

2006

Masakazu Shiba, Shizue F. Shiba, Riye Shiba  
Marital and Family Trust, Masazo Shiba Maital and  
Family Trust v. Toshiro Shiba, Jean O. Shiba, Seiji  
Shiba, Della Kono Shiba, Ronald and Natsuye  
Nishijima, Toshiro Shiba, Riye Shiba Marital and  
Family Trust, Masazo Shiba Marital and Family  
Trust : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

MASAKAZU SHIBA and SHIZUE F.  
SHIBA, MASAKAZU SHIBA ,  
TRUSTEE OF THE RIYE SHIBA  
MARITAL AND FAMILY TRUST,  
MASAKAZU SHIBA, TRUSTEE OF  
THE MASAZO SHIBA MARITAL AND  
FAMILY TRUST,

Plaintiffs-Appellants,

vs.

TOSHIRO SHIBA, JEAN O. SHIBA,  
SEIJI SHIBA, DELLA KONO SHIBA,  
RONALD AND NATSUYE  
NISHIJIMA, RONALD AND NATSUYE  
NISHIJIMA, TRUSTEES OF THE  
RONALD AND NATSUYE NISHIJIMA  
FAMILY TRUST, TOSHIRO SHIBA ,  
TRUSTEE OF THE RIYE SHIBA  
MARITAL AND FAMILY TRUST,  
TOSHIRO SHIBA, TRUSTEE OF THE  
MASAZO SHIBA MARITAL AND  
FAMILY TRUST, AND DOES 1-10,

Defendants-Appellees.

Case No. 20060560

BRIEF OF APPELLANT

INTERLOCUTORY APPEAL FROM JUDGMENT  
OF THE FOURTH DISTRICT COURT OF UTAH COUNTY, UTAH, THE  
HONORABLE JAMES TAYLOR, DISTRICT COURT JUDGE

FILED  
UTAH APPELLATE COURTS  
JUN 11 2007

IN THE SUPREME COURT  
OF THE STATE OF UTAH

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Ronald and Natsuye Nishijima Family Trust

## **LIST OF PARTIES**

The parties are as reflected on the case caption.

In addition to the attorneys shown on the cover page, all plaintiffs were also represented by John Fueston of Bradford & Brady (R. 0490 - 0001) defendants were also represented by Mr. George A. Hunt of Williams and Hunt, P.C., (R. 094 - 088) and Mr. Douglas Matsumori of Ray, Quinney & Nebeker (R. 157 - 156) Mr. Craig Carlile, of Ray, Quinney & Nebeker (R. 248 - 183) and Mr. Grant Sumsion of Ray Quinney & Nebeker. (R292 -289).

Judge James R. Taylor is the judge currently assigned to the case. He conducted the first phase of a bifurcated trial and entered the findings of facts, conclusions of law and judgment based on that trial. He is also the judge assigned to hear the second phase of the bifurcated trial, which date has not yet been set, pending the ruling on this appeal. Judges Ray Harding, Jr., Anthony W. Schofield, Fred D. Howard, and Steven L. Hansen were also assigned to the case at various times.

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Crowther v. Mower, 876 P.2d 876, 878 (Utah App. 1994)  
Cummings v. England, 362 P.2d 584, 585 (Utah 1961)  
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Jenkins v. Jensen (66 P. 773 (1901)  
Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985)  
Maw v. Noble, 354 P.2d 121 (Utah, 1960)  
Nelson v. Davis, 592 P.2d 594, 596 (Utah 1979)  
WebBank v. American General Annuity Service Corp. 54 P.3d 1139 (Utah 2002)

### Statutes and Rules Cited:

48-2a-804 Utah Code Annotated

### Other Authorities Cited:

17A Am Jur 2d. Contracts §551 (1991)  
17A Am Jur 2d. Contracts §554 (1991)

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RONALD AND NATSUYE NISHIJIMA,  
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NISHIJIMA, TRUSTEES OF THE  
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TRUSTEE OF THE RIYE SHIBA  
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TOSHIRO SHIBA, TRUSTEE OF THE  
MASAZO SHIBA MARITAL AND  
FAMILY TRUST, AND DOES 1-10,

Defendants-Appellees.

Case No. 20060560 - SC

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BRIEF OF APPELLANT

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**JURISDICTION**

The Order from which this interlocutory appeal is taken was signed May 31, 2006



and entered June 1, 2006. (R. 1180 - 1159)<sup>1</sup>. The 20 day deadline for filing a motion for interlocutory appeal (Rule 5 Utah R. App. P. ) fell on June 21, 2006. Plaintiff filed its Petition for Permission to Appeal Interlocutory Order with the Supreme Court on June 16, 2006. After receiving a response to the Petition from the respondents, the court granted the Petition for Interlocutory Appeal on July 27, 2006. Jurisdiction is conferred on this Court by Utah Code Ann. §78-2-2(3)(j) (1966), because the appeal is one over which the Court of Appeals does not have original jurisdiction.

### **ISSUES PRESENTED**

First Issue on Appeal. Where parties own real property as tenants in common and enter into a clear and unambiguous written agreement to sell the property and to distribute the proceeds from the sale in a specific amount to each co-tenant, and following the agreement, sell the property and divide the proceeds consistent with their agreement, may the court subsequently order that the share of the proceeds of one co-tenant be divided again, as if that share of the proceeds were still owned in common? The trial court's interpretation of the contract and ensuing legal determinations are questions of law, reviewed for correctness. Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985); Crowther v. Carter, 767 P.2d 129, 131 (Utah App. 1989). This issue is one of two main focuses of the Court's order.

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<sup>1</sup>The documents in the trial court record and organized in reverse chronological order, with the result that the numbering placed on the documents pursuant to Rule 11(b) of the Utah Rules of Appellate Procedure runs in reverse order on each document.

Second Issue on Appeal. Where the court finds that a written agreement between all general and limited partners of a limited partnership clearly and unambiguously expresses that all partners agreed to be governed by the terms of the written agreement and that the agreement is a valid amendment to the limited partnership, did the court err in ruling that the agreement failed to modify the method of distribution of the partnership assets upon its termination? The trial court's interpretation of the contract and ensuing legal determinations are questions of law, reviewed for correctness. Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985); Crowther v. Carter, 767 P.2d 129, 131 (Utah App. 1989). This issue is one of the two main focuses of the court's Order.

### **DETERMINATIVE PROVISIONS**

Appellant does not contend that there are constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative of the appeal.

### **STATEMENT OF THE CASE**

A. Nature of the case. This is an interlocutory appeal from an order issued following the first phase of a bifurcated civil action for termination, dissolution and accounting of a limited partnership, and for the termination and distribution of assets of a trust, which is a limited partner in the partnership.

B. Course of proceedings and disposition below.

Plaintiffs filed their Complaint on May 9, 2000 (R. 49 - 1). Plaintiff filed its Amended Verified Complaint on February 26, 2001 (R. 179-163). On June 1, 2005, the

parties filed a Joint Motion for Bifurcation of Issues and Holding Separate Trials (R. 1002 - 999) and Stipulation for Bifurcation of Issues and Holding of Separate Trials (R. 1006 - 1003). The first phase of the case was tried to the bench on June 20 - June 23, 2005. (R. 1080, 1079, 1078, 1070). On June 27, 2005, the court issued its Memorandum Decision (R. 1097 - 1081). Proposed Findings of Fact and Conclusions of Law were disputed. Findings of Fact and Conclusions of Law and Order were filed with the court on April 3, 2006 (R. 1151 - 1131), and Amended Findings of Fact and Conclusions of Law and Order were signed by the court on May 21, 2006 and entered by the court on June 1, 2005. (R. 1180 - 1160).

Plaintiff filed his Petition for Permission to Appeal Interlocutory Order with the Supreme Court on June 16, 2005.

#### C. Statement of Facts.

Beginning in the 1950s, Masazo Shiba and his two sons, Toshiro Shiba (sometimes referred to in the record as “Tosh”) and Masakazu Shiba (sometimes referred to in the record as “Sok”) began to acquire farm ground in the area of Lehi, Utah, and began to farm the land that was acquired. (R. 179, ¶2). On December 31, 1985, Masazo Shiba conveyed to the Masazo Trust by Quit Claim Deed, all his right, title and interest in and to certain property including the thirty acre parcel with his home and the home of Toshiro Shiba. However, Toshiro did not convey his interest in the 30 acre parcel to the Masazo Trust. Toshiro retained his interest in the 30 acre parcel, including the homes of Masazo

Shiba and Toshiro Shiba (R. 1178, ¶5).

On December 31, 1985, the Shiba Family Farms limited partnership (the “Limited Partnership”) was created by the execution and filing of the Articles of Limited Partnership of Shiba Family Farms (the “LP Agreement”). Sok and Toshiro Shiba were named as general partners of the Limited Partnership, and the following were named as limited partners: Masazo Shiba, Riye Shiba, Jean Shiba, Shizue Shiba, Seiji Shiba, Della Shiba, Nats Nishijima, and Ronald Nishijima. (R. 1178-1177, ¶8 ). The LP Agreement provided that in the event of the dissolution of the partnership, the general partners (i.e., Sok and Toshiro) were to wind up the affairs of the partnership and could “elect to distribute undivided interests in partnership property to the partners in kind in proportion to their capital accounts at the time of distribution.” (R. 1177 ¶10). The LP Agreement could be amended only if the amendment was proposed in writing to the limited partners, and the consent of more than 51% of the ownership of the Limited Partnership was given in writing, and in any event no amendment which reduced “the interest of any partner’s capital, profits, and depreciation or sharing ratio” could be binding without the specific consent of each partner affected thereby. (R. 1177, ¶11).

On December 31, 1985, Masazo and Riye conveyed to the Limited Partnership farm land totaling approximately 300 acres. This was the principal asset of the Limited Partnership. Following the conveyance of the farm land to the Limited Partnership, Sok and Tosh operated the farm as general partners under an agreement to rent the farm land

from the Limited Partnership. (R. 1177, ¶12). On or after December 31, 1985, the interest of Masazo in the Limited Partnership was transferred by him to the Masazo Trust. (R. 1177, ¶12). On December 4, 1990, Masazo Shiba executed the First Amendment to the Masazo Trust to provide that the interest in the Limited Partnership owned by the Masazo Trust “shall be distributed in such a way as to achieve a final percentage of ownership” of any interest held by the Masazo Trust in real property (including the 30 acre parcel but excluding the houses owned by Masazo and Tosh) among the children as follows:

Masakazu (Sok)	43 ½ %
Seiji	6 ½ %
Natsuye (Nats)	6 ½ %
Toshiro (Tosh)	43 ½ %

The First Amendment to the Masazo Trust directed the Trustees of the Masazo Trust to “make distribution out of the shares this trust owns in the limited partnership, or which it acquires by operation of my Last Will and Testament, to the above-named persons to achieve said final result through my estate and the estate of my spouse. (R. 1176, ¶16). On December 27, 1990, Masazo executed the Second Amendment to the Masazo Trust to provide a specific legal description for Masazo’s primary residence that would be distributed upon his death to Sok. The parcel described in the Second Amendment to the Masazo Trust was comprised of 1.372 acres. (R. 1176, 1175, ¶17).

Prior to December 1994, Sok and Tosh became unable to effectively cooperate in the operation of the farm. This inability to cooperate also caused difficulty in the operation of the Limited Partnership. (R. 1175, ¶20). These difficulties led to the

commencement of prior litigation involving the farm ground and the operation of the Limited Partnership. As a result of the litigation, it was determined that the farm land should be sold. But the partners decided that because of the low basis in the farm land, a simple sale of the farm land would have incurred significant capital gains taxes. Therefore, the partners agreed that a Section 1031 “like kind” exchange of suitable property for the farm land which would be substituted into the Limited Partnership to replace the farm land and avoid immediate capital gains taxes. (R. 1175, ¶21).

The partners sought advice and counsel from a lawyer (David Jeffs) and from a CPA to guide them in a Sections 1031 exchange. (R. 1175, ¶22). On December 3, 1994, the family, including Masazo, met at Ron and Nat’s house for a family meeting regarding Masazo’s Trust, the Limited Partnership, Masazo’s estate plan, and Section 1031 transactions. All the individual members of the Limited Partnership representing 100% of the ownership interest signed a family “Agreement” (the “Family Agreement”). Masazo signed a document entitled “No Change Pledge to the Masazo Shiba Marital and Family Trust Agreement” (“No Change Pledge”). Each of the siblings and their spouses signed the No Pledge Agreement as witnesses. (R. 1174, ¶23). The Family Agreement clearly and unambiguously expresses that all the partners agreed to be governed by four identified documents: (1) No Change Pledge; (2) Exchanging Properties from the Farm Sale; (3) Pre-Allocation Plans A & B; and (4) Present Ownership Schedule (collectively the “Family Agreement”). (R. 1174, ¶24). As part of the Family Agreement Masazo

pledged that he would not make any further changes to the Masazo Trust, so that all his heirs and the partners of the Limited Partnership could rely on the inheritance they anticipated receiving from Masazo at his death. Masazo acknowledged that implementation of the plan of the Family Agreement would require him to amend the Masazo Trust and he agreed to cooperate by amending his trust to facilitate the exchanging of properties outlined in the Family Agreement.(R. 1174, ¶25). The trustor of the Masazo Shiba Marital and Family Trust agreement retained in paragraph 3 the specific authority to modify the trust agreement. (R. 1174, ¶26). The fourth paragraph of the first page of the No Change Pledge purports to give beneficiaries of the trust the right to acquire replacement properties upon sale of the farm using their anticipated trust inheritances. (R. 1173, ¶27). The fourth paragraph of the first page of the No Change Pledge also contains the statement, “The pre-allocated amount and its earning shall remain my [Masazo’s] property until such time of distribution from my estate.” (R. 1173, ¶28). The Family Agreement provided that the assets of the Limited Partnership could be allocated to various children who would each locate a Section 1031 property to replace their designated share of the farm land owned by the Limited Partnership. The intent of the Family Agreement was that the farm land was to be sold and, with the proceeds of sale, the replacement properties could be purchased. Income or loss and management expenses for those replacement properties would be attributed to the partner who located and designated the replacement property. By replacing the Limited Partnership property

with the replacement properties, the sale of the farm land could qualify as a “like kind” exchange and avoid immediate liability for capital gains taxes from the sale with the basis in the farm land being transferred to the replacement properties, and the management of Limited Partnership assets would be effectively divided among the partners. (R. 1173, ¶29).

Following the December 1994 meeting, the partners all began looking for exchange properties. Nats and Ron Nishijima located a building lot in Farmington, Utah (the “Farmington Lot”); and Sok located a medical office building (the “Medical Clinic”). The other partners were unsuccessful in finding suitable replacement properties, although Tosh made numerous offers to purchase properties from various owners. (R. 1172, ¶31). On December 3, 1994, in conjunction with the family meeting, Masazo, Sok, Shizue, Seiji, Della, Ron, Nats, Tosh and Jean all signed a Water Stock Agreement, which distributed 30 shares of the Utah Lake Distributing Company held by Sok and Tosh to the children of Masazo and Riye in accordance with the final distributions provided for in the Second Amendment to the Masazo Trust, i.e., 43.5% to Sok, 43.5% to Tosh, 6.5% to Seiji, and 6.5% to Nats. (R. 1172, ¶32). On January 10, 1995, the farm land was sold, along with some personal farming and irrigation equipment owned by Sok and Tosh in their individual capacities. The purchase price of the farm land was \$1,952,868. The purchase price of the farming and irrigation equipment was \$253,382, for a total purchase price of \$2,206,250. The sale of the farm land triggered the need to designate replacement



properties within the time required by the IRS for like kind exchanges. (R. 1172, ¶33).

At the time of the sale of the farm land, the Masazo Trust and Tosh also sold their interest in the 30 acres, including the two residential lots and homes, to the purchaser of the farm land. (R. 1172, ¶34). The proceeds of the sale related to Masazo's home and lot were deposited into an account held at Fidelity Investments, account no. T103225994 in the name of Masazo Shiba Marital and Family Trust (the "Fidelity Account"). The Fidelity Account was established under the joint control of Tosh and Sok, as Trustees of the Masazo Trust. (R. 1172, 1171, ¶35).

On January 30, 1995, the Farmington Lot, located and identified by Natsuye and Ronald Nishijima as replacement property, was purchased by the Limited Partnership for \$57,000. (R. 1171, ¶36). Masakazu located a medical office which could be purchased with a combination of his pre-designated share and seller financing. The other partners were unsuccessful in spite of numerous offers to purchase submitted to various parties by Toshiro. It was proposed that funds from Tosh, Seiji and the marital trusts be contributed to complete the purchase on condition that when Masakazu located financing, the funds would be released to be placed to other projects. (R. 1171, ¶37). On July 6, 1995, the Medical Clinic was purchased for the total purchase price of \$1,610,415. The following parties contributed to the purchase of the Medical Clinic in the following amounts:

The Limited Partnership, as to 69.48%	\$1,118,628.00
The Masazo Trust, as to 3%	\$48,300.00
Sok Shiba, as to 13.76%	\$221,536.00
Tosh Shiba, as to 13.76%	\$221,536.00

(R. 1171, ¶38). On July 6, 1995, a Warranty Deed was delivered by the seller of the Medical Clinic, as Grantor, conveying and warranting title in the Medical Clinic to the following: Shiba Family Farms, a Utah limited partnership, as to an undivided 69.48% interest; and Masakazu Shiba and Toshiro Shiba, Trustees of the Masazo Trust, as to an undivided 3% interest; and Masakazu Shiba, as to an undivided 13.76% interest, and Toshiro Shiba, as to an undivided 13.76% interest.(R. 1171, 1170, ¶39). Financing was accomplished some months later in November 1995 with the execution of a non-recourse note by Shiba Family Farms to Berkshire Insurance company.(R. 1170, ¶41 ). Proceeds from the loan were then distributed which were equal to the Shiba Family Farms funds and personal funds contributed to the purchase by Toshiro to repay to them the funds used for the purchase of the clinic which had previously been allocated to all other partners except Masakazu and the marital trust (R. 1170, ¶42). Interest for the use of the money for those months was charged to and paid by Masakazu. (R. 1170, ¶43). The money received by Toshiro on behalf of Toshiro, Seiji and the martial trusts was invested in identified stocks and accounts in the name of Shiba Family Farms, where it remains.(R. 1170, ¶44). The proceeds of the Berkshire Loan were deposited into an account or accounts owned by the Limited Partnership and were managed under the direction of Tosh as a general partner. Interest on the loan amount for the months between purchase of the Medical Clinic and the closing on the Berkshire Loan was charged to Sok. The proceeds of the Berkshire Loan were invested in identified stocks and financial

instruments and accounts in the name of the Limited Partnership, where they remain.(R. 1170, ¶45).

Following its purchase, the Medical Clinic was managed by Sok, as a general partner. (R. 1169, ¶46). At all times following the purchase of the Medical Clinic, the tax returns of the Limited Partnership showed that the Limited Partnership treated the Medical Clinic as an asset of the Limited Partnership in the same capital percentage as the farm land had been held before the sale. (R. 1169, ¶48). Upon the advice of accountants, for tax years 1996, 1997, 1998 and 1999, Tosh attempted to make reconciliations or re-accountings of partnership income according to the pre-allocations contemplated in the Family Agreement. The reconciliations for tax years 1996 and 1999 were not used, but for tax years 1997 and 1998 partners made payments to one another which they identified as “gifts” in order to specifically attribute expenses of operation, profit, or loss from the allocated properties to the partners who had located those properties. The “gifts” were made with the full knowledge of all partners that they were not truly gifts but were attempts to reallocate or adjust the profit and loss of the Limited Partnership based on the pre-allocation of exchange property. (R. 1169, ¶49). In October 1998, Masazo passed away, rendering the trust incapable of further amendment. (R. 1168, ¶51).

Since at least December 1997 through the present date, Tosh and Sok have been unable to cooperate on partnership matters and business, including the preparation of tax returns for the Limited Partnership. (R. 1168, ¶52). On September 1, 2000, the Limited

Partnership, as Grantor, conveyed the Farmington Lot to Ron and Nats Nishijima, by Warranty Deed. (R. 1168, ¶55). All property, real and personal, and all financial accounts have been retained in the name and title of the Limited Partnership except for the Farmington Lot which was distributed to Natsuye and Ronald Nishijima by the Limited Partnership. (R. 1167, ¶56).

Amendments to the Shiba Family Farms partnership are specifically allowed under section 15.8 of the partnership agreement upon approval of more than 51% ownership interest of the partners. (R. 1167, ¶59). All of the partners representing 100% of the ownership interest executed the 1994 agreement. (R. 1167, ¶60). The 1994 agreement (Exhibit 13) clearly and unambiguously expresses that all the partners agreed to be governed by four documents including the “No Change Pledge to the Masazo Shiba Marital and Family Trust Agreement...Dec. 3, 1994”; “Exchanging Properties From Farm Sale...Dec. 3, 1994”; “Pre-Allocation Plans A&B...Dec. 1, 1994”; and, “Present Ownership Schedule...Oct. 22, 1994.”(R. 1167, ¶61).

### **SUMMARY OF ARGUMENT**

The first issue is whether tenants in common who agree to a specific distribution of proceeds from the sale of real property they own in common, and who distribute the proceeds consistent with their prior agreement, take their share of the proceeds free from claim by the other co-tenant. The first focus in determining the ownership of these funds must be to understand the nature of the tenancy in common relationship, then to interpret

the agreement between the co-tenants regarding that relationship. Of the two possibilities presented to the court, the only interpretation which is consistent with the courts own factual findings was that the Masazo Trust owned \$142,127 in proceeds from the sale of the land, free from claim by its co-tenant, and Toshiro Shiba owned \$232,600 in proceeds from the sale of the land, free from claim by his co-tenant. The other potential outcome, that after the sale and distribution of the proceeds, the Masazo Trust owned the \$142,127 in common with Toshiro Shiba, is inconsistent with the factual findings of the court, the intent of the parties as demonstrated by the written documents, and the parties subsequent actions, and should have been rejected as a matter of law.

The second issue is whether a written agreement, determined by the court to be a valid amendment to the limited partnership, modified the distribution of the partnership assets to its members upon the dissolution of the partnership. The first focus in interpreting the effect of the Family Agreement is to review the partnership agreement and its amendment with a view to harmonizing all its terms. The second focus in interpreting the agreement is to construe any ambiguity to be consistent with the understanding and intent of the parties. Of the two possible interpretations provided to the trial court, the only one which was internally consistent, and which was consistent with subsequent actions taken by the parties was that the parties agreed to acquire property as directed, based on their respective interests in the partnership, then allow each partners to manage their acquired properties, and upon termination of the partnership, distribute to

each partner its acquired property. The other potential interpretation, that the parties agreed upon an present value in the partnership only to allow each partner to manage their designated asset until the termination of the partnership, is inconsistent with the intent of the parties as demonstrated by the written documents, and the parties subsequent actions and should have been rejected as a matter of law.

### **ARGUMENT**

#### **THE MASAZO FAMILY TRUST IS ENTITLED TO SOLE OWNERSHIP OF THE \$142,127 IT RECEIVED BY AGREEMENT WITH ITS TENANT IN COMMON**

When tenants in common enter into an agreement for the distribution of proceeds from the sale of their land, then sell their land and distribute the proceeds consistent with their agreement, following distribution of the funds does one tenant in common retain a one-half interest in the proceeds of his former co-tenant? For the reasons explained below, this court should hold that once the property owned in common was sold and the funds were divided pursuant to the terms of the agreement, the tenancy in common relationship terminated and neither co-tenant retained a claim against the other's proceeds from the sale.

Where two parties own an interest in real property as joint tenants, the conveyance of interest by one of the joint tenants, severs the grantor's interest creating a tenancy in common with the remaining joint tenant's interest. Crowther v Mower, 876 P.2d 876, 878 (Utah App. 1994); and, Nelson v. Davis 592 P.2d 594, 596 (Utah 1979). By deeding

his interest in the property to the Masazo Trust on December 31, 1985 Masazo Shiba severed his joint interest in the 30 acre parcel, and created a tenancy in common relationship between the Masazo Trust and Toshiro Shiba.

When tenants in common decide to sell commonly owned property, each co-tenant has a right to share in the proceeds of the sale according to their proportionate interests. Cummings v. England, 362 P.2d 584, 585 (Utah 1961). Tenants in common are presumed to hold equal fractional undivided shares in the property Garret v Ellison, 72 P.2d 449, 452 (Utah 1937). At the time of sale of the 30 acre parcel of land owned by the Masazo Trust and Toshiro Shiba, each co-tenant was entitled to receive its proportionate share of the proceeds from the sale, which was presumed to be one half of the proceeds. Pursuant to the accountings provided by Toshiro Shiba, the combined value of the 30 acre parcel and two residences thereon totaled \$482,000 (Exhibit 1, p.8, (Present Ownership)).<sup>2</sup> Without an agreement to modify the presumption, each party would have been entitled to one-half of the value, or \$241,000.

However, by agreement, the parties could and did change how the proceeds from

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<sup>2</sup>The agreement identified the total proceeds to be received by the sale of farm land, most of which was owned by Shiba Family Farms a limited partnership. However, included in the sale was the 30 acre parcel which the Masazo Trust owned in common with Toshiro Shiba, on which two residences had been built. Near the middle of the page, under the title “Masazo Shiba Martial & Family Trust and Toshiro Shiba T.I.C., the and value total of \$99,400 was divided equally at \$49,700 to each, while the Residences were divided with Masazo Shiba Marital and Family Trust assigned 100% of the \$150,000 value of Res. 1; and Toshiro Shiba & Jean Shiba assigned 100% of the \$232,600 value of Res. 2. The residences were not to be included in the division of partnership assets.

the sale would be distributed. As the trial court correctly noted, Masazo Shiba and Toshiro Shiba and other members of their family and partnership entered into the Family Agreement which clearly and unambiguously expresses that all agreed to be governed by four identified documents including the Present Ownership schedule. In the Present Ownership schedule, the Masazo Trust and Toshiro Shiba agreed to distribute the proceeds from the sale of the 30 acres of land in a manner other than in equal shares. As is shown in the exhibit, the co-tenants acknowledged that their present ownership in their respective residences on the property consisted of a gross amount of \$150,000 for the Masazo Trust residence and \$232,600 for the Toshiro Shiba residence. Upon sale of the property, the parties confirmed their agreement, by distributing \$349,692 to Toshiro Shiba<sup>3</sup> (Tr. 653); and also distributing \$142,127 (\$150,000, less costs of sale) to the Masazo Trust, for its interest in Masazo's personal residence thereon. (Tr. 653). The \$142,127 was subsequently placed in the Fidelity Account, owned by the Masazo Shiba Marital and Family Trust. (R. 1172, 1171 ¶35).

The parties to a contract have the inherit ability to enter into new contracts, or to amend, or modify any existing contract. The Present Ownership agreement, is inconsistent with and a modification of the tenant in common presumption of equal interests in the property. As such it modifies the agreement of the parties regarding their individual interests in the 30 acre parcel. If the interpretation of this document is that it

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<sup>3</sup>This amount included his interests in the net proceeds from the sale of the Toshiro Shiba residence, as well as his interests in other personal property of the partnership.



does not modify the equal interests presumption, the presumption of equal interests in the property would control. In the present case the trial court inexplicably found the Present Ownership to be part of an enforceable agreement, but also found that Toshiro Shiba is entitled to claim one half interest in the portion of the sales proceeds that represent the Masazo Trust's interest in the property under the agreement. A contract may be rescinded or discharged by acts or conduct of the parties inconsistent with the continued existence of the contract, and mutual assent to abandon or rescind a contract may be inferred from the attendant circumstances and conduct of the parties. However, in the present case, the Family Agreement and its Present Ownership schedule, was not rescinded or discharged by acts or conduct, rather the opposite. Upon the sale of the property, Toshiro Shiba signed authorized the distribution of \$142,127 to the Masazo trust at closing representing the trust's separate interests in the property.

The trial court correctly concluded as a matter of law that partners agreed to be governed by the Family Agreement including its various documents (R. 1174, ¶24), and that the 30 acre parcel of ground was owned by the Masazo Trust and Toshiro Shiba in equal undivided interests (R. 1178 ¶5), and that the joint tenancy was severed by the quit claim deed in 1985 (R. 1163 ¶17). But inexplicably, and without further explanation the court erred when it also concluded that the interest of Toshiro was "never transferred by any document or agreement until the entire farm was sold", and that after the sale "Toshiro retained legal title to half of the property included as a specific devise to

Masakazu through the trust” (R. 1163 17). Either the interests of the parties was controlled by the Present Ownership schedule in which case the Masazo Trust is entitled to receive the \$142,127 free from claim by Toshiro Shiba, or their interests were controlled by the tenant in common presumption, in which case, the Masazo Trust is entitled to one half of the value of the 30 acre parcel, or \$241,000 free from claim by Toshiro Shiba. By declaring that Toshiro Shiba retains a one-half interest in the \$142,127 disbursed to the Masazo Trust, the court ignored that the parties established their respective distributions from the sale of the property in the both by written agreement and by the conduct of the parties.

The trial court’s ruling is inconsistent with its own findings and should be corrected on appeal. The Masazo Trust is entitled to the \$142,127 it received representing its interest in the Masazo residence, and Toshiro Shiba, while also entitled to his benefits under the agreement is not additionally entitled to an additional one-half share of the Masazo Trust proceeds.

## **ARGUMENT**

### **THE FAMILY AGREEMENT PROVIDES FOR THE FUTURE DISTRIBUTION OF EACH PARTNER’S RESPECTIVE INTEREST IN THE PARTNERSHIP UPON ITS TERMINATION**

The second issue presented in this appeal is the interpretation of the parties intent in signing several documents in an effort to amend their limited partnership agreement. At issue is the question of whether the Family Agreement intends to establish each

partner's interests in the partnership solely for management and diversification purposes, or whether the terms of the agreement provided a plan for the future distribution of partnership assets different from the parties interests in the company upon termination of the partnership. Appellant maintains the terms of the Family Agreement, though not artfully drafted by Toshiro Shiba, establishes a plan whereby a then present determination of each parties' equity in the partnership was made, partners were pre-allocated their interests in the partnership, with the intent that while the partnership continued to operate as a legal entity, each partner would manage its pre-allocated share, assume the gains or losses from its pre-allocated share, and upon distribution receive as its distribution of interests from the partnership, the assets acquired with that partner's pre-allocated share along with any gain or loss in its value. For reasons explained below, this court should hold that the Family Agreement and the subsequent actions of the parties based thereon manifest the parties intent to adopt such a pre-allocation, management, and future distribution plan.

Utah Code §48-2a-804 provides mandatory language regarding the distribution of limited partnership assets.

**48-2a-804. Distribution of assets.**

Upon the winding up of a limited partnership, the assets shall be distributed as follows:

- (1) to creditors, including partners who are creditors, to the extent permitted by law, in satisfaction of liabilities of the limited partnership other than liabilities for distributions to partners under Section 48-2a-601 or 48-2a-604;
- (2) except as provided in the partnership agreement, to partners and

former partners in satisfaction of liabilities for distributions under Section 48-2a-601 or 48-2a-604; and,

(3) except as provided in the partnership agreement, to partners with respect to their partnership interest;

(a) for the return of their contributions; and

(b) in the proportions in which the partners share in distributions.

Except for the requirement to pay creditors, upon termination of a limited partnership distributions to partners are controlled primarily by the provisions of the limited partnership agreement. Partners are allowed to make agreements for distribution of partnership assets that are different from traditional methods of distribution and different from distributions established by statutes if the partnership agreement or an amendment to the agreement so provides.

The trial court correctly found on the evidence presented that “all the individual members of the Limited Partnership representing 100% of the ownership interest signed the Family Agreement. Appellants do not dispute the trial courts finding that “the Family Agreement clearly and unambiguously expresses that all the partners agreed to be governed by four identified documents: (1) No Change Pledge (Exhibit 14); (2) Exchanging Properties from the Farm Sale; (3) Pre-Allocation Plans A & B; and (4) Present Ownership Schedule. Appellants also do not dispute the courts findings that as a matter of law that the Family Agreement together with the four specified documents, are valid amendments to both the trust and the Shiba Family Farms partnership agreement. However, appellants believe the court erred in interpreting the Family Agreement when it

concluded that the Family Agreement fails to modify distribution of the replacement properties upon dissolution of the partnership. It is this conclusion of law that is disputed. The amendment along with the subsequent actions taken by the partnership members clearly establish that the agreement should be interpreted to provide for the distribution to each partner of their respective replacement properties upon dissolution of the partnership.

Although it is clear that the partners intended to modify their partnership agreement, the language of the Family Agreement is ambiguous and uncertain as to the intent of the parties regarding final distribution of the partnership assets. The agreement makes reference to recommendations that are not made part of the agreement, yet indicate the parties' desire to follow them ("In our case, it would be to follow the recommendation of David Jeffs to continue the partnership for a period of one year and preferably three or until Dad's death.") (Exhibit 1, p. 4 (Exchanging Properties From Farm Sale), ¶3). While acknowledging a desire to "allow individualizing the partner's undivided interests without making distributions", there is no explanation of what "individualizing the partner's interests means, or its purpose. (Exhibit 1, p. 4 (Exchanging Properties From Farm Sale), ¶4). The agreement includes "pre-allocating the equities" without any further explanation of what "pre-allocating the equities" means, or its purpose, other than to "individualize" the parties interests. It then goes on to explain that the partners will be allowed to invest the "pre-allocated" amount in their separate properties, be responsible for their respective

properties, but that all properties will remain partnership properties until such time that the partnership is dissolved, (emphasis added) (Exhibit 1, p. 4 (Exchanging Properties From Farm Sale), ¶4). There is uncertainty and ambiguity as to such terms as “pre-allocation”, “individualize” and ownership of the “separate properties” without further explanation of how the property will be distributed or disposed of. The agreement proceeds through a complex process to determine the present equity of each partner, even taking into consideration the future change in ownership interests that will occur upon the death of Masazo Shiba and the distribution of its interest in the partnership to the other partners.(Exhibit 1, p. 4 (Exchanging Properties From Farm Sale), ¶5).

While it is clear the parties agreed to amend the partnership agreement by executing the Family Agreement, the precise purpose and intent of the parties regarding its impact on the distribution of the partnership assets upon termination are not as clearly stated.

In case a contract or any of its language or parts, is ambiguous and uncertain so that construction is called for, the surrounding circumstances at the time it was made should be considered for the purpose of ascertaining its meaning and the intention of the parties. In construing a contract, a court should, to the best of its ability, place itself in the situation occupied by the parties when the agreement was made and avail itself of the same light which the parties possessed when the agreement was made. 17A Am Jur 2d §351, See also, Maw v. Noble, 354 P.2d 121 (Utah, 1960). In determinating the meaning

of an indefinite or ambiguous contract, the construction place upon the contract by the parties themselves is to be considered by the court. The practical construction of uniform conduct of the parties under a contract is a consideration of much importance in ascertaining its meaning, and that consideration is entitled to great, if not controlling, weight in ascertaining the parties' understanding of the contract terms and language, since the parties are in the best position to know what was intended by the language employed.

17A Am Jur §354; See also, WebBank v. American General Annuity Service Corp. 54 P.3d 1139 (Utah 2002); and Jenkins v. Jensen (66 P. 773 (1901)). Where the Family Agreement was drafted by Defendant Toshiro Shiba, and the language used in the contract is indefinite and ambiguous, and hence of doubtful construction, the practical construction of the parties themselves should be controlling in determining the intent of the parties.

With the impending sale of the partnership's primary asset, Toshiro Shiba sought advice from an attorney on the implementation of a plan that would allow the partners to both qualify for a 1031 like kind exchange to avoid capital gains taxes, while presently dividing the assets of the partnership among the partners. The attorney introduced the concept of pre-allocating future interests so they could presently divide the property and agree to a future method of distribution (Tr. 51 line 20 - 52 line 19). The attorney also recommended that the partnership engage in the exchange (sale of farm land for like kind property), but include a pre-allocation concept in its plan to help each partner designate

the parcel that it is ultimately going to end up with upon distribution. He explained this would be done by having the partnership make a determination of how much of the land's sales price was to be used by each partner to reinvest in replacement property. (Tr. 55 line 25 - 56 line 16). The attorney also recommended a method for distribution of the newly acquired property, by waiting at least one year, then distributing the property to the partner who had selected that particular replacement property. (Tr. 57 line 19 - 58 line 8) The attorney also recommended that income and expenses from individual properties could be allocated among the partners through special allocations (Tr. 58 line 9 - 59 line 14).

In its attempt to describe the recommendation of David Jeffs, the contract provides that the partnership could "individualize" the partner's undivided interest without actually making distribution at this time by "pre-allocating" the equities, that such pre-allocation would allow individual partners to invest in separate properties, to acquire replacement property in equal value to their equities, and that each partner, (not the partnership) would be responsible for their respective property even though all replacement properties would remain property of the partnership until it is dissolved. (Exhibit 1, p.4 (Exchanging Properties from Farm Sale), ¶4). A formula was even included in the agreement, "present ownership plus future inherited share from the trusts equals pre-allocated share." (Exhibit 1, p. 4 (Exchanging Properties from Farm Sale), ¶5).

The need to accurately determine the individual partners equity was so great that



the agreement provided a method to calculate the anticipated share each partner would receive from their father's trust upon his future death, with a promise from their father that he would not change the provisions of his trust during the remainder of his life (Exhibit 1, pp. 2-3, (No Change Pledge)). The need for precision in calculating a present interest based on a future events begs the question, if the intent of the agreement was only an effort to assign areas of management within the partnership, why would it matter what the individual partner's equity interest is, or would be following the death of Masazo Shiba? Why would they then pre-allocate the value to each partner to "allow each partner to acquire replacement property in a value equal to their current equities? That they needed to calculate their equity, including the equity each would receive at a future date on the death of their father is entirely consistent with the intent of their plan to ultimately distribute to each partner its replacement property after meeting the requirements of the 1031 like kind exchange. It is part and parcel of the plan of calculating, pre-allocating an equity value to each partner, and to allow each to "invest in separate properties," that "each partner will be responsible for," but that would remain in the partnership "until such time that the partnership is dissolved." (Exhibit 1, p. 4, (Exchanging Properties From Farm Sale), ¶4). Such efforts would serve no purpose if the intent was only to assign management of assets to partners.

The agreement also makes provisions in the event the replacement property selected by each partner is not matched to their pre-allocated equity. It provides that "the

boot either given or received is to be tracked to the respective partner's interest.” (Exhibit 1, p. 4 (Exchanging Properties from Farm Sale), ¶6). Again, this begs the question, why would the purchase of replacement property with partnership assets create a need to track any increase or decrease in value to a single partner's interest in the partnership? It is clear that such tracking would only be appropriate if the partner was to receive the replacement property at a future date as the distribution of the partner's equity.

The agreement provides that “the income, expenses and depreciation can also be tracked to the respective property, and not comingled [sic] with others in the partnership” (Exhibit 1, p. 4 (Exchanging Properties from Farm Sale), ¶6) and that “Upon dissolution of the partnership, the ultimate value of the property at that time will also be separate. Thus, if a property performed better or worse than the others, it does not affect them.” (Exhibit 1, p. 4 (Exchanging Properties from Farm Sale), ¶6). If this agreement is interpreted that it does not anticipate a future distribution of the replacement properties to the partner who acquired them, why then would they also include a provision to track income, expenses and deprecation to the respective property? Why would they concern themselves that the ultimate value of each replacement property is separate from the others?

Although it is important for the purposes of the 1031 like kind exchange that all replacement property be named an asset of the partnership, the partner's intent in the agreement is to create an agreement that allows them to treat the replacement properties

separately, as the “pre-allocated” interests of each partner. Why else would the agreement provide that although the properties must remain in the partnership until it is dissolved, and all financing of properties must be in the partnership name, the financing will be tracked to the individual property?

Based on the Family Agreement, one of the partners, the Ronald and Natsuye Nishijima trust, identified and purchased a building lot in Farmington in the partnership name from the proceeds of the farm sale, as the Nishijima Trust’s replacement property. This lot was later distributed to Ronald and Natsuye Nishijima as its disbursement from the partnership. This is consistent with the interpretation that the pre-allocated amount was used to purchase a replacement property nominally belonging to the partnership, but which would be later distributed to the partner who located it and applied its pre-allocated funds to its purchase.

Masakazu Shiba located a medical office which could be purchased with a combination of his pre-designated share and seller financing. However, the other partners were unsuccessful in locating and purchasing replacement property. It was agreed that in addition to funds pre-allocated to Masakazu Shiba, the funds pre-allocated to Toshiro, Seiji, and the marital trusts also be contributed to complete the purchase. This use of the pre-allocated funds of Toshiro, Seiji and the marital trusts was made on condition that when Masakazu later obtained financing, the proceeds from the financing would be released back to Toshiro, Seiji and the martial trusts to be placed with other projects. (R.

1171, ¶37). The property was purchased with a the combination of pre-allocated funds and personal funds of some of the partners. Several months later in November 1995 financing was acquired for the property. (R. 1170, ¶41). Proceeds from the loan were distributed which were equal to those pre-allocated to all partners except Masakazu and the marital trust. Funds were also distributed which replaced or were equal to personal funds contributed to the purchase by Toshiro. (R. 1170, ¶42).

The telling aspect of these financing arrangements was that interest for the use of the money for those months was charged by the other members of the partnership for the use of “their” pre-allocated money and was paid by Masakazu Shiba personally.(R. 1170, ¶43). This act is singularly significant, in that it clearly demonstrates the dual nature of ownership of the partnership assets. For tax purposes the assets are owned by the partnership, while the management is assigned to individual partners. But, through the agreement, the partners understood that each possessed a future interest in the pre-allocated equities, plus any gain or loss incurred by their use prior to distribution. By requiring Masakazu Shiba to personally pay interest for the temporary use of the “partnership” funds, the partners acknowledged the intent of the Family Agreement was not to consider the medical office a partnership asset. The clear intent of the parties was to separate each partner’s pre-allocated interests from the others, and to create a future interest in the assets purchased with the pre-allocated equity.

There are other examples of the intent of the parties to treat the replacement

properties as ultimately belonging to the partner who identified them and arranged for their purchase. This includes the efforts of Toshiro Shiba to make reconciliations or re-accountings of partnership income according to the pre-allocations contemplated in the Family Agreement. Based on his reconciliations for tax years 1997 and 1998 partners made payments to one another which they identified as “gifts” in order to specifically attribute expenses of operation, profit or loss from the allocated properties to the partners who had selected those properties. The “gifts” were made with the full knowledge of all partners that they were not truly gifts but were attempts to reallocate or adjust the profit and loss of the Limited Partnership based on the pre-allocation of exchange property. (R. 1169, ¶49). If the intent of the parties was to simply work within the parameters of a limited partnership they would have no need to use personal funds to reallocate to each partner the partnerships profits and losses based on the performance of their replacement property acquired with pre-allocated funds. The only reasonable interpretation was that the parties’ agreement intended that during the time the partnership nominally owned each replacement property, each partner was responsible to receive or pay the income or cost its future property cost the other partners until distribution.

Based on the explanation of the attorney, and the actions of the parties, it the court should interpret the Family Agreement to amend the partnership agreement by providing for the partners to receive distribution of trust assets at a future date, not based on percentage of ownership at that future time, but rather, based on a distribution in kind

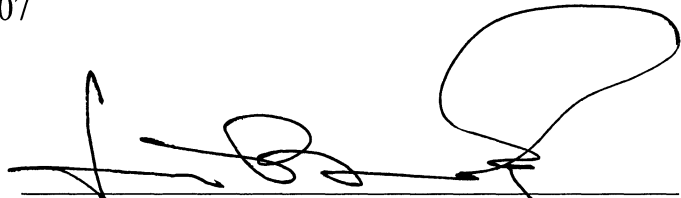
consisting of the replacement property each partner located and arranged for the partnership to purchase, including any gain or loss in revenues and equity associated with the replacement property.

### CONCLUSION

The trial court's conclusion that Toshiro Shiba is entitled to one-half of the proceeds received by the Masazo Trust from the sale of their jointly owned property should be reversed. Because the Toshiro Shiba and the Masazo Trust as tenants in common agreed to a specific division of the proceeds from the sale based on their respective interests in the property, and each received the amounts provided in the agreement, neither should have claim on the other's proceeds.

The trial court's conclusion that the Family Agreement of December 3, 1994 agreement fails to explicitly modify distribution of the replacement properties upon dissolution of the partnership or termination of the trust and that ultimate ownership and distribution upon dissolution of the partnership would be as previously established should be reversed. This court should affirm that the Family Agreement is a valid amendment to the partnership agreement and that the agreement as amended provides for the future distribution to each partner the replacement property it located, managed and had the partnership acquire from that partner's pre-allocated share in the partnership.

DATED this 7<sup>th</sup> day of June, 2007



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M. JAMES BRADY and  
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**MAILING CERTIFICATE**

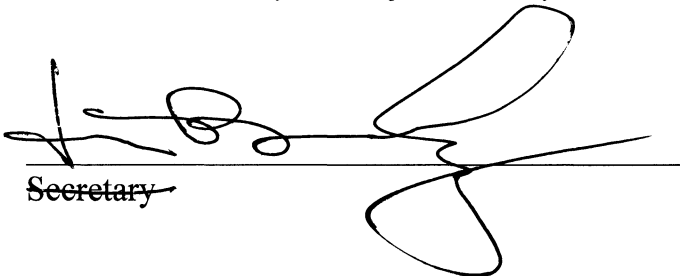
On this 7<sup>th</sup> day of June, 2007, two copies of the foregoing Brief of Appellant was mailed, first class mail postage paid to:

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Secretary



APPENDIX “A”

MEMORANDUM DECISION (R. 1097 - 1081)

6/27/05 ga Deputy

**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

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Masakazu Shiba et. al.,	:	
Plaintiffs	:	Memorandum Decision
vs.	:	Date: June 27, 2005
Toshiro Shiba, et. al.,	:	Case Number: 000401595
Defendants	:	Division VII: Judge James R. Taylor

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This matter came before the Court for trial of severed issues on June 20, 21, 22 and 23.

After receipt of evidence and argument the matter was taken under advisement. The Court now makes this memorandum decision.

This decision will not be a resolution of this entire case because, by stipulation of counsel, issues were severed for trial in the hope that this Court's rulings would then facilitate resolution of the balance of the action. This Court understands the issues to be determined by this hearing to be:

1. Whether distribution of assets presently titled in the name of the Shiba Family Farms Limited Partnership should be modified by the "Agreement" executed by all on or about December 3, 1994 (exhibit 13) and the documents incorporated or referenced by that document (exhibits 14 and 15);

2. Ownership of funds presently held in the Fidelity account resulting or set aside after being attributed to the sale of the home of Masazo Shiba; and,

3. Whether assets in the Masazo Shiba Family Trust should be distributed evenly among the four children of Masazo. On this point all agreed that any asset in the trust which is not included in property of the limited partnership or specifically bequeathed or designated to a family member or someone else should be treated as residual property of the trust and divided evenly among the four children. The only point of dispute surrounds identification of that property. That issue has been reserved for later determination.

#### Limited Family Partnership

The Shiba Family Farm Limited Partnership (hereinafter “SF”) was created in 1985 as part of the overall estate plan of Masazo Shiba and his wife Riye Shiba. The principal asset was a 300 plus acre farm which had been purchased during the 1950's and farmed from that time by Masazo and, later by a partnership operated by two of his sons, Masakazu and Toshiro. It was undisputed and the Court finds that SF included a specific definition of the interests of Masakazu and Toshiro as general partners and Masazo, his wife and the remaining children (and spouses) as limited partners. Distributions of profit, loss or property in kind were required to be made according to specified interests (exhibit 8, paragraphs 8.1 and 8.2). The limited partnership interests of Masazo and Riye were transferred to marital trusts. Upon the death of Riye, her interest merged with the trust of Masazo and by 1994 the Masazo Family Trust held a position as a limited partner with a capital position equal to the initial portions held by Masazo and Riye as individuals.

Sometime before 1994 the family encountered trouble in that the SF general partners, who were also joint trustees of the Masazo Family Trust, became unable to effectively cooperate in the operation of the affairs of SF. As the result of litigation or, perhaps, simply because of the disagreement it was determined that the farm should be sold. Because the property had been purchased approximately 40 years earlier a simple sale would have incurred significant capital gains taxes. The partners were, therefore, looking for a way to effect a Section 1031 “like kind” exchange which would substitute property into SF to replace the farming property and avoid immediate capital gains taxes. It was also desirable, because of the inability of the partners to cooperate, to separate management and responsibility for the various SF assets. Both Masazo and Toshio, together or separately consulted with local counsel David Jeffs. A plan was suggested whereby Masazo would first agree to not alter or otherwise amend his plan for distribution of properties and assets upon his death. SF assets would then be allocated to the various children who would each locate property to replace their designated share. SF would sell the farm and, with the proceeds, purchase the properties to be found. Income or loss and management expenses for those properties would be attributed to those who located the asset. By replacing SF property with properties that could qualify as “like kind exchanges” within a proper time after the sale of the farm property, SF could avoid immediate payment of capital gains taxes from the sale (the basis would be transferred to the replacement properties) and management of SF assets would be effectively divided.

The scheme was proposed by Mr. Jeffs in his letter of October 7, 1994. Implementation of the plan required the resolution of conflicts between the trusts of the parents and, most significantly, modification of the SF agreement to allow specific allocation of assets, income and expenses among the partners.

On October 22, 1994 shortly after receiving the Jeffs letter the family met in an effort to resolve differences. A second meeting was held on December 3, 1994. Exhibit 13 "Agreement" was executed during or following the December meeting by all SF partners, general and limited. The agreement incorporated and specifically indicated an intent to be bound by four identified documents: "No Change Pledge to the Masazo Shiba Marital and Family Trust Agreement" (exhibit 14); "Exchanging Properties From Farm Sale—December 3, 1994;" "Pre-Allocation Plans A & B...Dec. 1, 1994;" and, "Present Ownership Schedule. . . Oct. 22, 1994" (all exhibit 15).

Partners all began looking for exchange properties. Daughter Natsuye and her husband Ronald Nishijima located a building lot in Farmington (hereinafter identified as "FP"). Masakazu located a medical office building (hereinafter the "clinic") which could be purchased with a combination of his pre-designated share and seller financing. The other partners were unsuccessful in spite of numerous offers to purchase submitted to various parties by Toshiro.

The farm was sold in January, 1995 (exhibit 76) triggering the need to arrange for exchange properties within a designated time. When it was apparent that exchange properties

could not be located for Toshiro or Seiji or the marital trust partnerships it was proposed that their funds would be contributed to the clinic purchase on condition that when Masakazu located financing, the funds would be released to be placed to other projects. Title to the clinic was taken by deed to SF, Toshiro, Masakazu and the Family trust as tenants in common. Percentage of ownership was according to a determination of ownership of SF assets calculated by Mr. Jeffs as directed and assisted by the general partners, Toshiro and Masakazu. The percentages were generally consistent with the December 3, 1994 documents after accounting for investment of the Nishijima portion in the FP.

Financing was accomplished some months later in November, 1995, with the execution of a non-recourse note by SF to Berkshire Life Insurance Company. Proceeds from the loan which replaced or were equal to the SF funds used for purchase of the clinic attributed or allocated to all partners except Masakazu and the marital trust and to personal funds contributed to the purchase by Toshiro. Interest for the use of the money for those months was charged to and paid by Masakazu. The money was invested in identified stocks and accounts in the name of SF, where it remains.<sup>1</sup>

For several years SF made tax declarations and public accountings that would indicate that all properties including FP, the clinic and the investment accounts were held by SF and

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<sup>1</sup>Some funds from the sale of the farm were not available for like kind exchanges and were placed in SF accounts. In particular, money identified as proceeds from the home of Masazo was placed in a Fidelity account. Disposition of those proceeds will be discussed separately.

managed together in the same percentage of ownership as the farm had been before the sale. The partners felt this behavior was compelled by the need to insure the continued 1031 exchange tax benefit. Upon the advice of accountants, reconciliations or re-accounting according to the pre-allocations were performed for the years 1996, 1997, 1998 and 1999 by Toshiro. The 1996 reconciliation was not used but in 1997 and 1998 partners made payments identified as “gifts” at the request of Toshiro to specifically attribute expenses of operation, profit or loss from the allocated properties to the partners who had located those properties. No one was satisfied with the 1999 reconciliation and Masakazu, feeling that he had “cashed out” the other partners believed he now owned the clinic and had no need to account. Toshiro was advised that the “backroom” re-computations were illegal in that they violated both the still unamended SF agreement and the law related to 1031 exchanges. Masazo passed away in October, 1998 rendering the trust incapable of further amendment.

Counsel for Masakazu makes alternative arguments. The end result desired by Masakazu is a determination by this Court that the clinic and attendant operating accounts, along with the indebtedness should be distributed to him after adjusting for the 3% ownership of the trust and steps are taken to ensure remaining partners have no obligation or involvement with the Berkshire loan (which might require a re-financing). To get to that end counsel argues, first, that dissolution of SF and distribution of SF assets among partners are legally distinctive and need not occur at the same time. Dissolution, defined by Utah Code Annotated section 48-1-27 results

from a change in the relationship of the partners caused by the non-participation of a partner and is specifically distinguished from “winding up” or termination of partnership operations and distribution of partnership properties. He argues that when the partners ceased to cooperate in 1997 or 1998 a dissolution occurred which began the process of winding up leading to distribution. More critically, he argues that the 1994 agreement was a written modification of the 1985 SF agreement which both directs present termination of partnership activities and distribution of partnership properties. As an alternative argument, he argues that once the partners have become unable to cooperate under Utah Code Annotated section 48-2a-801 this Court has equitable power to enter a decree of judicial dissolution, eventually effecting a distribution of assets under section 48-2a-804.

Counsel for Toshiro, on the other hand, insists that SF has never been dissolved since, by its terms, it may only be dissolved by agreement of the partners. Key to the argument is his position that the 1994 agreements did not modify the SF agreement and that this Court cannot, in the name of equity, modify a written partnership agreement when the partners have failed to make the changes (even though some may have, at various times, acted as if the changes had been made). He argues that even if the Court acts to effect a judicial dissolution the Court is not free to “do equity” with partnership assets and responsibilities but must direct a wind-up and distribution in a manner consistent with the partnership agreement.

Utah Code Annotated, section 48-2a-801 provides in relevant part that:



A limited partnership is dissolved and its affairs shall be wound up upon the happening of the first to occur of the following: . . .

- (2) upon the happening of events specified in writing in the partnership agreement;
- (3) written consent of all partners; . . .
- (5) entry of a decree of judicial dissolution under Section 48-2a-802

The SF partnership agreement (exhibit 8, section 3.1) indicates that the partnership should continue “until dissolved by the death, insanity, bankruptcy, retirement, resignation or expulsion of both the General partners . . . or until dissolved by law or by agreement of the parties hereto.”

A judicial decree of dissolution is appropriate “whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement” (U.C.A. section 42a-802).

While the evidence is not clear that all of the parties have agreed to dissolution, this Court finds to a preponderance of the evidence that the general partners have become unable to cooperate and agree on fundamental matters related to the operation and management of the partnership and that it is not reasonably practicable to carry on the business in conformity with the partnership agreement, however it may have been amended. A decree of dissolution should therefore be entered and the partnership affairs wound up leading to a distribution of trust assets (U.C.A. Sections 48-2a-803 and 804).

Much of the partnership is owned by the Masazo Shiba Marital and Family Trust (hereinafter “the trust”). The trustees of the trust were initially the same individuals who were

designated as SF general partners, Masakazu and Toshiro. The trustor, Masazo, has died meaning that under the terms of the trust the property of the trust should now be distributed to the named beneficiaries. That portion of SF which is held by the trust should, according to the terms of the trust, be distributed 43.5% to Masakazu, 6.5% to Seiji, 6.5% to Natsuye and 43.5% to Toshiro. The FP property has already been distributed to Natsuye and her husband and it is undisputed that whatever share she and her husband might claim from either SF or the trust should be reduced by an amount equal to the value of FP.

If the 1994 agreement effectively allocated and assigned ownership of specific SF assets then the clinic and attendant cash accounts should be treated as the sole property of Masakazu and remaining assets should be divided among the remaining partners. If the 1994 agreement failed to effectively allocate SF properties then 69.48 % of the clinic, attendant cash and all other SF investments should be considered the property of the trust and distributed through the trust in such a way as to result in the percentages noted above (43.5%, 6.5%, 6.5% and 43.5%).

This Court specifically determines that although a decree of dissolution is required and that winding up and distribution of SF assets should be undertaken, the Court does not have equitable authority to vary the terms of the partnership to alter the ownership shares of the various partners. Section 48-2a-804 requires that upon the winding up of a limited partnership, “the assets shall be distributed” in accordance with the partnership agreement after accounting

for interim distributions and withdrawals.<sup>2</sup>

Amendments to the SF partnership agreement are specifically allowed under section 15.8 upon approval of more than 51% ownership interest of the partners. All of the partners representing 100% of the ownership interest executed the 1994 agreement. The agreement (exhibit 13) clearly and unambiguously expresses that all the partners agreed to be governed by four documents including the “No Change Pledge To The Masazo Shiba Marital And Family Trust Agreement . . . Dec. 3, 1994), (hereinafter “No Change Pledge”); “Exchanging Properties From Farm Sale . . . Dec. 3, 1994;” “Pre-Allocation Plans A & B . . . Dec. 1, 1994;” and, “Present Ownership Schedule . . . Oct. 22, 1994.”

The trustor of the Masazo Shiba Marital And Family Trust Agreement (Exhibit 2, “the trust”) retained in paragraph 2 the specific authority to modify the trust agreement. Mr. Jeffs noted in his proposal of October 7 (exhibit 11) that an amendment to the trust was necessary to carry out his suggestions. At that point the trustor (Masazo) was alive and able to make the amendment.

The “No Change Pledge” is a document executed only by Masazo (although witnessed by all the other partners). Although there was some question suggested about Masazo’s ability to understand documents in English, the undisputed testimony was that Toshiro translated, when

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<sup>2</sup>Arguably, the “pre-allocation” or designation of the FP to Natsuye and her husband and of the clinic to Masakazu could be considered and treated as an interim distribution under U.C.A. Section 48-2a-601, if such a distribution were authorized by the SF partnership agreement. It wasn’t although no party is presently challenging that distribution.

necessary, into Japanese and that Masazo understood the document which he signed. The fourth paragraph on the first page (Bates stamped TOSH-1458 of exhibit 14) purports to give beneficiaries of the trust the right to acquire replacement properties upon sale of the farm using their anticipated trust inheritances. But that grant is followed by the statement, “The pre-allocated amount and its earnings shall remain my property until such time of distribution from my estate.” If, as urged by Masakazu, the allocation of the clinic and the FP assets would be removed from that distribution the sentence would be rendered meaningless. This Court must assume that the language which tracks income, expenses and depreciation to the respective properties rather than to respective beneficiaries was intentional. The Court must conclude that the trustor (Masazo) intended to transfer only the ability to select and manage the particular replacement assets to the selecting partners. That interpretation gives some meaning to all of the paragraph and is consistent with the overall goal of protecting against early tax liability but diversifying control and management of SF assets.

This Court therefore determines that although an effective amendment to the trust, the intent of Mazazo in the “No Change Pledge” was not to remove the designated properties from his overall estate plan but to temporarily delegate selection and management of replacement assets upon sale of the farm. His intent was that those properties be returned to his estate plan for distribution at his death.

The document entitled “Exchanging Properties From Farm Sale” (hereinafter

“exchanging document”) must be read in conjunction with the “No Change Pledge.” While the pledge was directed toward the trust, the “exchanging document” was intended to create a framework to carry out the Jeffs plan for sale and replacement of SF assets. In the 6<sup>th</sup> paragraph on the first page (TOSH-1460, exhibit 15) the document says, in relation to replacement properties, that:

“[t]he income, expenses and depreciation can also be tracked to the respective property and not co-mingled with others in the partnership. Upon dissolution of the partnership, the ultimate value of the property at that time will also be separate. Thus, if a property performed better or worse than the others, it does not affect them.”

Earlier, in the 4<sup>th</sup> paragraph on the same page it says:

A unique way to allow individualizing the partner’s undivided interests without actually making distribution is to pre-allocate the equities. This pre-allocation will allow the individual partners to invest in separate properties. Each partner or combination may acquire replacement property, preferably of equal value to their equities. Each partner will be responsible for their respective property. However, all replacement properties will remain in the partnership and are its property until such time that the partnership is dissolved.

The agreement says that performance of replacement properties will be considered separately but that ownership of those properties will remain in the partnership. Reading the “No Change Pledge” and the “exchanging properties” documents together it is clear that all agreed that both the trust and the SF partnership agreement would allow the selection and management of replacement properties to be assigned to each of the partners to a degree equal to their percentage of ownership but that ultimate ownership and, critical for this discussion, distribution

upon dissolution of the partnership would be as previously established. The documents are valid amendments to both the trust and the SF partnership agreement but they fail to explicitly modify distribution of the replacement properties upon dissolution of the partnership or termination of the trust.

Pre-allocation plans A and B, together with the “Present Ownership” table were calculations to assist in the selection and allocation of replacement properties but also do not affect the ultimate plan for distribution of trust and partnership properties. In particular the “Present Ownership” document acknowledges the ongoing substantial ownership of SF assets by the trust and was later used by Mr. Jeffs to calculate the percentage of ownership specified within the clinic deed.

This Court therefore finds that the 1994 agreement, together with the four specific documents accepted by all parties effectively amended the trust and the SF partnership documents to allow each SF partner to individually (or in concert with others) select and manage replacement properties. The intent was to preserve the tax advantage of a like kind exchange for farm property to be sold and to diversify management of the assets. On the other hand, the agreement did not remove the replacement property from the estate plan as established by Masazo and specifically required that ownership of the properties remain within the partnership and ultimately be distributed in accordance with the unchanged estate plan. In short, the Court concludes that the argument of Toshio is correct and that all SF assets including the clinic and

associated cash accounts and the funds invested after the refinancing must be distributed in accordance with the partners' capital ownership. This will require, as part of the winding up process, that both sides to this dispute fully account for non-partnership distributions and expenditures of partnership assets, including cash.

#### Cash From the Sale of the Masazo Home (the Fidelity Account)

Masazo and Toshiro had homes on lots within an approximate 30 acre parcel of property sold with the farm. When that property was originally purchased title was placed in the name of Masazo and Toshiro as joint tenants (exhibit 60). The joint tenancy was severed when Masazo transferred, by quit claim deed, his portion to the trust (exhibit 62). The 30 acres included two parcels of approximately 1.5 acres each. Masazo had a home on one parcel and Toshiro had a home on the other parcel. The property was specifically excluded from SF partnership. As noted in the "Estate Plan for Masazo and Riye Shiba" (exhibit 1):

Area two contains the 30.1 acre parcel which has the house of Masazo and Riye Shiba (on 2 acres M or L), house of Tosh and Jean Shiba (on 1.5 acrs M or L) and the various outbuildings and improvements jointly owned by Masakazu and Tosh Shiba. The half interest held by Masazo will be transferred to Masakazu and the other half held by Tosh. This 30.1 acre parcel is not included in the limited partnership but its acreage and value (land only) will be included in the final distribution of properties including the value of the house (Masazo and Riye's) which will be given to Masakazu and included in his share. The reason this parcel is omitted from the partnership is because of the improvements situated on it which are not to be included in this estate plan.

As of October 22, 1994 the parties all agreed that the value of the Masazo home was

\$150,000.00 (exhibit 15, “Present Ownership”). The home, along with the rest of the 30 acres and, indeed, all of the farm acreage was sold in the same transaction in January, 1995. \$142,000<sup>3</sup> of the proceeds were separated and placed in a separate Fidelity account which has been separately maintained since that time. Masakazu now argues that Masazo’s intent was to specifically transfer to him the value of the home. Citing the nonademption statute, Utah Code Annotated section 75-2-606 Masakazu urges that he should receive the entire fund with any accumulated interest. Toshiro argues that he owned 50% of the value from the beginning since Masazo could only transfer the half that he owned at the creation of the estate plan. Counsel for Toshiro agreed that the nonademption statute applies, but only to what Masazo had to give. He insists that Toshiro and Masakazu should share equally in the account and that none of it should be included in the residual share of the trust, which was to be divided equally (25% each) to the four children.

This Court concludes that Toshiro is again correct. No explanation or testimony was provided to explain why the property was originally purchased in the name of both Masazo and Toshiro. Masazo seems to have disregarded that joint tenancy when he created his estate plan but the interest of Toshiro was created by warranty deed in 1959. The joint tenancy was severed by the quit claim deed in 1985 but Masazo could not unilaterally extinguish the ownership interest of Toshiro which was never transferred by any document or agreement until the entire

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<sup>3</sup>All agree that the gross amount of \$150,000 resulted from the sale of the home and that \$8,000 was consumed in expenses leaving a net of \$142,000 from sale of the home.

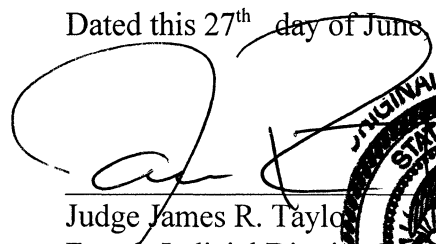


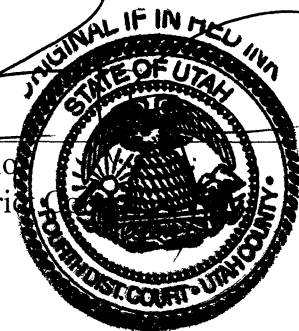
farm was sold. The plain evidence is that Toshiro retained legal title to half of the property included as a specific devise to Masakazu through the trust. It is axiomatic that a trustor cannot give away what he does not own. The Fidelity account should be equally shared by Masakazu and Toshiro.

### Conclusion

The Court concludes that although the 1994 agreement effectively amended both the trust and the limited partnerships, it authorized the separate replacement and management of the farm property but not distribution of that property at the dissolution of the partnership or distribution of the trust. The cash in the Fidelity account represents proceeds from the sale of the home which was specifically devised to Masakazu. Because 50% of that property was owned by Toshiro, that attempted transfer was only effective to half of the value. Accordingly Masakazu and Toshiro should share equally in the Fidelity account. Counsel for the Defendant Toshiro Shiba is directed to prepare findings and an order consistent with this decision.

Dated this 27<sup>th</sup> day of June, 2005

  
Judge James R. Taylor  
Fourth Judicial District



**A certificate of mailing is on the following page.**

**Shiba v. Shiba 000401595 Memorandum Decision 6/27/05**

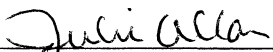
Copies of this Order mailed to:

M. James Brady  
389 North University Avenue  
Provo, Utah 84601

Evan A. Schmutz  
3319 North University Avenue  
Provo, Utah 84604

David Ray Carver  
Westgate Business Center  
180 South 300 West, Suite 218  
Salt Lake City, Utah 84101

Mailed this 28 day of June, 2005, postage pre-paid as noted above.

  
\_\_\_\_\_  
Court Clerk

## APPENDIX “B”

FINDINGS OF FACTS CONCLUSIONS OF LAW AND ORDER (R. 1180 - 1159)

M. JAMES BRADY (#3703)  
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**FILED**  
Fourth Judicial District Court  
of Utah County, State of Utah  
6-1-06 <sup>dx</sup> Deputy

Attorneys for Plaintiffs

File No. 2123.04

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**IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY  
STATE OF UTAH**

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MASAKAZU SHIBA and SHIZUE F.  
SHIBA, MASAKAZU SHIBA , TRUSTEE  
OF THE RIYE SHIBA MARITAL AND  
FAMILY TRUST, MASAKAZU SHIBA,  
TRUSTEE OF THE MASAZO SHIBA  
MARITAL AND FAMILY TRUST,  
Plaintiffs,  
vs.

TOSHIRO SHIBA, JEAN O. SHIBA, SEIJI  
SHIBA, DELLA KONO SHIBA, RONALD  
AND NATSUYE NISHIJIMA, RONALD  
AND NATSUYE NISHIJIMA, TRUSTEES  
OF THE RONALD AND NATSUYE  
NISHIJIMA FAMILY TRUST, TOSHIRO  
SHIBA , TRUSTEE OF THE RIYE SHIBA  
MARITAL AND FAMILY TRUST,  
TOSHIRO SHIBA, TRUSTEE OF THE  
MASAZO SHIBA MARITAL AND  
FAMILY TRUST, AND DOES 1-10,  
Defendants.

**AMENDED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

Civil No. 000401595  
Judge James Taylor  
Division # 7

This matter came to trial before the honorable James R. Taylor for a bench trial on June 20,  
21, 22 and 23, 2005. Plaintiffs were represented by James Brady of Bradford and Brady. Defendants

Toshiro Shiba, in his individual capacity and his capacity as trustee, and Jean Shiba were represented by Evan A. Schmutz of Hill, Johnson & Schmutz, L.C., and Defendants Ronald and Natsuye Nishijima, and Seiji and Della Shiba were represented by David Carver.

By a pretrial stipulation of the parties and pursuant to the order of the court, the trial of this case was bifurcated. The issues tried in this phase of the proceedings were limited to the following: (1) a determination of whether distribution of the assets presently titled in the name of the Shiba Family Farms, Ltd., a Utah limited partnership, was to be modified by a certain “agreement” signed by the family members, including Masazo Shiba, on December 3, 1994 and the documents referenced in such “agreement”, and the effect thereof, and (2) a determination of the ownership of the funds held in the “Fidelity Account” representing the proceeds of the sale of Masazo Shiba’s home.

At the conclusion of the evidence and closing arguments, the Court took the matter under advisement and, on June 27, 2005, issued its Memorandum Decision. The Court now makes the following Findings of Fact and Conclusions of Law:

### **FINDINGS OF FACT**

1. Plaintiffs Masakazu Shiba (“Sok”), Toshiro Shiba (“Tosh”), Natsuye Shiba (“Nats”) and Seiji Shiba (“Seiji”) are siblings and the children of Masazo and Riye Shiba, both of whom are deceased.
2. Beginning in the 1950s, Masazo, Tosh and Sok began to acquire farm ground in the area of Lehi, Utah, and began to farm the land that was acquired.

3. On May 25, 1959, Masazo and Tosh acquired by warranty deed approximately 100 acres of ground from Robert Webb and Phyllis Webb. (Exhibit 60). Included within such acreage was a parcel of approximately thirty acres upon which Masazo and Tosh each built homes.

4. On December 31, 1985, Masazo acted as Trustor in executing the Masazo Shiba Marital and Family Trust (the “Masazo Trust”). On the same date, Riye Shiba acted as Trustor in executing the Riye Shiba Marital and Family Trust (the “Riye Trust”). Tosh and Sok were named as the Trustees of both the Masazo Trust and the Riye Trust. (Exhibit 2).

5. On December 31, 1985, Masazo Shiba conveyed to the Masazo Trust, by Quit Claim Deed, all his right, title and interest in and to certain property including the thirty acre parcel with his home and the home of Tosh Shiba. (Exhibit 62). However, Tosh did not convey his interest in the 30 acre parcel to the Masazo Trust. Tosh retained his interest in the 30 acre parcel, including the homes of Masazo and Tosh.

6. The Masazo Trust provided, among other things, that upon the death of Masazo the interest of the Masazo Trust in the home Tosh built and resided in, together with a lot comprising approximately 1.49 acres should be distributed to Tosh or his heirs. (Exhibit 2, paragraph (6)(i)).

7. The Masazo Trust also provided that upon the death of Masazo, the interest of the Masazo Trust in Masazo’s primary residence, together with the lot on which it was built was to be distributed to Sok or his heirs. (Exhibit 2, paragraph (6)(ii)).

8. On December 31, 1985, the Shiba Family Farms limited partnership (the “Limited Partnership”) was created by the execution and filing of the Articles of Limited Partnership of Shiba

Family Farms (the “LP Agreement”). Sok and Tosh Shiba were named as general partners of the Limited Partnership, and the following were named as limited partners: Masazo Shiba, Riye Shiba, Jean Shiba, Shizue Shiba, Seiji Shiba, Della Shiba, Nats Nishijima, and Ronald Nishijima. (Exhibit 8).

9. Among other provisions, the LP Agreement provided that on an annual basis or at other times as determined by the general partners, the profits from the partnership could be distributed to the partners “provided that all of the partners shall participate in any such distribution pro rata in accordance with their respective capital contributions” (i.e., “in the ratio of [the partners’] share of the capitalization of the partnership).” (Exhibit 8, Section 8.1 and 8.2).

10. The LP Agreement also provided that in the event of the dissolution of the partnership, the general partners (i.e., Sok and Tosh) were to wind up the affairs of the partnership and could “elect to distribute undivided interests in partnership property to the partners in kind in proportion to their capital accounts at the time of distribution.” (Exhibit 8, Section 14.2).

11. The LP Agreement could be amended only if the amendment was proposed in writing to the limited partners, and the consent of more than 51% of the ownership of the Limited Partnership was given in writing, and in any event no amendment which reduced “the interest of any partner’s capital, profits, and depreciation or sharing ratio” could be binding without the specific consent of each partner affected thereby. (Exhibit 8, Section 15.8).

12. On December 31, 1985, Masazo and Riye conveyed to the Limited Partnership farm land totaling approximately 300 acres. This was the principal asset of the Limited Partnership. Following the conveyance of the farm land to the Limited Partnership, Sok and Tosh operated the farm as general partners under an agreement to rent the farm land from the Limited Partnership.

13. On or after December 31, 1985, the interest of Masazo in the Limited Partnership was transferred by him to the Masazo Trust.

14. On or after December 31, 1985, the interest of Riye Shiba in the Limited Partnership was transferred by her to the Riye Trust.

15. On April 19, 1989, a certificate for 15 shares of Utah Lake Distributing Company, an irrigation company, was issued to Masakazu Shiba and on the same date a certificate for 15 shares of the same irrigation company was issued to Tosh Shiba. (Exhibit 35).

16. On December 4, 1990, Masazo executed the First Amendment to the Masazo Trust to provide that the interest in the Limited Partnership owned by the Masazo Trust “shall be distributed in such a way as to achieve a final percentage of ownership” of any interest held by the Masazo Trust in real property (including the 30 acre parcel but excluding the houses owned by Masazo and Tosh) among the children as follows:

Masakazu (Sok)	43 ½ %
Seiji	6 ½ %
Natsuye (Nats)	6 ½ %
Toshiro (Tosh)	43 ½ %

The First Amendment to the Masazo Trust further directed the Trustees of the Masazo Trust to “make distribution out of the shares this trust owns in [the Limited Partnership], or which it acquires by operation of my Last Will and Testament, to the above-named persons to achieve said final result through my estate and the estate of my spouse. (Exhibit 3).

17. On December 27, 1990, Masazo executed the Second Amendment to the Masazo Trust to provide a specific legal description for Masazo’s primary residence that would be distributed



upon his death to Sok. The parcel described in the Second Amendment to the Masazo Trust was comprised of 1.372 acres. (Exhibit 4).

**18.** On January 14, 1995, a certificate for 198 shares of Welby Jacob Water Users Company, an irrigation company, was issued to the Limited Partnership. (Exhibit 34).

**19.** Riye died on November 3, 1986. Upon her death, the interest in the Limited Partnership held by the Riye Trust merged with the Masazo Trust. As of Riye's death, the Masazo Trust held a position as a limited partner in the Limited Partnership equal to the combined interests initially held by Masazo and Riye in the Limited Partnership, subject to any transfers of interests to other partners that were made between December 31, 1985 and Riye's death.

**20.** Prior to December 1994, Sok and Tosh became unable to effectively cooperate in the operation of the farm. This inability to cooperate also caused difficulty in the operation of the Limited Partnership.

**21.** These difficulties led to the commencement of prior litigation involving the farm ground and the operation of the Limited Partnership. As a result of the litigation, it was determined that the farm land should be sold. But the partners decided that because of the low basis in the farm land, a simple sale of the farm land would have incurred significant capital gains taxes. Therefore, the partners agreed that a Section 1031 "like kind" exchange of suitable property for the farm land which would be substituted into the Limited Partnership to replace the farm land and avoid immediate capital gains taxes.

**22.** The partners sought advice and counsel from a lawyer (David Jeffs) and from a CPA to guide them in a Section 1031 exchange.

**23.** On December 3, 1994, the family, including Masazo, met at Ron and Nat's house for a family meeting regarding Masazo's Trust, the Limited Partnership, Masazo's estate plan, and Section 1031 transactions. On the same date, all the individual members of the Limited Partnership representing 100% of the ownership interest signed a family "Agreement" (the "Family Agreement") (Exhibit 13). On the same date, Masazo signed a document entitled "No Change Pledge to the Masazo Shiba Marital and Family Trust Agreement" ("No Change Pledge"). Each of the siblings and their spouses signed the No Pledge Agreement as witnesses. (Exhibit 14).

**24.** The Family Agreement clearly and unambiguously expresses that all the partners agreed to be governed by four identified documents: (1) No Change Pledge (Exhibit 14); (2) Exchanging Properties from the Farm Sale (Exhibit 15); (3) Pre-Allocation Plans A & B, (part of Exhibit 15); and (4) Present Ownership Schedule (part of Exhibit 15) (collectively the "Family Agreement").

**25.** As part of the Family Agreement Masazo pledged that he would not make any further changes to the Masazo Trust, so that all his heirs and the partners of the Limited Partnership could rely on the inheritance they anticipated receiving from Masazo at his death. Masazo acknowledged that implementation of the plan of the Family Agreement would require him to amend the Masazo Trust and he agreed to cooperate by amending his trust to facilitate the exchanging of properties outlined in the Family Agreement. (Exhibit 14).

**26.** The trustor of the Masazo Shiba Marital and Family Trust agreement retained in paragraph 3 the specific authority to modify the trust agreement.

27. The fourth paragraph of the first page of the No Change Pledge purports to give beneficiaries of the trust the right to acquire replacement properties upon sale of the farm using their anticipated trust inheritances.

28. The fourth paragraph of the first page of the No Change Pledge also contains the statement, “The pre-allocated amount and its earning shall remain my [Masazo’s] property until such time of distribution from my estate.”

29. The Family Agreement provided that the assets of the Limited Partnership could be allocated to various children who would each locate a Section 1031 property to replace their designated share of the farm land owned by the Limited Partnership. The intent of the Family Agreement was that the farm land was to be sold and, with the proceeds of sale, the replacement properties could be purchased. Income or loss and management expenses for those replacement properties would be attributed to the partner who located and designated the replacement property. By replacing the Limited Partnership property with the replacement properties, the sale of the farm land could qualify as a “like kind” exchange and avoid immediate liability for capital gains taxes from the sale with the basis in the farm land being transferred to the replacement properties, and the management of Limited Partnership assets would be effectively divided among the partners.

30. The plan set forth in the Family Agreement was proposed by lawyer David Jeffs in a letter dated October 7, 1994. (Exhibit 11). However, as set forth therein, implementation of the plan required modification of the LP Agreement to allow specific allocation of assets, income and expenses among the partners.

**31.** Following the December 1994 meeting, the partners all began looking for exchange properties. Nats and Ron Nishijima located a building lot in Farmington, Utah (the “Farmington Lot”); and Sok located a medical office building (the “Medical Clinic”). The other partners were unsuccessful in finding suitable replacement properties, although Tosh made numerous offers to purchase properties from various owners. (See e.g., Exhibits 73, 86, 90, 91, 92, 95, 100, 111).

**32.** On December 3, 1994, in conjunction with the family meeting, Masazo, Sok, Shizue, Seiji, Della, Ron, Nats, Tosh and Jean all signed a Water Stock Agreement, which distributed 30 shares of the Utah Lake Distributing Company held by Sok and Tosh to the children of Masazo and Riye in accordance with the final distributions provided for in the Second Amendment to the Masazo Trust, i.e., 43.5% to Sok, 43.5% to Tosh, 6.5% to Seiji, and 6.5% to Nats. (Exhibit 33).

**33.** On January 10, 1995, the farm land was sold, along with some personal farming and irrigation equipment owned by Sok and Tosh in their individual capacities. The purchase price of the farm land was \$1,952,868. The purchase price of the farming and irrigation equipment was \$253,382, for a total purchase price of \$2,206,250. (Exhibit 76). The sale of the farm land triggered the need to designate replacement properties within the time required by the IRS for like kind exchanges.

**34.** At the time of the sale of the farm land, the Masazo Trust and Tosh also sold their interest in the 30 acres, including the two residential lots and homes, to the purchaser of the farm land. (Exhibits 69 and 70).

**35.** The proceeds of the sale of Masazo’s home and lot were deposited into an account held at Fidelity Investments, account no. T103225994 in the name of Masazo Shiba Marital and

Family Trust (the “Fidelity Account”). The Fidelity Account was established under the joint control of Tosh and Sok, as Trustees of the Masazo Trust. (Exhibit 81).

**36.** On January 30, 1995, the Farmington Lot, located and identified by Natsuye and Ronald Nishijima as replacement property, was purchased by the Limited Partnership for \$57,000. (Exhibits 26 and 71).

**37.** Masakazu located a medical office which could be purchased with a combination of his pre-designated share and seller financing. The other partners were unsuccessful in spite of numerous offers to purchase submitted to various parties by Toshiro. It was proposed that funds from Tosh, Seiji and the marital trusts be contributed to complete the purchase on condition that when Masakazu located financing, the funds would be released to be placed to other projects.

**38.** On July 6, 1995, the Medical Clinic was purchased for the total purchase price of \$1,610,415. The following parties contributed to the purchase of the Medical Clinic in the following amounts:

The Limited Partnership, as to 69.48%	\$1,118,628.00
The Masazo Trust, as to 3%	\$48,300.00
Sok Shiba, as to 13.76%	\$221,536.00
Tosh Shiba, as to 13.76%	\$221,536.00

(Exhibit 36).

**39.** On July 6, 1995, a Warranty Deed was delivered by the seller of the Medical Clinic, as Grantor, conveying and warranting title in the Medical Clinic to the following:

Shiba Family Farms, a Utah limited partnership, as to an undivided 69.48% interest; and

Masakazu Shiba and Toshiro Shiba, Trustees of the Masazo Trust, as to an undivided 3% interest; and

Masakazu Shiba, as to an undivided 13.76% interest, and

Toshiro Shiba, as to an undivided 13.76% interest.

(Exhibit 72).

**40.** The foregoing percentages of ownership in the Medical Clinic were calculated by Mr. Jeffs, as directed and assisted by the general partners, Sok and Tosh.

**41.** Financing was accomplished some months later in November 1995 with the execution of a non-recourse note by Shiba Family Farms to Berkshire Insurance company. (Exhibits 74, and 40).

**42.** Proceeds from the loan were distributed which replaced or were equal to the Shiba Family Farms funds used for the purchase of the clinic which were attributed or allocated to all partners except Masakazu and the marital trust, and were distributed which replaced or were equal to personal funds contributed to the purchase by Toshiro.

**43.** Interest for the use of the money for those months was charged to and paid by Masakazu.

**44.** The money received by Toshiro on behalf of Toshiro, Seiji and the marital trusts was invested in identified stocks and accounts in the name of Shiba Family Farms, where it remains.

**45.** The proceeds of the Berkshire Loan were deposited into an account or accounts owned by the Limited Partnership and were managed under the direction of Tosh as a general partner. Interest on the loan amount for the months between purchase of the Medical Clinic and the closing on the Berkshire Loan was charged to Sok. The proceeds of the Berkshire Loan were invested in identified stocks and financial instruments and accounts in the name of the Limited Partnership, where they remain.

46. Following its purchase, the Medical Clinic was managed by Sok, as a general partner.

47. On March 14, 1996, acting on the request of Sok Shiba, attorney David Jeffs wrote to both Sok and Tosh to transmit a draft Management Agreement in an attempt “to resolve many of the issues which we have previously discussed about the management of the two properties, the allocation of income and the ultimate distribution of the properties.” (Exhibit 87). The proposed Management Agreement was rejected by Tosh and no Management Agreement was ever entered into.

48. At all times following the purchase of the Medical Clinic, the tax returns of the Limited Partnership showed that the Limited Partnership treated the Medical Clinic as an asset of the Limited Partnership in the same capital percentage as the farm land had been held before the sale. (See e.g., Exhibits 44, 80, 94, 97, 99).

49. Upon the advice of accountants, for tax years 1996, 1997, 1998 and 1999, Tosh attempted to make reconciliations or re-accountings of partnership income according to the pre-allocations contemplated in the Family Agreement. The reconciliations for tax years 1996 and 1999 were not used, but for tax years 1997 and 1998 partners made payments to one another which they identified as “gifts” in order to specifically attribute expenses of operation, profit or loss from the allocated properties to the partners who had located those properties. The “gifts” were made with the full knowledge of all partners that they were not truly gifts but were attempts to reallocate or adjust the profit and loss of the Limited Partnership based on the pre-allocation of exchange property. (Exhibit 29).

**50.** At some point in this process, Tosh was advised that these “backroom” re-computations and “gifts” were illegal in that they violated both the still unamended LP Agreement and the law related to Section 1031 exchanges. As a result, he discontinued the preparation of reconciliations.

**51.** In October 1998, Masazo passed away, rendering the trust incapable of further amendment.

**52.** Since at least December 1997 through the present date, Tosh and Sok have been unable to cooperate on partnership matters and business, including the preparation of tax returns for the Limited Partnership. (See e.g., correspondence between Tosh and Sok in Exhibits 96, 112, 113, 114, 115, 130, 132).

**53.** On January 6, 2000, Tosh wrote a letter to attorney David Jeffs responding to Mr. Jeff’s letter of March 14, 1996 regarding the proposed Management Agreement. Tosh proposed a revised Management Agreement. (Exhibit 23).

**54.** On February 4, 2000, Mr. Jeffs wrote to Tosh advising that Sok had rejected the Management Agreement proposed by Tosh, and enclosing a proposed Liquidation, Exchange and Distribution Agreement (“Liquidation Agreement”). (Exhibit 24). Tosh rejected the proposed Liquidation Agreement.

**55.** On September 1, 2000, the Limited Partnership, as Grantor, conveyed the Farmington Lot to Ron and Nats Nishijima, by Warranty Deed. (Exhibit 30).



56. All property, real and personal, and all financial accounts have been retained in the name and title of the Limited Partnership except for the Farmington Lot which was distributed to Natsuye and Ronald Nishijima by the Limited Partnership.

57. As general partner of the Limited Partnership, Tosh has borrowed funds from the investment accounts of the Limited Partnership, for which he has executed promissory notes.

58. The general partners have become unable to cooperate and agree on fundamental matters related to the operation and management of the partnership and that it is not reasonably practicable to carry on the business in conformity with the partnership agreement however it may have been amended.

59. Amendments to the Shiba Family Farms partnership are specifically allowed under section 15.8 of the partnership agreement upon approval of more than 51% ownership interest of the partners.

60. All of the partners representing 100% of the ownership interest executed the 1994 agreement.

61. The 1994 agreement (Exhibit 13) clearly and unambiguously expresses that all the partners agreed to be governed by four documents including the “No Change Pledge to the Masazo Shiba Marital and Family Trust Agreement...Dec 3, 1994”; “Exchanging Properties From Farm Sale...Dec. 3, 1994”; “Pre-Allocation Plans A&B...Dec. 1, 1994”; and, “Present Ownership Schedule...Oct. 22, 1994.”

## **CONCLUSIONS OF LAW**

1. Utah Code Ann., §48-2a-801 provides in relevant part:

A limited partnership is dissolved and its affairs shall be wound up upon the happening of the first to occur of the following : . . .

- (2) upon the happening of events specified in writing in the partnership agreement;
- (3) written consent of all partners; . . .
- (5) entry of a decree of judicial dissolution under Section 48-2a-802.

**2.** The LP Agreement provides that the partnership should continue “until dissolved by death, insanity, bankruptcy, retirement, resignation or expulsion of both the General Partners . . . or until dissolved by law or by agreement of the parties hereto.” (Exhibit 8, §3.1).

**3.** A judicial decree of dissolution is appropriate “whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement.” (Utah Code Ann., §48-2a-802).

**4.** The general partners of the Limited Partnership in this case have become unable to cooperate and agree on fundamental matters related to the operation and management of the Limited Partnership and it is not reasonably practicable to carry on the business in conformity with the partnership agreement, however it may have been amended.

**5.** A decree of dissolution should be entered and the affairs of the Limited Partnership should be wound up in accordance with the terms and provisions of the LP Agreement, leading to a payment of all obligations and expenses of the Limited Partnership, an accounting of the capital accounts of the partners, and a distribution of the remaining assets of the Limited Partnership in accordance and conformity with such capital accounts.

**6.** The interest of the Masazo Trust in the Limited Partnership should be distributed to the beneficiaries of the Trust in accordance with the terms of the Masazo Trust, as amended by the First and Second Amendments thereto. In particular, the Court concludes that final distribution of

the Masazo Trust interest in the Limited Partnership should be done so as to accomplish a final distribution of the trust's interest in the partnership to the children in the following percentages:

Sok	43.5%
Tosh	43.5%
Seiji	6.5%
Nats	6.5%

**7.** The share that Ron and Nats are entitled to receive from winding up and distribution of the Limited Partnership shall be reduced by the value of the Farmington Lot which has already been distributed to them, the Court concluding that such prior distribution was an advance against the interest of Ron and Nats in the Limited Partnership. Value should be determined as of the date of conveyance to Ron and Nats.

**8.** The Agreement (Exhibit 13) clearly and unambiguously expresses that all the partners agreed to be governed by four documents including the 'No Change Pledge to the Masazo Shiba marital and Family Trust Agreement . . . Dec. 3, 1994'; Exchanging Properties From Farm Sale . . . Dec 3, 1994'; 'Pre-Allocation Plans A&B . . . Dec 1, 1994'; and, 'Present ownership schedule . . . Oct. 22, 1994'.

**9.** Pre-allocation Plans A&B, together with the "Present Ownership" table were calculated to assist in the selection and allocation of replacement properties but also do not affect the ultimate plan for distribution of trust partnership properties.

**10.** Notwithstanding the terms and provisions of the Family Agreement of December 3, 1994, the Court concludes that it does not have equitable power to vary or ignore the terms and provisions of the LP Agreement to alter the ownership shares of the partners therein.

**11.** Utah Code §48-2a-804 requires that upon winding up of a limited partnership, "the

assets shall be distributed” in accordance with the partnership agreement after accounting for interim distributions and withdrawals.

12. The Court interprets and construes the No Change Pledge of Masazo (Exhibit 14) as a matter of law to conclude that Masazo intended to transfer only the ability to select and manage the particular replacement assets to the selecting partners consistent with his goal to provide tax protection and diversification of control and management over Limited Partnership assets.

13. The Court concludes that the No Change Pledge was an effective amendment to the Trust but that the intent and effect of such amendment was not to remove the designated replacement properties, including the Medical Clinic, from his overall estate but to temporarily delegate selection and management of replacement assets upon the sale of the farm land, and that such properties would remain in his estate until his death when they would be distributed in accordance with the terms of the Masazo Trust, as amended by the First and Second Amendments.

14. When read together, the No Change Pledge and the document entitled “Exchanging Properties from Farm Sale” (Exhibit 15) clearly provide that all the family members agreed that both the Masazo Trust and the LP Agreement would allow the selection and management of replacement properties to be assigned to each of the partners to a degree equal to their percentage of ownership in the Limited Partnership for management and diversification purposes, but ultimate ownership and distribution upon dissolution of the partnership would be as previously established.

15. The documents, the 1994 Agreement together with the four specified documents, are valid amendments to both the trust and the Shiba Family Farms partnership but they fail to explicitly modify distribution of the replacement properties upon dissolution of the partnership or termination of the trust.

16. The Court concludes that all assets of the Limited Partnership, including the Medical Clinic, investment and cash accounts, water rights, and the funds invested from the Berkshire Loan, must be distributed to the partners in accordance with their respective capital ownership, after taking into account the effect of the Masazo Trust distribution. This will require, as part of the winding up process, that all parties fully account for any distributions, withdrawals and/or expenditures of Limited Partnership assets or funds.

17. The 30 acre parcel of ground that was owned by Masazo and Tosh in equal, undivided interests, included the two residences. The joint tenancy was severed by the quit claim deed in 1985 but Masazo could not unilaterally extinguish the ownership interest of Toshiro which was never transferred by any document or agreement until the entire farms was sold. Toshiro retained legal title to half of the property included as a specific devise to Masakazu through the trust.

18. Upon the sale of the 30 acre parcel in connection with the sale of the farm land by the Limited Partnership, the proceeds attributable to the residence of Masazo and the underlying 1.372 acres were deposited into the Fidelity Account.

19. The Court concludes that the Masazo Trust, as amended, provides for distribution of all interest held by the Masazo Trust in the residence of Masazo and the underlying 1.372 acres to Sok. Therefore, the Court concludes that Sok is entitled to a distribution from the Fidelity Account of an amount equal to 50% of the Fidelity Account.

### **ORDER**

The foregoing Findings of Fact and Conclusions of Law having been entered by the Court, and good cause appearing,

IT IS HEREBY ORDERED as follows:

1. The Masazo Trust is hereby probated and the assets thereof are to be distributed as follows:

a. The Fidelity Account shall be distributed to Sok and Tosh in equal amounts.

b. The interest of the Masazo Trust in the Limited Partnership shall be distributed to the beneficiaries of the Trust in the following percentages: Sok – 43.5%; Tosh – 43.5%; Seiji – 6.5%; and Nats – 6.5%.

c. The interest of the Masazo Trust in the Medical Clinic shall be distributed to the beneficiaries of the Trust in the following percentages: Sok - 43.5%; Tosh - 43.5%; Seiji - 6.5%; and Nats - 6.5%.

d. All other assets owned by the Masazo Trust shall be distributed to the beneficiaries in equal shares of 25% each.

2. The Limited Partnership is hereby judicially dissolved.

3. The Limited Partnership shall be wound up in accordance with the terms and provisions of the Limited Partnership Agreement. After payment of all expenses and liabilities of the Limited Partnership, the remaining assets shall be sold (or distributed in kind if such can be done by agreement of the general partners) and the proceeds thereof shall be distributed to the partners in accordance with their capital accounts, after accounting for any interim or prior distributions or withdrawals of partnership assets, including cash.

4. The Court shall set a schedule for the second phase of this bifurcated proceeding to determine an accounting and distribution of all remaining Masazo Trust assets and of the partnership

capital accounts in the Limited Partnership.

5. At the second phase of this bifurcated proceeding the Court will appoint one or both of the general partners or another qualified person to conduct the winding up of the Limited Partnership.

6. The Court reserves the determination of attorney's fees, costs and expenses of the litigation until the next phase of this bifurcated proceeding.

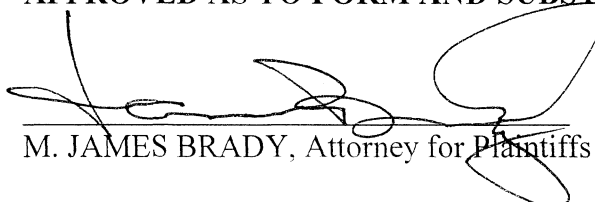
DATED this \_\_\_\_ day of March, 2006.

BY THE COURT:

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HONORABLE JAMES TAYLOR  
FOURTH DISTRICT JUDGE

**APPROVED AS TO FORM AND SUBSTANCE:**

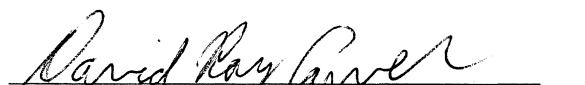


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M. JAMES BRADY, Attorney for Plaintiffs

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EVAN A. SCHMUTZ, Attorney for Defendants  
Tosh and Jean Shiba



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DAVID CARVER, Attorney for Defendants  
Ron and Nats Nishijima and  
Seiji and Della Shiba

capital accounts in the Limited Partnership.

5. At the second phase of this bifurcated proceeding the Court will appoint one or both of the general partners or another qualified person to conduct the winding up of the Limited Partnership.

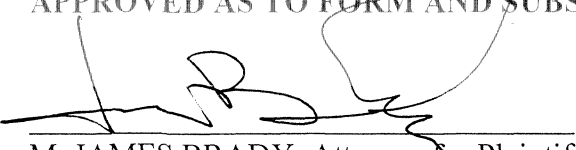
6. The Court reserves the determination of attorney's fees, costs and expenses of the litigation until the next phase of this bifurcated proceeding.

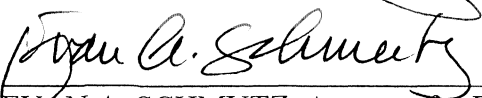
DATED this 31 <sup>May</sup> day of March, 2006.

BY THE COURT:

HONORABLE JAMES TAYLOR  
FOURTH DISTRICT JUDGE

APPROVED AS TO FORM AND SUBSTANCE:

  
M. JAMES BRADY, Attorney for Plaintiffs

  
EVAN A. SCHMUTZ, Attorney for Defendants  
Tosh and Jean Shiba

\_\_\_\_\_  
DAVID CARVER, Attorney for Defendants  
Ron and Nats Nishijima and  
Seiji and Della Shiba



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 22<sup>nd</sup> day of May, 2006, they caused a true and correct copy of the foregoing document to be served upon the following persons by depositing the same in the United States Mail, postage prepaid, addressed as follows:

Evan Schmutz  
HILL, JOHNSON & SCHMUTZ  
3319 North University Avenue  
Provo, Utah 84604

David Ray Carver  
CARVER & WEST, L.L.C.  
Westgate Business Center  
180 South 300 West, Suite 218  
Salt Lake City, Utah 84101

  
Secretary

## APPENDIX "C"

### EXHIBIT 1

#### FAMILY AGREEMENT

- a) Agreement
- b) No Change Pledge
- b) Exchanging Properties for the Farm Sale
- c) Pre-Allocation Plans A&B
- d) Present Ownership Schedule

# AGREEMENT

A family partnership meeting was held on December 3, 1994, at the home of Ron and Nats Nishijima with the following members present: Masazo Shiba, Masakazu & Shizue Shiba, Seiji & Della Shiba, Ron & Nats Nishijima and Tosh & Jean Shiba.

The purpose of this meeting was to continue the unfinished agenda of a previous meeting held and attended by the same parties on October 22, 1994.

Explanation and discussion was held on the intricacies of exchanging the farm property in its sale for other income producing properties. In order to facilitate a successful transformation to acquire replacement properties, it was highly stressed that mutual cooperation and agreements be made.

The most important topic was for Dad to make a pledge that he will not change the distribution schedule of the trusts. This was a concern which has been relieved and now allows us to go forward in the search for replacement properties without fear that the pre-allocated amounts will be changed.

Accordingly, it was agreed by all whose presence and signatures below, pledge that the following documents will govern:

No Change Pledge To The Masazo Shiba Marital And Family Trust Agreement...Dec. 3, 1994

Exchanging Properties From Farm Sale...Dec. 3, 1994

Pre-Allocation Plans A & B...Dec. 1, 1994

Present Ownership Schedule...Oct. 22, 1994

<u>Masazo Shiba</u> Masazo Shiba	Date: <u>December 3, 1994</u>
<u>Masakazu Shiba</u> Masakazu Shiba	<u>Shizue F. Shiba</u> Shizue F. Shiba
<u>Seiji Shiba</u> Seiji Shiba	<u>Della K. Shiba</u> Della K. Shiba
<u>Ronald H. Nishijima</u> Ronald H. Nishijima	<u>Natsuye S. Shiba</u> Natsuye S. Shiba
<u>Toshiro Shiba</u> Toshiro Shiba	<u>Jean O. Shiba</u> Jean O. Shiba

NO CHANGE PLEDGE TO THE MASAZO SHIBA  
MARITAL AND FAMILY TRUST AGREEMENT

I, Masazo Shiba, affirm that my estate plan and that of my late spouse, Riye Shiba, made on December 31, 1985, be honored with the changes listed in my first and second amendments executed on the 4th and 27th of December 1990, respectively.

It is my continued desire that the estate plans as previously written, are to pass on my property including that which was recognized as belonging to my late spouse, Riye Shiba, with the following distribution shares as prescribed in the first amendment of my marital and family trust agreement:

43.5%	Masakazu and Shizue F. Shiba
6.5%	Seiji and Della K. Shiba
6.5%	Ronald H. and Natsuye S. Nishijima
43.5%	Toshiro and Jean O. Shiba

I acknowledge that the intent of this document is to give my beneficiaries of the estate plans, quiet enjoyment so that they will receive their intended shares as designated above. I recognize that exchanging for income producing properties is the best method to preserve the maximum of the proceeds from the sale of the farm.

I give permission to my beneficiaries to combine their expected (inherited) shares from my present trust and that of my late spouse's trust with theirs in acquiring properties. It is with the understanding that my beneficiaries can use a pre-allocated amount equal to their expected (inherited) share based on value determined at the time of farm sale shown on Present Ownership Schedule dated October 22, 1994. The pre-allocated amount and its earnings shall remain my property until such time of distribution from my estate. However, in the situation in which it is necessary to make a moderate income adjustment in regard to different trust shares in either Sok's or Tosh's property, I give my consent to do so.

I recognize that there will be disparities among the property values when determined at the time of distribution of my estate. This will be remedied by tracking and correlating the amounts from the farm sale attributed to the respective partner shares. This will also include unused amounts with its respective taxes or debts if incurred.

I pledge that I will not change, nor cause to change, the estate plans in respect to the provisions of my first and second amendments to my marital and family trust agreement since I do not have any reason to do so either now or in the

future. However, I will cooperate by amending my trust to facilitate exchanging of properties outlined in the document titled "Exchanging Properties From Farm Sale presented in family meeting on December 3, 1994."

Masazo Shiba Date: 03 December, 1994  
Masazo Shiba

Witness:

Masakazu Shiba Shizue F. Shiba  
Masakazu Shiba Shizue F. Shiba

Seiji Shiba Della K. Shiba  
Seiji Shiba Della K. Shiba

Ronald H. Nishijima Natsuye S. Nishijima  
Ronald H. Nishijima Natsuye S. Nishijima

Toshiro Shiba Jean O. Shiba  
Toshiro Shiba Jean O. Shiba

TOSH-1459



**EXCHANGING PROPERTIES FROM FARM SALE**  
Presented In Family Meeting On December 3, 1994

A meeting was held with Howard Sherwood, CPA, in his office with Sok, Jean and Tosh on November 30, 1994.

The purpose of this meeting was to clarify the accounting concerns that arose from the structuring of the 1031 exchanges of the farm sale.

Howard referred to "luck of the draw" in which there has not been any audits among the various 1031 exchanges he has made that involved partnerships. Those were in which distributions of the assets were made and the partnership dissolved. He made it clear that the *comfort level* should determine the method for us to follow. In our case, it would be to follow the recommendation of David Jeffs to continue the partnership for a period of one year and preferably three or until Dad's death.

A unique way to allow individualizing the partner's undivided interests without actually making distribution is to pre-allocate the equities. This pre-allocation will allow the individual partners to invest in separate properties. Each partner or combination may acquire replacement property, preferably of equal value to their equities. Each partner will be responsible for their respective property. However, all replacement properties will remain in the partnership and are its property until such time that the partnership is dissolved.

Present equity of each partner is established from the farm sale after selling expenses are deducted. This amount with the addition of an expected share to be ultimately received from the trusts will establish the amount that will be pre-allocated to each partner. *In other words, present ownership plus future inherited share from the trusts equals pre-allocated share.* ✓

If a replacement property is not matched to the equity, the boot either given or received is to be tracked to the respective partner's interest. The income, expenses and depreciation can also be tracked to the respective property and not comingled with others in the partnership. Upon dissolution of the partnership, the ultimate value of the property at that time will also be separate. Thus, if a property performed better or worse than the others, it does not affect them. Howard assures us that all of this can be tracked by accounting. The key to be able to accommodate this is by mutual agreement of all partners.

The two trust equities can be treated by combining one with Sok's property and the other with Tosh's property. The beneficiary interests of Seiji, Nats and Tosh (spouses

included in all and future references) are to be relinquished from the trust that is linked with Sok. Tosh will resign as trustee of that trust. The opposite is to be done with the other trust that is linked with Tosh.

In regard to the difference in equities of the two trusts, the net amount to be allocated to the beneficiaries is to be transferred from either Sok or Tosh...depending on the balance. Those amounts designated for future distribution from the respective trusts to Seiji and Nats are to be transferred either by Sok or Tosh from their personal equities. Please refer to the schedules shown in Pre-Allocation Plan A and B. Again, by mutual agreement, equities determined at the time of farm sale are to be used without consideration of change in values at time of actual trust distribution or partnership dissolution.

Since the trust shares when combined with Sok's and Tosh's properties will not be equal in proportion in each, the income of the trusts will likewise be unequal (41.6% and 56.4%). If the trust share is higher, Sok's or Tosh's share will be smaller. Since Mother's trust equity is larger than Dad's, the one linked with Mother's will result with a smaller share of income. To adjust for that, the income share in each property can be adjusted so that Sok and Tosh will have the same percentage from their properties. Again, by mutual agreement.

In regard to financing of properties, the partnership will have to carry the mortgage on them. The extent of the mortgages may be limited by the amount and number of them. This will require coordination since it will all come under the original partnership. Financing will be tracked to the individual property.

All of the preceding discussion is predicated on replacing the farm properties in the original limited partnership with other replacement properties. The original partnership will need to be continued with all replacement properties held by it for at least six months. After that time, the original partnership can be split into two or more.

All of the partnerships will be separate entities with their own partners and books. Sok's partnership can be made with Shizue, Sok and a trust. Seiji's can be with he and Della. I do not have any answer for Ron's and Nat's trust yet. They can however have common partners (with others) if it is desired.

These partnerships can be terminated about three years from now or when settling Dad's estate.

\*\*\*\*\*

342.6 acres

27.8 acres

Partners Present Share In Acres	342.6 acres					27.8 acres	
	Masazo's Trust	Riye's Trust	Sok & Shizue	Tosh & Jean	Seiji & Della	Masazo's Trust	Tosh & Jean
	15.50%	26.50%	22.50%	22.50%	6.50%	50.00%	50.00%
	53.1	90.8	77.1	77.1	22.3	13.9	13.9

**TOTAL SHARE OF LTD. PARTNERSHIP WITH T.I.C. PARCEL INCLUDED**

342.6 + 27.8 = 370.4 acres

Partners Total Present Share (ac)	370.4 acres						
	Masazo's Trust	Riye's Trust	Sok & Shizue	Tosh & Jean	Seiji & Della	Ron & Nats	
	67.0	90.8	77.1	91.0	22.3	22.3	
	0.00%	0.00%	43.50%	43.50%	6.50%	6.50%	
	0.0	0.0	161.1	161.1	24.1	24.1	

**PRE-ALLOCATION PLAN A**

Sok & Shizue d. Partnership A	3577/ac					3255 Net	
	Sok & Shizue's present share					275,700	250,900
	Masazo's Trust present share					239,700	218,100
	Riye's Trust present share (Share of)					61,200	55,700
						576,600	524,700
	Tosh & Jean's present share					325,600	296,300
	Riye's Trust present share					324,800	295,500
	Less for Sok & Shizue's share					-61,200	-55,700
	Less for Seiji & Della's share					-6,400	-5,900
	Less for Ron & Nats' share					-6,400	-5,900
	Tot. amt. to apply from Riye's Trust					250,700	228,100
						576,300	524,400
	Seiji & Della's present share					79,700	72,500
	Riye's Trust present share (Share of)					6,400	5,900
						86,100	78,300
	Ron & Nats' present share					79,700	72,500
	Riye's Trust present share (Share of)					6,400	5,900
						86,100	78,300

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12-11-11



**LIMITED PARTNERSHIP**

342.6 acres

	Masazo's Trust 15.50%	Riye's Trust 26.50%	Sok & Shizue 22.50%	Tosh & Jean 22.50%	Seiji & Della 6.50%	Ron & Nats 6.50%
Partners Present Share In Acres	53.1	90.8	77.1	77.1	22.3	22.3

27.8 acres

Masazo's Trust 50.00%	Tosh & Jean 50.00%
13.9	13.9

**TOTAL SHARE OF LTD. PARTNERSHIP WITH T.I.C. PARCEL INCLUDED**

342.6 + 27.8 = 370.4 acres

	Masazo's Trust	Riye's Trust	Sok & Shizue	Tosh & Jean	Seiji & Della	Ron & Nats
Partners Total Present Share (ac)	67.0	90.8	77.1	91.0	22.3	22.3
Future Share With Inheritance	0.00% 0.0	0.00% 0.0	43.50% 161.1	43.50% 161.1	6.50% 24.1	6.50% 24.1

**PRE-ALLOCATION PLAN B**

			3577/ac	3255 Net
Sok & Shizue Ltd. Partnership A	Sok & Shizue's present share	77.1	275,700	250,900
	Riye's Trust present share	90.8	324,800	295,500
	Less for Seiji & Della's share	-1.8	-6,400	-5,900
	Less for Ron & Nats' share	-1.8	-6,400	-5,900
	Less for Tosh & Jean's share	-3.1	-11,100	-10,100
	Tot. amt. to xfer from Riye's Trust	84.1	300,800	273,700
		161.2 ac	576,500	524,600
Tosh & Jean Ltd. Partnership B	Tosh & Jean's present share	91.0	325,600	296,300
	Masazo's Trust present share	67.0	239,700	218,100
	Riye's Trust present share (Share of)	3.1	11,100	10,100
		161.1 ac	576,300	524,400
Seiji & Della Ltd. Part. C	Seiji & Della's present share	22.3	79,700	72,500
	Riye's Trust present share (Share of)	1.8	6,400	5,900
		24.1 ac	86,100	78,300
Ron & Nats Ltd. Part. C	Ron & Nats' present share	22.3	79,700	72,500
	Riye's Trust present share (Share of)	1.8	6,400	5,900
		24.1 ac	86,100	78,300

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PRESENT OWNERSHIP

Owner	Share	Gross Amount
IIBA FAMILY FARMS		
Farmland (342.6 ac @ 3577/ac)		1,225,500
Tosh & Jean Shiba	22.50%	275,700
Sok & Shizue Shiba	22.50%	275,700
Masazo Shiba Marital & Family Trust	15.50%	190,000
Riye Shiba Mar. & Fam. Trust	26.50%	324,800
Seiji & Della Shiba	6.50%	79,700
Ron & Nats Nishijima Family Trust	6.50%	79,700
MASAZO SHIBA MARITAL & FAMILY TRUST AND MOSHIRO SHIBA T.I.C.		
Land (27.8 ac @ 3577/ac)		99,400
Masazo Shiba Mar. & Fam. Trust	50.00%	49,700
Tosh Shiba	50.00%	49,700
Residences (Two)		
Res. #1 Masazo Shiba Mar. & Fam. Trust	100.00%	150,000
Res. #2 Tosh Shiba & Jean Shiba (Not included in division)	100.00%	232,600
CO-OWNED PROPERTIES		
Formerly Shiba Farms (Oral Partnership)		
Irrigation Equipment		34,600
Tosh Shiba	50.00%	17,300
Sok Shiba	50.00%	17,300
Improvements...Bldgs, feedlots, bins, etc.		257,800
Tosh Shiba	50.00%	128,900
Sok Shiba	50.00%	128,900

REDUCE GROSS AMOUNTS FOR SELLING EXPENSES APPROX. 6%

TOTAL AMOUNT

2,000,000

M.S. M.S. S.S. Seiji Shiba & Nats Nishijima  
Tosh Shiba & Jean Shiba