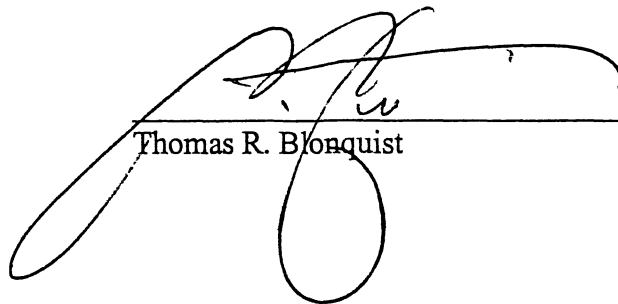
CLERK

BY THE COURT

A large, stylized handwritten signature in black ink is written over a circular official seal. The seal features the text "STATE OF UTAH" at the top and "DISTRICT COURT" at the bottom, with a central emblem. Below the signature, the text "Joseph C. Fratto, Jr." and "District Court Judge" is printed.

Joseph C. Fratto, Jr.
District Court Judge

The undersigned certifies that on the 31st day of August, 2007, a copy of the foregoing amended judgment was mailed, postage pre-paid, to Wendy Lems at 7650 South Union Park Center, Suite #350, Midvale, Utah 84047.



Thomas R. Blonquist