

2006

James Lewis Kimball v. Merae Kimball : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JAMES LEWIS KIMBALL,

Petitioner, Appellant, and
Cross-Appellee,

vs.

MERAE KIMBALL,

Respondent, Appellee, and
Cross-Appellant.

Appeal No. 20060263-CA

BRIEF OF APPELLANT
(Consolidated)

I. DIVORCE: Appeal from the Amended Decree of Divorce and Findings of Fact and Conclusions of Law entered by the Honorable Joseph C. Fratto of the Third Judicial District Court on September 20, 2005, and rendered as final order by Judge Fratto's Minute Entry (denying both Petitioner's Rule 60(b) Motion and Respondent's Rule 59(e) Motion to Amend) on February 21, 2006.

II. FIDELITY: Appeal from the final Orders of the Honorable Joseph C. Fratto of the Third Judicial District Court as follows: Findings of Fact and Conclusions of Law entered April 27, 2007; Judgment entered April 30, 2007; Memorandum Decision entered August 21, 2007; and Amended Judgment entered September 18, 2007.

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UTAH APPELLATE COURTS**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	v
JURISDICTIONAL STATEMENT:	1
I. DIVORCE	1
II. FIDELITY	1
ISSUES ON APPEAL, STANDARD OF REVIEW, and PRESERVATION	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES	7
STATEMENT OF THE CASE:	7
A. NATURE OF THE CASE	7
B. COURSE OF PROCEEDINGS	10
C. DISPOSITION OF THE CASE	11
STATEMENT OF FACTS	12
The Parties' Marriage	12
Divorce Proceedings	15
Stock Purchase Agreement Funds	15
Attorney's Fees and Costs	19
Fidelity Proceedings	20
Trial Rulings and Subsequent Procedures	23

TABLE OF CONTENTS (cont.)

	<u>Page</u>
SUMMARY OF ARGUMENTS	25
POINT I: THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE STOCK PURCHASE AGREEMENT MONIES WERE NOT MARITAL PROPERTY SUBJECT TO EQUITABLE DISTRIBUTION	25
POINT II: IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY APPELLANT’S 60(b) MOTION WHERE THE DRAFTED ORDERS DID NOT REFLECT THE ORDERS OF THE COURT	26
POINT III: THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ORDERING PAYMENT TO THE APPELLANT OF ATTORNEY’S FEES AND COSTS	26
POINT IV: THE TRIAL COURT ERRED IN ITS ULTIMATE CONCLUSION THAT THE APPELLANT HAD BEEN UNJUSTLY ENRICHED, PLACING THE SOLE BURDEN OF PROOF ON APPELLANT, AND THE TRIAL COURT HAD INSUFFICIENT EVIDENCE TO SUPPORT ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW	26
POINT V: THE TRIAL COURT ERRED IN AWARDING PREJUDGMENT INTEREST ON THE APPELLEE’S UNJUST ENRICHMENT CLAIM	27
POINT VI: THE TRIAL COURT ERRED IN ITS FAILURE TO MAKE ANY FINDINGS OF FACT OR CONCLUSIONS OF LAW REGARDING THE APPELLANT’S DEFENSES OF STATUTE OF LIMITATIONS AND COLLATERAL ESTOPPEL/ISSUE PRECLUSION	27
ARGUMENT:	28
I. <u>DIVORCE</u> :	28
POINT I. <u>STOCK PURCHASE AGREEMENT MONIES</u>	28
A. CHARACTERIZATION AS “INHERITANCE”	29

TABLE OF CONTENTS (cont.)

	<u>Page</u>
B. ENHANCEMENT OF THE ASSET	30
C. COMMINGLING OF THE ASSET	32
POINT II. <u>DENIAL OF 60(b) MOTION</u>	36
POINT III. <u>ATTORNEY’S FEES AND COSTS</u>	38
II. <u>FIDELITY:</u>	41
POINT IV. <u>UNJUST ENRICHMENT/SUFFICIENCY OF THE EVIDENCE</u>	41
A. COURT ERRED FINDING UNJUST ENRICHMENT	42
B. IMPOSITION OF BURDEN OF PROOF LIES WITH APPELLEE	47
C. INSUFFIENC EVIDENCE TO SUPPORT FINDINGS OF FACT AND CONCLUSIONS OF LAW	48
POINT V. <u>PREJUDGMENT INTEREST</u>	56
POINT VI. <u>LACK OF FINDINGS OR CONCLUSIONS RE: AFFIRMATIVE DEFENSES</u>	59
REQUEST FOR ATTORNEY’S FEES AND COSTS	63
CONCLUSION	63

TABLE OF AUTHORITIES

	<u>Page</u>
<u>STATUTES, RULES AND CONSTITUTIONAL PROVISIONS</u>	
Utah Code Ann. §30-3-3	38
Utah Code Annotated §78A-4-103 (recodified 2/07/08, previously §78-2a-3, §78-2a-3(2)(e), §78-2a-3(2)(j))	1
Utah Code Annotated §78B-2-305 (recodified 2/07/08, previously §78-12-26, §78-12-26(3))	61
Utah Rule of Appellate Procedure 24(a)(9)	41
Utah Rule of Appellate Procedure 34	63
Utah Rule of Civil Procedure 52(a)	5, 42, 59
Utah Rule of Civil Procedure 52(b)	5
Utah Rule of Civil Procedure 59(e)	i, 5, 6, 7, 60, 61
Utah Rule of Civil Procedure 60(b)	i, 3, 7, 12, 26, 36, 37, 38, 63

TABLE OF AUTHORITIES (cont.)

	<u>Page</u>
 <u>CASES</u>	
438 Main Street v. Easy Heat, 2004 UT 72, ¶ 51	5, 6, 60
A.K.& R. Whipple Plumbing & Heating v. Aspen Constr., 977 P.2d 518, 522 (Utah Ct. App. 1999)	5, 47
Andersen v. Andersen, 757 P.2d 476 (Utah App. 1988)	39, 40
Andreason v. Aetna Cas. & Surety Co., 848 P.2d 171, 177 (Utah Ct. App. 1993)	5, 57
Bailey-Allen Co., Inc. v. Kurzet, 876 P.2d 421 (Utah App. 1994)	58
Barber v. Barber, 792 P.2d 134 (Utah App. 1990)	29
Bellon v. Malnar, 808 P.2d 1089, 1097 (Utah 1991)	58
Berrett v. Stevens, 690 P.2d 553, 557 (Utah 1994)	43, 47
Birch v. Birch, 771 P.2d 1114 (Utah App. 1989)	3, 37
Boyce v. Boyce, 609 P.2d 928 (Utah 1980)	37
Boyer Co. v. Lignell, 567 P.2d 1112 (Utah 1977)	59
Bradford v. Bradford, 1999 UT App 373	33
Buckner v. Kennard, 2004 UT 78, ¶13	62
Burke v. Burke, 733 P.2d 133 (Utah 1987)	28, 29
Burt v. Burt, 799 P.2d 1166 (Utah App. 1990)	29
Career Serv. Review Bd. v. Utah Dept. of Corrections, 942 P.2d 933, 938 (Utah 1997)	62
Davis v. Davis, 76 P.3d 716, 2003 UT App 282	3

TABLE OF AUTHORITIES (cont.)

	<u>Page</u>
Dejavue Inc. v. Schultz, 1999 UT App 355, ¶ 24	57
Dejavue Inc. v. U.S. Energy Corp., 1999 UT App 355, ¶ 9	5, 57, 58
Desert Miriah, Inc. v. B&L Auto, Inc., 2000 UT 83, ¶ 10	4, 43, 47
Dubois v. Dubois, 504 P.2d 1380 (Utah 1973)	31
Hall v. Hall, 858 P.2d 1018, 1021 (Utah App. 1993)	2
Haumont v. Haumont, 793 P.2d 421 (Utah App. 1990)	38, 39
In Re: Connor, 158 P.3d 1097, 2007 UT 33, ¶12	60
Jeffs v. Stubbs, 970 P.2d 1234, 1243-1245 (Utah 1998)	4, 43, 59
Klinger v. Kightly, 889 P.2d 1372, 1381 (Utah Ct. App. 1995)	5
Kraatz v. Heritage Imps., 71 P.3d 188, 2003 UT App 201, ¶ 75	57
Larsen v. Collina, 684 P.2d 52 (Utah 1984)	3, 37
LeGrand Johnson Corp. v. Peterson, 420 P.2d 615 (1966)	59
Madsen v. Madsen, 2006 UT App 267, ¶ 3	60
Meagher v. Equity Oil Co., 299 P.2d 827 (Utah 1956)	37
Moon v. Moon, 790 P.2d 52, 431, 437 (Utah App. 1990)	29, 42
Mortensen v. Mortensen, 760 P.2d 304, 305-306 (Utah 1988)	2, 28, 29 31, 33
Orton v. Carter, 970 P.2d 1254, 1256 (Utah 1998)	5, 47
Osguthorpe v. Osguthorpe, 804 P.2d 530 (Utah App. 1990)	29
Pennington v. Allstate Ins. Co., 973 P.2d 932, 937 (Utah 1998)	6, 60

TABLE OF AUTHORITIES (cont.)

	<u>Page</u>
Peterson v. Peterson, 818 P.2d 1305 (Utah App. 1991)	41
Radman v. Flanders Corp., 2007 UT App 351, ¶ 4	57
Rasband v. Rasband, 752 P.2d 1331 (Utah App. 1988)	39
Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 900-901 (Utah 1989)	5, 42
Reinbold v. Utah Fun Shares, 850 P.2d 487, 489 (Utah App. 1993)	5, 42
Rucker v. Dalton, 598 P.2d 1336, 1338 (Utah 1979)	59
Saleh v. Farmers Ins. Exchange, 2006 UT 20, ¶ 28	57
Schaumberg v. Schaumberg, 875 P.2d 598 (Utah App. 1994)	30, 33
Shoreline Development Inc. v. Utah County, 835 P.2d 207, 210 (Utah App. 1992)	57, 58
State v. Pena, 869 P.2d 932, 936-939 (Utah 1994)	3, 4, 37, 43
Walther v. Walther, 709 P.2d 387 (Utah 1985)	39
West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991)	42
Willey v. Willey, 951 P.2d 226, 230 (Utah 1997)	3
Williamson v. Williamson, 1999 UT App 219, ¶ 9	59
Young v. Young, 979 P.2d 338, 342 (Utah 1999)	6, 60

SECONDARY SOURCES

Blacks Law Dictionary (7 th ed. Abridged)	29
David S. Dolowitz, <i>The Conundrum of Gifted, Inherited and Premarital Property in Divorce</i> , 11 UTAH BAR J. 16 (April, 1998)	29

IN THE UTAH COURT OF APPEALS

JAMES LEWIS KIMBALL,

Petitioner, Appellant, and
Cross-Appellee,

vs.

MERAE KIMBALL,

Respondent, Appellee, and
Cross-Appellant.

Appeal No. 20060263-CA

JURISDICTIONAL STATEMENT

I. DIVORCE:

This court has jurisdiction pursuant to UTAH CODE ANN. §78A-4-103 (recodified, previously §78-2a-3(2)(e) (Supp. 2001)). The Honorable Joseph C. Fratto of the Third Judicial District Court, Salt Lake County, State of Utah, presided over the trial in this matter and entered an Amended Decree of Divorce and Findings of Fact and Conclusions of Law on September 20, 2005, and made a final order by his Minute Entry entered on February 21, 2006.

II. FIDELITY:

This Court has jurisdiction pursuant to UTAH CODE ANN. §78A-4-103 (recodified, previously §78-2a-3(2)(j)) and the Order of the Supreme Court of the State of Utah, entered October 23, 2007, transferring jurisdiction of this matter to the Utah Court of Appeals. The Honorable Joseph C. Fratto of the Third Judicial District Court, Salt Lake County, State of Utah, presided over the trial in this matter and entered Findings of Fact

and Conclusions of Law on April 27, 2007; Judgment entered on April 30, 2007; Memorandum Decision entered on August 21, 2007; and Amended Judgment entered on September 18, 2007.

ISSUES ON APPEAL, STANDARDS OF REVIEW and PRESERVATION

Issue 1: Did the trial court abuse its discretion in finding that the stock purchase agreement monies were not marital property?

Standard of Review: Discretionary ruling subject to the abuse-of-discretion standard. *See Mortensen v. Mortensen*, 760 P.2d 304, 305-6 (Utah 1988), and *Hall v. Hall*, 858 P.2d 1018, 1021 (Utah App. 1993) (internal citations omitted).

Preservation: This issue was preserved; at the trial, sufficient evidence was presented by the Petitioner/Appellant that the stock purchase agreement monies were marital property subject to equitable distribution. Petitioner/Appellant presented sufficient evidence showing that the Respondent/Appellee did not receive the stock or resulting sales proceeds from intestate succession or by bequest or devise by will, but that Appellee's mother was the only one who inherited anything from Appellee's father pursuant to the agreed upon alteration of Appellee's father's will. (See Trial Transcript [hereinafter "Trans."] 74:24-25; 75:1). Moreover, sufficient evidence was presented at trial that the stock purchase agreement monies were marital property because Appellant enhanced the value of the stock, in that Appellant played a key role in negotiations over the purchase price of the stock and thereafter managed investment of the sales proceeds. (Div. Trans. 783:17-24; 785:16-25; 786:10-19; 787:18-23). Finally, sufficient evidence was presented at trial that the stock purchase agreement monies were commingled into

the marital estate or partially gifted to the Appellant by the Appellee where the funds were deposited into joint accounts and used to buy and sell property for the family unit. (Div. Trans. 95:19-25; 96:1-16; 826:20-25; 827:1-14).

Issue 2: Did the trial court abuse its discretion by not granting Petitioner's 60(b) Motion to set aside certain portions of the Amended Decree of Divorce and Findings of Fact and Conclusions of Law?

Standard of Review: Discretionary ruling subject to the abuse-of-discretion standard. State v. Pena, 869 P.2d 932, 938 (Utah 1994); Birch v. Birch, 771 P.2d 1114 (Utah App. 1989); and Larsen v. Collina, 684 P.2d 52 (Utah 1984).

Preservation: This issue was preserved; sufficient evidence was presented by the Petitioner/Appellant showing that it was an abuse of the trial court in denying the Petitioner's 60(b) Motion to set aside certain portions of the Amended Decree of Divorce and Findings of Fact and Conclusions of Law as such did not comport with the actual orders of the court. Appellant set forth thirteen (13) examples wherein the language of the pleadings either omitted particular findings addressed by the court and integral portions of the evidence presented at trial, and/or revised and added findings to the extent they were no longer consistent with the court's orders. (Addendum #3 & #4).

Issue 3: Did the trial court abuse its discretion by failing to order payment of the Petitioner's attorney's fees and costs?

Standard of Review: Discretionary ruling subject to the abuse-of-discretion standard. Davis v. Davis, 977 P.2d 539, 2003 UT App 282, ¶ 14; and Willey v. Willey, 951 P.2d 226, 230 (Utah 1997).

Preservation: This issue was preserved; at trial sufficient evidence was presented that Petitioner/Appellant should be awarded attorney's fees and costs. The Appellant demonstrated his financial need and showed that reasonableness of the fees should have only determined the amount of the award and not resulted in a denial in entirety; evidence was presented by the Appellant concerning his inability to pay attorney's fees and costs in relation to that of the Appellant, and counsel for Appellant testified as to her experience and efficiency, and the fee customarily charged in the locality for similar services. (Div. Trans. 1196:16-25; 1197:1-16; 1360:2-25; 1361:1-25; 1362:1). Finally, sufficient evidence was presented at trial showing that it was inappropriate for the trial court to make a finding and base its denial of fees based on the advancement of attorney's fees by Appellee's parents. (Div. Trans. 1208:3-25; 1209:8-13).

Issue 4: Did the trial court err in its ultimate conclusion that the Appellant had been unjustly enriched, placing burden on the defending party, and did the trial court have insufficient evidence to support its Findings of Fact and Conclusions of Law therein?

Standard of Review: Whether the unjust enrichment doctrine applies is a mixed question of application of law to facts, which is analyzed giving broad discretion to the trial court, based on the factors described in State v. Pena, 869 P.2d 932, 936-939 (Utah 1994); Jeffs v. Stubbs, 970 P.2d 1234, 1243-1245 (Utah 1998); and Desert Miriah, Inc. v. B&L Auto, Inc., 2000 UT 83, ¶ 10. When challenging the legal sufficiency of the evidence, a clearly erroneous standard of review applies, wherein a finding of fact is deemed "clearly erroneous" only if the Court concludes that the finding is against the

clear weight of the evidence. URCP 52(a) and (b); Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 900-901 (Utah 1989); Reinbold v. Utah Fun Shares, 850 P.2d 487, 489 (Utah App. 1993); and 438 Main Street v. Easy Heat, 2004 UT 72, ¶ 51; Rule 52(e).

Which party has the burden of proof is a legal question reviewed for correctness using a “correction of error” standard of review. Orton v. Carter, 970 P.2d 1254, 1256 (Utah 1998); and A.K. & R. Whipple Plumbing & Heating v. Aspen Constr., 977 P.2d 518, 522 (Utah Ct. App. 1999).

Preservation: This issue was preserved by the Appellant’s timely filed Notice of Appeal, after denial of Appellant’s Rule 59(e) Motion to Alter or Amend the Judgment and supporting Findings of Fact and Conclusions of Law, and by the Appellant’s Objection at time of trial (Div. Trans. 26:17-25).

Issue 5: Did the trial court err in awarding prejudgment interest?

Standard of Review: The award of prejudgment interest is a question of law, which is a correction of error standard of review. Dejavue Inc. v. U.S. Energy Corp., 1999 UT App 355, ¶ 9 (*citing* Andreason v. Aetna Cas. & Sur. 848 P.2d 171, 177 (Utah Ct. App. 1993)); *see also*, Klinger v. Kightly, 889 P.2d 1372, 1381 (Utah Ct. App. 1995).

Preservation: This issue was preserved by the Appellant’s timely Rule 59(e) Motion to Alter or Amend the Judgment and Supporting Findings of Fact and Conclusions of Law, which argued, in relevant part, that it was improper for the court to award prejudgment interest.

Issue 6: Did the trial court err in its failure to make any Findings of Fact or Conclusions of Law regarding the Appellant’s defenses of statute of limitations and

collateral estoppel/issue preclusion?

Standard of Review: The adequacy of a trial court's findings of fact is reviewed under a clearly erroneous standard of review. *See Young v. Young*, 979 P.2d 338, 342 (Utah 1999); *Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 937 (Utah 1998); *438 Main Street v. Easy Heat*, 2004 UT 72, ¶ 51; and Rule 52(e).

Preservation: This issue was preserved by the Appellant's timely Rule 59(e) Motion to Alter or Amend the Judgment and Supporting Findings of Fact and Conclusions of Law filed on May 10, 2007.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES
(Text of Utah Code Provisions and Rules provided in separate Addendum)

Utah Code Ann. §30-3-3

Utah Code Annotated §78A-4-103 (recodified 2/07/08, previously §78-2a-3, §78-2a-3(2)(e), §78-2a-3(2)(j))

Utah Code Annotated §78B-2-305 (recodified 2/07/08, previously §78-12-26, §78-12-26(3))

Utah Rule of Appellate Procedure 24(a)(9)

Utah Rule of Appellate Procedure 34

Utah Rule of Civil Procedure 52(a)

Utah Rule of Civil Procedure 52(b)

Utah Rule of Civil Procedure 59(e)

Utah Rule of Civil Procedure 60(b)

STATEMENT OF THE CASE

A. Nature of the Case:

This case is before the Court of Appeals to determine whether the trial court abused its discretion in finding that the stock purchase agreement monies were not marital property, subject to equitable distribution; whether the trial court erred in its ultimate conclusion that the Appellant had been unjustly enriched by receiving certain monies therefrom; placing the burden of proof on the Appellant; whether the trial court abused its discretion by not granting Appellant's 60(b) Motion to set aside certain portions of the Amended Decree of Divorce and Findings of Fact and Conclusions of Law, and Appellant's 59(e) Motion to Alter or Amend Findings and Conclusions, or which did not comport with the trial court's rulings and did not support its ultimate conclusion of law and Findings of Fact, including the court's award of prejudgment interest to the Appellee; whether the trial court erred in entering findings and conclusions of law that went well beyond the scope of an unjust enrichment claim and if so, whether the trial court erred in making factual findings regarding "fraud," "forgery," and "injust enrichment" to support a legal conclusion of unjust enrichment; and whether the trial court further erred in failing to make any finding or conclusion of law regarding the Appellant's affirmative defenses of statute of limitations and collateral estoppel/issue preclusion; and whether the trial court abused its discretion by not ordering payment to the Petitioner of his attorney's fees and costs.

During the early years of the parties' marriage, Appellant was employed with the Appellee's family business, Utah Bearing (from February, 1988), Cate Equipment

Appellee's other family business (from June, 1990) and Mesco (from April, 1994).

During their marriage, the parties enjoyed an extravagant and luxurious lifestyle; owned several properties, vehicles, and a boat; and held interests with several bank, financial institutions and stock accounts. The parties took several vacations and attended many sporting events, including tennis tournaments and camps, Utah Jazz games, and University of Utah sporting events.

The parties paid for all of their expenses accumulated from living such a jet-set lifestyle from the parties' mutual funds which included Appellant's salary and commissions, gifts or loans from his parents and money received by the parties during their marriage from the Stock Purchase Agreement. During the parties' marriage they would deposit, withdraw, and transfer monies between their accounts (separately and jointly held), which included Fidelity Investments, Zion's Bank, Bank One, First Security Bank, Wells Fargo Bank, and Jay Rice Investment accounts to support their family and marital lifestyle. Throughout their marriage the parties freely signed each other's name on checks from the various accounts and Mr. Kimball had trading privileges on the parties' stock accounts.

In 1993, Appellee's father and president of Utah Bearing and CATE Equipment died and left everything via a residuary clause in his will, including all of his stock interests that he possessed to the "James Franklin Pardoe Trust." Appellee was one of the beneficiaries to the Trust along with her mother and other siblings. In November 1993, the beneficiaries of the trust, including Appellee, altered the terms of the will and had all of the testamentary devises and bequests in the will go outright to Appellee's Mother,

Cherie Pardoe. Then, on November 1, 1993, Appellee received stock from an agreement entitled "Resolution of the Board of Directors of Utah Bearing" which in effect cancelled all previously issued shares of the corporation and issued new 1005 of Class A voting stock to Appellee.

The next year in 1994, Appellee received an initial offer from Dirk Pardoe, her brother and President of Utah Bearing, for purchase of her 1005 stock shares for an amount of \$1.7 million. After receiving such initial offer, Appellee discussed the matter with her husband, Jim Kimball (Appellant), who in connection with other advice sought from Appellant's friends and family members, convinced Appellee to reject this initial offer. In March of 1995, Appellee sold her 1005 shares of stock in Utah Bearing for \$2.5 million. The Stock Purchase Agreement as entered into called for a down payment of five hundred thousand dollars (\$500,000.00) and issued Appellee a promissory note for two million dollars (\$2,000,000.00), with interest to accrue at nine percent (9%) per year on the unpaid balance, resulting in a monthly payment of \$25,335.15. On March 24, 1995, Appellee received the \$500,000 down payment from the stock purchase agreement. Appellee deposited the entire amount into the parties' joint money marketing account at Zions Bank. From March through June of 1995 the parties received the monthly payments of \$25,335.15 and placed such into the parties' accounts held with Zion's bank (joint account), Bank One (joint account), and Fidelity Investments (Appellee's account). At the same time that these monies were being deposited into the parties' accounts other monies from Appellant's employment and gifts from Appellant's parents were also being deposited into the same accounts.

On July 1, 1997, Utah Bearing elected to pay off the remaining principle balance owed to Appellee pursuant to the Stock Purchase Agreement. The parties received \$1,691,963.99 for such remaining principle balance and deposited the full amount in the parties' joint Bank One account. The parties continued to use these funds for family expenses and necessities in connection with the monies they received from Appellant's employment and gifts from Appellant's parents, including purchase, as joint tenants, of two (2) parcels of land (Parcel #1 is a developed lot; and Parcel #2 is an undeveloped lot) at 2248 East Lauri Kay Drive, Salt Lake City, Utah. The parties remodeled the dwelling house situated on Parcel #1 and then sold Parcel #1 for \$460,000. At the time of trial the parties still owned, as joint tenants, Parcel #2, the undeveloped lot, and pursuant to the trial court's ruling, were granted equal interests in such property.

The trial court found that the stock purchase monies were not marital property subject to equitable division because: (1) they were never commingled into the marital estate; (2) they were an inheritance of the Appellee; (3) the Appellant did nothing to enhance, maintain, or protect the stock purchase monies; and (4) the Appellant had been unjustly enriched by certain funds he received therefrom, and that he had received such monies by "forgery. Furthermore, the trial court held that it was the Appellant's burden to show that he used such monies, from the altered or modified checks, for "family purposes."

B. Course of Proceedings:

The divorce action originated in the Third District Court upon the filing of the Complaint for Divorce by the Petitioner on March 18, 2002. The parties' marriage was

dissolved by a Bifurcated Decree of Divorce dated August 8, 2003, reserving for trial the custody and financial issues. The custody issues were resolved by stipulation approved by the Court and set forth in Order Re: Custody and Related Matters, dated March 10, 2005. During the pendency of the divorce trial proceedings, the Appellee's Amended Fidelity Complaint was pending for trial before the Honorable Judge Fratto. However, the divorce court made findings regarding the award and distribution of the parties' financial accounts and marital assets purchased from the Stock Purchase Agreement monies.

The Fidelity court did make finding that it was "injust" that the Appellant had received certain checks which he had modified or otherwise altered and that although the parties had throughout the course of their marriage, altered or signed one another's names on their respective checks (whether a joint or separate account), that the checks in question as raised by the Appellee, had been altered or modified by Appellant for his own benefit as he had failed to sufficiently show how such monies were used for "household or family" purposes.

C. Disposition of the Case:

Following a bench trial in December 2004, and April 2005, the divorce court issued its ruling, including the matters here at issue, in a May 24, 2005 hearing in which attorney for the Appellee was ordered to draft the Amended Decree of Divorce and Findings of Fact and Conclusions of Law. Such documents were drafted and submitted to the court without Appellant's approval as to form of the documents. Judge Fratto signed the Appellee's submitted documents on September 19, 2005. As a result,

Appellant filed Rule 60(b) Motion to Set Aside the Amended Decree of Divorce and Findings of Fact and Conclusions of Law, including a copy of the transcript of the court's ruling, arguing that such orders did not accurately reflect Judge Fratto's Findings and Orders, which were issued orally on May 24, 2005. The court took the matter under advisement, and on February 21, 2006, Judge Fratto issued a Minute Entry denying Appellant's Motion. The Court found that although expressed with different terminology, the pleadings drafted by counsel for the Appellee correctly captured the Court's findings. Appellant filed his Notice of Appeal with the Third District Court on March 21, 2006 along with a request for preparation of relevant portions of the trial transcript; Appellant's Statement of Issues was subsequently filed with the above-entitled Court on April 3, 2006; Appellant's Docketing Statement was filed with the above-entitled Court on April 10, 2006; and Briefs were submitted on November 3, 2006, December 5, 2006, January 5, 2007, and February 13, 2007, respectively in the divorce appeal action. In the Fidelity action, Appellant filed his Notice of Appeal with the Third District Court on October 19, 2007, along with a request for preparation of relevant portions of the trial transcript on October 31, 2007; Appellant's Docketing Statement was subsequently filed with the above-entitled Court on November 6, 2007. Thereafter, Appellee filed a motion to consolidate the Fidelity appeal with the pending Divorce appeal action. The Appellate Court granted such motion on January 7, 2008.

STATEMENT OF FACTS

The Parties' Marriage

1. Appellant and Appellee were married on February 11, 1987 in Salt Lake City, Salt

Lake County, State of Utah. During their marriage, four (4) minor children were born to them. (FOF 1; Div. Trans. 3:21-22; 833:22-24). At the time of the parties' marriage, Appellant was employed at Jorgensen Appraisal. (Div. Trans. 717:9-12). Subsequently during the parties' marriage, Appellant was employed with Utah Bearing, Appellee's family business (from February, 1988), CATE Equipment, Appellee's other family business (from June, 1990) and MESCO (from April, 1994). (Div. Trans. 664:4-21; 777:13-15; 778:1-23).

2. During the parties' marriage, the parties enjoyed an extravagant and luxurious lifestyle. The parties traveled all over the world and the United States. (Div. Trans. 24:8-25; 25:1-25; 26:1-25; 27:1-28; 28:14-25; 29:8-9; 32:12-25; 33:16-20; 34:16-17; 35:3-8, 23-25; 36:1-3, 18-20). The parties would often take a vacation or trip every weekend. The parties owned several properties, a boat, various stocks, and had several bank and financial accounts. (Div. Trans. 40:15-25; 41:13-25; 42:4-13).
3. During the parties' marriage, the parties had season tickets to the Utah Jazz, the University of Utah Men's Basketball, the University of Utah Football and attended high-profile sporting events such as the U.S. Open, the NCAA basketball tournament, and the NBA finals. (Div. Trans. 26:16-18; 37:11-20; 38:9-25; 39:1-11, 16-20; 40:5-14; 757:25; 758:1-25). They also had various sports club memberships and their family attended elite tennis tournaments and tennis camps, wherein the parties associated with famous celebrities such as Andre Agassi, world-renown tennis professional, and Holly Parkinson, top 80 tennis player in the world. (Div. Trans. 21:8-23; 22:23-25; 23:1-11; 26:16-18; 29:10-24; 30:3-9; 33:21-25; 35:3-8; 759:6-25).

4. Appellant described the parties lifestyle as a “jet-set” lifestyle funded by both of the parties’ funds, whether Appellant’s salary and commissions, gifts or loans from Appellant’s parents or from the Stock Purchase agreement monies. (Div. Trans. 668:3-14). The parties’ funds were used for family purposes, including entertainment, family vacations, travel, sporting events, food for the family, utilities, shopping for the family, medical and dental expenses for the family, purchasing marital property, vehicles and a family boat. (Div. FOF 17; Div. Trans. 668:20-25; 669:1-7; 680:12-21; 682:3-10; 686:20-25; 687:1-4; 706:15-25; 707:1-16; 718:2-24; 726:7-25; 727:1-16).
5. During the parties’ marriage, the parties deposited, withdrew, and transferred monies in accounts they 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, and marital expense purposes. These accounts were funded in large part by the sale of stock (Stock Purchase Agreement Monies) that the Appellee had received in consideration of her waiver of her interest as a beneficiary in a trust created by her father’s estate. (Div. Ex.s P1981-P2029; P2537, P2538, P2539, P2544, P2545, P2546, P2085-P2090, P2092, P2095-P2098, P2102-P2104); (Div. Trans. 96:4-16; 98:3-14; 101:13-25; 364:12-24 695:18-25; 696:21-25; 700:3-7; 703:23-25; 704:1-3; 725:2-12; 734:4-7; 739:3-10; 759:2-6; 765:4-18; 767:18-22; 769:13-24; 771:8-16; 773:6-9; 794:4-19; 840:3-25; 842:2-16; 846:21-25; 847:1-14; 898:6-25; 899:1-10).
6. During the parties’ marriage, both parties freely signed each others name on checks from their various accounts (held jointly and separately in their respective names), and both had trading privileges on the parties’ stock accounts. (Div. Ex.s P2123,

P1625); (Div. Trans. 464:16-25; 465:7-22; 828:9-25).

Divorce Proceedings

7. The parties' relationship deteriorated and Appellant and Appellee separated on or about February 2002. (Div. Trans. 666:24-25; 667:1-5). Appellant filed his Divorce Petition on March 19, 2002 with the Third District Court. (FOF 2; Div. Trans. 667:14-15). Appellee filed her Answer on April 11, 2002. Bifurcated Divorce was entered August 8, 2003 (FOF 3).
8. Trial was held in the bifurcated divorce matter before the Honorable Joseph C. Fratto, Third District Court Judge, on November 30, 2004; December 2, 3, 6, 7, 8, 10, and 14, 2004; and April 13, 14, and 15, 2005. The central issue at trial was the equitable division of the parties' marital assets and debts. (FOF 5)

Stock Purchase Agreement Funds

9. Appellee's father, Frank Pardoe, was President of both Utah Bearing and Fabrication, Inc. and CATE Equipment. (Div. Trans. 75:2-25; 76:1-6). Frank Pardoe died on August 9, 1993. (Div. Trans. 75:17-19). Mr. Pardoe had a Will that left everything via a residuary clause, including all of Mr. Pardoe's stock interests that he possessed, to the James Franklin Pardoe Trust. (Div. Trans. 74:15-23). Appellee is one of the beneficiaries to the Trust along with Appellee's mother and other siblings. (Div. P2434; Div. Trans. 74:24-25; 75:1).
10. On or about November 1993, Mr. Pardoe's heirs (and beneficiaries of the Trust), including Appellee, specifically agreed to alter the terms of the Will to have all testamentary devises and bequests in the Will go outright to Appellee's mother,

Cherie Pardoe, instead of going into the trust as specified in the residuary clause of the Will. (Ex. P2439; Div. Trans. 77:22-25; 78:1-25; 79:12-25; 80:1-19).

11. On November 1, 1993, approximately three (3) months after Mr. Pardoe died, Appellant received stock from an agreement entitled, “Resolution of the Board of Directors of Utah Bearing” (“Resolution”) canceling all previously issued shares of the corporation and issued new 1005 of Class A voting stock to Appellee. (Ex. P2440; Div. Trans. 87:12-25; 88:1-11; 89:4-6).
12. On or about 1994, Appellee received an initial offer from Derek Pardoe, Appellee’s brother and former President of Utah Bearing, for purchase of her 1005 stock shares which she had received pursuant to the Resolution, for a purchase offer of approximately \$1.7 million. (Div. Trans. 798:12-14).
13. On or about 1994, after receiving the initial offer, the Appellee discussed the matter with her husband Jim Kimball, and only after Appellant indicated that the initial offer was an undervaluing of the potential value of the stock shares, did the parties reject this initial offer. (Div. Trans. 800:3-23). Thereafter, the parties sought advice from Appellant’s family friend, Robert Rice, Appellant’s uncle, attorney Kay Lewis, and Robert Rice’s referred attorney, Thomas Kelsh. (Div. Trans. 341:17-25; 342:1-17; 343:11-25; 344:18-23; 783:17-24; 785:16-25; 786:10-19; 787:18-23; 795:5-15).
14. On March 24, 1995, after lengthy negotiations between the Appellant, Robert Rice, Thomas Kelch, Kay Lewis and representatives from Utah Bearing, Appellee’s 1005 shares of stock in Utah Bearing were sold for \$2.5 million pursuant to Stock Purchase Agreement, dated March 24, 1995, a substantially larger amount than initially offered.

(Div. Ex. P2453; FOF 8; Div. Trans. 90:1-25; 91:1-25; 92:1-25; 93:1-9; 94: 3-17; 797:16-25; 798:1-4).

15. According to the Stock Purchase Agreement, Utah Bearing was to pay Appellee a down payment of five hundred thousand dollars (\$500,000.00) and issue Appellee a ten (10) year promissory note, executed March 24, 1995, in the form of a Deed of Trust, for two million dollars (\$2,000,000.00), with interest to accrue at nine percent (9.0%) per year on the unpaid balance, resulting in a monthly payment of \$25,335.15. (Div. Ex. P2447; FOF 9; Div. Trans. 91:20-25; 92:1-12; 797:16-25; 798:1-4).
16. On or about March 24, 1995, Appellee received the five hundred thousand dollars (\$500,000.00) down payment from the Stock Purchase Agreement. (Div. Ex. 2454; FOF 9; Div. Trans. 95:19-25; 96:1-6; 802:24-25; 803:1-5). Appellee deposited the entire \$500,000.00 into the parties' joint money market account at Zions Bank. (Div. Ex. P2454; Div. Trans. 95:19-25; 96:1-16; 804:13-24; 824:13-25; 825:1-5).
17. From March 24, 1995 to July 1, 1997, the parties received monthly payments in the amount of \$25,335.15 pursuant to the Stock Purchase Agreement. (Div. Ex. 2454; FOF 10; Div. Trans. 96:17-20; 803:4-11; 825:20-25; 826:1-2). These monthly payments were deposited into several of the parties' accounts including but not limited to the parties' joint Zion's bank account, the parties' joint Bank One account, and the parties' Fidelity account. (Div. Trans. 826:20-25; 827:1-14). At trial, Appellee argued that these monies were an inheritance, and thus her sole and separate property. (Div. Trans. 171:14-23; 225:7-14; 290:5-12). Additionally, other sources of funds were deposited into these joint accounts throughout the course of the parties'

marriage such as Appellant's income from his employment and monetary gifts from Appellant's parents. (Div. Trans. 631:16-25; 632:1-2; 645:20-25; 646:1-2, 10-18; 649:8-14, 25; 650:1-14).

18. On or about July 1, 1997, Utah Bearing elected to pay off the remaining principle balance owed to Appellee under the Stock Purchase Agreement. On or about July 1, 1997, Appellee received \$1,691,963.99 for the remaining principle balance owed to Appellee under the Stock Purchase Agreement and the entire amount was deposited in the parties' joint Bank One account (any remainder of which will be hereinafter referred to, in combination with any remainder of the down payment and/or monthly payments described above, as "Stock Purchase Agreement Monies"). (Div. Ex. P2456; FOF 10; Div. Trans. 803:12-23). 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. (Div. Ex. P2102, P2103, P2542. Addendum VII).

19. The divorce court found that all funds received by Appellee pursuant to the Stock Purchase Agreement were characterized as her "inheritance"; these funds did not lose their character or identity by commingling; nor did Appellant's contribution to the negotiations over the purchase price constitute an enhancement of this asset entitling any equitable distribution to the Appellant. (COL 1-6). Therefore, the trial court found that these funds were not marital property subject to equitable division, and awarded the remaining sum of these funds ("Fidelity Account") to Appellee as her

sole and separate property. (COL 15).

20. Using funds from the Stock Purchase Agreement, on September 15, 1997, the parties as joint tenants, purchased two (2) parcels (Parcel #1 is a developed lot; and Parcel #2 is an undeveloped lot) at 2248 East Lauri Kay Drive, Salt Lake City, Utah, 84124 (hereinafter, "Parcel 1" and "Parcel 2"). (Div. FOF 40; Div. Trans. 545:23-25; 546:1-7; 689:4-9; 694:6-18; 703:14-17).
21. On or about October 14, 1998, the parties sold Parcel #1, the developed lot, and received approximately \$460,000.00 from the sale of Parcel #1. (Div. FOF 43; Div. Trans. 701:24-25; 703:23-25). To date, Appellee has retained the entire sum and has not distributed any portion thereof to Appellant. The trial court made no findings regarding this sum, despite Appellant's arguments to the contrary.
22. At time of divorce trial, the parties still owned Parcel #2, the undeveloped lot, as joint tenants. (Div. FOF 44, 58). The trial court ordered that this property be sold, with the net proceeds to be divided equally between the parties. (Div. FOF 59; Div. COL 7).

Attorney's Fees and Costs

23. Due to Appellee's consistent disregard of the trial court's orders concerning Appellant's parent-time with the minor children, Appellant paid attorney's fees and court costs in an attempt to compel Appellee to follow the court's orders. (Div. Trans. 1196:4-25; 1197:1-16). Appellant requested \$4,733.00 that was owed to his previous counsel Marty Olson and \$36,900.00 that was owed to the law firm of Corporon and Williams. Finally, he stated that he owed Lems Law Office, P.C. \$98,972.00, plus attorney's fees and costs arising from the trial. (Div. Trans. 1196:16-25; 1197:1-16).

At trial Appellant testified to the effect that he did not have the funds necessary to pay for attorneys fees and costs during the course of proceedings so he had to borrow funds from his parents, Jim and Earlena Kimball, in the form of a loan to be repaid, to pay for such fees and costs and that he still owed the entire amount that was borrowed. (Div. Trans. 1208:3-25; 1209:8-13).

Fidelity Proceedings

24. Trial was held in the Fidelity matter before the Honorable Judge Joseph C. Fratto, Jr. on August 22, 2006; August 23, 2006; August 24, 2006; February 28, 2007; and March 1, 2007.
25. Appellee initially filed her Fidelity Complaint on February 7, 2003, serving the Appellant therewith on February 7, 2003. Appellee subsequently filed Amended Verified Complaint in the Fidelity action on March 12, 2003. Appellee's Amended Verified Complaint in the Fidelity matter originally contained five (5) causes of action: Count I, "Common Law Fraud/Omissions;" Count II, "Unjust Enrichment;" Count III, "Breach of Contract;" Count IV, "Improperly Paid Forged and Altered Checks;" and Count V, "Improperly Cashed Altered Checks." However, at the time of the entry of the Findings of Fact and Conclusions of Law in this matter, each of these causes of action had been dismissed with the exception of Count II, "Unjust Enrichment."
26. In the Appellee's Amended Verified Complaint, the Appellee alleged "as a direct, proximate and legal result of Appellant's fraudulent conduct toward Appellee and his resulting unjust enrichment, Appellee was damaged in an amount to be proved at

trial.” (Appellee’s Amended Verified Complaint, ¶33). Appellee did not request prejudgment interest in any of her pleadings in this matter, nor did she request an award of prejudgment interest during the presentation of legal arguments to the court at time of trial.

27. At time of trial, the Appellee presented an opening statement in which her counsel stated “the damages that we’re claiming in this case, based upon the conduct of Mr. Kimball, are the \$3,000.00 on the altered check and the full amount on the checks that [the Appellant] forged.” (Fid. Trans. 6:2-4).

28. At time of trial, the Appellee called the Appellant, James L. Kimball to the stand. The Appellee, by and through counsel, then proceeded to go through a series of exhibits consisting of checks that she alleged had been altered or amended by the Appellant without the Appellee’s permission. The Appellee presented this evidence by asking the Appellant a repetitious series of questions in the form of “do you have any evidence,” to show the negative of the Appellee’s assertions. In essence, Appellee placed the burden of proof on the Appellant. (Fid. Trans. 21:2-3, 5; 23:2-4, 12-14; 24:22-24; 25:3-5; 26:10-11; 27:3-5, 13-15, 25; 28:1-3; 29:15-16, 20, 24-25; 30:1; 32:17-18; 35:1-3; 36:24; 37:1-2; 39:9-10; 41:13-15; 42:1-2, 9-10; 46:9-10; 48:2-4; 50:14-15; 51:2-4; 54:11-12; 55:7-9, 11-12, 25; 56:1; 58:14-15; 64:14-16; 65:8-9; 66:7-8; 67:18-19; 69:3-4; 70:17-18; 71:13-14; 73:14-15; 74:22-23; 76:2-4; 77:2, 7-9; 79:10-11; 90:13-14).

29. For example: “Mr. Kimball, my question to you is do you have any evidence that the proceeds from Ex. P5 went into the account that you’re referring to?” (Fid. Trans.

25:3-5). “Do you have any evidence today, Mr. Kimball, to show that the proceeds from P5 went for the closing costs on the Lori Kay home?” (Fid. Trans. 27:13-15). Approximately forty (40) questions of this nature were asked, constituting nearly the entirety of the Appellee’s direct examination of the Appellant.

30. Counsel for the Appellant objected to these questions, arguing that “[i]t is not the Appellant’s burden to prove whether there was fraud or not; and asking this witness whether he has proof is not proper under direct examination. It’s not his burden; it’s the [Appellee’s] burden.” The Court overruled the Appellant’s objection. (Fid. Trans. 26:16-21, 27:1).
31. Thereafter, this line of questioning continued. The Appellant repeatedly stated he may have the evidence asked for, by each of the Appellee’s questions, in the trial exhibit notebooks he had submitted to the court if he were given a few minutes to look through his trial exhibit notebooks that were sitting on the witness stand in front of him. (Fid. 23:9; 27:24; 28:6-7; 29:21-23; 32:19, 23-24; 35:4-5; 39:14-15; 42:3; 55:13; 56:2; 60:19; 64:17-18; 65:10-11; 66:9-10; 67:20-21; 69:5-6; 70:19-20; 71:15-17; 73:16-17; 74:24-25; 75:1; 76:5-7; 77:10-12; 79:12-15; 88:22). However, the court stated that he would not be given any such time to do so. (Fid. Trans. 28:8-10).
32. Then, counsel for the Appellee asked the Appellant a series of questions that insinuated that the Appellant had known for six months that the matter had been set for trial and that a key issue would be these checks, how they were deposited, how the funds were used, but that he had not taken the time to gather evidence in preparation for being called during the Appellee’s case-in-chief. (Fid. Trans. 58:22 – 60:8).

33. Finally, counsel for the Appellee then stated, still during the presentation of the Appellee's case-in-chief, "I think that's his duty and responsibility to convince the Court, number one, that he knows what he did with those funds, and to produce some document that supports his testimony. That's what their burden is at this point." (Fid. Trans. 133:5-9).
34. At closing arguments, both parties addressed the burden of proof. Counsel for the Appellee argued that it was the Appellant's burden to show how the funds in question were used. (Fid. Trans. 734:20-25; 735:1-25; 736:1-21). Counsel for the Appellant argued against the imposition of such a burden of proof on the Appellant and denied the existence of a shifting burden of proof under Utah law in an unjust enrichment cause of action. (Fid. Trans. 747:1-16; 748:15-17; 764:21-25; 765:2-7).

Trial Rulings and Subsequent Procedures

35. After taking the matter under advisement, Judge Fratto issued his divorce court ruling awarding all remaining funds from the Stock Purchase Agreement to the Appellee, finding that 1) these funds were received as an inheritance, and 2) that Appellee intended that they be handled separately, which was manifest by her actions and 3) that the funds were handled separately. The trial court held that the funds were not commingled and that the parties' joint accounts were "used as conduits, not repositories," for the funds. The court also held that there was no evidence that the Appellant enhanced the asset. (Addendum #5).
36. The divorce court also denied the remainder of Appellant's request for Attorney's fees and costs, finding that the total sum was not reasonable and that these costs had been

advanced by Appellant's parents and he was not legally obligated to pay them back.
(May 24, 2005 Hearing Transcript, pgs. 11-13, Addendum #5).

37. The divorce court also entered findings regarding the Fidelity account in relation to the remaining stock purchase monies therein that (i) Appellee opened an account at Fidelity Investments, the "Fidelity Account" herein, on February 26, 1996, as an individual account, with Appellee's social security number as the only tax identification number (Div. FOF, ¶ 13); (ii) without the Appellee'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 vehicle (Div. FOF, ¶ 33); (iii) said check was returned by Fidelity Investments marked "signature does not match" (Div. FOF, ¶ 34); (iv) appellant did not inform Appellee that he wrote checks payable to Zions Bank to make payments on the replacement Suburban vehicle loan by forging Appellee's name on Fidelity Account checks (Div. FOF, ¶ 39); (v) Appellee's inheritance was placed in a separate account accessible through the writing of checks by the Appellee only (Div. FOF, ¶ 50); (vi) Appellee's inherited funds were placed in the Fidelity Account that was in the Appellee's name at all times (Div. FOF, ¶ 51); (vii) Appellant did not report any of the income earned in the Fidelity Account in his 1998, 1999, 2000, or 2001 tax returns (Div. FOF, ¶ 60); (viii) Appellant, without authorization, forged Appellee's name on Fidelity Account checks totaling \$142,467.00 made payable to himself or cash that he converted to cash (Div. FOF, ¶ 72); (ix) Appellant did not inform Appellee what he did with the \$142,467.00 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 (Div. FOF, ¶ 73); (x) Appellant did not substantiate his testimony by producing receipts, cancelled checks or other documentation (Div. FOF, ¶ 74); (xi) Appellant, without authorization, altered 6 checks given to him by the Appellee by increasing them from \$1,000 to \$4,000 (Div. FOF, ¶ 75); (xii) the alterations reduced Appellee's balance in the Fidelity Account by \$18,000.00 more than Appellee intended when she wrote the checks and gave them to the Appellant (Div. FOF, ¶ 76); (xiii) Appellant has not given Appellee an accounting of his use of the said \$18,000.00 (Div. FOF, ¶ 77); and (xiv) it is reasonable that the money so obtained by the Appellant was used for family purposes for the benefit of all members of the family, including the Appellant (Div. FOF, ¶ 77).

38. Conclusions of Law were entered in the Divorce Matter: (i) Appellant should not be punished in this proceeding for, without authorization, forging Appellee's name on Fidelity Account checks and altering the amount of checks written by the Appellee on the Fidelity Account (Div. COL, ¶ 9); and (ii) Appellant shall not be punished in this proceeding for, without authorization, forging Appellee's name on Fidelity Account checks and altering the amount of checks written by the Appellee on the said Fidelity Account (Amended Decree of Div., ¶ 7).

SUMMARY OF ARGUMENTS

POINT I. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE STOCK PURCHASE AGREEMENT MONIES WERE NOT MARITAL PROPERTY SUBJECT TO EQUITABLE DISTRIBUTION

This court should find that it was an abuse of discretion to find that the Stock

Purchase Agreement Monies were Appellee's separate property either A) because the asset was not an inheritance, B) because Appellant acquired an equitable interest in the asset by his contribution to the enhancement, maintenance, or protection of the asset, or C) because the asset lost its separate character through commingling into the marital estate and exchanges wherein the Appellant received a legally recognizable interest in the asset.

POINT II. IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY APPELLANT'S 60(b) MOTION WHERE THE DRAFTED ORDERS DID NOT REFLECT THE ORDERS OF THE COURT

This Court should find that the trial court abused its discretion by not granting Appellant's 60(b) Motion to set aside certain provisions of the Amended Decree of Divorce and Findings of Fact and Conclusions of Law because those documents, drafted by Appellee's counsel, did not accurately reflect findings orally issued by the trial court.

POINT III: THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ORDERING PAYMENT TO THE APPELLANT OF ATTORNEY'S FEES AND COSTS

This Court should find that it was an abuse of the trial court's discretion to deny Appellant's request for attorney's fees and costs where Appellant had demonstrated respective financial need; reasonableness of fees should have only determined the amount of the award not resulted in a denial in entirety, and the trial court should not have relied upon whether the payment of fees had been advanced by a third party.

POINT IV: THE TRIAL COURT ERRED IN ITS ULTIMATE CONCLUSION THAT THE APPELLANT HAD BEEN UNJUSTLY ENRICHED, BASING THE SOLE BURDEN OF PROOF UPON APPELLANT, AND THE TRIAL COURT HAD INSUFFICIENT EVIDENCE TO SUPPORT ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW

The trial court erred in placing the burden of proof on the Appellant to show how

he was not unjustly enriched by the receipt of monies issued by the Appellee and/or altered by the Appellant as received from joint and separate bank and other financial accounts of the parties, held during their marriage; and by the court's ultimate holding that Appellant had been "injustly enriched" by his fraud and other forgery on checks received by Appellee. The imposition of burden lies with Appellee, not against the defending party. Moreover, the court had inconsistent findings regarding both the divorce and fidelity proceedings in relation to findings concerning the Appellant's use of "household or other marital funds."

POINT V: THE TRIAL COURT ERRED IN AWARDING PREJUDGMENT INTEREST ON THE APPELLEE'S UNJUST ENRICHMENT CLAIM

The court erred in awarding prejudgment interest on the Appellee's remaining cause of action, unjust enrichment, in that Appellee had not requested such in her Amended Complaint, nor had Appellee presented any arguments at time of trial in the Fidelity action regarding the same. Appellant is entitled to notice of claims to be presented in order to defend against the same. Appellant was not provided such notice nor reasonable opportunity to respond to Appellee's closing arguments requesting an award of prejudgment interest on the alleged "forged" or "fraudulent" checks.

POINT VI: THE TRIAL COURT ERRED IN ITS FAILURE TO MAKE ANY FINDINGS OF FACT OR CONCLUSIONS OF LAW REGARDING THE APPELLANT'S AFFIRMATIVE DEFENSES OF STATUTE OF LIMITATIONS AND COLLATERAL ESTOPPEL/ISSUE PRECLUSION

It was plain error of the trial court in its failure to address whatsoever the Appellant's affirmative defenses of statute of limitations regarding many of the checks, claimed to have been forged or altered by the Appellant and used as part of the

Appellee's unjust enrichment claim. Many dates of issuance on, or receipt for such checks were not legible nor placed in evidence; and further, many of such dates were past the four-year statute of limitations for a claim of unjust enrichment. Furthermore, the court also did not make any findings of fact or conclusions of law concerning the Appellant's affirmative defenses of collateral estoppel/issue preclusion as such claims had already been heard by the divorce court.

ARGUMENT – I. DIVORCE

POINT I. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE STOCK PURCHASE AGREEMENT MONIES WERE NOT MARITAL PROPERTY SUBJECT TO EQUITABLE DISTRIBUTION

This Court should find that it was an abuse of the trial court's discretion to find that the Stock Purchase Agreement Monies were not marital property, subject to equitable distribution. Under Utah law, property acquired by one spouse by gift¹ or inheritance during the marriage is generally awarded solely to that party upon divorce unless 1) the other spouse has contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it or 2) the property has been consumed or its identity lost through commingling or exchanges or where the acquiring spouse has made a gift of an interest therein to the other spouse. Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988) (internal citations omitted). Utah Courts have applied the *Mortensen* Rule as operating alongside the previous *Burke* Rule, also allowing departure from the general rule of separate property based on considerations of

¹ This brief will not address whether the Stock Purchase Agreements should accurately be characterized as a "gift," as the Trial Court's Findings of Fact and Conclusions of Law are based solely on the characterization of the monies as "inherited funds."

equitable principles. Burt v. Burt, 799 P.2d 1166, 1169 (Utah App. 1990); *see also* Burke v. Burke, 733 P.2d 133 (Utah 1987); David S. Dolowitz, *The Conundrum of Gifted, Inherited and Premarital Property in Divorce*, 11 UTAH BAR J. 16 (April, 1998) (*citing* Osguthorpe v. Osguthorpe, 804 P.2d 530 (Utah App. 1990); Moon v. Moon, 790 P.2d 52 (Utah App. 1990); Barber v. Barber, 792 P.2d 134 (Utah App. 1990); and Burt v. Burt, 799 P.2d 1166 (Utah App. 1990)). Pursuant to this standard, the trial court should have found that the Stock Purchase Agreement Monies were marital property subject to equitable distribution.

A. THE TRIAL COURT ABUSED ITS DISCRETION IN CHARACTERIZING THE STOCK RECEIVED BY APPELLEE AS “INHERITANCE”

This Court should find that it was an abuse of the trial court’s discretion to find that the stock received by Appellee during the parties’ marriage was an “inheritance” where Appellee did not receive the stock or resulting sales proceeds from intestate succession or by bequest or devise by will. Under Utah law, inheritances received during a marriage are generally included in a spouse’s separate property when a marital estate is divided. Mortensen v. Mortensen, 760 P.2d at 306 (internal citations omitted).

“Inheritance” is defined as “property received from an ancestor under the laws of intestacy” and “property that a person receives by bequest or devise.” BLACKS LAW DICTIONARY, 628 (7th ed. Abridged). Consistent with this definition, property has been considered “inheritance” by Utah Courts in the division of marital assets where it was received by intestate succession or through the probate of a will, never as broadly as to include intervivos transfers. *See* Burke v. Burke, 733 P.2d 133, 134 (Utah 1987)

(property received from the estate of party's mother); and Schaumberg v. Schaumberg, 875 P.2d 598 (Utah App. 1994) (property received from the estate of party's father).²

Under this definition, it was erroneous to characterize the Stock Purchase Agreement Monies as an inheritance. These funds resulted from the sale of stock that Appellee received from her Mother after her Father's death. Appellee's Mother is the only one who "inherited" anything from Appellee's Father, pursuant to the agreed upon alteration of Appellee's Father's will. (Div. Trans. 77:22-25; 78:1-25; 79:12-25; 80:1-19; Addendum #18). Such alternations, for whatever reasons effectuated, are not without legal consequences and this is one of them.

In summary, trial courts have broad discretion in the characterization and division of marital property. However, in this case that discretion was abused by finding that the stock and resulting sales proceeds were an inheritance, where such a characterization goes beyond the meaning of "inheritance" and is without precedent. Therefore, Appellant asks that this Court overrule this Conclusion of Law and related Findings of Fact, and find instead that the Stock Purchase Agreement Monies were marital property subject to equitable distribution. Alternatively, if this Court finds that the Stock Purchase Agreement Monies did result from an inheritance, Appellant asks this Court to find that the funds nevertheless should have been characterized as marital property based either on Appellant's acquisition of an equitable interest in the asset by his contribution to the

² A separate issue is whether property was received by a party during the marriage as a gift, as in Mortensen, 760 P.2d at 305, however, as stated above, since the Trial Court in the instant case, made no findings regarding whether the instant transfer was a "gift," this issue will not be analyzed herein.

enhancement, maintenance, or protection of the asset or due to the loss of the separate character of the assets by their being commingled with the marital estate.

B. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE VALUE OF APPELLEE'S STOCK WAS NOT ENHANCED BY THE APPELLANT

This Court should find that it was an abuse of the trial court's discretion to find that the value of Appellee's stock was not enhanced by the Appellant where Appellant played a key role in negotiations over the purchase price of the stock and thereafter managed investment of the sales proceeds. Under Utah law, separate property of one spouse should be considered part of the marital estate when the other spouse has by his or her efforts contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it. Mortensen, 760 P.2d at 308 (*citing Dubois v. Dubois*, 504 P.2d 1380, 1381 (Utah 1973)). For example, in *Dubois*, the husband was awarded 40 percent of a marital estate which consisted largely of the separate property of his wife because it was found that the value of the estate was due to his investment of what would have otherwise been his wife's separate property. 504 P.2d at 76.

Appellant asks that this Court find that the trial court abused its discretion in the instant case in not similarly finding that Appellant acquired an equitable interest in the Stock Purchase Agreement Monies by his efforts in enhancing the asset. At trial, the evidence showed that Appellee had initially received an offer of \$1.7 million for the purchase of her shares of stock. (Div. Tran. 798:12-14). Thereafter, Appellant advised Appellee that this offer was too low and initiated advice from his relatives and family friends regarding negotiations for the purchase price of the stock. (Div. Trans. 341:25;

342:1-15; 783:14-20; 785:16-19; 786:17-19; 787:4-6). Due to these efforts, and after lengthy negotiations between Appellant's contacts and Appellee's brother, Appellee's shares of stock were sold for \$2.5 million, an increase of \$800,000.00, over 30%. (Div. Tran. 800: 3-23; 801:7-25; 802:1-14; 900:22-25; Addendum #23). Thereafter, and throughout the course of the marriage, Appellant solely managed the parties' finances, including the Stock Purchase Agreement Monies. These efforts further considerably enhanced and protected the value of this asset. It was an abuse of discretion for the trial court not to find that by these actions, Appellant had acquired an equitable interest in the Stock Purchase Agreement Monies.

Therefore, Appellant asks this Court to find that the trial court abused its discretion in finding 1) that "Petitioner did not enhance Appellee's inheritance," and 2) that "[n]o act of the Petitioner increased the amount of shares of the Family Business that the Appellee received, caused Appellee's holdings in the Family Business to have a greater value or resulted in the Appellee receiving a greater price for her holdings." (Div. FOF 56, 57). If this Court does not find that the Stock Purchase Agreement Monies should have been characterized as marital property due to Appellant's enhancement of the asset, Appellant asks that this Court alternatively find that the Stock Purchase Agreement Monies should have been characterized as marital property due to their being commingled into the marital estate, as argued below.

C. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE STOCK PURCHASE AGREEMENT MONIES WERE NOT COMMINGLED OR PARTIALLY GIFTED TO THE APPELLANT BY THE APPELLEE

This Court should find that it was an abuse of the trial court's discretion to find

that the Stock Purchase Agreement monies were not commingled where the funds were deposited into joint accounts and used by the parties during their marriage, to buy and sell personal and real property as joint tenants. The second *Mortensen* exception provides that separate property should be considered part of the marital estate and equitably divided if the property has lost its character as a separate identity through commingling or exchanges or where the acquiring spouse has made a gift of an interest in the asset to the other spouse. Mortensen, 760 P.2d at 308. For example, in the *Schaumberg* Case, the equity in a pre-marital property was found to be marital property where marital assets were used to maintain the asset, through repairs, taxes, etc. Schaumberg v. Schaumberg, 875 P.2d 598 602-603 (Utah App. 1994). Moreover, in the *Bradford* Case, the Court found that a husband's transfer of separate property to himself and his wife as joint tenants transformed the property from separate property into marital property. Bradford v. Bradford, 1999 UT App 373, ¶24.

Pursuant to this framework, Appellant asks that this Court find that it was an abuse of discretion for the trial court to find that the Stock Purchase Agreement Monies could be deposited into joint accounts and used to purchase property as joint tenants, becoming commingled, and then transformed back into separate property by withdrawal from joint accounts or sale of property held as joint tenants, the “depository” holding of the trial court. (Addendum #1 and #2). For example, consider the characterization of the ownership of the Lori Kay Properties. The parties purchased two parcels of land, Parcel #1 and Parcel #2, using Stock Purchase Agreement Monies. Both properties were purchased and held as joint tenants. (Div. FOF 40; Div. Trans. 545:23-25; 546:1-7;

689:4-9; 694:6-18; 703:14-17). Parcel #1 was subsequently sold for approximately \$460,000.00, the sum of which was then deposited amongst the Stock Purchase Agreement Monies. (Div. FOF 43; Div. Trans. 701:24-25; 703:23-25). Parcel #2 had not yet been sold, but was equally divided between the parties pursuant to the trial court. (Div. FOF 44,58). The trial court found that Parcel #2 is marital property and should be sold and the proceeds distributed equally. (Div. FOF 59; Div. COL 7). However, the trial court made no findings regarding the \$460,000.00 in proceeds resulting from the sale of Parcel #1 resulting in this sum being held by Appellee with the remainder of the Stock Purchase Agreement Monies, but apparently the trial court would have considered this marital property if it had not yet been sold.

The same analysis was applied to the deposit of the Stock Purchase Agreement Monies in and out of joint bank accounts, with jointly filed taxes being paid from a joint bank account. The trial court held that such funds became commingled while in the joint accounts, but resumed their character as inheritance when withdrawn. (Div. FOF 54). Moreover, the trial court also found that “it is reasonable that the money so obtained by Appellant/Petitioner [accessed from the Fidelity account] was used for family purposes for the benefit of all members of the family, including the Petitioner.” (Div. FOF 78). A portion of the Stock Purchase Agreement Monies were deposited into the Appellee’s Fidelity account (Addendum V). At least in the divorce proceedings, the trial court found that such monies were used for family purposes, benefiting all of the family. [See however, Fid. FOF 19-22, 26].

First, Appellant Jim Kimball testified at trial that because withdrawals from the

Fidelity Account had to be at least \$1,000, it was the practice of the parties to transfer funds from the Fidelity account to the Bank One account so that the funds could be used in a piece-meal fashion for family expenses and the payment of bills related to maintaining the family. (Div. Trans. 924:10; 957:17). Appellant then admitted into evidence Ex.s P1931 – P1975, all copies of checks from the Fidelity account made out to either “Bank One,” “Jim Kimball,” “cash,” or otherwise, and went through these checks one at a time and testified that they were all used for a) payments to contractors who were remodeling and decorating the “Laurie Kay” home of the parties for services, materials, lighting fixtures, railings, carpets, etc.; b) payments to contractors for similar work on the second home of the parties (the “Village Point” home); c) utility payments for both homes of the parties; d) “household expenses,” “the maintenance of the family,” “family necessities,” and “family recreation,” such as groceries, tennis lessons, club memberships, gas, automobile payments, insurance payments, family trips, boating trips (such as to Lake Powell) or Christmas shopping; e) expenses related to a boating accident, such as towing charges and storage fees; and/or f) re-payment of a loan from his father, Dan S. Kimball, funds of which were used for family purposes. (Div. Trans. 912-979). Moreover the purpose of many of the checks can be discerned from whom the check was made out to, such as to “Questar Gas” or “Utah Power” (for utilities), “Metropolitan Life” or “King Leavitt” (insurance companies), to “Zions Bank” (who held a loan for the family automobile), or “Dr. Steven Aste” (the family dentist). (Div. Trans. 948:21; 956:8; 968:4; 969:21, 970:13).

In fact, directly contrary to what was stated by Appellee, two checks from the

Fidelity Account did indicate in the “memo” portion of the check they were used for a family purpose: 1) Ex. P1944, a check made payable to Jim Kimball for \$4,000.00 indicating “bills” on the memo line; and 2) Ex. P1953, a check payable to Metropolitan Life for \$1,399.00 indicating “insurance check” on the memo line, with Merae Kimball’s name signed by Jim Kimball. (Div. Trans. 934:8, 948:21). At least the trial court in the divorce proceedings found that some monies used by Appellant from the Fidelity account (as previously funded by the Stock Purchase Agreement monies) were used for “family or other household” purposes. (Div. FOF 78, 51). [See however, Fid. FOF 19-22, 26].

Appellant urges this Court to find that such analysis and method of characterizing and dividing the marital estate was an abuse of the trial court’s discretion. Appellant asks that this Court find instead that the Stock Purchase Agreement Monies were commingled into the marital estate when they were deposited into joint accounts, and that Appellant received an interest in Lori Kay Property Parcel #1 when it was titled as joint tenants. Therefore, both the proceeds from the sale of Parcel #1, and the Stock Purchase Agreement Monies should be characterized as marital property and distributed equitably.

POINT II. IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY APPELLANT’S 60(b) MOTION WHERE THE DRAFTED DOCUMENTS DID NOT REFLECT THE ORDERS OF THE COURT

This Court should find that the trial court abused its discretion by not granting Appellant’s 60(b) Motion to set aside certain provisions of the Amended Decree of Divorce and Findings of Fact and Conclusions of Law because those documents, drafted by counsel for the Appellee, did not accurately reflect the findings orally issued by the trial court (Addendum #5, #3 and #4). Utah Rule of Civil Procedure 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 Supreme Court of Utah has specifically held that the disposition of a Rule 60(b) Motion is a matter of judicial discretion and review of such a decision is subject to the abuse of discretion standard of review. Boyce v. Boyce, 609 P.2d 928, 931 (Utah, 1980); *see also* State v. Pena, 869 P.2d 932, 938 (Utah 1994); Birch v. Birch, 771 P.2d 1114, 1117 (Utah Ct. App. 1989); and Larsen v. Collina, 684 P.2d 52, 53 (Utah 1984). In Appellant’s Rule 60(b) Motion, he argued that the Amended Decree of Divorce and Findings of Fact and Conclusions of Law, that were prepared by counsel for the Appellee and signed by the Court, did not accurately memorialize the findings that were issued by Judge Fratto at the May 24, 2005 hearing, thus the Court should set them aside. (Addendum #3 & #4). Specifically, Appellant set forth thirteen examples wherein the language of the pleadings either omitted particular findings addressed by the court and

integral portions of the evidence presented at trial, revised findings to the extent they are no longer consistent with the Court's orders, or included provisions not addressed by the Court. (Addendum #5).

These discrepancies are so broad as to render the pleadings more like Appellee's "wish list" than a memorialization of orders of the court. However, the trial court did not address the points raised by Appellant's Motion, the trial court merely summarily denied Appellant's 60(b) Motion, stating that "although expressed with different terminology from that used in court, the pleadings "correctly capture the court's findings." (See February 21, 2006 Minute Entry, Addendum #6). However, in a review of Appellant's argument and examples this Court will find that these discrepancies amount to much more than semantical variance. Therefore, Appellant asks that this Court find that the trial court abused its discretion in its denial of Appellant's 60(b) Motion.

POINT III. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ORDERING PAYMENT TO THE APPELLANT OF ATTORNEY'S FEES AND COSTS

This Court should find that it was an abuse of the trial court's discretion to deny Appellant's request for attorney's fees and costs where Appellant had demonstrated respective financial need. Reasonableness of fees should have only determined the amount of the award not resulted in a denial in entirety, and the trial court should not have relied upon whether the payment of fees had been advanced by a third party. Utah Code Ann. §30-3-3 provides trial courts with the authority to award attorneys fees and costs in divorce proceedings, based on 1) the financial need of the requesting party, and 2) the reasonableness of the amount of the award. Haumont v. Haumont, 793 P.2d 421,

425 (Utah App. 1990). Utah Courts have applied this test using financial need to determine whether to award fees and reasonableness to determine the amount of such award. Financial need is determined by comparison of the resources of the parties.

For example, in Andersen v. Andersen, the Court found that one party's income and earning ability "paled in comparison" to the other's, therefore, given the disparity, it was an abuse of the discretion of the trial court to fail to award attorney's fees. 757 P.2d 476, 480 (Utah App. 1988). (*See also*, Walther v. Walther, 709 P.2d 387, 388 (Utah 1985)). Reasonableness is determined by consideration of many factors, including: "the difficulty of the litigation, the efficiency of the attorneys presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the experience of the attorneys involved." Rasband v. Rasband, 752 P.2d 1331, 1336 (Utah App. 1988). Such factors may be used by a trial court to determine not only if fees should be awarded, but to reduce the total amount requested to what is determined to be reasonable. Haumont, 793 P.2d at 426. For example, in Rasband, the Court upheld the trial court's determination of attorney fees where the trial court had limited the fees to what it determined to be a reasonable fee in light of the complexity of the case. 752 P.2d at 1336. Appellant asks this Court to find that in the instant case, the trial court did not correctly apply this standard, and as such, was an abuse of discretion.

In the divorce matter, considerable evidence was presented to the trial court regarding the Appellant's attorney's fees and costs in accompaniment of his request for award of the same. The Appellant testified as to the amount of his costs and his ability to

pay such costs in relation to that of the Appellee, and counsel for the Appellant testified as to her experience and efficiency and the fee customarily charged in the locality for similar services. (Div. Trans. 1196:16-25; 1197:1-16; 1360:2-25; 1361:1-25; 1362:1). Evidence was also presented regarding the fact that Appellant's parents had paid his attorney's fees on his behalf, in the form of a loan to Appellant. (Div. Trans. 1208:3-25; 1209:8-13). The trial court denied Appellant's request and made findings of fact that 1) Appellant/ Petitioner had not prevailed on the main issue of the case, 2) the fees charged by counsel for the Appellant/Petitioner were neither reasonable nor necessary and represent a situation where the matter "got out of hand," and 3) the fees connected with the child custody matters have been paid by Appellant/Petitioner's parents and he does not have an obligation to pay them back. (Addendum #5, pgs. 11-13).

Appellant asks this Court to find that the trial court's finding were an abuse of the trial court's discretion. First, the trial court had ample evidence regarding the respective financial resources of the parties. Specifically, Appellant testified about his income and inability to pay his legal fees. (Div. Trans. 1208:8-10). Therefore, as in the Andersen Case, it was an abuse of discretion for the trial court to fail to award fees. 757 P.2d at 480. Secondly, although the trial court did make a finding of fact to the effect that Appellant's legal fees at trial were excessive, the trial court should not have wholly denied Appellant's request based on this finding. Instead, the trial court should have only used this finding as a means to reduce Petitioner's total request to a sum it deemed would have been reasonable given the difficulty of the litigation, amount at stake for the Appellant, and fee customarily charged in the locality for services of a similarly

experienced attorney. Third, it was inappropriate for the trial court to make a finding regarding, and base its denial upon, the fact that Appellant's parents had advanced to him the costs of litigation. There is no sound analytical basis upon which a trial court can distinguish attorney's fees and costs that are currently represented as a debt to his attorney from those represented as a debt to his parents, bank, or otherwise. Furthermore, it would create undesirable incentives to do so and is contrary to public policy.

The policy behind broad trial court discretion in domestic matters concerning awards of attorney's fees is that the costs of such litigation are ordinarily paid from the marital estate. Peterson v. Peterson, 818 P.2d 1305, 1310 (Utah App. 1991). As the marital estate has often not yet been divided in divorce actions, it is often the case that one party is forced to incur debt for litigation costs, or receive advance for the same from family or friends. It is not within the discretion of the trial court to take account of such circumstances in determining awards for attorney's fees and costs. The trial court abused its discretion in such regard as it is irrelevant whether Appellant's fees had been advanced by his parents; therefore it was inappropriate for the trial court to make factual findings regarding the same and use that as a basis for denying attorney's fees and costs.

ARGUMENT – II. FIDELITY

POINT IV. THE TRIAL COURT ERRED IN ITS ULTIMATE CONCLUSION THAT THE APPELLANT HAD BEEN UNJUSTLY ENRICHED, PLACING THE SOLE BURDEN OF PROOF UPON APPELLANT, AND THE TRIAL COURT HAD INSUFFICIENT EVIDENCE TO SUPPORT ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court should find that there is insufficient evidence to support the trial court's Findings of Fact and Conclusions of Law. Rule 24(a)(9) of the Utah Rules of

Appellate Procedure states that "[a] party challenging a fact finding must first marshal all record evidence that supports the challenged finding. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous." Moon v. Moon, 973 P.2d 52 431, 437 (Utah Ct. App. 1999) (*citing* West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991)). When challenging the legal sufficiency of the evidence, a clearly erroneous standard of review applies, wherein a finding of fact is deemed "clearly erroneous" only if the Court concludes that the finding is against the clear weight of the evidence. URCP 52(a); Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 900-901 (Utah 1989); Reinbold v. Utah Fun Shares, 850 P.2d 487, 489 (Utah App. 1993). This Court should apply this standard and find that the following findings of fact are against the clear weight of the evidence and thus are clearly erroneous.

A. Court erred finding unjust enrichment.

This Court should find that the trial court erred in its ultimate conclusion that the Appellant had been unjustly enriched. Unjust enrichment is an equitable claim and has three necessary elements: 1) a benefit conferred on one person by another; 2) appreciation or knowledge of the benefit by the conferee; and 3) acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the

conferee to retain the benefit without payment of its value. *See Desert Miriah, Inc. v. B&L Auto, Inc.*, 2000 UT 83, ¶13 (citing *Berrett v. Stevens*, 690 P.2d 553, 557 (Utah 1994)). Under Utah law, whether the unjust enrichment doctrine applies is a mixed question of application of law to facts, which is analyzed giving broad discretion to the trial court, based on the factors described in *State v. Pena*, 869 P.2d 932, 936-939 (Utah 1994); *Jeffs v. Stubbs*, 970 P.2d 1234, 1243-1245 (Utah 1998); and *Desert Miriah, Inc. v. B&L Auto, Inc.*, 2000 UT 83, ¶10. This Court should find that the trial court erred in its finding that the Appellee had met her burden in relation to the requisite elements for an unjust enrichment claim, thus finding that the Appellant had been unjustly enriched. (Fid. Trans. 661:14-24).

Div. Findings of Fact 75, 76, 77 and 78 vs. Fid. Findings of Fact 19, 20, 21, 22 and 26

As the findings of the divorce court belie the findings of the Fidelity court in relation to the divorce court's findings that "Petitioner [Appellant], without authorization, altered 6 checks given to him by the Respondent [Appellee] by increasing them from \$1,000 to \$4,000; [t]he operations reduce Respondent's balance in the Fidelity Account \$18,000 more than Respondent intended when she wrote the checks and gave them to the Petitioner; Petitioner has not given Respondent an accounting of his use of said \$18,000; [i]t 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." (Div. FOF 75-78). However, the Fidelity court found that "the Defendant's [Appellant'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; [t]hese 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.” (Fid.FOF 19, 20). The Fidelity court further identified that 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 Ex.s P1-P7, inclusive, or drawing checks with the Defendant’s name or “Cash” as the payee, by the forged signature of the Plaintiff, as shown by Ex.s P18-P33, excluding P24 and P27, and P41, and P45-P46; “[t]he Defendant has been unjustly enriched in that he has taken money in which he was not entitled; [a]t 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.” (Fid.FOF 19-22, 26).

Evidence Supporting the Trial Court’s Findings of Fact 19, 20, 21, 22 and 26

- Moreover, Appellant referred to Ex. D-603, additional checks relating to household bills or family bills/expenses. (Fid. Trans. 619:13-25; 620:1-24; 624:3-25; 625:1-25).
- Furthermore, Appellant introduced evidence evidencing that the Appellee had at least constructive knowledge of her various bank statements, whether maintained with the Fidelity or Bank One account. Appellee introduced Ex.s P47 through P52. (Fid. Trans. 629:1-25; 630:1-25; 631:1-25; 632:1-17).
- Additionally, Appellant introduced through Appellee’s trial testimony that her husband, Appellant, handled the parties’ finances during their marriage. (Fid. Trans. 637:1-24; 638:4-25; 639:1-25; 640:25; 641:1-25; 642:1-17, 24-25; 643:1-25; 644:1-14).

Findings of Fact 10, 11, 12, 13, 14 and 15

However, in review of the Findings of Fact and Conclusions of Law in the Fidelity matter, the trial court found that “the Plaintiff [Appellee] neither interfered with, nor participated in the Defendant’s [Appellant’s] active role in the investment account at Fidelity Investments or Bank One; “[t]here 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; [t]he 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; [t]he 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; [t]he Defendant contends that the altering and signing of the Plaintiff’s name occurred with at least the tacit approval of the Plaintiff; [t]he Defendant further maintains that the proceeds from these checks were used for unspecified ‘family expenses’ or ‘family purposes’.” (Fid. FOF 10, 11, 12, 13, 14 and 15).

The Fidelity trial court further found that “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.” (Fid. FOF 19. See however, Div. FOF 51 and 78). Therefore, the Fidelity court did err in holding that Appellant had been unjustly enriched by the altered or “forged” checks from the Fidelity Account as requisite element, namely, “acceptance or

retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value” was not met by the Appellee in her unjust enrichment claim against the Appellant.

Evidence Supporting the Trial Court’s Findings of Fact 10, 11, 12, 13, 14 and 15

- The Appellant introduced D-9, various Fidelity account statements from 1995 to 2000 (Fid. Trans. 528:21-25; 529:1-25; 530:17-25; 531:1-10, 22-25; 532:1-7, 16-25; 533:1-25; 534:12-15; 535:6-18. Addendum IV).
- The Appellant attempted to introduce the joint tax return between he and his wife, Appellee, for 1995 showing joint tax debt in association with receipt by the parties of the stock purchase agreement monies. However, such exhibit was denied by the Fidelity court. (Fid. Trans. 537:14-25; 538:1-19). In contrast, the divorce court allowed the parties 1997 joint tax filing. See Addendum VII, evidencing joint tax debt of the parties due to income produced by the Fidelity/Stock Purchase Agreement monies.
- Furthermore, the Appellee introduced and/or referred to Ex. D-408 in relation to various Bank One account statements. (Fid. Trans. 540:7-25; 541:1-25; 542:1-25; 543:1-25; 544:1-25; 545:1-25; 546:1-25; 547:1-25; 548:1-25); Moreover, the Appellee introduced and/or referred to Ex. D-587 regarding the various checks written, altered or “forged” by Appellant. (Fid. Trans. 615:6-25; 616:1-25; 617:1-25; 618:1-8). Furthermore, Appellant referred to Ex.s D-596 and D-603. (Fid. Trans. 618:9-25; 619:1-12).
- Moreover, Appellant referred to Ex. D-603, additional checks relating to household bills or family bills/expenses. (Fid. Trans. 619:13-25; 620:1-24; 624:3-25; 625:1-25).
- Furthermore, Appellant introduced evidence evidencing that the Appellee had at least

constructive knowledge of her various bank statements, whether maintained with the Fidelity or Bank One account. Appellee introduced Ex.s P47 through P52. (Fid. Trans. 629:1-25; 630:1-25; 631:1-25; 632:1-17).

- Additionally, Appellant introduced through testimony of the Appellee that she claimed that during the parties' marriage that her husband, Appellant, stole monies belonging to Appellee. (Fid. Trans. 636:20-25).
- Additionally, Appellant introduced through Appellee's trial testimony that her husband, Appellant, handled the parties' finances during their marriage. (Fid. Trans. 637:1-24; 638:4-25; 639:1-25; 640:25; 641:1-25; 642:1-17, 24-25; 643:1-25; 644:1-14).

B. Imposition of burden of proof lies with Appellee, not Appellant.

This Court should find that the trial court erred by improperly imposing a burden of proof on the Appellant to show how certain funds in question were used rather than on the Appellee to prove all elements of her unjust enrichment cause of action. Which party has the burden of proof is a legal question reviewed for correctness using a "correction of error" standard of review. Orton v. Carter, 970 P.2d 1254, 1256 (Utah 1998); A.K.& R. Whipple Plumbing & Heating v. Aspen Constr., 977 P.2d 518, 522 (Utah Ct. App. 1999). Under Utah law, the Appellee had the burden to prove three separate elements to sustain a claim of unjust enrichment, including: 1) a benefit conferred on one person by another, 2) appreciation or knowledge of the benefit by the conferee, and 3) acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value. *See* Desert Miriah, Inc. v. B&L Auto, Inc., 2000 UT 83, ¶13 (citing Berrett v. Stevens, 690 P.2d 553,

557 (Utah 1994).

However, in the instant matter, it was repeatedly asserted by the Appellee at time of trial it was the Appellant's burden to show how the funds in question were used. This was asserted both during the Appellee's case-in-chief and throughout the trial, including closing arguments. (Fid. Trans. 133:5-9; 734:20-25; 735:1-25; 736:1-21). Appellee alleged that there was a "shifting burden" to the Appellant to show how the funds were used. However, at no time did the Appellee cite any Utah Code provision, rule or regulation, Utah case law, or otherwise demonstrating the validity of a shifting burden of proof in an unjust enrichment claim. The Appellant objected to the shifting of the burden of proof to himself which was overruled by the Court. (Fid. Trans. 26:16-21; 27:1). The Appellant argued that whether the Appellee conferred a benefit by actions was one of the elements, the Appellee needed to prove to demonstrate her unjust enrichment cause of action, not the Appellant. (Fid. Trans. 747:1-16; 748:15-17; 764:21-25; 765:2-7).

C. Insufficient evidence to support trial court's Findings of Fact and Conclusions of Law.

Fidelity Finding of Facts 19, 22, and 26 are not supported by sufficient evidence

Findings of Fact 19, 22, and 26 are all related to the issue of what the funds in question were used for and necessary to the determination of Conclusion of Law 2(A), which states "[t]he Appellant received a benefit from altering and forging the Appellee's checks." If the Appellee does not show that a benefit was conferred on the Appellant, the first element of an unjust enrichment cause of action, it follows that the Appellee cannot then show either of the other two necessary elements for an unjust enrichment cause of

action, namely, that the Appellant had appreciation or knowledge of the benefit and that the Appellant accepted or retained the benefit under such circumstances that it would be inequitable to allow him to retain it. Fid. FOF 19 states, “[t]he Appellant’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.” Fid. FOF 22 states, “[t]he defendant has been unjustly enriched in that he has taken money in which he was not entitled.” Fid. FOF 26 states, “[a]t 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.” [See however, Div. FOF 51 and 78].

Evidence Supporting the Trial Court’s Findings of Fact 19, 22, 26

- The Appellee introduced P1-P7 into evidence, various checks drawn on the Fidelity Account, payable to the Appellant and signed by the Appellee, in the period of 1999-2000. (Fid. Trans. 18:11- 25; 30:14-25; 31:4; 33:5-25; 34:4-5; 35:14-24; 38:3-18; 40:2-19; 229:3-25; 231:11-19; 233:5-11; 234:5-11; 236:1-6; 237:5-7, 25; 238:1-8. Div. Ex.s P1931-P1975. Addendum IV.). The Appellant acknowledged that the original amount of each of the checks was \$1,000.00, but each appeared to have been changed to \$4,000.00 before they were endorsed by the Appellant. (Fid. Trans. 19:1-25; 28:13-25; 42:23-25). The Appellant stated that it was possible that it was he who altered the check(s), but that it could have been the Appellee. (Fid. Trans. 19:9-25; 20:1-8; 29:1-11; 32:2-12; 36:16-25; 38:22-25; 39:1-8; 41:9-12; 43:18-20). The Appellant stated that he used the funds to pay family bills and family expenses, such as utilities. (Fid. Trans. 21:18-23; 22:12-25; 23:1; 32:13-16; 34:13-25). The Appellee testified that she made each of these checks out

for the sum of \$1,000.00 and did not change them to the sum of \$4,000.00. (Fid. Trans. 230:1-19; 232:1-14; 233:14-20; 234:14-25; 236:14-21; 237:8-17; 238:9-23).

- The Appellee introduced P8 into evidence, a check drawn on the Fidelity Account, payable to Bank One (where the parties kept their joint account) in the sum of \$9,335.00. (Fid. Trans. 44:2-10; 239:3-13). The Appellee testified that she did not sign that check; that she recognized the Appellant's handwriting on her signature on the check; and that she did not give the Appellant authorization to sign the check. (Fid. Trans. 239:14-25; 240:1-19). The Appellant testified that he signed the Appellee's name to this check and deposited it into the parties' Bank One account. (Fid. Trans. 44:11-22).

- The Appellee introduced P10 and P11 into evidence, each check drawn on the Fidelity Account and payable to Bank One for the sum of \$5,000.00. (Fid. Trans. 45:18-25; 46:1-5; 47:14-20, 24-25; 48:1; 241:23-25; 242:1-3; 242:25; 243:1-4). The Appellee testified that she did not sign that check; that she recognized the Appellant's handwriting on her signature on the check; and that she did not give the Appellant authorization to sign the check. (Fid. Trans. 242:4-21; 243:5-11). The Appellant admitted that he signed the Appellee's name to both of these checks. (Fid. Trans. 46:6-8; 47:21-23).

- The Appellee introduced P12 into evidence, a check drawn on the Fidelity Account, payable to Sure Commercial Carpet. (Fid. Trans. 48:14-22; 243:12-14). The Appellee testified that she did not sign that check; that she recognized the Appellant's handwriting for her signature on the check; and that she did not give the Appellant authorization to sign the check. (Fid. Trans. 243:15-19; 244:9-14). The Appellant admitted that he signed the Appellee's name to the check. (Fid. Trans. 48:17-19). The Appellant testified

that the funds were used for carpet at either the marital home or the parties' second home on Lori Kay Drive. (Fid. Trans. 48:23-25; 49:1-19).

- The Appellee introduced P13 into evidence, a check drawn on the Fidelity account made out to Bank One for the amount of \$3,000.00, signed by the Appellant using the Appellee's name, but endorsed on the back by the Appellee. (Fid. Trans. 49:24-25; 50:1-13; 244:24-25; 245:1-7). The Appellee testified that she did not sign the check or endorse the check and did not recognize the handwriting for her signature on the check. (Fid. Trans. 245:11-21). The Appellant testified that the funds were used for family expenses. (Fid. Trans. 50:25; 51:1).

- The Appellee introduced P14 into evidence, another check drawn on the Fidelity Account made out to Bank One in the amount of \$2,000.00. (Fid. Trans. 52:2-10). The Appellee testified that she did not sign the check and had no knowledge of the check. (Fid. Trans. 245:25; 246:1-16). The Appellant testified that it appeared he signed the Appellee's name to the check; however he did not remember doing so. (Fid. Trans. 52:7-8). No evidence was submitted by either party, as to what the funds were used for or whether the check was even cashed.

- The Appellee introduced P15 into evidence, a check drawn on the Fidelity Account dated May 18, 1999 for the sum of \$3,000.00. (Fid. Trans. 53:6-21; Trans. 17-20). The Appellee testified that she did not sign that check or endorse the check and, further, that she recognized the Appellant's handwriting for her signature on the check. (Fid. Trans. 246:21-25; 247:1-12). The Appellant testified that it appeared that the Appellee did not sign the front of the check but did endorse the back of the check and, further, the

Appellant did not recall how the funds were used. (Fid. Trans. 53:12-25; 54:1-16).

- The Appellee introduced P16 into evidence, a check drawn on the Fidelity Account on or about June 20, 1999 in the sum of \$2,000.00. (Fid. Trans. 54:21-25; 55:1-3). The Appellee testified that she did not sign that check; that she recognized the Appellant's handwriting on her signature on the check; and that she had not given the Appellant permission to sign her name on this check. (Fid. Trans. 247:13-19; 248:2-6). The Appellant admitted that it appeared he had signed the Appellee's name to the check, but he did not recall how the funds were used and could not tell whether the check had even been cashed. (Fid. Trans. 55:4-10).

- The Appellee introduced P17 into evidence, a check drawn on the Fidelity Account in the amount of \$4,000.00 wherein the Appellant signed the Appellee's name on the signature line of the check. (Fid. Trans. 55:18-24; Trans. 7-24).

- The Appellee introduced P18 into evidence, a check drawn on the Fidelity Account on or about March 8, 2000, for the amount of \$3,000.00, made payable to the Appellant. (Fid. Trans. 56:13-19). The Appellee testified that she did not recognize any of the writing on the check. (Fid. Trans. 250:20-25; 251:1-15). The Appellant testified that he could not tell whether he had signed the Appellee's name to the check or whether he himself had endorsed the back of the check. (Fid. Trans. 56:20-25; 57:1-23; 58:1-6).

- The Appellee introduced P19 into evidence, a check drawn on the Fidelity Account, made payable to the Appellant in the amount of \$3,000.00, endorsed on the back by the Appellant. (Fid. Trans. 61:3-19; 251:19-21). The Appellee testified that she did not sign that check and that she assumed it was the Appellant's handwriting on her signature on

the check. (Fid. Trans. 251:19-25; 252:1-12). The Appellant testified that “more than likely” he signed the Appellee’s name to the front of the check. (Fid. Trans. 61:20-25; 62:1-25; 63:1-25; 64:1-8).

- The Appellee further introduced P20 into evidence, a check drawn on the Fidelity Account, made payable to the Appellant for the sum of \$2,000.00. (Fid. Trans. 64:19-25; 65:1; 253:8-13). The Appellee testified that she did not sign that check; that she recognized the Appellant’s handwriting for her signature on the check; and that she did not know this check had been issued from her account. (Fid. Trans. 253:8-25; 254:1-9). The Appellant testified it is possible that he both signed the Appellee’s name to the front of the check and endorsed the back of the check with his own name. (Fid. Trans. 65:2-7).

- The Appellee introduced P21 into evidence, a check drawn on the Fidelity Account, payable to the Appellant for the sum of \$3,000.00. (Fid. Trans. 65:16-25). The Appellee testified that she did not write any portion of the check and that she recognized the Appellant’s handwriting for her signature on the check; and that she did not give the Appellant authorization to sign the check. (Fid. Trans. 254:10-25; 255:1-4). The Appellant testified that it is possible that he both signed the Appellee’s name to the front of the check and endorsed the back of the check with his own name. (Fid. Trans. 66:2-6).

- The Appellee introduced P22-P23, P25, P26, P29-P32, and P33 into evidence, each check drawn on the Fidelity Account and made payable to the Appellant for the sum of \$2,000.00. (Fid. Trans. 66:17-22; 68:4-19; 70:4-13, 25; 71:1-7; 73:22-25; 74:1-2; 75:6-21; 76:1-21; 77:21; 78:18-25; 261:22-25; 262:1-2; 263:4-7, 25; 264:1-2; 266:12-14). The Appellee testified that she did not sign any of these checks, that she recognized the

Appellant's writing for her signature on each of these checks, and that she did not, at any time, give the Appellant authority to write her name on any of these checks. (Fid. Trans. 255:5-25; 256:1-9, 20-25; 257:1-8; 258:13-19; 259:3-14; 262:3-25; 263:8-24; 264:8-25; 265:1-4, 8-25; 266:1-4; 266:15-25; 267:1-6). The Appellant testified it was possible or appeared that he both signed the Appellee's name to the front of each of the checks and endorsed the back of each of the checks with his own name. (Fid. Trans. 67:6-17; 68:20-25; 69:1-2; 70:14-16; 71:8-12; 74:3-6; 75:22-25; 76:1, 17-24; 77:22-25; 78:1-3; 79:1-9).

- The Appellee introduced P24 into evidence, a check drawn on the Fidelity Account, payable to Metropolitan Life for the sum of \$1,399.00. (Fid. Trans. 69:11-21). The Appellee testified that none of the writing on the check was hers and that she did not know the check had been written and did not grant any authority for the check. (Fid. Trans. 257:15-25; 258:1-3). The Appellant testified that it appeared that he signed the Appellee's name to the check. (Fid. Trans. 69:22-24).

- The Appellee introduced P27 into evidence, a check drawn on the Fidelity Account payable to King Leavitt, an insurance company. (Fid. Trans. 71:22-25; 72:1-8; 259:22-25; 260:1-3). The Appellee testified she did not authorize the check or have any knowledge of King Leavitt Insurance. (Fid. Trans. 260:4-16). The Appellant testified he believed the Appellee signed her own name to the front of the check. (Fid. Trans. 72:12-19).

- The Appellee introduced P28 into evidence, a check drawn on the Fidelity Account payable to "Cash" for the sum of \$3,000.00. (Fid. Trans. 72:24-25; 73:3-6; 260:17-22; 260:17-22). The Appellee testified that none of the writing on the check was hers and that it appeared that the Appellant signed her name to the check without her authorization

to do so. (Fid. Trans. 260:23-25; 261:5-16). The Appellant admitted that it appeared he both signed the Appellee's name to the front of the check and endorsed the back of the check with his own signature. (Fid. Trans. 73:10-13).

- The Appellee introduced P35 into evidence, a check drawn on the Fidelity Account and made out to the Appellant for the sum of \$4,000.00. (Fid. Trans. 86:1-5). The Appellant testified that the check had been endorsed both by himself and his father and that its purpose was to pay his father back for money he had loaned the parties to pay for family expenses. (Fid. Trans. 85:16-25; 86:12-25; 87:1-5). However, the Appellant denied that he signed the Appellee's name to the front of the check. (Fid. Trans. 86:6-11). The Appellee testified that she did not write the amount on the check and did not sign the check. (Fid. Trans. 269:9-16). The Appellee testified that she recognized the two endorsements on the back as the Appellant, Jim Kimball's, and the Appellant's father's, Dan S. Kimball. (Fid. Trans. 268:10-21).

- The Appellee introduced P39 into evidence, a check drawn on the Fidelity Account and payable to "Questar" for the sum of \$1,583.14. (Fid. Trans. 90:25; 91:1-6). The Appellee testified that she did not write any portion of the check and that the writing was the Appellant's. (Fid. Trans. 271:3-9). The Appellant admitted that he signed the Appellee's name to the front of the check. (Fid. Trans. 91:7-8).

- The Appellee introduced P40 into evidence, a check drawn on the Fidelity Account and payable to "Dr. Aste." (Fid. Trans. 91:13-20; 273:21-23). The Appellee testified that none of the writing on the check was hers, that she recognized the writing as the Appellant's, and that the Appellant did not have her authority to write the check. (Fid.

Trans. 273:24-25; 274:1-2, 13-16). Further, the Appellee testified that “Dr. Aste” is a dentist friend of the Appellant’s from high school who did not bill them for work he did for the family. The Appellant testified that he did not know whether it was he or the Appellee who signed the Appellee’s name to the check. (Fid. Trans. 91:21-25; 92:1-17).

- The Appellee introduced P42 into evidence, a check drawn on the Fidelity Account and made out to “Utah Power.” (Fid. Trans. 92:22-25). The Appellant testified that it appeared to be his writing that signed the Appellee’s name to the front of the check. (Fid. Trans. 93:5-7).
- The Appellee testified that she was not aware that the Appellant had signed her name on any checks from the Fidelity Account during their marriage and that he did at any time have her authority to do so. (Fid. Trans. 227:8-19; 228:5-18).
- The Appellee further testified that she was not aware that the checks represented in Appellee’s Ex.s P1-P7 were altered until she ordered copies of the checks from Fidelity sometime in the Spring of 2002. (Fid. Trans. 230:7-12; 232:20-25; 233:1-4, 17-24; 234:17-25; 236:17-21; 237:11-17; 238:9-23).

This Court should find that this evidence, even when viewed in a light most favorable to the Court’s findings, and including all reasonable inference drawn therefrom, is insufficient to support Fidelity Findings of Fact 19, 22, and 26.

POINT V: THE TRIAL COURT ERRED IN AWARDING PREJUDGMENT INTEREST ON THE APPELLEE’S UNJUST ENRICHMENT CLAIM

This Court should find that the trial court erred in awarding the Appellee prejudgment interest with respect to her claim of unjust enrichment. A decision to grant

or deny prejudgment interest presents a question of law, which Utah Appellate Courts review for correctness. Dejavue, Inc. v. U.S. Energy Corp., 1999 UT App 355, ¶ 9 (citing Andreason v. Aetna Cas. & Sur. 848 P.2d 171, 177 (Utah Ct. App. 1993)); see also, Radman v. Flanders Corp., 2007 UT App 351, ¶ 4, 589 Utah Adv. Rep. 19 (citing Saleh v. Farmers Ins. Exchange, 2006 UT 20, ¶ 28). Under Utah law, prejudgment interest may be awarded “to compensate for the full loss suffered by the Appellee in losing the use of the money over time.” Radman v. Flanders Corp., 2007 UT App 351, ¶ 19, 589 Utah Adv. Rep. 19 (citing Kraatz v. Heritage Imps., 2003 UT App 201, ¶ 75, 71 P.3d 188). The standard for evaluating claims for pre-judgment interest is 1) whether a loss is fixed at a definite time and 2) whether such interest can be calculated with mathematical accuracy. Shoreline Development Inc. v. Utah County, 835 P.2d 207, 210 (Utah App. 1992) (internal citation omitted).

However, under Utah law “prejudgment interest is typically not allowed in actions seeking equitable relief such as unjust enrichment.” Dejavue, Inc. v. Schultz, 1999 UT App 355, ¶ 24. This is due to the lack of certainty in equitable claims. For example, in the *Andreason* Case, the Utah Court of Appeals held that although prejudgment interest may be appropriate on an award of reimbursement for repair of damages to real property if the action is based on a tort, prejudgment interest on the cost of the Appellee’s home repairs was not appropriate because the award was based on a claim of promissory estoppel which requires findings by a fact-finder and were thus not mathematically certain. Andreason v. Aetna Casualty & Surety Co., 848 P.2d 171, 177-78 (Utah App. 1993) (internal citations omitted). On several occasions, the Utah Court of Appeals has

specifically rejected claims of prejudgment interest on awards based on unjust enrichment and held that an award of prejudgment interest “would never be appropriate” for an unjust enrichment claim. Dejavue, Inc. v. U.S. Energy Corp., 1999 UT App 355, ¶¶ 24-25; see also Bailey-Allen Co., Inc. v. Kurzet, 876 P.2d 421 (Utah App. 1994) and Bellon v. Malnar, 808 P.2d 1089, 1097 (Utah 1991). Moreover, the Utah Supreme Court has noted that “equity Appellees may claim lost interest as part of their damages” and held that “prejudgment interest must be sought directly as damages in unjust enrichment cases, if at all.” Shoreline Development, Inc. v. Utah County, 835 P.2d 207, 211 (internal citations omitted).

In application of these principles, this Court should find that the trial court erred when it awarded prejudgment interest on the Appellee’s unjust enrichment claim. First, the award of prejudgment interest was erroneous because the Appellee’s only claim at issue was unjust enrichment, the damages upon which require the assessment of a fact-finder, therefore the Appellee’s damages were not mathematically certain. Secondly, the award of prejudgment interest was erroneous because the Appellee did not directly seek it. The Utah Supreme Court has held that prejudgment interest must be sought directly as damages in an unjust enrichment case. *Id.* In this case, there was no such request either in the Appellee’s Amended Complaint, nor in her arguments before the Court at time of trial. In the Appellee’s opening statement at time of trial, her counsel stated “the damages that we’re claiming in this case, based upon the conduct of Mr. Kimball, are the \$3,000.00 on the altered check and the full amount on the checks that [the Appellant] forged.” (Fid. Trans. 6:2-4). Not only did the Appellant not directly seek prejudgment

interest as damages, nor did the Appellant present evidence regarding whether 1) any alleged loss was fixed at a definite time; or 2) whether or not interest can be calculated with mathematical accuracy; nor was any such evidence before the Court; nor where any findings made by the Court to support the claim of prejudgment interest. Thus, the Appellant was given no notice of this claim, nor an opportunity to present a defense regarding the same.

POINT VI. THE TRIAL COURT ERRED IN ITS FAILURE TO MAKE ANY FINDINGS OF FACT OR CONCLUSIONS OF LAW REGARDING THE APPELLANT'S AFFIRMATIVE DEFENSES OF STATUTE OF LIMITATIONS AND COLLATERAL ESTOPPEL/ISSUE PRECLUSION

This Court should find that the trial court erred in its failure to make any Findings of Fact or Conclusions of Law regarding the Appellant's affirmative defenses of statute of limitations and collateral estoppel/issue preclusion. Rule 52(a) of the Utah Rules of Civil Procedure states that "the [trial] court shall find the facts specially and state separately its conclusions of law thereon." *See also Jeffs v. Stubbs*, 970 P.2d 1234, 1242 (Utah 1998); *Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979); *Williamson v. Williamson*, 1999 UT App 219, ¶ 9 (emphasizing the importance of a trial court issuing adequate findings of fact). Under Utah law, failure to make findings upon all material issues raised by the pleadings is reversible error. *LeGrand Johnson Corp. v. Peterson*, 420 P.2d 615 (1966). It is the duty of the trial judge to find facts upon all material issues submitted for decision unless findings are waived. *Boyer Co. v. Lignell*, 567 P.2d 1112 (Utah 1977). Utah courts have held that "minimum factual findings are important for meaningful review" and that such "findings are adequate only if they are sufficiently

detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.” In Re: Connor, 2007 UT 33, ¶12, 158 P.3d 1097; Madsen v. Madsen, 2006 UT App 267, ¶ 3 (internal citations omitted). The adequacy of a trial court’s findings of fact is reviewed under a clearly erroneous standard of review. *See* Young v. Young, 979 P.2d 338, 342 (Utah 1999); Pennington v. Allstate Ins. Co., 973 P.2d 932, 937 (Utah 1998).

In this case, the Appellee presented argument and evidence of one claim of action, unjust enrichment. The Appellant presented argument and evidence of two defenses, namely 1) that many of the altered or allegedly forged checks introduced as part of the Appellee’s unjust enrichment claim were barred by the statute of limitations and 2) that the Appellee’s unjust enrichment claim was barred by the doctrine of res judicata/ collateral estoppel based upon the previous litigation of these matter in the parties’ divorce matter. At time of trial, the Appellee responded to the Appellant’s defenses, claiming that the Statue of Limitations had been tolled. However, the Findings of Fact issued by the trial court give no indication to what extent the Court considered either the Appellant’s defenses or the Appellee’s response to the same, nor do the Conclusions of Law give any mention of the defenses raised by the Appellant.

The Appellant brought the inadequacy of the Court’s Findings of Fact and Conclusions of Law to the attention of the trial court with his timely filed Rule 59(e) Motion to Alter or Amend the Judgment and Supporting Findings of Fact and Conclusions of Law on May 10, 2007. 438 Main Street v. Easy Heat, 2004 UT 72, ¶51; Rule 59(e). However, the trial court denied the Appellant’s Motion. In response to the

Appellant's argument, in the trial court's August 21, 2007, Minute Entry denying Appellant's 59(e) Motion, the Court held that "the Court's findings in this regard are a matter of record and need no recitation in the findings of fact." (Addendum #15).

The Appellant specifically invites this Court to find that, as a matter of law, many of the allegedly forged checks (Bank One checks) introduced as part of the Appellee's unjust enrichment claim were barred by the statute of limitations. The Utah statute of limitations establishes a four (4) year time limitation for actions based on fraud or mistake from the point of discovery of the fact by the Appellee. Utah Code Ann. §78B-2-305 (recodified, previously §78-12-26(3)). (Fid. Trans. 654:10-25; 655:1-25; 656:1-25; 657:1-25). Appellee testified that the Bank One Statements came in her name alone, but that she voluntarily declined to review them. (Fid. Trans. 629:3-24; 643:6-24). Thus, this Court should find that the Appellee had constructive knowledge of all the activity in her Bank One Account no later than the following month of such activity, when the statement would arrive. Thus, when the Appellee filed her Complaint on February 7, 2003, only checks written in the past four (4) years (February 7, 1999 – February 7, 2002) were still within the statute of limitations. This Court should find that all allegedly forged checks written prior to February 7, 1999 were barred by the statute of limitations and remand this matter for findings and orders consistent with the same. (Fid. Trans. 651:16-25; 652-661; 653:19-25; 654:1-25; 655:1-24; 656:1-25).

Moreover, Appellant also invites this Court to find, again as a matter of law, that Appellee's unjust enrichment claim was barred by the doctrine of res judicata based upon the previous litigation of these matters in the party's divorce matter. As listed herein in

¶5, the Findings of Fact and Conclusions of Law entered in these parties' Divorce Matter included findings on virtually all issues before the court in this matter, including the Appellant's alleged forgery of the very same checks at issue in this matter and the use of such funds which the divorce court found were for household and family purposes. (Div. FOF 51, 78). Thus, this Court should find that the Appellee's claims were barred by collateral estoppel.

Collateral estoppel/issue preclusion bars parties from re-litigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one. The four elements of collateral estoppel are: 1) the issue decided in the prior adjudication is identical to the one presented in the instant action, 2) the party against whom issue preclusion is asserted was a party to the prior adjudication, 3) the issue in the first action was completely, fully, and fairly litigated, and 4) the first suit resulted in a final judgment on the merits. Buckner v. Kennard, 2004 UT 78, ¶13; Career Serv. Review Bd. v. Utah Dept. of Corrections, 942 P.2d 933, 938 (Utah 1997). The doctrine of collateral estoppel purposes are 1) to preserve the integrity of the judicial system by preventing inconsistent judicial outcomes and 2) promoting judicial economy by preventing re-litigation of the same issue. Buckner v. Kennard, 2004 UT 78, ¶14.

This Court should find that, as a matter of law, the Appellee's claim of unjust enrichment regarding the alleged altered or forged checks, were barred by the legal doctrine of collateral estoppel and the complete litigation of the issue in the parties' Divorce Matter and in accordance with the divorce court's inherent powers of equity in the distribution of marital assets and marital debts.

REQUEST FOR ATTORNEY'S FEES & COSTS

Pursuant to Rule 34 of the Utah Rules of Appellate Procedure, Appellant respectfully requests attorney fees and costs incurred in filing this appeal.

CONCLUSION

Petitioner/Appellant/Cross-Appellee Jim Kimball respectfully requests that this court overturn the trial court's findings regarding 1) the characterization of the stock purchase agreement monies as non-marital property, 2) the limited finding of contempt on behalf of Appellee, 3) the denial of Appellant/Petitioner's 60(b) Motion and 4) the denial of Petitioner/Appellant's attorney's fees and costs at time of trial.

Further, Appellant respectfully requests that this court find 1) the trial court erred it is ultimate conclusion that the Appellant had been unjust enriched, and there is insufficient evidence to support a conclusion of unjust enrichment; 2) that the trial court erred in improperly imposing a burden of proof on the Appellant to show how certain funds in question were used rather than on the Appellant to prove all elements of the unjust enrichment cause of action; 3) the trial court erred in its award of prejudgment interest; 4) the trial court erred in making improper Findings of Fact and Conclusions of Law, such as those that go beyond the scope of the only claim at issue, unjust enrichment; and/or 5) the trial court erred in its failure to not make any Findings of Fact or Conclusions of Law regarding the Appellant's affirmative defenses of statute of limitations and collateral estoppel/issue preclusion. Thus, Appellant respectfully requests that this Court overturn the Findings of Fact and Conclusions of Law entered by the Third District Court on September 20, 2005, on April 30, 2007, and Amended Judgment

entered by the Third District Court on September 18, 2007. The Appellant also respectfully requests award of his attorney's fees and costs incurred in this appeal.

RESPECTFULLY SUBMITTED this 14th day of April, 2008.

LEMS LAW OFFICE, P.C.


Wendy J. Lems
Attorney for Petitioner/Appellant/Cross-Appellee

CERTIFICATE OF SERVICE

I certify that on this 14th day of April, 2008, a true and correct copy of the forgoing was sent via Hand-Delivery, to the following:

Thomas R. Blonquist, Esq.
40 South 600 East
Salt Lake City, Utah 84102
Attorney for Respondent/Appellee/Cross-Appellant

