

2006

Michael Hodge v. Diane Hodge : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL HODGE,	:	
Appellant/Respondent,	:	BRIEF OF APPELLANT
	:	
v.	:	Case No. 20060789-CA
DIANE HODGE,	:	
Appellee/Petitioner.	:	

BRIEF OF APPELLANT MICHAEL HODGE

Appeal From a Decree of Divorce Entered by the Third Judicial District Court,
Summit County, Utah, Honorable Bruce C. Lubeck Presiding

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JURISDICTION OF THE COURT OF APPEALS

The Utah Court of Appeals has jurisdiction over Appellant's/Respondent's appeal pursuant to Utah Code Ann. § 78-2a-3(2)(h) (2006) and Rules 3 and 4 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES PRESENTED FOR REVIEW BY APPELLANT

1. Whether the trial court incorrectly divided the marital estate without first accounting for, and excluding from the marital estate, the parties' pre-marital and separate property. Because this is a question of law, the standard of review is for correctness. *Smith v. Smith*, 793 P.2d 407, 409 (Utah Ct. App. 1990).

2. Whether the trial court incorrectly divided the marital estate by failing to allocate and divide the marital estate on a fifty-fifty basis as required by law. The standard of review for questions of law is for correctness. *Id.*

3. Whether the trial court made factual errors in its calculations to determine what assets and liabilities each party brought into the marriage and the value of the assets awarded to each party after the divorce. The trial court's factual findings are reviewed under the clearly erroneous standard. *Id.*

The standard of appellate review for questions of law is for correctness and a trial court is afforded no special deference on review. *Smith*, 793 P.2d at 409. In contrast, the standard of review for factual findings is clearly erroneous. *Id.* More specifically, the standard of review for the division of marital property in divorce, because it is an equitable proceeding, is "clear and prejudicial abuse of discretion." *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah Ct. App. 1991); *see also Bradford v. Bradford*, 1999 UT App

373, ¶12, 993 P.2d 887 (“we acknowledge that trial courts have considerable discretion in determining alimony and property distribution in divorce cases, and will be upheld unless a clear and prejudicial abuse of discretion is demonstrated.” *Id.* (internal citations omitted)). “This court will approve changes in a trial court’s property and debt distribution only if there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderated against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion.” *Finlayson v. Finlayson*, 874 P.2d 843, 847 (Utah Ct. App. 1994) (internal quotations omitted); *see also Naranjo v. Naranjo*, 751 P. 2d 1144, 1146 (Utah Ct. App. 1988). The issues raised in this appeal were preserved in Appellant’s Amended Proposed Findings of Fact and Conclusions of Law submitted on June 9, 2006, (R. 309-28) and in his Memorandum in Support of Motion to Amend Memorandum Decision, submitted June 29, 2006. (R. 406-13).

STATEMENT OF THE CASE

A. Nature of The Case, Course of Proceedings and Disposition Below.

This case involves the entry of a Decree of Divorce in which Appellant, Michael Hodge (“Husband”), appeals the trial court’s final award and division of the marital estate. Appellee, Diane Hodge (“Wife”), filed for a divorce on September 2, 2005 on the grounds of irreconcilable differences. (R. 1-4). Husband filed an Answer on November 8, 2005 (R. 20-22). Following a two day bench, before the honorable Bruce C. Lubeck on June 8 and 9, 2006, the trial court entered its Memorandum Decision on all issues except the issue of parent time which was scheduled for a subsequent trial in August, 2006. (R. 353-75). Findings of Fact and Conclusions of Law and a Decree of Divorce were entered

by the trial court on July 31, 2006. (R. 437-70). *See Findings of Fact and Conclusions of Law*, attached hereto as Addendum A. Prior to the final entry of the Decree of Divorce, Husband, filed a Motion to Amend Memorandum Decision on June 29, 2006, which was summarily denied on August 1, 2006. Subsequently, Husband, represented by new counsel, filed a timely Notice of Appeal on August 29, 2006. (R. 486-87)

B. Statement of Facts Relating to the Division of Marital Property.

First, because this appeal involves numerous accounts and asset values, a comprehensive reference table outlining the complete marital estate asset schedule is included herein and attached hereto as Addendum B.

On August 8, 1998, the parties were married and separated in or about November 2004, with a formal petition for divorce being filed on September 2, 2005. (R. 438). No children were born as issue of this marriage, however, Wife had two children from a previous marriage. (R. 440). At the time of the marriage, Wife was initially employed as a school teacher, then as a part-time sales representative, and since 2003 as a real estate agent. (R. 443). Husband has been continuously employed as a Delta Airlines pilot. (R. 440).

Wife's income has ranged from \$21,000, at the time the parties first met, to \$680,000 in 2005 when Wife worked in the Park City, Utah real estate market. (R. 396). Husband's income has ranged from \$198,000 in 2004 to approximately \$151,000 in 2005, and approximately \$130,000 in 2006. (R. 312). Husband's overall income reduction is a result of involuntary pay cuts at Delta Airlines even though he was promoted to the 767 captain position.

Each party entered the marriage owning separate homes and at different times during the course of the marriage these pre-marital assets were sold with the net proceeds being used to either fund the purchase of another marital residence (first the Monitor Drive home in Park City, Utah, and eventually the American Saddler Drive home also in Park City, Utah) or used to fund a jointly held Ameritrade investment account (#8730). (R. 449; 453; 454; 458). The pre-marital homes included Husband's Jeremy Ranch home with an equity interest he received of \$255,000 (R. 458); and Wife's Lucky John home, with an equity interest she received of \$443,000. (R. 449).

Prior to the marriage, and undisputed by the parties, Husband had a Delta Retirement Account which included his Delta Family Care Savings Plan valued at approximately \$89,000.¹ (R. 389; 319). Additionally, Wife is the beneficiary of a personal trust which had cash assets of approximately \$47,000 at the time of the marriage. (R. 383). Her trust was also the entity in which title to her pre-marital home (Lucky John, Park City, Utah) was held. (R. 453). The Lucky John home eventually sold during the course of the marriage and the proceeds from this sale were transferred into the parties' joint Ameritrade investment account (#8730). (R. 449).

i.) The pre-marital and marital homes.

Although the parties purchased two different homes during the course of the marriage, at the time of trial, the parties owned only one residence, i.e., the marital

¹ Husband's Delta Retirement Account includes four separate sub-accounts: 1) Delta Airlines Inc., also referred to as the "Family Care Savings Plan"; 2) Delta Defined Contribution Retirement; 3) Delta Traditional IRA; and 4) Delta MPPP. The total value of the Delta Retirement Account, at the time of trial, was \$375,535. *See* Exh. 134. The parties agree that \$89,277 from the Delta Family Care Savings Plan was a pre-marital asset.

residence located at 2964 American Saddler Drive, Park City, Utah, which the parties still own. (R. 454). At the time of trial, the parties stipulated to a current fair market value of the marital residence of \$1,350,000 less the debt encumbering the home of \$567,000 which resulted in a net equity of \$783,000. (R. 394; 317; 556; TT: 541, lines 5-7). Prior to purchasing the marital residence, in August 1998, the parties purchased their first home together on Monitor Drive, Park City, Utah, for \$975,180. (R. 454). In order to recast the loan on the Monitor Drive home (after the actual closing on this home and after Husband's Jeremy Ranch home also closed), Husband invested the net proceeds from the sale of his Jeremy Ranch home, in the amount of \$255,000, into the Monitor Drive home. (R. 454; 458). In addition, both parties invested \$20,000 of pre-marital monies into this home, and Husband subsequently invested an additional \$30,000 of his pre-marital funds as well. (R. 454). All told, Husband invested \$305,000 of separate pre-marital funds into the Monitor Drive residence. In addition, the parties borrowed money from Wife's sister's trust ("Suzie's Trust") in a total amount of \$254,000. (R. 454).

Eventually, the parties sold the Monitor Drive home and purchased the marital residence on American Saddler Drive. (R. 454). At the same time, the parties used \$200,000 from the sale of the Monitor Drive home to re-pay Suzie's Trust. (R. 454). A remaining debt of \$54,000 to that trust from that particular loan still exists. (R. 385).

Wife's pre-marital home on Lucky John, Park City, Utah was appraised in 1998 for \$740,000. (R.453). Wife lived in this home, prior to the marriage, with her two children and her permanently disabled sister, Suzie. Wife is the sole trustee of Suzie's Trust and Wife is responsible for her sister's care until either of their deaths. (R. 384). Prior to the marriage, Wife decided to move Suzie into her Lucky John home, borrowing

\$184,000 from Suzie's Trust to pay off the mortgage on that house. (R. 384; 449). In the summer of 2000, after the parties were married, Wife sold the Lucky John home and received net proceeds of \$627,000. (R. 449). However, \$184,000 of the \$627,000 represents an outstanding pre-marital debt to Suzie's Trust, leaving a remaining pre-marital equity interest of \$443,000 attributable to Wife. (R. 449). Wife did not repay this pre-marital debt, however, at that time. Instead, the parties used \$610,000 from these proceeds to open a joint Ameritrade account (#8730) in 2000, which assets were eventually lost in the stock market. (R. 449; 450).

Jeremy Ranch (Mike's pre-marital home)	\$255,000 (equity/co-mingled)
Lucky John (Diane's pre-marital home)	\$443,000 (equity/co-mingled)
American Saddler (marital residence)	\$783,000 (current equity interest)

In addition, to the pre-marital and marital residences at issue in this case, the parties had numerous other accounts including individual retirement accounts, checking accounts, and savings accounts. While the parties do not dispute that certain accounts are pre-marital, there are several accounts solely in one or the other party's name which, however, were established and/or funded during the course of the marriage with marital assets. (R. 459; 461-62). The division of these accounts are also disputed.

ii.) Loans from Suzie's Trust.

During the course of the marriage the parties incurred significant debt, in large part, because of the various loans from Suzie's Trust. As discussed in the preceding section, prior to the marriage Wife borrowed \$184,000 from Suzie's Trust to help pay off the mortgage on her Lucky John home. (R. 449). This loan was subsequently re-paid by Wife in December 2005. (R. 555; TT: 131). The parties took a second loan from Suzie's Trust in the amount of \$254,000, at the time they purchased the Monitor Drive home in 1998. (R. 454). The parties have repaid \$200,000 of this loan, thus leaving a remaining

debt for this loan of \$54,000. (R. 454). Lastly, the parties borrowed an additional \$100,000 from Suzie's Trust in or around May 2001 which was invested in the joint Ameritrade account, and was subsequently lost in the stock market. (R. 451). This amount has not been repaid, leaving a total amount still owing to Suzie's Trust of \$154,000. (R. 388).

Loan #1	\$184,000	(pre-marital/co-mingled)
Loan #2	\$254,000	(marital)
Loan #3	\$100,000	(marital)
Total:	\$538,000	
Payment #1	\$200,000	(marital)
Payment #2	\$184,000	(marital)
Total:	\$384,000	
<hr/> Debt Owing \$154,000		(marital)

iii.) Stock market investments.

The parties opened the joint Ameritrade account (#8730) in 2000 using \$610,000 of the sale proceeds from Wife's home. (R. 449-50). This initial investment sum included the outstanding loan of \$184,000. Unfortunately, the stock market took a dramatic downward turn and the parties lost their entire investment. (R. 449-50). Subsequently, in May of 2001, the parties borrowed an additional \$100,000 from Suzie's Trust and this too was eventually lost in the stock market. (R. 451). The trial court heard extensive testimony about each parties involvement with the Ameritrade account and their trading activities, and concluded that while Husband shouldered more responsibility for the parties' losses, the Ameritrade funds represented co-mingled funds and the loss was marital and attributable to both parties. (R. 449-53). The trial court was not persuaded that Wife was unaware of Husband's trading activities, therefore the trial court held her accountable for the marital loss as well. (R. 449-53).

iv.) Other relevant property findings.

The trial court further found that the parties' pre-marital funds were largely co-mingled as evidenced by the fact that the parties used these monies to purchase the marital residence, as well as the Monitor Drive home, and co-mingled funds when they opened their joint Ameritrade investment account. (R. 452; 453; 456; 458; 459). Regardless of this co-mingling, the trial court found the case was not appropriate for equalization of assets nor was each party entitled to be restored to his/her pre-marital position. (R. 457). The trial court's ruling is inconsistent in this regard because it states that the parties should not be restored to their pre-marital positions (R. 457) while also stating "the court's basic intent is for the parties to leave the marriage in the same relative position economically as when they entered the marriage" (R. 457).

In conclusion, the trial court awarded Wife the marital residence along with her other personal and business accounts largely accrued during the marriage. (R. 459; 461). Husband was awarded his Delta Retirement Account, along with his personal checking account, the remaining balance of the joint Ameritrade account, and various other accounts held solely in his name. (R. 459; 461; 462). After the division of the marital estate, the trial court also ordered an equitable adjustment whereby Wife was ordered to pay Husband \$100,000. The trial court found this to be equitable and an offset for Husband's contributions to the family during the course of the marriage and for the instability in the value of his Delta Retirement Account based on recent events with the Delta Airlines bankruptcy matter.² (R. 460-61).

² This issue was raised at trial by Husband's attorney and, in fact, on September 1, 2006 the Delta Airlines Pilots Defined Benefit Retirement Plan was terminated due to the Delta Airlines bankruptcy. The Pension Guarantee Trust Corporation has taken over the Defined Benefit Retirement Plan and will pay the Delta Pilots approximately 15% of their accrued benefits.

SUMMARY OF ARGUMENTS

The trial court committed reversible error when it failed to account for and segregate the parties' pre-marital and/or separate property which was not co-mingled during the course of the marriage, before it divided the marital estate. In addition, the trial court committed reversible error by failing to divide the estate on a fifty-fifty basis. Finally, it was reversible error for the trial court to base its findings on evidence which contradicted the evidence admitted at trial either by way of stipulation, individual exhibits, and/or testimony.

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW BECAUSE IT DID NOT ACCOUNT FOR, NOR DID IT SEGREGATE, THE PARTIES' PRE-MARITAL/SEPARATE PROPERTY BEFORE IT DIVIDED THE MARITAL ESTATE.

The unquestionable and fast-standing rule in divorce proceedings is that each party is presumed to be entitled to and shall retain their pre-marital and/or separate property that he or she brought into the marriage unless it has been co-mingled so that it has lost its separate character. *See Dunn v. Dunn*, 802 P.2d 1314, 1321 (Utah Ct. App. 1990). In this case, while the majority of pre-marital funds, mostly from the equity each party received from the sale of their respective pre-marital homes, were co-mingled, certain assets retained their separate character throughout the marriage. Therefore, as a matter of law, these assets should have been allocated to each of the parties prior to any division of the marital estate. By failing to follow this presumptive rule of law, the trial court committed reversible error. In addition, because this error raises an issue of law the standard of appellate review is for correctness and the trial court shall not be "accorded [] special deference on review." *Smith*, 793 P.2d at 409.

While the trial court entered a finding that “each of the parties brought pre-marital assets into the marriage” (R. 460) it failed to make specific and complete findings as to what these assets were and their values. Moreover, and significantly, the trial court failed to account for the fact that most of these pre-marital assets were co-mingled; it also failed to identify and value the parties’ separate property (not necessarily pre-marital) which retained its separate character throughout the marriage; and finally the trial court failed to award the pre-marital and/or separate property to each party before identifying and valuing the actual marital estate.

A. Husband should have been awarded his pre-marital and/or separate property which was not co-mingled.

It was undisputed at trial that Husband entered the marriage with \$89,277 in his Delta Family Care Savings Plan. (R. 389; 319). In addition, at the time of trial, Husband maintained a separate Ameritrade account (#1101) with a balance of \$5,910 which represents the remaining value of his pre-marital IBM stock.³ (R. 319; 390). This account is his pre-marital and separate property (R. 319) because it did not lose its separate character during the marriage. *See Oliekan v. Oliekan*, 2006 UT App 405, ¶20, 147 P.3d 464. At the time of trial, Husband also had a Zions Bank savings account with \$1,028 which represents, in part, the remaining funds from two \$10,000 gifts he received from his father, post-separation, and which were not co-mingled during the marriage. (R. 390; 322). Although not pre-marital, the two \$10,000 gifts constitute his separate property. In addition, the testimony at trial evidences that Husband had two RJ O’Brien

³ It should be noted that there are two Ameritrade accounts at issue in this case. Husband has maintained a separate Ameritrade account, #1101. The parties also maintained a joint Ameritrade account, #8730, which was funded by the equity from the Lucky John home. This latter account is the one in which significant sums of money were lost during the course of the marriage.

accounts; one with a balance at trial of \$52,000 from money earned prior to the marriage, and the other with a balance of \$18,000, the remaining funds from the \$20,000 gift referenced above. (R. 390; 319). Husband does not claim any separate interest in the \$255,000 of equity he received from the sale of his Jeremy Ranch home because these funds lost their separate character when they were co-mingled into the Monitor Drive home. In sum, the trial court should have awarded Husband his pre-marital and/or separate property which was not co-mingled in the amount of \$166,215 prior to valuing and dividing the marital estate. *See Addendum B.*

B. Wife should have been awarded her pre-marital and/or separate property which was not co-mingled.

Wife also had pre-marital property, which was not co-mingled, that should have been awarded directly to her before dividing the marital estate. The testimony at trial demonstrated that Wife had approximately \$47,000 in her personal trust at the time of marriage. (R. 383). However, the trial court's finding estimated the pre-marital value of the trust to be approximately \$60,000. (R. 458). There is no evidence to support this finding and Wife's own Amended Proposed Findings of Fact indicate otherwise. (R. 383). Arguably, hundreds of thousands of dollars moved in and out of this trust during the marriage, but at the time of trial, Wife's personal trust had an account balance of \$47,831 and the parties agreed that Wife should be awarded this amount as her separate property. (R. 320). *See Addendum B.*

In addition, it is undisputed by the parties that Wife maintained a pre-marital Schwab Rollover IRA account with a balance of \$63,317 (R. 320) which should also have been awarded to Wife as her pre-marital and separate property. The remaining accounts held in Wife's name, or that of her business Creating Communities, were earned during

the course of the marriage, and in part since separation (R. 459-61) but should not be considered separate property. *See Dunn v. Dunn*, 802 P.2d 1314, 1317-18 (Utah App. 1990) (*citing Gardner v. Gardner*, 748 P.2d 1076, 1079 (Utah 1988)). As such, those amounts should not be awarded separately to Wife and should be included in the marital estate. *Id.* Consequently, Wife should have only been awarded as pre-marital and/or separate property, a total of \$111,148 before dividing the marital estate. *See Addendum B.* Wife's \$443,000 from her Lucky John home cannot be claimed as separate property because it was extensively co-mingled and became part of the marital estate when it was deposited into the joint Ameritrade account (#8730). (R. 449; 453).

If the trial court had followed the presumptive rule and awarded each party their pre-marital and/or separate property, the marital estate would have been reduced by a total of \$277,363 (\$166,215 (+) \$111,148) leaving a remaining balance of \$1,149,997.60 to be equally divided between the parties. Husband would then have been awarded his pre-marital and/or separate property (\$166,215) plus his portion of the marital estate (\$574,998.80), which adjusts for his equitable portion of the re-payment to Suzie's Trust, for a total award of \$741,213.80. Because this error raises questions of law this Court shall not accord the trial court's decision any deference.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW BECAUSE IT DID NOT DIVIDE THE ESTATE ON A FIFTY-FIFTY BASIS AS REQUIRED BY LAW.

The general rule in divorce proceedings is that each party is entitled to all of his or her separate property and then fifty percent of the marital property. *Bradford v. Bradford*, 1999 UT App 373, ¶26, 993 P.2d 887 (emphasis added); *see also Burt v. Burt*, 799 P.2d 1166, 1172 (Utah Ct. App. 1990). "An unequal division of marital property, however, is only justified when the trial court 'memorializes in commendably detailed findings' the

exceptional circumstances supporting the distribution.” *Bradford*, 1999 UT App 373 at ¶27 (emphasis added); *see also Davis v. Davis*, 2003 UT App 282, ¶27, 138 P.3d 84. In *Davis*, the court found exceptional circumstances warranted the unequal distribution of the parties’ retirement accounts. *Id.* ¶13. Specifically, the court found that husband’s ability to ensure adequate retirement funds versus wife’s inability to do the same was significant. *Id.* ¶12. Moreover, the court found that husband could liquidate the real property he was awarded to also ensure adequate retirement funds. *Id.* Finally, the court found that wife had contributed significantly more money to the marital obligations than husband. *Id.* Consequently, considering these facts in their totality, the Appellate Court upheld the trial court’s finding that exceptional circumstances existed and supported a disparate distribution of the marital estate.

Similarly, in *Riley v. Riley*, 2006 UT App 214, ¶29, 138 P.3d 84 the Appellate Court also found exceptional circumstances warranted an unequal distribution of the marital estate, specifically of the retirement accounts. In *Riley*, the court was persuaded that because the family had relocated for the benefit of husband’s career, because wife had liquidated her pre-marital assets to further the husband’s career, because wife had contributed nearly \$300,000 more than husband to the marriage, and because wife did not have an increased earning capacity over the course of the marriage, it was equitable to award wife her retirement accounts in full. *Riley*, 2006 UT App at ¶29. These cases illustrate the rare occasions in which the trial court has found, th Appellate Court has upheld, the exceptional circumstances exception.

Unlike *Riley* and *Davis*, the trial court in this case made no findings of “extraordinary circumstances.” Instead of dividing the estate as required by law, the trial court abused its discretion by employing a ratio methodology unsupported by existing

case law or statute. The trial court determined, based on the value of Wife's pre-marital home and her trust account, that Wife brought 2.3 times more money into the marriage than Husband. (R. 458). The trial court then applied this ratio to divide the entire estate, without first accounting for and excluding from the respective pre-marital and/or separate property of the parties. Not only was it reversible error for the trial court to stray from the presumptive rule of a fifty-fifty division without a finding of "exceptional circumstances," but its ratio approach was also in error because the trial court did not identify all the pre-marital or separate property of the parties and it applied inaccurate values to that property which it did include.

The trial court's Findings of Fact and Conclusions of Law state that the parties' assets, both earned and lost during the marriage, were extensively co-mingled. (R. 452; 453; 456; 458; 459). Accordingly, this co-mingled property became marital property and subject to a fifty-fifty division at the time of divorce. While it is undisputed that nearly \$700,000 was lost from the marital estate in the stock market due, in part, to the Husband's conduct, the trial court made no such finding that this loss amounts to "exceptional circumstances" warranting an unequal and grossly unfair distribution of the marital estate. In fact, while the trial court noted that Husband was more culpable for the parties' financial losses, the trial court concluded that Wife was fully aware of Husband's activities and the losses were marital. (R. 452; 458; 459; 460). Also compelling and indicative that the trial court found this loss to be marital is the fact that the trial court equally awarded the loss carryover for tax purposes to each party. (R. 456).

Consequently, because the trial court made no "exceptional circumstances" findings, the trial court should have followed the presumptive approach and divided the marital estate equally. By contrast, without any justification in law or in fact, the trial

court did otherwise and attempted to return each party to “the same relative position economically as when they entered the marriage” (R. 457). The law does not provide the trial court with the discretion to reach such a conclusion without detailed findings evidencing “exceptional circumstances.” Moreover, even if the trial court believed the marital losses amounted to “exceptional circumstances,” the trial court failed to make “commendably detailed findings” regarding its conclusion. Instead, its detailed findings illustrate that it found both parties liable for the marital losses even though it found Respondent beared the primary burden and responsibility. (R. 452). To reach its conclusion that Husband was more culpable, the trial court found the parties invested in their Ameritrade account at the behest of Husband. (R. 449). The trial court found that Husband did not contribute any separate money into the account but used his pre-marital funds to pay down the mortgage on the Monitor Drive home. (R. 449). The trial court also found that Husband had been warned not to engage in such trading activities and that Husband traded unwisely. (R. 450). Nonetheless, while the trial court made these findings, it also found Wife’s testimony that she blindly signed the investment forms was “not highly credited.” (R. 450). The trial court also found that while the Husband traded unwisely Wife gave Husband the money to do so. (R. 450). Moreover, the trial court found that Wife had to know what Husband was doing since she transferred the funds from Suzie’s Trust. (R. 451). Therefore, there are no detailed findings that Husband’s conduct amounts to an “extraordinary circumstance;” rather the findings illustrate the trial court’s conclusion that both Husband and Wife are at fault. This error is an abuse of discretion as articulated in *Finlayson*. The trial court’s decision to not divide the marital estate equally is not supported by the factual record and results in a serious inequity of property distribution in favor of Wife. Without the proper foundation to support the trial

court's deviation from the law, this approach contravenes the well-established standard in divorce proceedings. Therefore, the trial court committed reversible error when it failed to award each party a fifty percent interest in the marital estate.

III. THE TRIAL COURT ERRED AS A MATTER OF FACT BECAUSE IT INCORRECTLY VALUED BOTH THE PRE-MARITAL CONTRIBUTIONS OF THE PARTIES AND THE OVERALL MARITAL ESTATE.

The trial court made several accounting errors both in its valuation of what each party brought into the marriage and with regard to what each party received when they divorced. While certain valuation errors may be corrected if this Court follows the presumptive rule for dividing the marital estate on a fifty-fifty basis, other errors will have to be corrected if this Court follows the ratio approach used by the trial court.

A. The trial court made numerous accounting errors when it determined the pre-marital value of each parties' assets.

The trial court made numerous valuation errors to determine the value of each parties' pre-marital contributions and improperly excluded from its calculations the parties' separate property which had not been co-mingled during the marriage. In addition, the trial court's approach to determine the parties' pre-marital contributions fails to address the fact that these assets were extensively co-mingled during the marriage. Disregarding this fact, the trial court simply valued each parties' pre-marital assets, ignoring any separate property (although not pre-marital), and concluded that Wife brought 2.3 times more money into the marriage than Husband. (R. 458). The trial court then applied this 2.3 ratio to determine a proportionate division of the entire marital estate, and again wrongfully included property, which should have been separately distributed before dividing the marital estate.

i.) Wife brought \$553,317 into the marriage not \$700,000.

Following this erroneous analysis, the trial court found Wife entered the marriage with an equity interest in her home and money from her trust, all totaled to be approximately \$700,000. (R. 458). The trial court made no findings with regard to any other account, such as her Rollover IRA account, which was undisputedly pre-marital. Specifically, the trial court found that Wife received \$640,000 from the sale of her Lucky John home (R. 458) and approximately \$60,000 from her trust thus finding her pre-marital contribution of \$700,000. (R. 458).

These findings are in error and not supported by the evidence admitted at trial. First, it is undisputed by the parties that Wife actually received \$627,000 at the time she sold her Lucky John home not \$640,000. (R. 384). In fact, the trial court contradicts itself on this point and specifically found that Wife had only \$443,000 of her own equity in that home because of the \$184,000 outstanding pre-marital loan to Suzie's Trust. (R. 449, ¶157 versus R. 458, ¶102). Therefore, the trial court erred when it found Wife received \$640,000 from the sale of her home.

The trial court separately erred when it included Wife's personal trust as a pre-marital asset with an approximate value of \$60,000. (R. 458). Again, this is inaccurate because Wife's testimony is that her trust was worth approximately \$47,000 at the time of marriage. (R. 383). Therefore, ascribing the values to the two assets which the trial court found to be pre-marital, based on the evidence admitted at trial, and in the parties' proposed findings of fact, the Wife's equity in her home (\$443,000) and her trust (\$47,000) amount to Wife's pre-marital contribution of \$490,000 rather than \$700,000 as found by the trial court.

Notably, however, even this analysis is flawed because the trial court failed to include in its pre-marital calculation, Wife's pre-marital Rollover IRA account, in the amount of \$63,317, which even the parties agreed was a pre-marital/separate asset. (R. 320). Therefore, Wife's total pre-marital and/or separate assets, including the equity in her home which was actually co-mingled, were \$553,317 rather than the \$700,000 the trial court found; a difference of \$146,683, which is significant.

ii.) Husband brought \$422,187 into the marriage not \$300,000.

The trial court determined that Husband brought into the marriage a total of \$300,000 between his Jeremy Ranch home and various savings accounts. (R. 458). Again, the trial court's finding is erroneous because it failed to account for additional and valuable pre-marital property. In addition to his home, Husband had \$89,277 in his Delta Retirement Plan, specifically in the Delta Family Care Savings Plan account (R. 389); he had pre-marital monies subsequently transferred to an RJ O'Brien account which had a balance, as of the trial date, of \$52,000 (R. 390); and Husband had \$5,910 from IBM stock earned prior to the marriage and held in a separate Ameritrade account (#1101). (R. 319). In sum, Husband actually had separate property with a value of \$402,187. In addition, and unaccounted for by the trial court, Husband received two \$10,000 gifts from his father during the marriage which were maintained as separate property and now sit, in part, in a Zions Bank account, and in part in an RJ O'Brien account. (R. 390; 319). Hence, Husband's separate and/or pre-marital property was actually \$422,187, not the \$300,000 as found by the trial court. This is not an insignificant amount and discrepancy.

Therefore, if this Court adopts the trial court's ratio approach, using the correct values of the assets, Wife brought only 1.3 times ($\$546,317 \div \$422,187$) more value into the marriage than Husband, not the 2.3 times as erroneously found by the trial court.

B. The trial court used the wrong current fair market value for the marital estate and wrongfully calculated the value of the assets awarded to each party at the time of divorce.

The trial court made factual errors in its valuation of the marital estate and the value of the assets each party was awarded at divorce. The first, and perhaps most significant error in its valuation of the marital estate is that the trial court found the present value of the marital residence to be \$1,300,000. (R. 454). While the trial court correctly found the remaining mortgage balance to be \$567,000, based on the evidence admitted at trial and agreed to by the parties, it concluded that there was a remaining equity interest of \$732,420. (R.454). This is a factual error and contradicts the stipulation entered into by the parties and admitted into the record at trial. Prior to trial, the parties stipulated to a current fair market value of the marital residence of \$1,350,000, less the debt encumbering the home with an actual net equity of \$783,000 rather than the \$732,420 as found by the trial court. (R. 394; 317). Adjusting for this error increases the overall value of the marital estate by \$50,580 and increases the overall value of assets awarded to Wife by the same amount.

i.) Wife was awarded a disproportionately higher share of the estate.

The trial court found that Wife had approximately \$70,000 in various accounts, at the time of trial, which were largely created since separation. (R. 459). The trial court found these various accounts to include: a business and personal account with Wells Fargo, a Simple IRA, a SEP IRA, a 401(k) rollover, and a Creating Community 401(k). (R. 461). The trial court subsequently awarded Wife these accounts, disregarding their marital nature, concluding that her total award, including the marital residence, equaled nearly \$800,000. (R. 459). However, these “various” accounts, held solely in Wife’s

name, amount to far more than the \$70,000 the trial court assigned. The balances, at the time of trial, were as follows:

• Wells Fargo (business account):	\$68,647
• Wells Fargo (personal)	\$19,233 ⁴
• Simple IRA	\$10,935
• Schwab SEP IRA	\$14,196
• Schwab 401(k)	\$29,679
• Schwab Rollover IRA	\$63,317

TOTAL:	\$206,007
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(R. 391). Consistent with Husband's duty to marshal the evidence in support of the trial court's finding, the only finding in support of the trial court's position that the "various" accounts equal nearly \$70,000 is that "Petitioner's combined balance in her banking and investment accounts is approximately \$70,700." (R. 461, ¶118). However, as the evidence admitted at trial, as well as the proposed findings of fact submitted by both parties substantiates this is clearly erroneous. There is nothing in the record which supports the trial court's finding that Wife's various accounts equal \$70,700. Therefore, applying the trial court's approach, but ascribing the actual values of the awarded assets, Wife was awarded \$783,000 as equity in the marital residence plus \$206,007 from her "various" accounts. In addition, Wife was also awarded the parties' 2004 tax refund in the amount of \$19,486 (R. 322; 461), and her personal trust account with a balance of \$47,831. (R. 461; 320). Therefore, Wife was awarded assets from the marital estate totaling \$1,056,324. Moreover, assuming this Court agrees with Husband's dissipation

⁴ While the balance in Wife's personal account (#8033), as of April 11, 2006 was \$19,233, this represents an unreconciled balance. Exh. 37 and 48 (received at trial) evidence that on April 17 and 24, 2006, Wife transferred two amounts from her business account (#5638) into her personal account, totaling \$41,248.60. Because these statements are on different dates, they cannot be reconciled and fail to evidence the deposits in transit between these accounts. Accordingly, Husband claims the marital estate was dissipated by Wife in the amount of \$41,248.60. (R. 409).

argument set forth in footnote 3, Wife actually received an additional \$41,248.60 resulting in a total award of \$1,097,572.60. This far exceeds the \$800,000 the trial court found it had awarded Wife. Admittedly, the trial court also assigned Wife the remaining marital debt of \$154,000 to Suzie's Trust and an equitable payment to Husband of \$100,000. (R. 460). Therefore, Wife will actually leave the marriage with a total of \$843,572.60, with no other outstanding liabilities. This is nearly \$300,000 more than Wife actually entered the marriage with even including the equity from her pre-marital home which was co-mingled during the marriage.

ii.) Husband was awarded less than his proper share of the marital estate.

In stark contrast, Husband was awarded his Delta Retirement Account in the amount of \$375,535. (R. 459; 394). This amount includes the \$89,277 from his Family Care Savings Plan which was unquestionably pre-marital money. (R. 389; 325; 411). The trial court also awarded Husband his personal checking account which the trial court found had a balance of \$30,000. (R. 459). The trial court additionally awarded Husband \$12,600 from the parties' Wasatch Ice investment. (R. 461). However, the trial court's accounting is in error because Husband's personal checking account balance already included the \$12,600 refund from Wasatch Ice. (R. 410). Therefore, Husband had a checking account balance of \$18,400 (R. 326), in addition to the Wasatch Ice Refund of \$12,600. (R. 410). Finally, the trial court awarded Husband the remaining accounts held in his name. (R. 461). These accounts included Husband's two RJ O'Brien accounts totaling \$70,000 (R. 390); his separate Ameritrade account (#1101) of \$5,910 (R. 319); the joint Ameritrade account (#8730) of \$315 (R. 319); and his Zions Bank account of \$1,028. (R. 390). In sum, including the \$100,000 equalizing payment from Wife, Husband was awarded \$583,838; nearly \$300,000 less than Wife. In addition, the trial

court found that Husband's retirement funds, in particular the MPPP account (a sub-account of the Delta Retirement Account) in the amount of \$103,098, were uncertain and speculative at best. R. 459-60; R. 556; TT: 460-62). Therefore, Husband's total award may more accurately be closer to \$480,740.

CONCLUSION

This Court should reverse the trial court's Findings of Fact and Conclusions of Law and Decree of Divorce in favor of Husband because the trial court did not divide the marital estate as required by law and it made several critical factual errors when it determined the parties' pre-marital and separate assets as well as the value of the marital estate at the time of divorce. The errors result in a substantial inequity of the property distribution and amount to an abuse of discretion.

Dated this 6th day of April 2007.

CLYDE SNOW SESSIONS & SWENSON

A handwritten signature in black ink, appearing to read "Clark W. Sessions", is written over a horizontal line.

CLARK W. SESSIONS

ELIZABETH A. SCHULTE

Attorneys for Appellant/Respondent

Michael Hodge

CERTIFICATE OF SERVICE

I hereby certify that on the 6th of April 2007, two true and correct copies of the foregoing BRIEF OF APPELLANT were hand delivered to:

Kenneth A. Okazaki
Stephen C. Clark
Melissa M. Bean
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Attorneys for Appellee/Petitioner

A handwritten signature in black ink, appearing to read "Melissa M. Bean", written over a horizontal line.

IN THE UTAH COURT OF APPEALS

MICHAEL HODGE,	:	
Appellant/Respondent,	:	BRIEF OF APPELLANT
	:	
v.	:	Case No. 20060789-CA
DIANE HODGE,	:	
Appellee/Petitioner.	:	

ADDENDUM TO BRIEF OF APPELLANT

Addendum A	Findings of Fact and Conclusions of Law
Addendum B	Table outlining the complete marital estate asset schedule

Tab A

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FILED BY DS

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

DIANE HODGE, Petitioner, v. MICHAEL HODGE, Respondent.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 054500189 Judge Bruce C. Lubeck
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This matter came on for trial before the Honorable Bruce C. Lubeck on Thursday the 8th day of June and Friday, the 9th day of June, 2006. Petitioner was present and represented by counsel, Kenneth A. Okazaki and Lori W. Nelson. Respondent was present and represented by counsel, Christina I. Miller.

The Court, having previously bifurcated the financial matters from the child related matters, and having heard testimony and admitted exhibits, now hereby makes the following:

FINDINGS OF FACT

1. The parties are husband and wife having been married on the 8th, day of August, 1998.
2. The parties separated on the 30th day of October, 2004, though on occasions thereafter until approximately March 2005 they remained in the same marital home.
3. Petitioner filed a Petition for Divorce on or about the 2nd day of September, 2005, requesting certain relief, including that she be granted a Decree of Divorce from Respondent on the grounds of irreconcilable differences, the same to become final upon entry.
4. Respondent filed an Answer on or about the 8th day of November, 2005.
5. Petitioner filed a Certificate of Readiness six days later, on or about the 14th day of November, 2005.
6. Petitioner filed a Motion to Bifurcate which was denied on or about the 15th day of November, 2005.
7. The Court held a scheduling conference on the 7th day of December, 2005, at which time a trial date was fixed.
8. Respondent filed a Motion for Temporary Orders on the 30th day of December, 2005, which was heard on the 20th day of March, 2006. At that time the Court entered an oral order which was signed the 1st day of May, 2006. That order required the parties to abide by the interim agreement which obligated Respondent to pay one-half the mortgage on the marital residence, awarded Petitioner the use and occupancy of the marital residence and ordered her to pay the expenses thereon, with the exception of one-half the mortgage. Each of the parties was

awarded their own vehicles and Petitioner was ordered to pay Respondent \$2,000 per month in alimony for the months of April, May, and June 2006. The Court appointed a parent-time evaluator to assess the best interests of Petitioner's children based on Respondent's request for parent-time with his step-children. The Court later incorporated Respondent's objections into a subsequent order.

9. On or about the 2nd day of May the Court entered an order for discovery.

10. Respondent filed a Motion to Continue on or about the 26th day of May on the basis that the parent-time evaluation had not been completed. The Court held a telephone conference on the 31st day of May, 2006, and ordered that trial would not be continued but the financial issues would be bifurcated from the child related issues and trial on the child related issues would be held on the 23rd day of August, if necessary.

JURISDICTION AND GROUNDS

11. Irreconcilable difference have arisen between the parties, which differences make the marriage irreparable, notwithstanding the efforts the parties made through counseling to preserve the marriage.

12. Petitioner should be granted a Decree of Divorce on the grounds of irreconcilable differences, the same to become final upon entry.

13. This Court has jurisdiction over the matter as both parties are residents of Summit County, State of Utah, and were for three months immediately prior to the filing of the action.

CHILD RELATED ISSUES

14. There have been no children born issues of this marriage. However, Petitioner has two children from a previous marriage, to wit:

- a. Elizabeth Rinehart, born September 28, 1990
- b. Jackson L. Rinehart, born December 21, 1993

15. Petitioner and Respondent were ordered to obtain a parenting time evaluation. Based upon Petitioner's insistence that the parties retain Dr. Goldsmith to prepare the evaluation, the evaluation has been delayed and will not be available until approximately mid-July 2006.

16. Petitioner may file a motion in sufficient time to allow both parties the opportunity to fully brief the issue of Respondent's standing or right to seek parent-time with Petitioner's children. The briefing should be sufficiently in advance of the trial date to allow the Court to determine in advance if that date should be stricken.

ALIMONY AND THE PARTIES EMPLOYMENT AND INCOME

17. Respondent is 47 years of age, is in good health and suffers from no disability. In 1981, Respondent joined the Air Force and obtained his pilot's license. In 1989, Mike obtained employment with Delta Airlines and is currently employed by Delta Airlines as a captain. Respondent flies various schedules and flies approximately 70-80 hours per month.

18. In 2004, Respondent earned a gross annual income of approximately \$198,776. In 2005, Respondent earned a gross annual income of approximately \$150,655.33. As of April 17, 2006, Respondent earned a gross income of approximately \$40,718.

19. On May 31, 2006, the Delta pilot's union ratified a concessionary agreement which will save Delta approximately \$280,000,000 per year. Among the concessions, was a fourteen percent reduction in pay for all pilots from the rates they received in 2005. The pilot's rates in 2005 were a thirty-three and one-half percent reduction from their rates in 2004.

20. The Court finds Mike is capable of earning a gross income of \$129,564, or \$10,797 per month (a fourteen percent reduction from 2005) for purposes of determining an equitable amount of alimony.

21. Respondent earns his income flying for Delta Airlines. Respondent's 2005 income was based on flying an average of 10 days per month. The remainder of the month Respondent does not work and is capable of supplementing his income from secondary sources.

22. Respondent has recently become licensed as a real estate agent in Park City and will have the ability to supplement his income and earn the same income as Petitioner has earned.

23. Respondent claims monthly expenses of approximately \$8,000 - \$9,000 and anticipates greater expenses when he purchases a home. The Court finds he is a single man, with no child support and he is a captain with Delta Airlines, as noted above. The Court finds Respondent's claimed expenses should be reduced as they are not reasonable or necessary.

24. Respondent's claimed needs are reduced in the areas of gifts, coaching, gas, dental, food supplements, food in general, charity (which is voluntary), investment expense, counseling, bike costs, telephone and cell phone, entertainment and travel (he flies for free), retirement, and vehicle.

25. The Court finds Respondent's claimed expenses demonstrate some lack of credibility. In total Respondent's claimed expenses for dining out, food, food supplements, and meals while on trips (most of which are reimbursed by Delta), totals over \$1,200 per month for one person. The Court finds that even for someone who exercises vigorously, as Respondent appears to do, that amount of food is not reasonable or necessary.

26. The Court finds this is not a major factor, but was one of the factors the Court uses in determining overall credibility. The Court finds a person who attempts to convince the Court his needs include a food budget of over \$1,200 per month is not, in the eyes of the Court, a person that the Court is required to believe.

27. The Court finds Respondent's legitimate expenses do not exceed \$5,000 per month. As being fully capable of earning, at a very minimum, \$129,000 per year, Respondent has not shown a need for alimony and that either as a pilot or real estate agent he is capable of meeting his own needs.

28. The Court finds that Respondent did support Petitioner and her two children during the marriage, but this does not entitle him to ongoing support given the facts and circumstances of this case.

29. The Court also finds the Respondent, in his employment and given the nature of pilots with Delta and their work, Respondent could, given his seniority level, earn more as a pilot than he is now earning. The Court finds and hereby concludes that Respondent could, if he desired, fly a different airplane in which he is more senior than his current assignment in a 767 and thus fly more and earn more, even though his per-hour pay may be reduced. The Court does

not suggest this should occur, but does find that Respondent made clear in his testimony in various ways the he has not sought to maximize his income but has sought a balance to make sufficient income and enjoy life.

30. The Court finds Respondent's statement "who does not want to work less" was one such comment and the further evidence of his emphasis in training for and competing in bicycle events. The Court finds no fault in Respondent's chosen lifestyle and desire to achieve balance, but does find it impacts the alimony analysis. Utah law requires the Court to analyze a party's ability to contribute to their own support when that party is requesting alimony and even at his reduced wage, Respondent can meet those needs. Furthermore, the Court finds Respondent could work more and therefore earn more as a pilot and could possibly earn some income working part-time as a real estate agent.

31. The Court finds Respondent is not entitled to alimony as he is fully capable of meeting his own needs as a pilot and through his own efforts, which have been substantial. The Court also finds that if Respondent achieves even part of the success attained by Petitioner in the real estate field, his income would be greater than his income as a pilot.

32. Petitioner is 47 years of age, in good health and suffers from no disability. Petitioner is a successful real estate agent and recently obtained her brokers certification. Petitioner started her real estate career in 2002. Petitioner is not employed by Prudential but is an independent contractor associated with Prudential.

33. The Court finds that no one can predict commission income in real estate or any other field but history is the best indicator. Based on Petitioner's gross income in 2003,

(approximately \$65,000), in 2004 (approximately \$328,000), in 2005 (approximately \$740,000) and in 2006 to date (mid-April), which, when annualized and with adjustments, would total \$750,000, that Petitioner's income is approximately \$475,000 per year gross, or approximately \$40,000 per month, which is the Court's best estimate given the listings and inventory.

34. The Court finds Petitioner's work history or income prior to 2002 when she became a real estate agent was not revealed in full by the testimony, nor her income other than in 1998.

35. Notwithstanding Petitioner's argument that her income will go down and Respondent's argument it will remain the same as it was in 2005, the Court finds it cannot predict what Petitioner may earn and the parties' expectations that the Court fix a future income for Petitioner in a commission based job are not reasonable.

36. The Court does find that there is no evidence to support the allegation or conclusion that Petitioner will have income equal to her income in 2005 every year. Nor does the Court find there is evidence to support the notion Petitioner will be a pauper. The Court does not find credible Petitioner's testimony that her market will "dry-up" when the East-West Resort package is sold. The Court does find that Petitioner will do well even after the East-West Resort is sold out and Petitioner starts over her real estate career.

37. The Court does find that Petitioner's real estate income has been earned in the resort/second home market but that she will earn enough income to support herself and her children.

38. The Court does not find this is an appropriate case where income is in any fashion to be equalized. During the marriage from 1998 until 2003, Petitioner's income was not shown by the testimony, but evidently was relatively minimal (\$24,000 at the time of marriage) compared to the current levels. The parties lived off Respondent's salary largely until 2002 when Petitioner became a realtor. Thus, the parties' standard of living did not substantially change until 2004, shortly before their October 2004 separation. The Court finds the evidence supports the conclusion that the elevated standard of living commenced sometime in 2004 when Petitioner began to receive larger commissions.

39. The Court finds the parties 2003 standard of living to be based on Petitioner's income of \$65,000 and Respondent's income of \$189,912. Respondent's income from 2001 and 2002 was substantially similar to his 2003 income (\$190,132 in 2001 and \$187,726 in 2002). Thus, the Court finds this is not a case where it needs to balance the "misery" of insufficient income. The Court also finds this is not a case where an established standard of living was in place for a lengthy period of time before separation. Utah Code Ann. Section 30-3-5 (8)(c) provides the date of separation is considered as the date to which the Court should look in determining the standard of living for purposes of awarding alimony.

40. Prior to the parties' separation in October 2004, the parties had been married just over six years. This is neither a short nor long term marriage, but the Court finds it is closer to being a short term marriage than a long term marriage. Thus, the Court finds the standard of living that exists as of trial, or in 2005, or even to some extent during the later part of 2004, is not one which is or was established and one that merits an attempt by the Court to provide

Respondent with an enhanced standard of living beyond what was experience during almost lal of the marriage.

41. The Court finds Petitioner has earned much more money since separation than that which was available to the parties during almost all of their marriage. The standard of living of the parties while together was not as Respondent asserts. During most of the marriage the parties lived on Respondent's earnings.

42. The Court finds that Petitioner did not have meaningful income until 2002 and the parties separated in late 2004. Prior to separation the parties lived on less than \$200,000 and that paid all the living expenses for four people, the parties and Petitioner's two children.

43. The Court finds that income equalization is not appropriate in this case and further that Respondent is not entitled support based on an enhanced standard of living. The Court finds, pursuant to Utah Code Ann. Section 30-3-5 (8)(c) that the standard of living enjoyed at the time of separation is the appropriate standard of living on which to base its analysis of alimony and Respondent is fully capable of supporting himself at that standard of living with no contribution from Petitioner in the form of either income equalization or alimony.

44. The Court finds that because Respondent has not demonstrated a need for alimony the other factors need not be considered. As such, the Court is not considering Petitioner's ability to pay alimony. The Court also finds, however, in considering the parties claimed expenses, that Petitioner's expenses are not credible, but also finds they are not relevant. The Court finds Petitioner could certainly pay alimony, despite her claim to the contrary and that her claimed business expenses are not considered credible by the Court. The Court emphasizes,

however, that neither Petitioner's business expenses nor her personal expenses are relevant to the analysis as Respondent can fully meet his needs on his income.

45. Thus, even if Respondent's expenses increase should he purchase a home, a rational approach to life would allow a large mortgage payment on what Respondent currently earns by his own efforts.

46. The Court also finds this is not the situation, as argued by Respondent, where he should be compared to a "stay-at-home mom" who supported the "breadwinner" by raising the children and allowing the breadwinner to earn income and thus should share in the increased income of that breadwinner.

47. Respondent, during much of the marriage, did not do more than his share to take care of the children while Petitioner worked. Thus, he is not entitled to the benefit of his support. Furthermore, the Court finds Respondent was not in any way responsible for Petitioner's increase in income, either from his support or from his efforts in other areas such as raising children.

48. The Court finds that although Respondent encouraged Petitioner to become employed in the real estate field, his support after Petitioner obtained her real estate license was minimal and indeed, to call it support would be stretching the evidence to support an unwarranted conclusion.

49. The weight of the evidence supports the finding that Respondent did not like Petitioner being at work and away from him and Petitioner's children and, in fact, Respondent encouraged Petitioner to work less so she could earn an income of perhaps \$100,000 per year.

50. The Court finds Respondent did not support Petitioner by attending functions with her but instead continued his personal activities such as mountain biking and training.

51. The Court finds that Respondent is a fully capable airline captain, and previously an instructor, who was married to someone who was fortunate enough to become involved in an occupation, late in their marriage, that recently earned great income and will likely continue to do so at least in the near future.

52. The Court finds Respondent was not, in any way, responsible for Petitioner's increased income, and he should not, therefore, share in that increase as it has come almost entirely after separation.

53. The Court finds the income Petitioner has achieved is not the product of Respondent's supportive efforts in any major part, but is largely the product of her own effort, while raising her two children with some assistance from Respondent.

54. As such, the Court finds that no alimony should be awarded to either party. Furthermore, the Court finds that Respondent's request for "income equalization" for the years of 2004, 2005 and 2006 to date is not reasonable or equitable under the circumstances and that request should be denied.

INSURANCE

55. The Court finds that each party should obtain and/or maintain their own medical and dental insurance and pay any costs, premiums and/or deductibles associated therewith within 30 days from the date the Decree of Divorce is entered, if they have not already done so.

56. The Court finds that Respondent acquired a \$250,000 term life insurance policy with USAA and a \$250,000 term life insurance policy with Harvey Watt & Company. The policies have no cash value. Respondent should be awarded said policies, as his sole and separate property, with no claim by Petitioner.

STOCK LOSSES

57. Subsequent to the parties' marriage, in 2000, Petitioner sold the Lucky John Home, for which she received net proceeds of \$627,000. Of those proceeds, \$443,000 was from Petitioner's trust and \$184,000 was from Susan's trust. These proceeds were placed in an Ameritrade investment account opened by the parties at Respondent's behest. Respondent did not contribute any of his separate money to the Ameritrade account, rather, he opted to invest his premarital funds by paying down the mortgage on the parties' home located on Monitor Drive. ("Monitor Drive Home".)

58. Before opening the Ameritrade account, Respondent determined, based on his own efforts and contact with others, that he could make money by investing in the stock market, dealing in what is commonly considered as a speculative activity, dealing in what are called "covered calls." Indeed, the Court finds on one of the applications for modification of the account, the term "speculative" was checked by Respondent. The parties spent a great deal of time and testimony on the issue of this account and the resulting loss during trial

59. The Court finds, based on the documents and testimony, Petitioner signed the documents to open the account and those applications contain information about Petitioner's and

Respondent's supposed investing experience. The Court finds the applications were not very truthful.

60. The Court finds that while Petitioner may maintain she did not read or understand the documents, the Court finds that Petitioner is a talented and accomplished person, and her testimony that she blindly signed the documents is not highly credited.

61. The Court finds Respondent began investing initially with approximately \$50,000 and did reasonably well. The Court finds the stock market, at least the stock Respondent was trading, did not do well in 2000, and eventually the Respondent used and lost all \$610,000 from the sale of the Lucky John Home, as margin calls of the stock market declined, particularly the tech stocks in which Respondent was dealing.

62. The Court finds Respondent had been warned by others, specifically Petitioner's financial advisor, not to engage in such trading as it was too speculative. The Court finds that advice from investment advisors is and can be completely contrary, i.e., do not buy bonds, buy bonds, etc.

63. The Court finds Respondent traded unwisely, admittedly, but Petitioner had to give Respondent money to do so. The Court does not credit Petitioner's testimony that she did not know what Respondent was doing, or that she only approved trading for approximately \$50,000.

64. The Court finds that it may well have been the original understanding to only invest \$50,000, but that changed over time. The Court does not find Respondent is being forthright in his testimony about advising Petitioner "every step of the way", and the Court finds

that neither party was entirely credible in their testimony concerning how the money was lost, and who knew what. The Court finds it is inconceivable that Petitioner believed the money from the sale of the Lucky John home was “just sitting” in the Ameritrade account, and that Respondent was merely “playing” with \$50,000 of it. This finding is particularly born out by the later event of Petitioner releasing an additional \$100,000 from Susan’s trust in 2001 after being told by Respondent that he had lost the original \$610,000.

65. The Court finds that after the \$610,000 was lost by Respondent, that Respondent begged Petitioner’s forgiveness for losing her money, and made a commitment to repay the sums, acknowledging all blame and responsibility for losing the money.

66. The Court finds in May 2001, in an effort to recoup the losses, Respondent borrowed an additional \$100,000 from Susan’s trust to invest. The Court finds Petitioner knew what Respondent was doing and had to transfer the funds from Susan’s trust. The Court finds this transfer was an act of desperation in an attempt to recoup some of the losses. The Court finds those funds were also lost in their entirety.

67. The Court finds that when additional money was borrowed from Susan’s trust in 2001, and invested into the Ameritrade account, and also lost by Respondent, Petitioner simply had to know where the money was going and what it was being used for. The Court finds that as Petitioner was the sole trustee of the accounts, Respondent could not access the money from Susan’s trust without Petitioner’s approval and without her action.

68. The Court finds that while there was no testimony about how this was accomplished, what Respondent said to Petitioner to convince her transfer to additional funds, the Court finds Petitioner simply had to know it was for a similar purpose as the original funds.

69. The Court finds that although the losses in the stock market were marital, the Respondent bears the primary burden and responsibility. The Court finds Petitioner basically “sat by” and though Petitioner is a competent person, she is not versed in such stock market activity and did not fully appreciate the speculative nature of the trading, nor did she know exactly what Respondent was doing in the stock market.

70. The Court finds Respondent did not tell Petitioner exactly what he was doing, nor how the funds were disappearing and being lost. The Court finds that had the trading resulted in a large profit, turning approximately \$600,000 into \$1,000,000,000, for example, certainly Petitioner could and would and should claim she would be entitled to benefit from that increase.

71. The Court finds the decision to “lose” the money was not a decision anyone made, but the decision to invest, was in reality, the decision of both parties, and the unfortunate eventuality of the staggering economic losses is one that both must bear, though perhaps not equally.

72. The Court finds Petitioner originally desired to use the proceeds of the Lucky John Home to reduce the mortgage on the Monitor Drive Home, but again, the Court finds that Petitioner knew Respondent was “playing the market”, but the Court specifically finds and determines Petitioner did not know exactly what Respondent was doing, nor did she know the exact nature of the speculative activity involved, buying covered calls. Petitioner did not know

the money had been lost until it was gone, and the Court finds she was not involved in the daily fluctuations, mostly negative, of the market.

73. The Court finds that a gain would be attributable to Petitioner and so was the loss. The money was co-mingled, although Petitioner's premarital, became marital when Petitioner allowed the Respondent to unwisely use it to trade in the stock market.

74. Prior to the parties' marriage, Petitioner was the beneficiary of a trust established by her parents, which was her own personal trust. ("Personal Trust".) The Personal Trust held cash and property assets, which was funded solely by inherited or gifted assets prior to the parties' marriage. A home and real property located at 1550 Lucky John, Park City, Utah, ("Lucky John Home"), was held in this Personal Trust, which was valued at \$740,000 at the time of the parties' marriage.

75. Petitioner is the trustee of a trust for her sister, Susan, who is permanently disabled. ("Susan's Trust".) Petitioner, as trustee of Susan's Trust, manages all of Susan's finances and care. Petitioner determined that it would be in Susan's best interest to have her reside with Petitioner and her children to avoid placement of Susan in an out-of-home facility, and provide Susan valuable socialization and a comfortable family setting.

76. Petitioner borrowed \$184,000 from Susan's Trust to pay down the mortgage on the Lucky John Home and move Susan in to live with her and her two children.

77. Petitioner is the sole trustee of Susan's trust and she may act as she deems proper in Susan's interest. Petitioner's brother, Arthur Anderson, is an alternate trustee of Susan's trust.

78. In August 1998, the parties purchased a home and real property located at 2563 Monitor Drive ("Monitor Drive Home"), which was purchased for \$975,180.52. Each of the parties placed \$20,000 of personal funds down to purchase the Monitor Drive Home.

79. The Court finds the parties borrowed an additional \$254,000 from Susan's trust put toward the mortgage balance on the home. It was understood between the parties that they would commit to repay this loan.

80. In September, 1998, Respondent sold his premarital home and received net proceeds in the amount of \$240,000. Respondent invested the proceeds of this sale to pay down the mortgage on the Monitor home, bringing the balance of the mortgage on the Monitor Home to \$441,000.

81. The Court finds that Respondent invested an additional \$30,000 for the Monitor Drive home.

82. In April 2000, the parties sold the Monitor Drive home.

83. The parties utilized \$200,000 from the proceeds of the Monitor Drive home to partially repay Susan's trust.

84. The parties then purchased a home and real property, which is the parties' current marital residence, located at 2964 American Saddler Drive.

85. The Court finds the American Saddler Drive home has a present value of \$1,300,000, with a mortgage balance of \$567,000 for a net equity of \$732,420.

PROPERTY AND ASSETS

86. The Court finds that Petitioner should be awarded the American Saddler Drive home and all equity therein, utilizing the funds contained therein to pay her personal trust, Susan's trust, and return her premarital down payment.

87. The Court finds that the home should be refinanced within sixty days from the date of entry of the Decree of Divorce in Petitioner's own name.

88. The Court finds that during the marriage, the parties acquired personal property and household furnishings. Petitioner has retained and has possession of the majority of the parties' marital personal property and household furnishings

89. The Court finds that further trial time, specifically that trial time scheduled for August 23, 2006, is reserved for child related issues and shall not be utilized for personal property issues. The Court finds that if the parties cannot resolve the personal property issue through mediation, that the Court will rule based upon the testimony heard at trial, coupled with the exhibits received. The Court finds that very little testimony was received, but the Court did receive exhibits from each party.

90. The Court finds that during the course of the marriage, the parties acquired a 2003 Acura MDX valued at approximately \$19,000, a 2002 Acura MDX valued at approximately \$22,000, and a 2001 Subaru Outback, valued at approximately \$12,000.

91. The Court finds Petitioner should be awarded the exclusive use, possession and ownership of the 2002 Acura MDX, subject to any and all liability thereon, as her sole and separate property.

92. The Court finds Respondent should be awarded the exclusive use, possession and ownership of the 2003 Acura MDX, and the 2001 Subaru Outback, subject to any and all liability thereon, as his sole and separate property.

93. The Court finds that each of the parties should contact his or her lienholders within thirty days from the date of the Decree of Divorce, and have the other party's name removed from the loan, lease, title, and any insurances associated with either parties' automobiles. Each party is ordered to send an authorization to the other party's lienholder to remove his or her name, if necessary.

94. During the course of the marriage, the parties acquired an interest in a limited partnership known as New Sea Cliffs. The parties' interest in New Sea Cliffs is not salable or transferable and has limited value, except for tax write-off. The Court finds that each party should be awarded one-half of the interest in New Sea Cliffs, Hawaii, subject to any and all liability thereon, as his or her sole and separate property.

95. During the course of the marriage, the parties acquired a loss carryover due to the loss of money in the stock market. This loss carryover can be utilized on the parties' future tax returns. Inasmuch as the Court finds the money invested in the stock market was co-mingled, martial funds, each party should be awarded one-half of the loss carryover.

96. During the course of the marriage, the parties acquired Wasatch Ice stock. After the parties' separation, the stock was redeemed; however, Respondent received the redemption check and deposited it into his account. The Court finds the Respondent should be awarded that Wasatch Ice redemption proceeds in the amount of \$12,600.

97. During the course of the marriage, the Petitioner acquired a business known as Creating Community. Petitioner should be awarded that business as her sole and separate property, with no claim by Respondent. Petitioner should assume and pay any and all liabilities associated with the business, forever holding Respondent harmless therefrom.

PROPERTY DIVISION

98. In the attempt to be equitable as to property division, the Court has struggled. The Court does not find this is a case for equalization of assets or income. The Court finds that each of the parties came into the marriage with assets, with the income of one party, Petitioner, changing dramatically since separation. The Court does not accept Respondent's approach that equalization should occur, nor does it accept Petitioner's position. The Court does not believe the parties should be restored to their premarital position as the marriage is not of such short duration that Respondent's contributions to the family should be discounted entirely, as Respondent supported the family during most of the marriage.

99. The Court is not capable of determining with precision the amounts that should be offset, credited, backed out, or put in someone's column, as the parties seem to do with great ability. The Court finds its ultimate result is an attempt to be fair and equitable, given the facts and circumstances of this case. The Court's basic intent is for the parties to leave the marriage in the same relative position economically as when they entered the marriage, with some minor adjustments and modifications, due to Respondent's principal fault in losing much of what the Court has found to be the marital estate and because of Petitioner's enhanced income at the present time.

100. The Court finds that because it is not such a short term marriage, the Court does not have to restore the parties to the exact condition which existed at the time of marriage, but does find that this is a case where each party should be able to basically “walk away” in the same economic proportion as when they entered the marriage, and Respondent should not benefit to the extent he believes he should because the marriage “produced” a high income party. The Court does not believe, and does not find the standard of living should be equalized as the major income from Petitioner has been, in large part, realized after separation and the appropriate standard of living to be considered is the time of separation, pursuant to U.C.A. §30-3-5(8)(c).

101. The Court finds Respondent brought into the marriage, from the sale of his Jeremy Ranch home, approximately \$255,000, plus some other savings, and his income, which supported the family. In round figures, the Court finds Respondent brought premarital money, which was all co-mingled, of approximately \$300,000 into the marriage.

102. The Court finds Petitioner brought the proceeds from the sale of the Lucky John home in the approximate sum of \$640,000, plus money in her personal trust, for a total of approximately \$700,000.

103. The Court finds Petitioner brought approximately 2.3 times the amount Respondent brought in. The Court finds this does not include the various loans from Susan’s trust.

104. The Court finds of the approximate \$700,000 Petitioner brought into the marriage, \$600,000 was lost. The Court also finds that none of Respondent’s original property, premarital and later co-mingled, was lost.

105. The Court finds that while the loss suffered by Petitioner is marital, the principal reason is the activity and conduct of Respondent. The Court finds that Petitioner did not stop the conduct, and therefore, bears some responsibility.

106. However, the Court finds Petitioner brought just over twice as many assets into the marriage, as did Respondent, and Petitioner lost approximately 85% of those funds.

107. The Court has not been able to calculate any formula or precise figure that should be attributable to Respondent concerning the loss, but does find his proportion of the fault is greater than that of Petitioner in losing the money.

108. The Court finds the parties co-mingled their funds and obtained a home now with equity of approximately \$732,000. As noted above, this property should be awarded to Petitioner. The Court finds Petitioner has approximately \$70,000 in various accounts on her own, created largely since separation. Thus, Petitioner leaves the marriage with more than she entered, with approximately \$800,000 and she entered with approximately \$700,000. Petitioner has repaid much of the “loans” taken from Susan’s trust, and some remains to be repaid. The Court finds Respondent has not participated in that repayment.

109. The Court finds Respondent’s \$300,000 has not been “lost”, but has become marital, as it was used to purchase the homes, which now end in Petitioner’s ownership. The Court finds Respondent has approximately, as best the Court can calculate, though there is uncertainty of course what the Delta pension may do and what may disappear to either Delta or the Pension Benefit Guarantee Corporation, that Respondent has the sum of approximately \$375,000. The Court also finds that Respondent has \$30,000 in checking.

110. The Court finds that it was not made clear from the evidence, and the Court cannot ascertain the exact amount of the value of Respondent's retirement funds, given the status of Delta Airlines. Thus, the Court, giving flexibility to the uncertainty of those retirement accounts, believes Respondent leaves the marriage in the approximately proportion that he entered with just under half of the assets which Petitioner now has.

111. The Court finds, however, that because those retirement funds are certainly not worth what the exhibits show on paper, the Court believes the Petitioner should provide the sum of \$100,000 to Respondent.

112. The Court finds Respondent should be given an equitable lien on the American Saddler Drive home until that amount is paid by Petitioner. The Court finds that Petitioner may refinance or otherwise pay Respondent that sum within 120 days of the final Decree of Divorce.

113. The Court finds that given that Respondent was mainly responsible for the major losses to Petitioner, and give that the loans to Susan's trust have mostly been repaid by Petitioner, and given that one loan was for the very purpose of investing, and given that Petitioner will no doubt be responsible for repaying that loan, that equity does not require Respondent be awarded anything further. However, the Court believes he is entitled to the sum of \$100,000 as he provided for the family for most of the marriage.

114. The Court finds, in making this order, it is attempting to avoid tedious calculations to which the parties could not agree. The Court does find however, that each of the parties brought premarital assets into the marriage, Petitioner more than Respondent, and that

they lost together approximately everything that Petitioner brought in, but she has now been awarded a home with equity above that which was lost jointly.

115. The Court also finds in fairness in equity, that Respondent supported the family for most of the four years with very little income from Petitioner. Thus, the Court's calculation, which is fair and equitable under the circumstances, is that neither the Petitioner or Respondent owes the other party any sums beyond that which has been ordered above.

116. The Court finds the parties own several bank and other investment accounts.

117. The Court finds Petitioner has personal and business accounts with Wells Fargo, a simple IRA, a SEP IRA, a 401(k) rollover, and a Creating Community 401(k).

118. The Court finds Petitioner's combined balance in her banking and investment accounts is approximately \$70,700.

119. The Court finds Respondent has accounts with Ameritrade, a Delta checking account, an R.J. O'Brien investment account, a Zions Bank account, an R.J. O'Brien 401(k), and \$12,600 for Wasatch Ice.

120. The Court finds the Wasatch Ice refund is to be awarded to Respondent.

121. The Court finds the 2004 income tax refund is to be awarded to Petitioner.

122. The Court finds each party should be awarded all retirement accounts and all other accounts in their own name and in their possession.

123. In making this award, the Court is aware that some of Respondent's retirement accounts were accumulated during the marriage, and some are premarital. However, the Court finds that given Petitioner's income, and what the Court believes to be her prospects for

continued substantial income, Respondent should be awarded his retirement accounts free and clear of any interest to Petitioner.

124. The Court further finds that Petitioner should be awarded all of the accounts in her name free and clear of any interest to Respondent, as discussed above.

125. The Court finds the parties should cooperate with one another to remove their respective names from the other's accounts which were awarded to each party as outlined herein.

126. The Court finds that Petitioner should have returned to her, her prior name of Rinehart.

127. The Court finds each party is to retain any frequent flyer miles in their names, although the Court was not clear from the evidence how such miles were accumulated by either party, especially Respondent, and the Court does not understand the Respondent's need for such miles other than to give them to someone else.

128. The Court finds each party is responsible for their own post-separation debt which they have incurred.

129. The Court finds if other joint debts are later discovered, that have not been divided as specifically outlined herein, the person incurring the debt should be solely responsible for payment thereof, and the Court hereby orders the incurring party to hold the other party harmless therefrom. In addition, the party incurring the debt should inform the creditor of his or her responsibility to pay the joint debt and keep the creditor informed of the party's current address for the purposes of notification.

130. The parties should be ordered as follows:

- a. The party obligated to pay a debt is ordered to send a copy of the Decree of Divorce to each joint creditor informing them that he/she is required to pay that debt.
- b. The party obligated to pay a debt is ordered to notify each joint creditor of each party's separate address for purposes of notification.
- c. The party obligated to pay a debt is ordered to inform the joint creditor that each party is entitled to receive individual statements, notices and correspondence required by law, or by the terms of the contract. In addition, the party is ordered to inform the credit agency that no negative credit report or other exchange of credit history or repayment practices may be made regarding the joint debt, unless the creditor has first made a demand for payment on the party who is not required to pay the debt.

131. The Court finds that each of the parties is fully capable of paying their own attorney fees and therefore hereby orders each party to pay their own costs and fees.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the matters as both parties are residents of Summit County, State of Utah, and were for three months immediately prior to filing of this action.
2. Petitioner should be granted a Decree of Divorce from Respondent on the grounds of irreconcilable differences, the same to become final upon entry.
3. The terms of the Decree of Divorce should be consistent with the above outlined findings of fact.

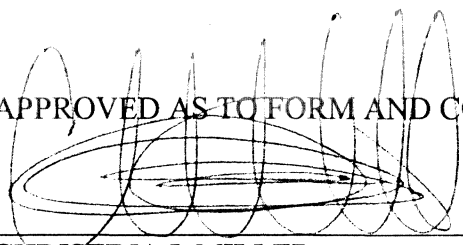
DATED this 31 day of July, 2006.

BY THE COURT:



DISTRICT COURT JUDGE

APPROVED AS TO FORM AND CONTENT:



CHRISTINA I. MILLER
Attorney for Respondent

7-25-06

Tab B

Hodge v. Hodge
Appeal No. 20060789
Proposed Asset Schedule Based on 50/50 Split of Marital Assets

Description of Property	Value	Diane's Separate and/or Premarital	Mike's Separate and/or Premarital	Marital
ASSETS				
Wasatch Ice Stock	\$12,600.00			\$12,600.00
2004 Income Tax Refund	\$19,486.00			\$19,486.00
2964 American Saddler \$1,350,000 value - \$567,000 mortgage	\$783,000.00			\$783,000.00
Delta 401k Family Care Savings Plan (premarital portion)	\$89,277.00		\$89,277.00	
Delta account, remaining accounts including: 401k Family Care Savings Plan (marital portion) - \$165,396 Delta Defined Contribution Retirement Account - \$17,158 Delta Traditional IRA - \$606 Delta MPPP - \$103,098	\$286,258.00			\$286,258.00
Ameritrade (8730)	\$315.00			\$315.00
Ameritrade (1101)	\$5,910.00		\$5,910.00	
RJ O'Brien Accounts IRA	\$52,000.00		\$52,000.00	
RJ O'Brien Accounts	\$18,000.00		\$18,000.00	
Schwab SEP IRA	\$14,196.00			\$14,196.00
Schwab 401k	\$29,679.00			\$29,679.00
Schwab Rollover IRA	\$63,317.00	\$63,317.00		
Schwab Trust Account	\$47,831.00	\$47,831.00		
Schwab Simple IRA	\$10,935.00			\$10,935.00
Delta Credit Union Checking/Savings	\$18,400.00			\$18,400.00
Zions Bank Savings	\$1,028.00		\$1,028.00	
Wells Fargo Creating Community Account (5638)	\$68,647.00			\$68,647.00
Wells Fargo Personal Account (8033)	\$19,233.00			\$19,233.00
Wells Fargo ¹	\$41,248.60			\$41,248.60
Delta Pension				QDRO
2003 Acura MDX - Mike				
2002 Acura MDX - Diane				
2001 Subaru Outback - Mike				
LIABILITIES				
December 2005 Payment to Suzie's Trust	-\$154,000.00			-\$154,000.00
TOTAL		\$111,148.00	\$166,215.00	\$1,149,997.60
1/2 Marital Assets Value		\$574,998.80	\$574,998.80	
TOTAL AWARD		\$686,146.80	\$741,213.80	
<p>1- While the balance in Ms. Hodge's personal account (8033), as of April 11, 2006 was \$19,233, this represents an unreconciled balance. Exh. 37 and 48 (received at trial) evidence that on April 17 and 24, 2006, Ms. Hodge transferred two amounts from her business account (5638) into her personal account, totaling \$41,248.60. Because these statements are on different dates, they cannot be reconciled and fail to evidence the deposits in transit between these accounts. Accordingly, Mr. Hodge claims the marital estate was dissipated by Ms. Hodge in the amount of \$41,248.60. (R. 409)</p>				