

1995

McCarvel v. Herbert : Brief of Appellant

Utah Court of Appeals

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Don R. Petersen; Leslie W. Slaugh; Howard, Lewis & Petersen; Attorneys for Appellant.

Dana D. Burrows; Attorney for Appellee.

Recommended Citation

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DOCKET

IN THE UTAH COURT OF APPEALS

<p>CAROLYN HERBERT McCARVEL, Plaintiff-Appellee, vs. BLAKE T. HERBERT, Defendant-Appellant.</p>	<p>Case No. 950552-CA Oral Argument at Priority 15</p>
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BRIEF OF APPELLANT

APPEAL FROM THE FINAL DECREE OF THE FOURTH JUDICIAL COURT OF UTAH COUNTY, THE HONORABLE RALPH M. HARDING

DON R. PETERSEN and
LESLIE W. SLAUGH, for:
HOWARD LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601

ATTORNEYS FOR APPELLANT

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ATTORNEY FOR APPELLEE

IN THE UTAH COURT OF APPEALS

<p>CAROLYN HERBERT McCARVEL, Plaintiff-Appellee, vs. BLAKE T. HERBERT, Defendant-Appellant.</p>	<p>Case No. 950552-CA Oral Argument Priority 15</p>
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BRIEF OF APPELLANT

APPEAL FROM THE FINAL DECREE OF THE FOURTH JUDICIAL
COURT OF UTAH COUNTY, THE HONORABLE RAY M. HARDING

DON R. PETERSEN and
LESLIE W. SLAUGH, for:
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TABLE OF AUTHORITIES

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IN THE UTAH COURT OF APPEALS

CAROLYN HERBERT McCARVEL,
Plaintiff-Appellee,

vs.

BLAKE T. HERBERT,
Defendant-Appellant.

Case No. 950552-CA

Oral Argument Priority 15

BRIEF OF APPELLANT

JURISDICTION

This is an appeal from a final decree in a domestic relations matter. Jurisdiction is conferred on this Court by Utah Code Ann. § 78-2a-3(2)(i) (Supp. 1995).

ISSUES PRESENTED

1. Are the trial court's findings deficient where the trial court failed to make any finding on the critical disputed issues and failed to explain the reason for denying Husband's defenses? This is an original issue presented to this Court. Although the issues presented in this appeal involve discretionary rulings by the trial court, the trial court is still required to make findings on all material issues sufficient to show that the decree "follows logically from, and is supported by, the evidence." Butler, Crockett & Walsh Development Corp. v. Pinecrest Pipeline Operating Co., 909 P.2d 225, 231 (Utah 1995) (citation omitted).

2. Did the trial court abuse its discretion in determining that Wife was not estopped from seeking one-half of the current equity in the home, where it was undisputed that the parties had agreed to some modification of the divorce decree, Husband made improvements to the home in reliance upon his understanding that Wife did not claim any of the increased equity, and Wife did not respond to letters which confirmed that belief? This issue is reviewed for abuse of discretion. Trolley Square Assocs. v. Nielson, 886 P.2d 61, 65 (Utah Ct. App. 1994). This issue was raised in Husband's answer (R. 61 ¶ 9) and in Husband's trial memorandum. (R. 134-130.¹)

3. Did the trial court abuse its discretion in determining that Wife's claims were not barred by laches, where Wife waited over five years before bringing her claim for part of the equity in the home and where Husband had made improvements to the home in reliance on his understanding, which had been clearly communicated to Wife, that he would only be obligated to pay the remaining balance of the \$10,000.00 provided in the decree of divorce? This issue is reviewed for abuse of discretion. Papanikolas Brothers Enterprises v. Sugarhouse Shopping Center Associates, 535 P.2d 1256, 1260 (Utah 1975). This issue was raised below in Husband's answer (R. 61, ¶ 9), and in Husband's trial memorandum (R. 127-126).

¹The papers in the trial court file are organized in reverse chronological order, with the result that the record index numbers for any particular document run in reverse order.

4. Did the trial court abuse its discretion in ordering the home equity split as of the time of sale or appraisal, where that unfairly allowed Wife to profit from her own inaction? The trial court's adjustment of the parties' property interests is reviewed for abuse of discretion. Watson v. Watson, 837 P.2d 1, 5 (Utah Ct. App. 1992) (citation omitted). This issue was raised below in Husband's trial memorandum. (R. 125-123.)

DETERMINATIVE STATUTES AND RULES

Husband is not aware of any constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative of the appeal or of central importance to the appeal.

STATEMENT OF THE CASE

A. Nature Of The Case. This is an appeal from a final decree which amended a prior decree in a domestic relations case. Only the division of property was at issue.

B. Course Of Proceedings And Disposition Below. The parties were divorced by decree entered October 21, 1987. (R. 53-51.) On September 20, 1994, Wife filed a Motion for Order to Show Cause, which sought to enforce a provision in the divorce decree requiring Husband to pay a portion of the home equity to Wife. (R. 54.) The trial court issued the requested order to show cause. (R. 59-58.) Husband responded to the order to show cause and asserted, among other things, that Wife's claims were barred by laches, promissory estoppel and the statute of limitations. (R. 62-60.)

A hearing on the order to show cause was held before Judge Steven L. Hansen on October 27, 1994. (R. 68-67.) Judge Hansen ordered the matter set for a trial before a district court judge. (Id.) The case was assigned to Judge Ray M. Harding and set for trial on April 17, 1995. (R. 69.) Following trial, the court entered its memorandum decision finding the issues in favor of Wife. (R. 144-143.) The court entered its Findings of Fact and Conclusions of Law (R. 148-146) and its Order Amending Decree of Divorce (R. 151-149) on August 15, 1995. Husband filed his notice of appeal on September 13, 1995. (R. 155-154.)

On October 26, 1995, Wife filed a motion for extension of time to file a notice of cross-appeal. (R. 159-158.) On November 30, 1995, the trial court granted that motion by memorandum decision (R. 170-169), and also signed an Order for Extension of Time to Submit Cross-Appeal which had been submitted to the court by Wife prior to the court's ruling, and which stated that Wife had ten days to file her notice of cross-appeal. (R. 172-171.) Thereafter, on December 21, 1995, the trial court entered its Findings of Fact and Conclusions of Law on the extension of time issues (R. 174-173), and a second Order. (R. 176-175.) This second Order did not specify when the notice of appeal should be filed.² Wife filed her notice of cross-appeal on January 8, 1996.

² Rule 4(e) of the Utah Rules of Appellate Procedure provides that the maximum extension of time which may be granted by a trial court is "10 days from the date of entry of the order granting the motion."

C. Statement Of Facts. The parties were divorced by a decree entered September 27, 1987. (R. 53-51.) Two provisions of the divorce decree give rise to the dispute presently before the Court:

3. Each party is hereby ordered to pay their own debts and Plaintiff is to take Defendant's name off any credit cards she is using.

. . . .

5. Defendant is ordered to pay Plaintiff her equity in the home, namely, Ten Thousand Dollars (\$10,000.00) within eighteen (18) months, namely, March 1989. In the event such amount is not paid, the parties are to sell the home and the net equity is to be divided between the parties. Each party is to sign appropriate documents to sell the home and each party agrees to fully cooperate in the selling of such home.

On May 16, 1989, Wife's attorney sent a letter to Husband's attorney asserting that Husband had failed to make the home equity payment required by the divorce decree. (R. 119-118.) Wife thereafter had a telephone conversation with Husband regarding the foregoing provisions of the divorce decree. (R. 193.) At that time, Wife had not complied with her obligation to take Husband's name off the credit cards and to pay the credit cards (R. 230-231, 195-196), nor had Husband paid the \$10,000.00. (R. 193, 220.)

During the telephone conversation, according to Husband, he offered to pay the credit card bills for Wife, with the amount of the credit card payments to be offset against the \$10,000.00 equity payment, and she agreed to accept the offset and to allow Husband

to pay the balance of the \$10,000.00 equity payment to her after he finished paying off the credit cards. (R. 220, 228-29.) Wife admitted the conversation occurred, but asserted that she only agreed to allow the offset against whatever equity payment she was entitled to, i.e, not limited to \$10,000.00. (R. 193, 209.)

On June 5, 1989, apparently following the conversation between Wife and Husband, Husband sent a letter to his attorney asserting that the home equity issue had been resolved. (R. 116.) Husband's attorney, in turn, sent a letter to Wife's attorney which stated:

I am informed by Mr. Herbert that he has contacted his ex-Wife directly and satisfied the problems in regard to the demands that you made in your recent letter to me. If your understanding is different from this, please let me know.

(R. 114.) No response was made to that letter. (R. 230.) Over three years later, on July 21, 1992, Wife sent a letter to Husband claiming that she was entitled to \$25,000.00 as her share of the equity in the house. (R. 73.) Husband responded, through his attorney, by reminding Wife of the agreement made in 1989, and inviting Wife to discuss the matters with Husband's attorney. (R. 71-70.) Again, Wife did not respond to the letter or make any further efforts to collect the claimed home equity payment, until she filed her order to show cause to commence the current proceeding. (R. 213-214.)

Following the 1989 agreement, Husband made all of the payments on the credit cards. (R. 211.) The total of the payments was \$6,077.04. (R. 110, 226.) The last payment on the credit cards

was made in November, 1994. (R. 229, 234.) Husband also made all of the mortgage payments for the house and made improvements to the home, including installation of a new furnace and air conditioning system (October 1992 or 1993), and installation of a new front door and new patio doors (just before trial in April, 1995). (R. 223.) Husband also prepared the home for landscaping. (R. 231.) The cost of the improvements was approximately \$6,000.00. (Id.)

SUMMARY OF ARGUMENT

This Court should hold as a matter of law that Wife is estopped from asserting her claims. Husband, through counsel, sent letters to Wife setting forth Husband's understanding of the agreement between the parties. Wife failed to respond to the letters. Based on his belief that his debt to Wife was only \$10,000.00 less credit card payments, Husband made improvements to the home and failed to make other arrangements to pay the debt prior to further appreciation of the value of the home. Wife's inaction should be held to create an estoppel or to bar her claims on the grounds of laches.

At a minimum, the Court should remand with directions that the equity be determined as of July, 1992. On that date, Husband's counsel sent a letter to Wife clearly communicating that Husband believed his only obligation was to pay \$10,000.00 less credit card payments. Wife did not respond, and following that date, Husband

invested at least \$6,000.00 in improvements to the home. Also, the house continued to appreciate in value.

If this Court does not direct judgment in favor of Husband, the case should be remanded for additional findings. The trial court is required to make findings on all material issues in order to permit appellate review. The trial court found that the parties had reached an oral agreement in May, 1989, to modify the payment requirements of the divorce decree, but failed to make needed findings concerning the terms of that agreement. The court further failed to make any findings to support its denial of Husband's equitable defenses of laches and estoppel. Remand of this case is required to permit the trial court to make the required findings.

ARGUMENT

POINT I

THE TRIAL COURT'S FINDINGS OF FACT ARE INSUFFICIENT TO SUPPORT THE DECISION.

The need for detailed findings of fact has been repeatedly emphasized by the Utah appellate courts:

Failure of the trial court to make findings on all material issues is reversible error unless the facts in the record are "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment." The findings of fact must show that the court's judgment or decree "follows logically from, and is supported by, the evidence." The findings "should be sufficiently detailed and include enough subsidiary facts to disclose the steps by

which the ultimate conclusion on each factual issue was reached."

Butler, Crockett & Welsh Development Corp. v. Pinecrest Pipeline Operating Co., 909 P.2d 223, 231 (Utah 1995) (quoting Acton v. J. B. Deliran, 737 P.2d 996, 999 (Utah 1987)).

The trial court failed to resolve the disputed factual issues in this case. The parties agreed that they had a telephone conversation in May or June, 1989, resulting in an agreement that Husband was going to pay the credit card payments and that those payments were to be deducted from whatever he owed Wife. The parties disagreed, however, on several important issues. Husband's recollection, confirmed in a letter to which Wife did not respond, was that the credit card payments were to be deducted from the \$10,000.00 home equity amount, and that the balance was to be paid after the credit card payments were finished. Wife at trial asserted disagreement as to both the amount of the home equity and the time for payment.

Resolution of that disputed issue was critical. If the Husband's version was accurate, it is difficult to see how the trial court's decision could be sustained. If the Wife's recollection of the initial agreement was accurate, the trial court should have specifically considered the effect of her failure to respond to the letters from Husband's attorney on the subject.

The trial court also failed to state its reasons for denying Husband's claims of estoppel, laches and waiver. The trial court's memorandum decision does not even address those issues. The

Findings of Fact and Conclusions of Law prepared by Wife's counsel state only: "The court having reviewed the trial memorandum of the Defendant and having considered Defendant's argument for estoppel, waiver, equitable doctrine of laches, and valuation of the property, denied the same." This cursory finding is insufficient.

Husband argues below that the evidence compels a determination in his favor. At a minimum, however, the matter should be remanded to the trial court for entry of findings on the disputed issues, in order to permit appropriate appellate review.

POINT II

WIFE IS ESTOPPED FROM CLAIMING HALF OF THE APPRECIATED VALUE OF THE HOME.

This Court outlined the elements of estoppel as follows:

Estoppel is an equitable doctrine which precludes parties from asserting their rights where their actions render it inequitable to allow them to assert those rights. Estoppel requires proof of three elements: (1) a statement, admission, act, or failure to act by one party inconsistent with a later-asserted claim; (2) the other party's reasonable action or inaction based on the first party's statement, admission, act, or failure to act; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate its statement, admission, act, or failure to act.

State ex rel. Parker v. Irizarry, 893 P.2d 1107 (Utah Ct. App. 1995).

Each of these elements was satisfied in this case. Although Wife did not recall receiving some of the letters (R. 212-213), there was no real dispute that Husband had clearly communicated to

Wife or to her attorney that the issues regarding payment for the home equity had been resolved, and that the total payments Husband would be required to make would be \$10,000.00.³ Also undisputed is that Wife failed to take any effective action to controvert the clear understanding expressed in Husband's statements. Finally, there was injury to Husband from the inaction. Based on his assumption that he and Wife had agreed that he would only pay \$10,000.00 less the credit card payments, he continued making improvements to the home and, more importantly, made no efforts to obtain a loan to satisfy the debt to Wife before the property values increased further.

Even if the initial agreement was as now asserted by Wife, Wife still had a duty to respond and refute the claims in the letters from Husband's counsel. The house was apparently appreciating rapidly in value. Where Wife knew that Husband believed that his only debt to Wife was \$10,000.00 less the credit card payments, it was inequitable to allow her to sit idly by and allow the house to appreciate and to then claim half of the appreciated value of the house. The trial court abused its discretion by disregarding Husband's claims of estoppel.

POINT III

WIFE'S CLAIMS WERE BARRED BY LACHES.

Husband's obligation to pay Wife a portion of the equity matured in March, 1989. Wife did not seek court assistance in

³ Husband would be willing to pay interest on the \$10,000.00.

enforcing that claim for five and one-half years. Wife made one demand, in May 1989, for payment of the equity, which was promptly met by Husband negotiating with her for payment of the credit card debt. The only other attempt was her letter in July, 1992, which actually compounded her inaction because she failed to respond to the letter from Husband's counsel asserting that Husband's total obligation was \$10,000.00, and thereby reinforced Husband's belief concerning the agreement in 1989. Under these circumstances, the trial court should have held the claims barred by laches. Laches has been defined as follows:

Laches is not mere delay, but delay that works a disadvantage to another. To constitute laches, two elements must be established: (1) The lack of diligence on the part of plaintiff; (2) An injury to defendant owing to such lack of diligence. Although lapse of time is an essential part of laches, the length of time must depend upon the circumstances of each case, for the propriety of refusing a claim is equally predicated upon the gravity of the prejudice suffered by defendant and the length of plaintiff's delay.

Papanikolas Brothers Enterprises v. Sugarhouse Shopping Center Associates, 535 P.2d 1256, 1260 (Utah 1975).

Husband satisfies these elements. There was obviously a lack of diligence by Wife. Her excuses for her lack of diligence were feelings of guilt⁴ and her non-pushy personalty. (R. 202.) Wife offered no other evidence to controvert the claim of laches. While persons are certainly not required to be litigious, Wife should

⁴She did not explain why she felt guilty for seeking more than \$10,000 in home equity.

have, at a minimum, responded to the July, 1992, letter from Husband's attorney.

The trial court apparently based its determination on the fact that, had Husband paid the \$10,000.00 to Wife in March, 1989, Wife could have paid the credit card debts. That may be true, but it is really irrelevant to the issue of whether Wife was guilty of laches. There is no evidence that Husband had the ability to pay \$10,000.00 in March, 1989. From the minimal payments he made on the high-interest credit card obligations, one would assume that he did not have an ability to make that payment. More importantly, if the agreement was as Husband understood it to be, he had no reason to make the payment. Husband's understanding of the agreement was that the balance of \$10,000.00 was not due until he had finished paying on the credit cards. Had Wife not been sitting on her rights, Husband likely would have taken different actions. He would not, for example, have contributed \$6,000.00 to improvements on the house. By delaying to take any action when she reasonably should have known that Husband believed that his total obligation was \$10,000.00, Wife has been guilty of laches. This Court should remand the matter to the trial court with instructions to dismiss Wife's claims on the grounds of laches.

POINT IV

THE TRIAL COURT ERRED IN ORDERING THE HOME TO BE VALUED AT THE TIME OF THE HEARING.

The trial court's order grants Wife the full benefit of all appreciation in the home, by ordering that the home be sold or

appraised, and that she receive half of the equity at the time of sale or appraisal, less certain specified offsets for the Husband's credit card payments and mortgage payments. This unfairly rewards Wife for her inaction. Husband argued in his trial memorandum that the equity in the home should be split as of March, 1989. Such a ruling would be appropriate based on the agreement between the parties. At a minimum, however, the Court should order that the equity be determined as of July, 1992.

CONCLUSION

The undisputed evidence in this case shows that the parties made an oral agreement to modify certain payment requirements specified in their decree of divorce. Husband believed the agreement to be that his total debt was \$10,000.00 less the credit card payments, and it is undisputed that Wife knew or should have known that such was Husband's belief, at least by July, 1992. This Court should hold that Wife's claim for one-half of the current equity is barred by her laches, or that she is estopped from asserting the claim by her failure to respond to the letters from Husband's attorney. Alternatively, the Court should remand this matter for adequate findings on the disputed issues.

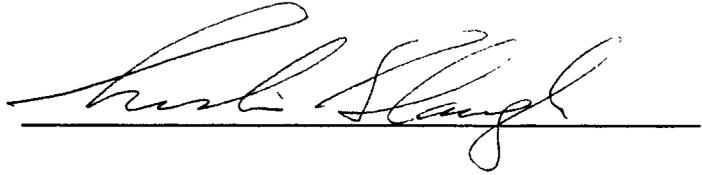
DATED this 22nd day of March, 1996.


LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to the following, postage prepaid, this 22nd day of March, 1996.

Dana D. Burrows, Esq.
387 West Center Street
Orem, UT 84057

A handwritten signature in cursive script, appearing to read "Dana D. Burrows", is written above a solid horizontal line.

J:\LWS\HERBERT.BRF

APPENDIX "A"

Decree of Divorce (R. 53-51)

FILED
1987 OCT 21 2:33
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RONALD R. STANGER #3074
Attorney for Plaintiff
80 East 100 North
P. O. Box 477
Provo, Utah 84603
(801) 375-5010

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

CAROLYN HERBERT,
Plaintiff,

✓ DECREE OF DIVORCE ✓

vs.

BLAKE T. HERBERT,
Defendant.

Civil No. CV 87 264

The above-entitled matter, having come on regularly for hearing before the Court on the 21st day of September, 1987 before the Honorable Ray M. Harding. Plaintiff was present and represented by Ronald R. Stanger, Defendant was present and represented by Don R. Petersen. Plaintiff moved for an Order amending the grounds in paragraph 4 of the Complaint to allege irreconcilable differences as grounds for such divorce. The Court granted such motion. The Court also heard a Stipulation entered into between the parties and the Court approved such Stipulation. The Court having heard evidence and having considered the stipulation entered into by the parties and

having made in writing its Findings of Fact and Conclusions of Law and being fully advised in the premises;

NOW HEREBY ORDERS, ADJUDGES AND DECREES AS FOLLOWS:

1. Plaintiff is hereby awarded a Decree of Divorce from and against the Defendant, the same to become final upon the signing and entry in the Registry of Actions.

2. No alimony is to be awarded.

3. Each party is hereby ordered to pay their own debts and Plaintiff is to take Defendant's name off of any credit cards she is using.

4. Each party is awarded the life insurance policy presently in their respective names.

5. Defendant is ordered to pay Plaintiff her equity in the home, namely, Ten Thousand Dollars (\$10,000.00) within eighteen (18) months, namely, March 1989. In the event such amount is not paid, the parties are to sell the home and the net equity is to be divided between the parties. Each party is to sign appropriate documents to sell the home and each party agrees to fully cooperate in the selling of such home.

6. Plaintiff is to be awarded the following items of personal property:

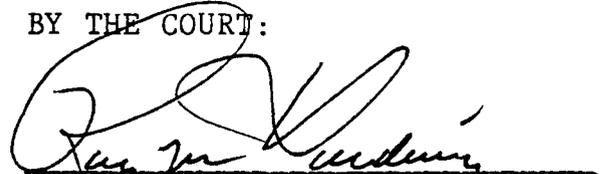
1974 Ford Torino Elite
Gray couch purchased in 1986
Sewing machine
Cedar chest

Personal pictures
Clothing
China

7. Each party is ordered to pay their own attorney fees and costs incurred in this matter.

DATED this 21st day of October, 1987.

BY THE COURT:


RAY M. HARDING, Judge

APPROVED AS TO FORM:


DON R. PETERSEN
Attorney for Defendant

CERTIFICATE OF DELIVERY

Delivered a copy of the foregoing Decree of Divorce in an envelope, postage prepaid, this 29th day of September, 1987 to the office of Don R. Petersen, Attorney for Defendant, 120 East 300 North, P. O. Box 778, Provo, UT 84603.


Secretary

APPENDIX "B"

Memorandum Decision (R. 144-143)

FILED
Fourth Judicial District Court
of Utah County, State of Utah
May 12, 1995
CARMA B. SMITH, Clerk

Deputy

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

CAROLYN HERBERT McCARVEL, Plaintiff,	MEMORANDUM DECISION
vs.	CASE NO. 87 264
BLAKE T. HERBERT, Defendant.	DATE: May 12, 1995
	JUDGE: RAY M. HARDING
	LAW CLERK: Laura Cabanilla
	DEPUTY CLERK: Georgia Snyder

This matter came before the Court for ruling after hearing held in this matter on April 17, 1995. Having received and considered the testimony and evidence presented in this matter, the Court finds as follows:

The parties were divorced in 1987. Pursuant to the divorce decree entered in this matter, each party was to "pay their own debts and Plaintiff is to take Defendant's name off of any credit card she is using." Also, Defendant was ordered to "pay Plaintiff her equity in the home, namely, Ten Thousand Dollars (\$10,000) within eighteen months, namely March, 1989. In the event such amount is not paid, the parties are to sell the home and the net equity is to be divided between the parties."

By May of 1989, Plaintiff had not paid off the credit cards, nor had Defendant paid Plaintiff the \$10,000.

Both parties admit that the decree was modified by them in May of 1989 in that they agreed that Defendant would pay off the credit card debt for Plaintiff although they disagree whether this payment would be offset against the \$10,000 as Defendant suggests, or against what "he owed her," according to Plaintiff.

The Court finds that had Defendant paid Plaintiff her \$10,000 equity in the home by March of 1989, Plaintiff could likely have paid her credit cards. By delaying the payment of

the \$10,000 equity, Defendant has caused his own undoing. Defendant had the use of the premises, and the benefit of retaining the use of the \$10,000, while only making payments on the high interest credit cards, which would require the equivalent of her paying the interest on the debt since 1987. Yet Defendant desires to hold Plaintiff to a non-inflationary total amount while receiving the benefit himself of the rise in land values.

Therefore, the Court finds in equity that Plaintiff is entitled to have the home sold and the net equity divided between the parties. Defendant may however, take an offset before division of the equity, for mortgage payments he has made since entry of the decree, as well as a credit of \$6,000 for improvements he has made to the property. After an equal division of the remaining equity, Defendant may take an additional offset in the amount of \$6,077.04, the amount of credit card payments he made.

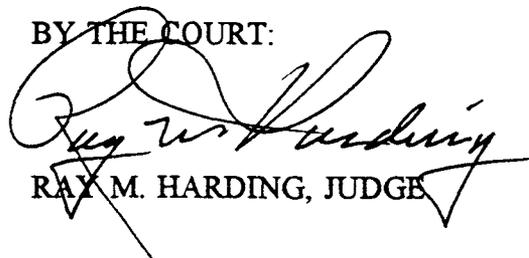
Should Defendant desire to buy out Plaintiff's equity in the home rather than having it sold he has that right. To do so, the property must be appraised by a mutually agreed upon appraiser, if the parties cannot agree on an appraiser, the Court will appoint one. Defendant must then exercise his right to buy out Plaintiffs interest in the equity of the home within 60 days of that appraisal.

Each party shall bear their own attorney's fees in this matter.

Counsel for Plaintiff is to prepare an order within 15 days of this decision consistent with the terms of this memorandum and submit it to opposing counsel for approval as to form prior to submission to the Court for signature. This memorandum decision has no effect until such order is signed by the Court.

Dated this 12th day of May, 1995.

BY THE COURT:



RAY M. HARDING, JUDGE

cc: Don R. Petersen, Esq.
Dana D. Burrows, Esq.

APPENDIX "C"

Findings of Fact and Conclusions of Law (R. 148-145)

DANA D. BURROWS - 5045
Attorney for Plaintiff
387 West Center
Orem, Utah 84057
Telephone: (801) 222-9700

95 AUG 15 4 10 53
JK

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

CAROLYN HERBERT (McCARVEL) : FINDINGS OF FACT AND
Plaintiff, : CONCLUSIONS OF LAW
vs. :
BLAKE T. HERBERT, :
Defendant. : Civil No. 87 264
Judge Ray M. Harding

The above-entitled matter having come before the Court for trial on issues certified to Judge Harding on April 17, 1995. Plaintiff was present and represented by counsel Dana D. Burrows. Defendant was present and represented by counsel Don R. Petersen. The Court having entertained the argument of counsel and testimony of the parties as well as affidavits of attorneys' fees and memorandum regarding property settlement and being fully advised in the premises, and having issued a Memorandum Decision dated May 12, 1995, now, therefore, the Court now enters its Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The parties were divorced in 1987.
2. Pursuant to the Divorce Decree entered in this matter, each party was to pay their own debts and Plaintiff was to take Defendant's name off of any credit card she used. Also, Defendant

was ordered to pay Plaintiff her equity in the home in the amount of \$10,000 within eighteen months, namely by March 1989. In the event such amount was not paid, the parties were ordered to sell the home and the net equity divided between the parties.

3. By May of 1989, Plaintiff had not paid off the credit cards nor had Defendant paid Plaintiff the \$10,000.

4. The Decree of Divorce was modified by the parties in May of 1989 in that they agreed that Defendant would pay off the credit card debt for Plaintiff although they disagree whether this payment would be offset against the \$10,000 as Defendant suggests, or against what Plaintiff alleges Defendant owed her.

5. The Court having reviewed the trial memorandum of the Defendant and having considered Defendant's argument for estoppel, waiver, equitable doctrine of laches, and valuation of the property, denied the same.

6. The Court finds that had Defendant paid Plaintiff her \$10,000 equity in the home by March of 1989, Plaintiff could likely have paid her credit cards. By delaying the payment of the \$10,000 equity, Defendant has caused his own undoing. Defendant had the use of the premises and the benefit of retaining the use of the \$10,000 while only making payments on the high interest credit cards, which would require the equivalent of her payment the interest on the debt since 1987. Yet Defendant desires to hold Plaintiff to a non-inflationary total amount while receiving the benefit himself of the rise in land values.

7. Therefore, the Court finds in equity that Plaintiff is

entitled to have the home sold and the net equity divided between the parties. Defendant may, however, take an offset, before division of the equity, for mortgage payments he has made since entry of the decree as well as a credit of \$6,000 for improvements he has made to the property. After an equal division of the remaining equity, Defendant may take an additional offset in the amount of \$6,077.04, the amount of credit card payments made.

8. Should Defendant desire to buy out Plaintiff's equity in the home rather than having it sold, he has that right. To do so, the property must be appraised by a mutually agreed upon appraiser. If the parties cannot agree on an appraiser, the Court will appoint one. Defendant must then exercise his right to buy out Plaintiff's interest in the equity of the home within 60 days of that appraisal.

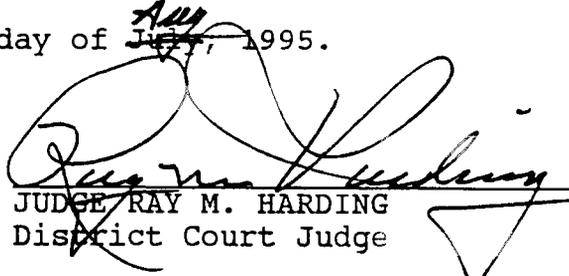
9. Each party shall be responsible for their own attorney's fees in this matter.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties in the above-entitled matter.

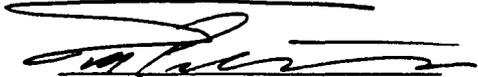
2. All remaining provisions of the Findings of Fact are hereby incorporated into the Conclusions of Law.

DATED this 14 day of ^{Aug}~~July~~, 1995.



JUDGE RAY M. HARDING
District Court Judge

APPROVAL AS TO FORM


Don Petersen
Attorney for Defendant

4-504 MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 17th day of July, 1995.

Don R. Petersen
120 East 300 North
P.O. Box 778
Provo, UT 84603



DANA D. BURROWS

APPENDIX "D"

Order Amending Decree of Divorce (R. 151-149)

DANA D. BURROWS - 5045
Attorney for Plaintiff
387 West Center
Orem, Utah 84057
Telephone: (801) 222-9700

MICROFILMED B/16/95

STATE COURT
STATE OF UTAH
95 AUG 15 AM 10:51
JK

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

CAROLYN HERBERT (McCARVEL) : ORDER AMENDING DECREE OF
Plaintiff, : DIVORCE
vs. :
BLAKE T. HERBERT, : Civil No. 87 264
Defendant. : Judge Ray M. Harding

The above-entitled matter having come before the Court for trial on issues certified to Judge Harding on April 17, 1995. Plaintiff was present and represented by counsel Dana D. Burrows. Defendant was present and represented by counsel Don R. Petersen. The Court having entertained the argument of counsel and testimony of the parties as well as affidavits of attorneys' fees and memorandum regarding property settlement and being fully advised in the premises, and having issued a Memorandum Decision dated May 12, 1995, and having entered its Findings of Fact and Conclusions of Law, now, therefore, **IT IS HEREBY ORDERED:**

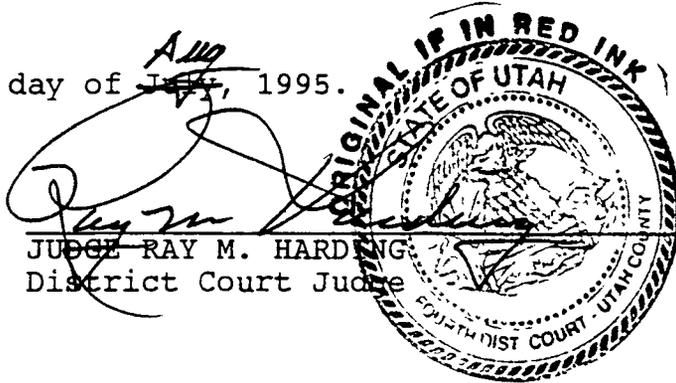
1. Plaintiff is entitled to have the home sold and the net equity divided between the parties. Defendant may, however, take an offset, before division of the equity, for mortgage payments he has made since entry of the decree as well as a credit of \$6,000 for improvements he has made to the property. After an equal

division of the remaining equity, Defendant may take an additional offset in the amount of \$6,077.04, the amount of credit card payments made.

2. Should Defendant desire to buy out Plaintiff's equity in the home rather than having it sold, he has that right. To do so, the property must be appraised by a mutually agreed upon appraiser. If the parties cannot agree on an appraiser, the Court will appoint one. Defendant must then exercise his right to buy out Plaintiff's interest in the equity of the home within 60 days of that appraisal.

3. Each party shall be responsible for their own attorney's fees in this matter.

DATED this 14 day of ^{Aug}~~July~~, 1995.



JUDGE RAY M. HARDING
District Court Judge

APPROVAL AS TO FORM


Don Petersen
Attorney for Defendant

4-504 MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 17th day of July, 1995.

Don R. Petersen
120 East 300 North
P.O. Box 778
Provo, UT 84603

A handwritten signature in black ink, appearing to read 'Dana D. Burrows', written over a horizontal line.

DANA D. BURROWS

APPENDIX "E"

Exhibit A, Letter dated May 16, 1989 (R. 119-118)

RONALD R. STANGER
Attorney and Counselor at Law
UNITED SURETY BUILDING
80 EAST 100 NORTH - P.O. BOX 477
PROVO, UTAH 84603

(801) 375-5010

May 16, 1989

Mr. Don R. Petersen
Attorney at Law
120 East 300 North
P. O. Box 778
Provo, UT 84603

RECEIVED

MAY 18 1989

RE: Herbert vs. Herbert

HOWARD, LEWIS & PETERSEN

Dear Don:

My client, Carolyn Herbert, has brought to my attention that paragraph 5 of the Decree of Divorce has not yet been complied with. Such paragraph reads as follows:

"5. Defendant is ordered to pay Plaintiff her equity in the home, namely, Ten Thousand Dollars (\$10,000.00) within eighteen (18) months, namely, March 1989. In the event such amount is not paid, the parties are to sell the home and the net equity is to be divided between the parties. Each party is to sign appropriate documents to sell the home and each party agrees to fully cooperate in the selling of such home."

Mr. Herbert has refused to comply with such order.

The purpose of this letter is to see if we can avoid running up additional attorney's fees and see if you could check with your client to see if he would be willing to comply without the necessity of further legal action.

I have been instructed to file an Order to Show Cause In Re: Contempt. I hesitate to do that therefore, I thought it would be more professional to write to you directly to see if we can assist our clients.

I have called you on the telephone and it might be that we have chatted about this by the time you get this letter.

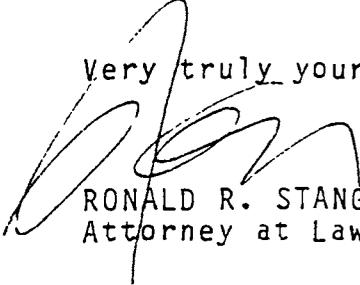
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Mr. Petersen
May 16, 1989
Page Two

I would appreciate it if you would call me at your earliest convenience.

Very truly yours,



RONALD R. STANGER
Attorney at Law

RRS:sw
cc: Carolyn Herbert

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..000 112

APPENDIX "F"

Exhibit B, Letter dated June 5, 1989 (R. 116)

18060

RECEIVED

JUN 08 1989

5 June 1989

HOWARD. LEWIS & PETERSEN

Om R. Petersen

I received your letter a few days ago. I have been trying to get in touch with you by phone. You have been too busy so I am sending you a letter.

I have contacted my ex-wife and we have resolved the differences on the money matter.

Thank you
Blake T. Hubert

APPENDIX "G"

Exhibit C, Letter dated June 12, 1989 (R. 114)

Howard, Lewis & Petersen
Attorneys and Counselors at Law
120 East 300 North Street
Post Office Box 778
Provo, Utah 84603

Jackson Howard
S. Rex Lewis
Don R. Petersen
Craig M. Snyder
John L. Valentine
D. David Lambert
Fred D. Howard
Leslie W. Slauch
Kevin J. Sutterfield

Area Code 801
Telephone 373-6345
Telefax 377-4991

L:Stanger.sr
Our File No. 18,060

June 12, 1989

Mr. Ron Stanger
Attorney at Law
80 East 100 North
P.O. Box 477
Provo, UT 84603

Re: Herbert v. Herbert

Dear Ron:

I am informed by Mr. Herbert that he has contacted his ex-wife directly and satisfied the problems in regards to the demands that you made in your recent letter to me. If your understanding is different from this, please let me know.

Very truly yours,

HOWARD, LEWIS & PETERSEN



Don R. Petersen

DRP/sdr
cc: Mr. Blake Herbert

APPENDIX "H"

Exhibit F, Letter dated July 31, 1992 (R. 71-70)

HOWARD, LEWIS & PETERSEN

ATTORNEYS AND COUNSELORS AT LAW

120 East 300 North Street

Post Office Box 778

Provo, Utah 84603

Telephone: (801) 373-6345

Facsimile: (801) 377-4991

File No.

Jackson Howard
Don R. Petersen
Craig M. Snyder
John L. Valentine
D. David Lambert
Fred D. Howard
Leslie W. Slaugh

Kevin J. Sutterfield
F. Richards Smith III
Linda J. Barclay
Danielle M. Ferron

OF COUNSEL
S. Rex Lewis
Dwight Flickanger

July 31, 1992

Carolyn McCarvel
1316 East Knollwood Drive
Sandy, Utah 84092

Re: Carolyn McCarvel v. Blake Herbert

Dear Mrs. McCarvel:

Your letter of July 21, 1992 to Mr. Blake T. Herbert has been referred to our office. I have reviewed your letter, together with the Decree of Divorce, and I am informed that subsequent to the Decree of Divorce there was an agreement made. Mr. Herbert agreed to pay for credit card obligations which had been incurred by yourself. These were incurred by way of a Zions First National Bank VISA Card and a Zions First National Bank MasterCard. The agreement provided that Mr. Herbert would pay for these accounts, and the amounts that he paid would be subtracted from the \$10,000.00.

Your letter dated July 21st makes no reference to the agreement made with Mr. Herbert. I note in the file that I received a letter from Mr. Ronald Stanger, who was representing you at the time of the divorce, making demand for the \$10,000. I was informed by Mr. Herbert in May of 1989 that an agreement had been made and I so informed Mr. Stanger by way of a letter dated June 12, 1989. I never heard anything further from him.

Mr. Herbert wants to be responsible about this matter and he is willing to pay the \$10,000.00 after receiving a credit for payment of the credit card obligations, and credit for approximately \$800.00 by way of checks that he paid directly to you.

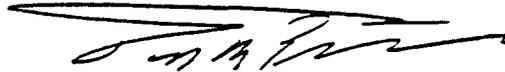
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Carolyn McCarvel
July 31, 1992
Page 2

I would appreciate hearing from you, or if you are represented by an attorney, please have your attorney contact me. Mr. Herbert is desirous to resolve this matter without the necessity of further costs and expenses involved.

Very truly yours,

HOWARD, LEWIS & PETERSEN



Don R. Petersen

DRP:dlp
cc: Blake T. Herbert

L:mcCarvel.ltr

000 070