

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 Appellee

Utah Court of Appeals

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M. James Brady, Margot Edwards; attorneys for appellants.

Evan A. Schmutz, Andrew V. Wright; Hill, Johnson and Schmutz; David Ray Carver; Carver and West; attorneys for appellees.

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**IN THE SUPREME COURT OF THE 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 : App. Case No.: 20060560  
MARITAL AND FAMILY TRUST, :

Plaintiffs and Appellants, : Oral argument requested

v. :

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 and Appellees, :

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**BRIEF OF THE APPELLEE**

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Appeal from the Judgment of the Fourth Judicial District Court,  
County of Utah, State of Utah  
The Honorable James R. Taylor

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FILED  
UTAH APPELLATE

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OF THE RIYE SHIBA MARITAL AND :  
FAMILY TRUST, MASAKAZU SHIBA, :  
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MARITAL AND FAMILY TRUST, :

Plaintiffs and Appellants, : Oral argument requested

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Appeal from the Judgment of the Fourth Judicial District Court,  
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The Honorable James R. Taylor

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M. James Brady  
Margot Edwards  
BRADFORD & BRADY, P.C.  
389 North University Ave.  
P.O. Box 432  
Provo, Utah 84601

Attorneys for Plaintiffs/Appellants

Evan A. Schmutz  
Andrew V. Wright  
HILL, JOHNSON & SCHMUTZ, LC  
RiverView Plaza, Suite 300  
4844 North 300 West,  
Provo, Utah 84604-5663

Attorneys for Defendants/Appellees:  
Toshiro Shiba, Jean O. Shiba, Toshiro  
Shiba as Trustee of the Riye Shiba  
Marital and Family Trust, and Toshiro  
Shiba as Trustee of the Masazo Shiba  
Marital and Family Trust

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

Attorneys for Defendants/Appellees:  
Seiji Shiba, Della Kono Shiba, Ronald  
and Natsuye Nishijima, and Ronald and  
Natsuye Nishijima as Trustees of the  
Ronald and Natsuye Nisijima Family  
Trust

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## **I. STATEMENT OF JURISDICTION**

The Order from which this interlocutory appeal is taken was entered on June 1, 2006. (R. 1180-1159). Plaintiffs filed their Petition for Permission to Appeal Interlocutory Order with the Supreme Court on June 16, 2006. 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) because the appeal is one over which the Court of Appeals does not have original jurisdiction.

## **II. STATEMENT OF THE ISSUES**

### **Appellees are Dissatisfied with Appellants' Statement of the Issues.**

Pursuant to Rule 24(b)(1), Utah Rules of Appellate Procedure, and because Appellees are dissatisfied with the statement of issues provided in Appellants' Brief, Appellee hereafter sets forth the Appellants' statement of issues and the reasons for Appellee's dissatisfaction with the same.

#### **A. Appellants' Statement of the Issues and Standard of Review.**

1. 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?

Standard of Review: 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).

2. Where the court finds that a written agreement between 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 trial court err in ruling that the agreement failed to modify the method of distribution of the partnership assets upon its termination?

Standard of Review: 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).

B. Appellees' Dissatisfaction with Appellants' Statement of the Issues.

Issue No. 1: Appellants' statement of the first issue presented by this appeal contains an inaccurate and erroneous statement of the factual circumstances presented at the trial of this action. Appellants refer to a 'clear and unambiguous agreement' but cannot cite to or produce any agreement which provides for sale of the 30 acre parcel and distribution of proceeds in specific amounts. Appellants fail to include in their statement the fact that the property in question is the 30 acre parcel which was originally acquired by Masazo Shiba ("Masazo") and Tosh Shiba ("Tosh") as tenants in common, each with an undivided 50% interest in such property, and which interest Tosh had held since prior to the creation of the Trusts or the Limited Partnership. Also, it is not clear from the

statement that Appellants challenge the trial court's factual finding that Tosh Shiba did not ever convey his 50% interest in Masazo's home and the surrounding property, or the trial court's corresponding legal conclusions that Masazo had no right to dictate the disposition of Tosh's interest in the 30 acre parcel through his Trust. (R. 1163, ¶¶17, 18)

Therefore, as to the money deposited into the Fidelity Account from the proceeds of sale of the Masazo home and property, Tosh was never a tenant in common with Sok, and the clear and unambiguous Family Agreement did not provide for conveyance by Tosh of his personal interest in the Masazo home and property to the Partnership, or to Sok.

Issue No. 2: The basis of Appellee's challenge to the Appellants' statement of issue no. 2 lies both in the inaccuracy of the statement of factual circumstances presented therein as well as in the inconsistency with the statement of issue no. 1 as to the absence of ambiguity, and with the argument raised by Appellants' Brief in support of such statement. The primary asset of the Shiba Family Farms Limited Partnership ("Partnership") was the family farm, a tract of approximately 300 acres. (R. 1177, ¶12). The Partnership also owned valuable water rights. (R. 1175, ¶18). On January 10, 1995, the farm land owned by the Partnership was sold, along with personal farming and irrigation equipment owned by Appellant Masakazu Shiba ("Sok") and Tosh. (R1172, ¶33). On July 6, 1995, the Medical Clinic property was purchased by the following parties and in the following percentages of ownership:

Limited Partnership	69.48%
---------------------	--------

The Masazo Trust	3%
Sok Shiba	13.76%
Tosh Shiba	13.76%

(R1171, ¶38). The Warranty Deed delivered in connection with the purchase of the Medical Clinic established title in the Medical Clinic to the purchasing parties in the same interests as they contributed to the purchase price. (R1171, ¶39).

The Limited Partnership Agreement (“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 “in accordance with their respective capital contributions” and in the event of dissolution of the Partnership, the general partners were to wind up the affairs of the Partnership and “distribute undivided interests in partnership property to the partners in kind in proportion to their capital accounts at the time of distribution.” (Exh. 8) (R. 1177, ¶¶9, 10).

Despite Appellants’ attempt to characterize their appeal as an appeal of the trial court’s interpretation of the contract, the issue presented for appeal in issue no.2 is, in actuality, a challenge to the trial court’s underlying determination of facts. Therefore, Appellants’ statement of the standard of review as pertains to issue no. 2 is incorrect. In light of the fact that Appellants ask this Court to examine factual issues and determinations, the standard of review of such findings should proceed under the more deferential “clearly erroneous” standard. *Gallegos ex rel. Rynes v. Dick Simon Trucking, Inc.* 110 P.3d 710 (Utah App. 2004).

Under this standard, a trial court’s findings will not be set aside unless clearly

erroneous. “In order to establish that a particular finding of fact is clearly erroneous, ‘[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court’s findings are so lacking in support as to be against the clear weight of the evidence.’ If the evidence is inadequately marshaled, this court assumes that all findings are adequately supported by the evidence.” *Chen v. Stewart*. 2004 UT 82, ¶19, 100 P.3d 1177, 1184). As to mixed questions of law and fact:

The application of a legal standard ... involves varying degrees of discretion depending on the standard in question. If the application of the standard is extremely fact sensitive, then the reviewing court should generally give the trial court considerable discretion in determining whether the facts of a particular case come within the established rule of law. Even where the [appellants] purport to challenge only the legal ruling, ... if a determination of the correctness of a court’s application of a legal standard is extremely fact sensitive, the [appellants] also have a duty to marshal the evidence.” *Id.*

Appellants’ statement of the standard for review is incorrect, as it incorrectly characterizes the question on appeal as strictly a legal question when it is a review of the trial court’s findings of fact. As shown above, Appellees have completely failed to marshal the evidence. Therefore, the Court should assume that, in the Appellants’ failure to marshal, all findings of fact (including mixed findings of fact and law) are adequately supported by the evidence.

### **III. 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 action for dissolution and accounting of a limited partnership, and for the

probate and distribution of the assets of a trust, which is a limited partner in the partnership.

**B. Court Proceedings and Disposition.**

Appellees hereby adopt the Appellants' Statement of the Case as to the "Course of proceedings and disposition below". (*See* Appellants' Brief, p. 3).

**C. Material Facts.**

Appellant Sok, and Appellees Tosh, Natsuye Shiba Nishijima ("Nats") and Seiji Shiba ("Seiji") are siblings and the children of Masazo and Riye Shiba ("Riye"), both of whom are deceased. (R. 1179, ¶1). 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. (R. 1179, ¶2).

On May 25, 1959, Masazo and Tosh acquired by warranty deed approximately 100 acres of ground from Robert Webb and Phyllis Webb. Under the Warranty Deed for the 100 acres, Masazo and Tosh each held an undivided 50% interest as tenants in common. (Trial Exhibit 60; addendum Exhibit A). Included within such acreage was a parcel of approximately thirty acres upon which Masazo and Tosh each built homes (the "30 acre parcel"). (R. 1178, ¶3). 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. (Trial Exhibit 2; addendum Exhibit B) (R. 1178, ¶4).

On December 31, 1985, Masazo conveyed to the Masazo Trust, by Quit Claim Deed, all his right, title and interest in and to certain property including the 30 acre parcel with his home and the home of Tosh Shiba. (Trial Exhibit 62; addendum Exhibit C). 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. (R. 1178, ¶5). 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, ¶ (6)(i)). (R. 1178, ¶6). 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. (Trial Exhibit 2, paragraph (6)(ii)), (R. 1178, ¶7).

On December 31, 1985, the Partnership was created by the execution and filing of the Articles of Limited Partnership of Shiba Family Farms. Sok and Tosh Shiba were named as general partners of the Partnership, and the following were named as limited partners: Masazo, Riye, Jean Shiba ("Jean"), Shizue Shiba ("Shizue"), Seiji, Della Shiba ("Della"), Nats, and Ronald Nishijima ("Ron"). (Trial Exhibit 8; addendum Exhibit D) (R. 1178-77, ¶8).

Among other things, 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, §§ 8.1 and 8.2) (R. 1177, ¶9). 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, § 14.2) (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 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, § 15.8) (R. 1177, ¶11).

On December 31, 1985, Masazo and Riye conveyed to the Partnership farm land totaling approximately 300 acres. This was the principal asset of the Partnership. Following the conveyance of the farm land to the Partnership, Sok and Tosh operated the farm as general partners under an agreement to rent the farm land from the Partnership. (R. 1177, ¶12).

On or after December 31, 1985, the interests of Masazo and Riye Shiba in the Partnership were transferred by them to their respective trusts (R. 1176, ¶¶13, 14).

On December 4, 1990, Masazo executed the First Amendment to the Masazo Trust to provide that the interest in the 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 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. (Trial Exhibit 3; addendum Exhibit E) (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. (Trial Exhibit 4; addendum Exhibit F) (R. 1175-76, ¶17).

Riye died on November 3, 1986. Upon her death, the interest in the 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 Partnership equal to the combined interests initially held by Masazo and Riye in the Partnership, subject to any transfers of

interests to other partners that were made between December 31, 1985 and Riye's death. (R. 1175, ¶19).

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 Partnership. (R. 1175, ¶20). These difficulties led to the commencement of prior litigation involving the farm ground and the operation of the 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 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 Section 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. On the same date, all the individual members of the Partnership signed a family "Agreement" (the "Family Agreement") (Trial Exhibit 13; Appellants' Exhibit 1). 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. (Trial Exhibit 14; Appellants' Exhibit 1) (R. 1174, ¶23). The Family Agreement incorporated and specifically indicated an intent to be bound by four identified documents: (1) No Change Pledge (Trail Exhibit 14); (2) Exchanging Properties from the Farm Sale ("Exchanging Properties document") (Trail Exhibit 15; Appellants' Exhibit 1); (3) Pre-Allocation Plans A & B ("Pre-Allocation Plans") (part of Trail Exhibit 15); and (4) Present Ownership Schedule (part of Trail Exhibit 15) (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 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) (R. 1174, ¶25). However, Masazo never amended the Masazo Trust in the manner contemplated. (*See* Trial Exhibits 1 through 7; addendum Exhibits B, E, F - J).

Although the fourth paragraph of the No Change Pledge purports to give beneficiaries of the trust the right to acquire replacement properties upon the sale of the farm using their anticipated trust inheritances, the same paragraph also contains the statement: "The pre-allocated amount and its earnings shall remain my [Masazo's] property until such time of distribution from my estate." (Trial Exhibit 14) (R. 1173, ¶¶27-28).

The Family Agreement provided that the assets of the 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 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. (R. 1173, ¶29). 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 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 Partnership assets would be effectively divided among the partners. (R. 1173, ¶29).

The plan set forth in the Family Agreement was proposed by lawyer David Jeffs in a letter dated October 7, 1994. (Trail Exhibit 11; addendum Exhibit K). However, as set forth therein, Mr. Jeffs recognized and instructed that implementation of the plan would require modification of the LP Agreement to allow specific allocation of assets, income and expenses among the partners. (R. 1173, ¶30). The LP Agreement was never modified to accomplish the proposed implementation of the plan. (Exhibit 8).

Following the December 1994 meeting, the partners all began looking for exchange properties. Nats and Ron 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., Trial Exhibits 73, 86, 90, 91, 92, 95, 100, 111; addendum Exhibits L - S). (R. 1172, ¶31).

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. (Trial Exhibit 76; addendum Exhibit T). 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 acre parcel, including the two residential lots and homes, to the purchaser of the farm land. (Trial Exhibits 69 and 70; addendum Exhibits U and V) (R. 1172, ¶34). 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 the Masazo Trust (the "Fidelity Account"). The Fidelity Account was established under the joint control of Tosh and Sok, as Trustees of the Masazo Trust. (Trial Exhibit 81; addendum Exhibit W) (R. 1172-1171, ¶35) .

On January 30, 1995, the Farmington Lot was purchased by the Partnership for \$57,000. (Trial Exhibits 26 and 71; addendum Exhibits X and Y) (R. 1171, ¶36).

When replacement properties could not be found by all the partners, it was proposed that Tosh, Sok and the Masazo Trust contribute funds to complete the purchase

of the Medical Clinic and when refinancing was subsequently acquired, the funds would be released to be placed in other projects. 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

(Trial Exhibit 36; addendum Exhibit Z) (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, as to an undivided 69.48% interest; and  
Masakazu Shiba and Toshiro Shiba, Trustees, 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.

(Trial Exhibit 72; addendum Exhibit AA) (R. 1171-1170, ¶39). 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. (R. 1170, ¶40).

On November 21, 1995, refinancing for the Medical Clinic was accomplished with the closing of a loan from Berkshire Life Insurance Company in the amount of \$900,000 (the “Berkshire Loan”), and the execution of a non-recourse note in that amount by the Partnership, the Masazo Trust, Sok and Tosh as obligors. (Trial Exhibits 74, 40; addendum Exhibits BB and CC) (R. 1170, ¶41). The proceeds of the Berkshire Loan were deposited into an account or accounts owned by the Partnership and managed under

the direction of Tosh, as a general partner. The proceeds of the Berkshire Loan were invested in identified stocks and financial instruments and accounts in the name of the Partnership, where they remain. (R. 1170, ¶42). Following its purchase, the Medical Clinic was managed by Sok, as a general partner. (R. 1169, ¶46)

On March 14, 1996, acting on the request of Sok, 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.” (Trial Exhibit 87; addendum Exhibit DD). The proposed Management Agreement was rejected by Tosh and no Management Agreement was ever entered into. (R. 1169, ¶47).

At all times following the purchase of the Medical Clinic, the tax returns of the Partnership showed that the Partnership treated its interest in the Medical Clinic as an asset of the Partnership in the same capital percentage as the farm land had been held before the sale. (See e.g., Trial Exhibits 44, 80, 94, 97, 99; addendum Exhibits EE - II) (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 Partnership based on the pre-allocation of exchange property. (Trial Exhibit 29; addendum Exhibit JJ) (R. 1169, ¶49).

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, and no more “gifts” were exchanged by the partners after tax year 1998. (R. 1168, ¶50).

In October 1998, Masazo passed away, rendering the Masazo 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 Partnership. (See e.g., correspondence between Tosh and Sok in Trial Exhibits 96, 112, 113, 114, 115, 130, 132; addendum Exhibits KK - QQ) (R. 1168, ¶52). 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. (Trial Exhibit 23; addendum Exhibit RR) (R. 1168, ¶53). 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”). (Trial

Exhibit 24; addendum Exhibit SS). Tosh rejected the proposed Liquidation Agreement. (R. 1168, ¶54).

On September 1, 2000, the Partnership, as Grantor, conveyed the Farmington Lot to Ron and Nats, by Warranty Deed. (Trial Exhibit 30; addendum Exhibit TT, R. 1168, ¶55).

All property except for the lot conveyed to Ron and Nats, real and personal, and all financial accounts, have been retained in the name and title of the Partnership. (R. 1167, ¶56).

As general partner of the Partnership, Sok has managed the Medical Clinic. During the course of such management, Sok has withdrawn for his personal use funds from the rental income of the Medical Clinic for which accounting has not been made to the Partnership. (Tr. 497). As general partner of the Partnership, Tosh has borrowed funds from the investment accounts of the Partnership, for which he has executed promissory notes and paid interest to the Partnership in accordance with the provisions set forth in the LP Agreement. (R. 1167, ¶57).

Prior to the Trial of this action, no dissolution of the Partnership has occurred, and there has been no winding up of Partnership affairs. Amendments to the Partnership are specifically allowed under section 15.8 of the Partnership Agreement 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. (R. 1167, ¶¶59-60).

The 1994 Family Agreement (Trial Exhibit 13) clearly and unambiguously expresses that all the partners agreed to be governed by four documents including the No Change Pledge; the Exchanging Properties document; the Pre-Allocation Plans; and, the Present Ownership Schedule. (R. 1167, ¶61).

#### **IV. SUMMARY OF THE ARGUMENT**

The trial court correctly concluded that Tosh Shiba is entitled to a distribution of 50% of the funds held in the Fidelity Account representing his interest in the proceeds from the sale of Masazo's home and acreage because Tosh never conveyed his interest to the Trust or the Partnership and Masazo had no legal ability to transfer Tosh's interest to his trust. Further, the trial court correctly concluded that the Family Agreement failed to modify distribution of the Partnership assets upon dissolution of the Partnership and that distribution of the assets must be effectuated as previously established in the LP Agreement.

Further, as Appellants have failed to argue the issues as presented, have not properly preserved or raised the issue of ambiguity, have improperly present extrinsic evidence of intent and have failed to marshal the evidence, this Court should adopt the trial court's findings and conclusions, affirming the same on appeal.

## V. ARGUMENT

### A. **THE TRIAL COURT CORRECTLY CONCLUDED THAT TOSH DID NOT RELINQUISH TITLE TO AN UNDIVIDED ONE HALF INTEREST IN THE MASAZO HOME AND ACREAGE AND IS, THEREFORE, ENTITLED TO A DISTRIBUTION OF 50% OF THE FUNDS HELD IN THE FIDELITY ACCOUNT FROM THE SALE OF MASAZO'S HOME.**

As noted above, from a reading of Appellants' issue no. 1, it is difficult to understand the precise legal issue Appellants seek to have reviewed. However, a reading of Appellants' argument makes clear that Appellants seek to overturn the trial court's conclusion and order that the funds deposited in the Fidelity account belong to Tosh and Sok in equal shares. Appellants contend that in the Family Agreement, specifically the Present Ownership Schedule, Tosh and the Masazo Trust agreed to convey their jointly held property (i.e., Masazo's home) and distribute all of the proceeds from the sale of the home to Sok. (Appellants' Brief at 16-18).

Appellants' argument fails for several reasons. First, Appellants have completely failed to demonstrate how the Present Ownership Schedule constitutes an agreement for Tosh to convey to Sok all of his interest in the Masazo residence. The schedule makes no such statement and, although signed, does not contain a sufficient declaration of contractual intent or a sufficient description of property to support a legal conclusion that Tosh has conveyed his titled interest in a specific property to Sok. "If the property to be conveyed under a land sales contract is not described by the agreement with certainty, specific performance of the agreement may not be required." *Barnard v. Barnard*, 700 P.2d 1113, 1114 (Utah 1985). To the contrary, the Present Ownership Schedule sets forth

a number of items of real and personal property and what appears to be corresponding shares attached to each. The only reference to property in the Present Ownership Schedule which could be the Masazo home is the following: “Res. #1 Masazo Shiba Mar. & Fam. Trust.” However, that reference is imprecise, does not include any legal description of property and fails to reference Tosh’s undisputed title to an undivided 50% interest. Consequently, the Masazo home and related real property is not described specifically or sufficiently, the shares are internally inconsistent from a mathematical analysis, the calculations predate and presuppose a sales transaction (i.e., specific amounts) that never occurred, and the calculations are not referenced in any of the text of the Family Agreement in such a way as to support a finding or legal conclusion that the parties had reached an agreement to convey property in the manner argued by Appellants.

Indeed, and to the contrary, the No Change Pledge (Trial Exhibit 14, Appellants’ Exhibit 1) references the Present Ownership Schedule, but does so in language which unmistakably refutes Appellants’ contention. At page one of the No Change Pledge, Masazo provides that while the Present Ownership Schedule may be used by his children to calculate a “pre-allocated amount”, he makes clear that the “pre-allocated amount and its earnings shall remain my property until such time of distribution from my estate,” thus dispelling any argument that a pre-distribution occurred. (Emphasis added). He concludes the No Change Pledge by stating: “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.’” (Trial Exhibit 14,

Appellants' Exhibit 1). From the foregoing, it is clear that Masazo was discussing only his property, and as to his property, Masazo decided to retain all ownership of the same until it was distributed from his estate. Further, although he made clear any exchange of properties would require modification of his trust and that he would cooperate in amending it, the trust was never modified accordingly. Therefore, as to Tosh Shiba's property, the No Change Pledge had no force or effect. It was applicable only to Masazo's property held in trust.

It appears that Masazo may have been operating under a mistaken assumption that his trust owned 100% of his home, or that he had simply forgotten that Tosh was the titled holder of 50% of the home but, either way, Masazo had no legal ability to convey property owned by Tosh. The trial court correctly ruled on this point.

Second, nothing in the language of the Family Agreement, including the Present Ownership Schedule, contains any statement of agreement by Tosh to convey the property. Further, there is no statement from which the existence of consideration to support a conveyance by Tosh can be determined or implied. "Consideration is an 'act or promise, bargained for and given in exchange for a promise. . . ." *Resource Management Co. v. Weston Ranch*, 706 P.2d, 1028, 1036 (Utah 1985). "Where consideration is lacking, there can be no contract." *General Ins. Co. Of America, v. Carnicero Dynasty Corp.*, 545 P.2d 502, 504 (Utah 1976). In the absence or lack of consideration stated or implied in any of the Family Agreement documents, there can be no contract to bind Tosh to a conveyance of his interest in Masazo's home and acreage. What is clear in the trial

record is that no deed or contract exists for the purchase and sale, or the conveyance by gift, of Tosh's interest in Masazo's home. The trial court recognized the absence of such an agreement by concluding that Tosh retained his interest.

Nevertheless, Appellants argue that the Present Ownership schedule modifies the agreement of the parties regarding their individual interests in the 30 acre parcel.

Appellants concede that the trial court concluded the four documents comprising the Family Agreement were agreed upon by the parties and are "valid amendments to both the trust and the [LP Agreement]" but Appellants fail to also point out that the trial court found that such documents "fail to explicitly modify distribution of the replacement properties upon dissolution of the partnership or termination of the trust." (R. 1164, ¶¶15).

Finally, as discussed below, Appellants fail to direct this Court to any determinative provisions of either the Masazo Trust or the LP Agreement which provide for distribution of Tosh's interest in the proceeds of the sale of the residences. In light of the lack of any definitive language in the Family Agreement modifying the Masazo Trust or the LP Agreement, and the absence of language in the Trust and LP Agreement to provide for conveyance of Tosh's property, the Court properly held that while the Pre-allocation Plans, together with the Present Ownership Schedule were calculations to assist in the selection of and allocation of replacement properties, they do not affect the ultimate plan for distribution of Trust and Partnership properties. As to Tosh's interest in the Masazo home, the Court reviewed the plain evidence and concluded that Tosh retained

legal title to half the property until he sold his share to the purchaser of the Farm, and his interest could not be disturbed or amended by the Family Agreement.

Pursuant to the Masazo Trust, Masazo directed that the Trust's  $\frac{1}{2}$  share in the 30 acre parcel was to be distributed under three separate provisions of the Trust. Under Section 5d(6)(i), the interest of the Masazo Trust in 1.49 acres "more or less" of the 30 acre parcel where Tosh's home was located was to be distributed to Tosh. Since Tosh already owned the other undivided  $\frac{1}{2}$  of the 1.49 acres and home, as a beneficiary of the Trust, he became the 100% owner of the home and parcel on which it sits. (Masazo Trust, Exhibit 2, p. 7). Under Section 5d(6)(ii), as amended, the  $\frac{1}{2}$  undivided interest of the Masazo Trust in 1.372 acres of real property where Masazo and Riye's primary residence was located was to be distributed to Sok. (Masazo Trust, Second Amendment, Exhibit 4). At the distribution of the Trust, that would result in Sok owning an undivided  $\frac{1}{2}$  interest in the Masazo home and 1.372 acres, and Tosh owning an undivided  $\frac{1}{2}$  interest in the home and 1.372 acres (due to the fact that Tosh's interest was never conveyed nor relinquished). Under Section 5d(6)(iii), the remaining portion of the Masazo Trust's  $\frac{1}{2}$  share of the 30 acre parcel was to be distributed in equal shares to Tosh and Sok. (Masazo Trust, Exhibit 2, p. 8).

At the time the farm was sold in 1995, the 30 acre parcel was sold with it. (R. 1172, ¶34). All of the proceeds of the sale of Masazo's home and the 1.372 acres that it sits on were deposited into an account known as the Fidelity Account, which is still owned by the Masazo Trust. (R. 1172-1171, ¶35). Appellants fail to point out that not

only does Tosh, by virtue of the 1959 Warranty Deed (Exhibit 60), own a half interest in proceeds of the sale of Masazo's residence, but the Masazo Trust also provides that Tosh is to receive the Masazo Trust's share in Tosh's residence, therefore making Tosh owner of 100% of the proceeds resulting from the sale of his residence and 50% of the proceeds resulting from the sale of Masazo's residence. Therefore, the trial court properly concluded Tosh was entitled to 50% of the Fidelity Account. (R. 1163, ¶ 14).

In this case the merger doctrine supports the trial court's determination. The Utah Supreme Court has recognized that the merger doctrine serves the purpose of "preserv[ing] the integrity of the final document of conveyance and encourag[ing] the diligence of the parties." *Secor v. Knight*, 716 P.2d 790, 795 (Utah 1986). In accord with this principle is the basic premise that

ordinarily, a final contract does represent the final meeting of the minds, and in it are merged all the terms expressing the final intentions of the parties and any augmentations. If there are inconsistencies between the terms of the preliminary and final contracts, those of the latter will ordinarily govern.

*Embassy Group, Inc. v. Hatch*, 865 P.2d 1366, 1370 (Ut.Ct.App. 1993); Quoting *Mawhinney v. Jensen*, 120 Utah 142, 150, 232 P.2d 769, 774 (1951). "Furthermore, the supreme court has recognized that a deed is tantamount to a final real estate contract . . . " *Id.* at 1371; Quoting *Espinoza v. Safeco Title Ins. Co.*, 598 P.2d 346, 348 (Utah 1979).

Here, Tosh's 50% interest (as established by the Warranty Deed) in Masazo's home never was conveyed into the Masazo Trust and therefore the parties couldn't have

agreed to a certain distribution because the Trust never owned the property. There is no document that ever conveys Tosh's interest into the Masazo Trust. As such, the court cannot distribute property pursuant to the Masazo Trust that the Trust does not own.

The parties agreed that Masazo's home, in which Tosh owned a ½ interest as tenant in common (Exhibit 60, R. 1178), was valued at \$150,000.00 (R. 1084-1083). Subsequently, the proceeds from the sale of the home were placed in the Fidelity Account (R. 1172, 1171). On December 31, 1985, Masazo conveyed, by quit claim deed, his interest in the property including the 30 acre parcel on which his home stood. (Exhibit 62, R. 1178). However, Tosh did not convey any of his interest in the 30 acre parcel or in Masazo's home. (R. 1178).

Therefore, pursuant to Tosh's ownership under the 1959 Warranty Deed and the determinative provisions of the Masazo Trust, Tosh is entitled to one half of the proceeds deposited into the Fidelity Account and one half of any interest accrued thereon.

**B. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE FAMILY AGREEMENT FAILED TO MODIFY DISTRIBUTION OF THE PARTNERSHIP ASSETS UPON DISSOLUTION OF THE PARTNERSHIP.**

Notwithstanding Appellants' improper arguments regarding ambiguity of the Family Agreement, there has never been an effective amendment regarding modification of distribution percentages pursuant to the LP Agreement. (R. 1164, ¶¶ 14-15). The trial court concluded that amendments to the LP Agreement were specifically allowed under section 15.8 of the partnership agreement (Exhibit 8) upon approval of more than 51% ownership interest of the partners. Specifically, section 15.8 states, in part, the following:

Amendments. If the General Partners shall propose in writing to the Limited Partners the adoption of an amendment to this agreement, and if, within thirty (30) days of the giving of a notice containing such proposal, more than fifty-one percent (51%) in ownership interest of the partners, including the General Partners, shall have given their written consent thereto, then each Limited Partners, shall, if requested, promptly execute or cause to be executed one or more amendments to this agreement and certificates of the partnership as may be required to reflect such amendments under the laws of the jurisdictions in which the partnership does business at such time.

Here, there has been no such amendment. The trial court determined in its Memorandum Decision that by reading the documents of the Family Agreement in conjunction with one another:

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 . . . fail to explicitly modify distribution of the replacement properties upon dissolution of the partnership or termination of the trust.

(R.1086-1085).

The trial court also found that the partners were aware of the LP Agreement and sought advice from professionals regarding implementation of certain financial strategies.

(R. 1175, ¶22). As such, the partners were aware that if they intended to modify or alter the ownership shares of the partners they would have to comply with the LP Agreement to effectuate such an amendment. (R. 1173, ¶30). However, this did not happen. Rather, the evidence supported the trial court's conclusion that there was no amendment and that the partners implemented the 1031 exchange for the purpose of selecting and managing

replacement properties, assigned to each partner to a degree equal to their percentage of ownership in the Partnership, for management and diversification purposes only, but that ultimate ownership and distribution of the Partnership would be as set forth in the unamended LP Agreement. ( R. 1165-64, ¶¶10-16).

Further, a limited partnership is a creature of statute and courts do not have authority to disregard the legal structure and manner in which a limited partnership may be amended. The trial court recognized this legal principle when it stated: “. . . 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.” (R. 1065, ¶11). In its Memorandum Decision, the trial court based its conclusion on Utah Code § 48-2a-804, and stated:

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.

(R. 1065-1064). Notably, Appellants do not challenge the trial court’s conclusion that it does not have equitable power to vary or ignore the LP Agreement.

Therefore, as limited partnerships are created by statute, and as the LP Agreement is specific as to how the partners are to effectuate an amendment of the same, the trial court’s ruling is correct that it does not have the authority to ignore or vary the terms of the LP Agreement to alter ownership percentages of the partners and that the Family Agreement does not modify the distribution method of the LP Agreement. As such, there

has never been an effective amendment altering or modifying the distribution percentages of the LP Agreement.

Moreover, and contrary to Appellants' argument that the parties intended the Family Agreement to amend the LP Agreement, the documentary evidence is clear that the parties intended that the Partnership retain ownership of all replacement properties and that upon dissolution of the Partnership, distribution of the assets would be as previously established in the LP Agreement. (R. 1069, 1064).

**1. Appellants Misconstrue the Trial Court's Findings Regarding Payment of Interest for Purchase of the Medical Clinic.**

Appellants have misconstrued a finding of fact of the trial court and have failed to marshal the evidence and clarify such finding in the attempt to have this court believe that the parties' intent was something other than what the evidence demonstrates. In the trial court's Amended Findings of Fact and Conclusions of Law, paragraph 43, the court found: "Interest for the use of the money for those months was charged to and paid by Masakazu." (R.1170). However, there was never a finding that Sok used his personal funds to pay this interest. There also has never been a finding by the trial court that the Partnership did not make final payment on the accrued interest for the use of the aforementioned monies. Despite the absence of such a finding, Appellants have nevertheless asserted that the interest for the use of this money was paid by Sok personally. (Appellants' Brief at 29). This simply is not the case and is not supported by the record.

The payment referenced by the trial court in finding no. 43 (R. 1170) was \$31,264.59. This amount was calculated in the document entitled “Distribution of Interim Amounts Before Loan Funding Under Pre-Allocated Basis.” (See Exhibit UU to Appendix). On that document, payment of the stated sum is referenced as having been made by check no. 311 on November 20, 1995. The corresponding check is drawn on the account of Shiba Family Farms – the Partnership – at Zions Bank. (See Exhibit VV to Appendix). This clearly demonstrates that while Sok wrote the check, it was paid from Partnership funds, not Sok’s personal funds.

Though marked for use as exhibits at trial, the foregoing documents were not introduced by either party. However, Appellees believe under the circumstances of this argument, where Appellant wrongly implies from the Court’s finding that Sok paid the interest the factual assertion that Sok actually paid the interest from his personal funds, it is appropriate to provide copies of records showing that Sok paid the interest from partnership funds. At a minimum, Appellees have demonstrated that it is not proper for Sok to draw the inference from the trial court’s findings that payment of such interest was made from Sok’s personal funds.

Therefore, as Appellants’ argument is based, in part, on the theory that the parties used personal funds to pay the other partners for use of the partnership funds, and as this scenario is not a true representation, Appellants’ argument must fail. The trial court determined that the properties and assets of the Partnership remain the property of the Partnership until such time of dissolution. (R. 1086-1085).

Therefore, the trial court's ruling should be affirmed that the Family Agreements, as a matter of law, failed to modify the LP Agreement with respect to the distribution of the replacement properties upon dissolution of the Partnership.

**C. APPELLANTS FAIL TO ARGUE THE ISSUES AS PRESENTED, HAVE NOT PROPERLY RAISED OR PRESERVED THE ISSUE OF AMBIGUITY, IMPROPERLY PRESENT EXTRINSIC EVIDENCE OF INTENT AND FAIL TO MARSHAL THE EVIDENCE.**

**1. As Appellants Have Failed to Properly Raise the Issue of Ambiguity, They Should be Barred from Arguing Such on Appeal and any Citation to Extrinsic Evidence of Intent is Inappropriate and Should not be Considered.**

A review of Appellants' Brief shows that regardless of how they characterize the issues, this is not an appeal of alleged legal error by the trial court. Indeed, there is almost no citation to legal authority in the brief, and no attempt to demonstrate that the trial court erred in its application of law to the facts. Instead, Appellants argue that the Family Agreement documents at issue in this case are ambiguous and unclear, and focus their argument on an analysis of selective evidence to show that the court committed "legal error" in concluding that the LP Agreement required distribution of the assets of the Partnership in accordance with the capital ownership of each partner.

Although it is difficult to identify the Appellants' argument from their presentation of the issues,<sup>1</sup> a review of Appellants' Brief shows that the argument as to issue no. 2 is almost exclusively focused on the argument that the trial court erred in not interpreting

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<sup>1</sup> For this reason, the Appellees have challenged the statement of issues and set forth the reasons for their dissatisfaction with the statement of issues presented by Appellant. *See infra* pp. 1-5.

the Family Agreement to be ambiguous with respect to the distribution of the replacement properties at dissolution of the Partnership, and in failing to apply the Family Agreement to distribute the property of the Partnership according to certain “pre-allocations” of property for management within the Partnership. In making this argument, Appellants contend that the trial court should have considered extrinsic evidence of the parties’ intent. (Appellants’ Brief at 18-22). However, Appellants have failed to raise and preserve the issue of ambiguity before this Court. Appellants never raised at trial, in their docketing statement, or in their statement of issues presented, the question of whether the trial court erred in failing to find, as a matter of law, that the Family Agreement was ambiguous thus requiring examination of extrinsic evidence in order to amend the LP Agreement on the question of distribution.

Rather, the Appellants specifically argued to the trial court that the Family Agreement was clear and unambiguous and constituted an amendment or modification of the LP Agreement with respect to distribution of the replacement properties. (Tr. 761-68). The Court agreed in part that the Family Agreement “unambiguously expresses that all the partners agreed to be governed by [the] four documents [comprising the Family Agreement].” (R. 1165, ¶8). But the trial court further concluded, as a matter of law, that pursuant to the No Change Pledge (Exhibit 14), “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.” (R. 1164, ¶12). The trial court also

concluded that the No Change Pledge “was an effective amendment to the Trust but that the intent of such amendment was not to remove the designated replacement properties, including the Medical Clinic, from [Masazo’s] 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.” (R. 1164, ¶13).

In summary of the foregoing conclusions, the trial court concluded that when read together, the documents comprising the Family Agreement clearly provide that all the family members agreed that “ultimate ownership and distribution upon dissolution of the partnership would be as previously established.” (R. 1164, ¶14). The trial court concluded as a matter of law that the Family Agreement constituted a valid amendment to both the Masazo Trust and the Partnership but they failed to explicitly modify distribution of the replacement properties upon dissolution of the Partnership or termination of the Trust. (R. 1164, ¶15). Therefore, the trial court concluded 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. (R. 1163, ¶16)

In order to challenge the correctness of the trial court’s legal conclusions as to the interpretation of the contracts at issue in this case, i.e., the Family Agreement, the Masazo Trust and the LP Agreement, Appellants must demonstrate that the trial court improperly interpreted and applied specific language in such contractual documents from the four

corners of the documents. On this appeal (at least as to issue no. 2)<sup>2</sup>, however, Appellants have for the first time contended that the Family Agreement documents are ambiguous and unclear and that resort to an examination of extrinsic facts is necessary in order to determine the intent of the parties with respect to such documents. It is improper to raise this issue for the first time on appeal.

Appellants have not properly preserved the legal question of whether the trial court erred in holding that the Family Agreement is clear and unambiguous. It is well established that courts will not consider matters raised for the first time on appeal. *Wade v. Stangl*, 869 P.2d 9, 11 (Utah App. 1994). Utah courts generally look at three factors when determining whether a party properly preserved an issue for appeal: “(1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority.” *Brookside Mobile Home Park, LTD. v. Peebles*, 48 P.3d 968, 972 (Utah 2002) as cited from *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998); *see also State v. Brown*, 856 P.2d 358, 361 (Utah App. 1993) (for an issue to be properly preserved for appellate review, it must be raised to a level of consciousness such that the trial judge can consider it).

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<sup>2</sup> It appears that Appellants take an inconsistent view as to whether the Family Agreement is ambiguous or not, depending upon the issue raised. For example, in issue no. 1, Appellants contend that the parties entered into a “clear and unambiguous written agreement” to sell the farm and related property (including the 30 acre parcel) and distribute the proceeds in a specific amount to each co-tenant), but then, when making their argument as to issue no. 2, Appellants contend that the Family Agreement is ambiguous and unclear.

Here, counsel for Appellees has been unable to locate any instance in the trial court record where the Appellants raised the issue of ambiguity of the Family Agreement with respect to amending the distribution percentages of the partners upon dissolution of the Partnership. Rather, and contrary to Appellants' current position, at the trial of this matter Appellants argued that the court should find the Family Agreement sufficient to modify the LP Agreement so as to provide for a distribution of the replacement properties. (Tr. 761-68). Alternatively, Appellants argued that if the trial court did not find the Family Agreement sufficient to modify the LP Agreement, the court should find that the LP Agreement could be modified by conduct of the parties. (*Id.*) Appellants' arguments at trial in no way raised the issue that the Family Agreement is ambiguous. Further, the trial court never addressed the issue of ambiguity. As such, the Appellants have failed to raise this issue and any attempt to do so now for the first time on appeal should be barred.

Moreover, the Appellants' arguments do not track or follow their Docketing Statement and the Statement of Issues Presented. Rather, Appellants' first issue for appeal refers to the "clear and unambiguous written agreement", and the second issue states that although the court found the Family Agreement to be unambiguous, the court nonetheless erred by finding that the Family Agreement did not modify distribution of the replacement properties upon dissolution of the Partnership. (Appellants' Brief at 3). However, Appellants' Statement of the Issues makes no mention nor in any way refers to Appellants' argument that the court erred by not finding the Family Agreement to be

ambiguous. Despite the failure to present the issue of ambiguity, Appellants make ambiguity the central focus of their argument on appeal.

As additional proof that the Appellants have not properly raised the issue of ambiguity, Appellants cite no law with respect to proper review of a trial court's finding that a contract is unambiguous; nor is there any discussion or analysis demonstrating that the trial court improperly concluded that the Family Agreement failed to explicitly modify distribution of the Partnership assets. Rather, the only discussion and citation to law in Appellants' brief refers to how a court should view extrinsic evidence of an ambiguous contract. The Appellants then proceed to a discussion of extrinsic evidence without ever demonstrating or even alleging that the court erred in not finding the Family Agreements to be ambiguous.

Importantly, there has been no legal conclusion that the Family Agreements, the Masazo Trust or the LP Agreement are ambiguous. The trial court was never presented with the issue of ambiguity with respect to the Family Agreement and distribution of replacement properties. Therefore, without having challenged the trial court's legal conclusion that the Family Agreement is not ambiguous, the Appellants cannot resort to extrinsic evidence.

**2. As Appellants' First and Second Issues Challenge the Trial Court's Findings and Conclusions – that the Family Agreement Failed to Expressly Modify Distribution of the Limited Partnership – and as the Challenge is Fact Intensive, the Appellants Have Failed in Their Duty to Marshal the Evidence in Support.**

Utah courts hold that even where a party purports to challenge only the trial court's legal ruling, if a determination of the correctness of the court's application of a legal standard is fact intensive, the party has a duty to marshal the evidence. A party cannot dodge this duty by attempting to frame the issues as legal ones. *United Park City Mines Co., v. Stichting Mayflower Mountain Founds*, 140 P.3d 1200, 1206 (Utah 2006); *See also Chen v. Stewart*, 100 P.3d 1177, 1184-1185 (Utah 2004).

The trial court carefully analyzed the Family Agreement, and each document comprising the same, and made numerous factual findings upon which it based its ruling that the Family Agreement failed to modify the LP Agreement with respect to distribution of the replacement properties. (*See Amended Findings of Fact and Conclusions of Law* ¶¶ 23- 31, 37, 46, 48, 51, 56, 59 -61; R. 1174-1167). As noted above, none of these findings referenced the presence of ambiguity in the documents. Each of these findings were incorporated into the trial court's conclusions that the Family Agreement did not modify the LP Agreement's provisions regarding distribution of the property of the Partnership. Therefore, a party challenging the trial court's legal conclusions regarding whether the Family Agreement modified the LP Agreement as to distribution must also challenge the mixed questions of law and fact present in such conclusions. Such an appellant has a duty to marshal the evidence to support its challenge of facts.

In order to properly marshal the evidence, a party is required to gather all the evidence that supports the court's finding and:

temporarily remove [their] own prejudices and fully embrace the adversary's position; [they] must play the devil's advocate. In so doing, appellants must present the evidence in a light most favorable to the trial court and not attempt to construe the evidence in a light favorable to their case . . . In sum, to properly marshal the evidence the challenging party must demonstrate how the court found the facts from the evidence and then explain why those findings contradict the clear weight of the evidence.

*United Park City Mines Co.* 140 P.3d at 1207, quoting *Chen v. Stewart*, 100 P.3d 1177, 1184-1185 (Utah 2004) (internal citations and quotations omitted).

Here, Appellants purport to challenge the trial court's legal ruling that the Family Agreement does not modify distribution of the replacement properties upon dissolution of the Partnership or termination of the Masazo Trust. (Appellants' Brief at 22). However, instead of challenging that ruling on a review of the language contained within the four corners of the documents themselves, Appellants resort to a discussion of the parties' subsequent actions and extrinsic evidence to support their argument. Examples of Appellants' arguments include the following:

The second issue presented in this appeal is the interpretation of the parties' intent in signing several documents in an effort to amend the limited partnership agreement. (Appellants' Brief at 19) (emphasis added).

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. (*Id.* at 22) (emphasis added).

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. (*Id.* at 23) (emphasis added).

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. (*Id.*) (emphasis added).

As demonstrated by the foregoing statements, Appellants' entire argument regarding their second issue for appeal, consists of a presentation of extrinsic evidence regarding intent and subsequent actions. (*See* Appellants' Brief at 21-31). As such, the Appellants have a duty to marshal all the evidence supporting the trial court's finding that the Family Agreement failed to modify distribution of the replacement properties out of the Partnership. (*United Park City Mines Co.* 140 P.3d at 1206). Mere recitation of selective extrinsic facts of intent and subsequent actions in support of argument does not fulfil a party's marshaling burden. *Id.* at 1207.

Here, the Appellants have failed to marshal the evidence. Appellants' Brief is completely devoid of any recitation of all the evidence on which the trial court based its finding, any discussion and analysis regarding viewing such evidence in a light most favorable to Appellees, and any discussion that despite all the evidence in support, the trial court's finding contradicts the clear weight of the evidence. (*Id.*). Indeed, Appellants ignore key evidence in the record, key findings of fact made by the trial court, and fail completely to examine the testimony and documentary exhibits admitted in support of the trial court's findings. Rather, Appellants simply dive into a discussion of selective extrinsic evidence of intent and subsequent actions without properly challenging and marshaling the evidence in support of the court's finding.

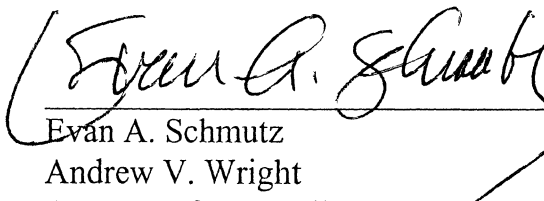
As such, this court should affirm the trial court's ruling that the Family Agreement fails to modify the LP Agreement with respect to distribution of the Partnership assets at dissolution.

## **VI. CONCLUSION**

Based on the foregoing, Appellees respectfully request that this Court affirm the trial court's ruling that (1) Tosh is entitled to one half interest in the Fidelity Account, representing his share of the proceeds and accrued interest resulting from the sale of Masazo's home, and (2) the Family Agreement failed to modify the LP Agreement as to distribution of the Partnership's assets upon dissolution. Therefore the Partnership's assets should be distributed in accordance with the terms and provisions contained therein.

DATED this 9<sup>th</sup> day of October, 2007.

HILL, JOHNSON & SCHMUTZ, L.C.

  
Evan A. Schmutz  
Andrew V. Wright  
Attorneys for Appelles

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9<sup>th</sup> day of October, 2007, they caused a true and correct copy of the Brief of the Appellee and the Addendum to Brief of the Appellee to be served upon the following persons by depositing the same in the United States Mail, postage prepaid, addressed as follows:

M. James Brady  
Margot Edwards  
BRADFORD & BRADY  
389 North University Avenue  
P.O. Box 432  
Provo, Utah 84601

*Attorneys for Plaintiffs/Appellants*

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

*Attorneys for Certain Defendants/Appellees*

Sent Via:

\_\_\_\_\_ Hand -Delivery  
\_\_\_\_\_ Facsimile  
  X   Mailed (postage prepaid)

