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Borley v. Smith Appellant's Brief Dckt. 35751

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STATEMENT OF THE

A.

NATURE OF THE CASE

This case arises out of a post-divorce Motion to Divide Omitted Asset filed by Plaintiff / Respondent, Debra A. Borley, hereinafter “Debra.” In her Motion to Divide Omitted Asset, Debra sought to divide a “retro-check” Defendant / Appellant, Kevin Smith, hereinafter, “Kevin,” received from his employer after the parties’ divorce was final, alleging the “check was a community asset that was not divided in the Judgment and Decree of Divorce.” The magistrate court, in its Memorandum Decision determined that the proceeds received by Kevin were not omitted assets in the Property Settlement Agreement attached to the Judgment and Decree of Divorce, but ordered a division of a portion of the proceeds received by Kevin anyway pursuant to a formula that was not set forth in the Judgment and Decree of Divorce or the Property Settlement Agreement.

Kevin appealed the magistrate court’s Memorandum Decision to the District Court contending the magistrate court *had no jurisdiction to make a determination as to* Debra’s Motion to Divide Omitted Asset because the Property Settlement Agreement attached to the Judgment and Decree of Divorce was not merged with the Judgment and Decree of Divorce, and even if it was merged, the issue was barred by the doctrine of res judicata. Kevin further contended that all proceeds he received from his employer post-divorce was his sole and separate property.

The District Court, in its Decision on Appeal, affirmed the magistrate court’s ruling that the Property Settlement Agreement was merged into the Judgment and Decree

of Divorce and further ruled the magistrate court had jurisdiction to modify the Judgment and Decree of Divorce. The District Court then ruled the magistrate court erred in applying the time rule method to divide certain retirement benefits received by Kevin post divorce where the Judgment and Decree of Divorce divided retirement assets using the accrued benefit method. Finally, the District Court ruled the magistrate court erred when it found the “stock allocation” received by Kevin post divorce was his separate property.

Kevin appeals the District Court’s decision regarding the issues of merger, res judicata and determination that compensation Kevin received from his employer post divorce was an omitted asset.

B.

COURSE OF PROCEEDINGS IN THE MAGISTRATE COURT

On September 22, 2005, the magistrate court filed a Judgment and Decree of Divorce in the above-entitled action that granted Debra and Kevin a divorce from each other. (R. pp. 19 – 20). Attached to that Judgment and Decree of Divorce was a Property Settlement Agreement entered into by the parties on September 15, 2005 that divided all of the parties’ marital property and debt which the court approved in the Judgment and Decree of Divorce. (R. pp. 21 – 29). On March 24, 2006, Debra filed a Motion to Divide Omitted Asset. (Stipulation to Augment Record filed February 4, 2009, Exhibit “A.”). On March 27, 2007, Kevin filed a Motion for Summary Judgment (Stipulation to Augment Record filed February 4, 2009, Exhibit “E.”). On April 26, 2007, the magistrate court filed a Stipulation to Vacate Trial; Take Telephonic Deposition and Order wherein the parties agreed to submit a Stipulation of Facts to the magistrate court

along with memorandums in support of their legal positions. (Stipulation to Augment Record filed February 4, 2009, Exhibit "I."). On August 1, 2007, the parties filed Plaintiff's and Defendant's Stipulated Facts. (Stipulation to Augment Record filed February 4, 2009, Exhibit "J."). The parties then submitted their Memorandum in Support of their legal positions.

On October 10, 2007, the magistrate court filed its Order Granting in Part and Denying in Part Plaintiff's Motion to Divide Omitted Asset. (R. pp. 43 – 45). On November 28, 2007, Kevin filed his Notice of Appeal. (R. pp. 46 – 48). On December 28, 2007, Debra filed her Notice of Cross Appeal. (R. pp. 49 – 51).

C.

COURSE OF PROCEEDINGS IN THE DISTRICT COURT

On August 21, 2008, the District Court heard oral argument on Kevin's appeal and Debra's Cross-Appeal. (R. p. 52). On September 10, 2008, the District Court filed its Decision on Appeal. (R. pp. 52 – 66). On October 8, 2008, Kevin filed his Notice of Appeal. (R. pp. 67 – 69). On October 29, 2008, Debra filed her Notice of Cross Appeal. (R. pp. 70 – 72).

D.

STATEMENT OF FACTS

The parties were divorced by a Judgment and Decree of Divorce filed on September 22, 2005. Paragraph 2 of the Judgment and Decree of Divorce specifically states:

2. **PROPERTY SETTLEMENT AGREEMENT:** The Property Settlement Agreement dated September 15, 2005 is approved by this court. The Property Settlement Agreement is approved by this Court, but it is not merged nor incorporated into this Judgment and Decree of Divorce. A copy of that Agreement is attached hereto. The parties have provided all of the terms of the said Agreement. (Emphasis added).

(R. pp. 19 – 20). The Judgment and Decree of Divorce was drafted by Debra's counsel.

It is important to note that pursuant to the terms of the Property Settlement Agreement entered into by the parties, Kevin received \$135,152.00 of the net community and Debra received \$301,990.00 of the net community. (R. p. 29). Paragraph 10 of the Property Settlement provides:

10. **AGREEMENT TO BE MERGED:** The parties hereto agree that in the event a divorce is entered, the original of this Agreement will be submitted to the court for approval and the parties hereto will request that this Agreement be merged and incorporated and made a part of the Judgment and Decree of Divorce. (Emphasis added).

(R. p. 24).

In the parties' Property Settlement Agreement dated September 15, 2005, Kevin's retirement benefits through United Airlines were divided as follows:

4. **DIVISION OF RETIREMENT BENEFITS.** Husband has been employed by United Airlines and has a pension, either with United Airlines, or now with Pension Benefit Guarantee Association. Wife shall receive fifty percent (50%) of the benefit accumulated by Husband during the marriage to be set over to her pursuant to a Qualified Domestic Relations Order.

(R. p. 22). The Property Settlement Agreement divided the parties' income as follows:

13. **SEPARATE PROPERTY/INCOME AFTER SIGNING OF AGREEMENT:** The parties hereto stipulate and agree that from and after the date of the signing of this Agreement, any and **all** property or income acquired or earned by either party hereto shall be the separate property of the party who has acquired or earned it and the other party shall have no claim thereon. The parties agree that any income earned by either party after the date of signing this Agreement shall be the

ARGUMENT

I.

STANDARD OF REVIEW

In Infanger v. City of Salmon, 137 Idaho 45, 44 P.3d 1100 (2002), the Idaho Supreme Court held:

In an appeal from an order of summary judgment, this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment. *Eagle Water Company, Inc. v. Roundy Pole Fence Company, Inc.*, 134 Idaho 626, 7 P.3d 1103 (2000). All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Id.* Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Id.* If there is no genuine issue of material fact, only a question of law remains, over which this Court exercises free review. *Post v. Idaho Farmway, Inc.*, 135 Idaho 475, 20 P.3d 11 (2001). (Emphasis added).

137 Idaho at 47. In this action, there is no dispute as to the facts as the parties submitted stipulated facts to the Court. As such, this appeal consists of questions of law over which the Court exercises free review.

In Carr v. Carr, 116 Idaho 754, 779 P.2d 429 (App. 1989), the Idaho Court of Appeals held:

On appeal from the district court reviewing a magistrate's findings and conclusions, we examine the record of the trial court independently of, but with due regard for, the district court's intermediate appellate decision. *Cole v. Kunzler*, 115 Idaho 552, 768 P.2d 815 (Ct.App. 1989). Findings of fact made by the magistrate will not be disturbed on appeal where they are supported by substantial and competent, although conflicting, evidence. *Salazar v. Tilley*, 110 Idaho 584, 716 P.2d 1356 (Ct.App. 1986). As to questions of law, we will exercise free review. *Cole v. Kunzler, supra*. Furthermore, an appellate court must afford deference to a trial court's opportunity to assess the credibility of witnesses and the weight of evidence presented at trial; on review, this

Court is precluded from substituting its opinion for that of the trier of fact. *See Salazar v. Tilley, supra*. Depending upon our analysis, we will either affirm or reverse the district court accordingly. *Matter of the Estate of Bradley*, 107 Idaho 860, 693 P.2d 1062 (Ct. App. 1984).

116 Idaho at 756.

II.

THE DISTRICT COURT AND THE MAGISTRATE COURT ERRED WHEN THEY RULED THE PROPERTY SETTLEMENT AGREEMENT ENTERED INTO BY THE PARTIES WAS MERGED INTO THE JUDGMENT AND DECREE OF DIVORCE FILED ON SEPTEMBER 22, 2005.

In the Memorandum Decision filed in this action on October 10, 2007, the magistrate court ruled:

Therefore based on the doctrine set forth in *Phillips v. Phillips supra* this particular property settlement agreement is deemed to be merged into the decree of divorce and is not integrated which allows this court to interpret and/or modify the same.

(R. p. 36). The holding by the Supreme Court in *Phillips v. Phillips*, 93 Idaho 384, 462 P.2d 49 (1969), that the magistrate court based its decision states:

We, therefore, hold that when parties enter into an agreement of separation in contemplation of divorce and thereafter the agreement is presented to a district court in which a divorce action is pending and the court is requested to approve, ratify or confirm the agreement, certain presumptions arise. In the absence of clear and convincing evidence to the contrary, it will be presumed that each provision of such an agreement is independent of all other provisions and that such agreement is not integrated; it will be further presumed that the agreement is merged into the decree of divorce, is enforceable as a part thereof and if necessary may be modified by the court in the future. (Emphasis added).

93 Idaho at 387. In *Phillips v. Phillips*, 93 Idaho 384, 462 P.2d 49 (1969), the record did not disclose the intent of the parties as to the issue of merger. The Idaho Supreme Court stated as follows:

In the case at bar the record discloses no clear intent of the parties relating to 'integration' and 'merger.' We, therefore, presume that the

district court had continuing jurisdiction to modify the divorce decree on proper motion and showing therefor.

93 Idaho at 387. In contrast, the Judgment and Decree of Divorce filed in the action specifically stated in paragraph 2 as follows:

The Property Settlement Agreement is approved by this Court, but is not merged nor incorporated into this Judgment and Decree of Divorce. (Emphasis added).

(R. pp. 19 – 20).

The magistrate court ruled that since no clear and convincing evidence was presented, the Property Settlement Agreement was presumed to be merged stating:

Since there is no clear and convincing evidence as to whether or not this agreement was to be merged then the presumptions that arise under the *Phillips* doctrine would prevail and indicate that in fact the merger did take place in the absence of clear and convincing evidence otherwise.

(R. p. 36). No clear and convincing evidence needed to be presented to the magistrate court as to the merger issue because the Judgment and Decree of Divorce in unambiguous and is not subject to interpretation. In *Toyama v. Toyama*, 129 Idaho 142, 922 P.2d 1068 (1996), the Idaho Supreme Court held:

As this Court has previously held, the rules of construction of contracts apply equally to the interpretation of divorce decrees. *DeLancey v. DeLancey*, 110 Idaho 63, 65, 714 P.2d 32, 34 (1986). If the language of the decree is clear and unambiguous, determination of the its meaning and legal effect is a question of law upon which this Court exercises free review. *Id.* If, on the other hand, the language of the decree is reasonably susceptible to conflicting interpretations, it is considered ambiguous, and the determination of its meaning is a question of fact. *Id.* 714 P.2d at 34. In that case, the magistrate's interpretation of the decree will be upheld if supported by substantial and competent evidence. *Ireland*, 123 Idaho at 958, 855 P.2d at 43.

129 Idaho at 144. Since the Judgment and Decree of Divorce is unambiguous and not subject to interpretation, there is no question of fact before the court thereby negating

the need to present any evidence on the issue. The fact that the Property Settlement Agreement contains language stating that the parties would request that the Property Settlement Agreement be merged is of no consequence as it is the language in the Judgment and Decree of Divorce that controls.

The District Court, in its Decision on Appeal affirming the Magistrate Court's determination that the Property Settlement Agreement is merged into the Judgment and Decree of Divorce held:

Smith argues that because the language in the Judgment and Divorce Decree is unambiguous, the Court must exercise free review over the magistrate court's decision. This argument is misplaced. It is true that the language of the divorce decree when taken alone is unambiguous, but in making his determination the magistrate court considered both the agreement and the decree. When these two documents are read together they are ambiguous as to the parties' intent. Consequently, their interpretation is a question of fact and the Court must review the magistrate court's findings only to determine whether they were based on substantial and competent evidence. The Court finds his findings are based on substantial competent evidence and, therefore, the Court upholds his determination.

(R. p. 61). In so ruling, the District Court did not take into account the "doctrine of merger." In Davidson v. Davidson, 916 S.W.2d 918 (Tennessee App. 1995), the Tennessee Court of Appeals held:

Wife further asserts that since the QDRO and the MDA are agreements respecting the same subject matter, the doctrine of merger applies. She correctly cites *Magnolia Group v. Metropolitan Dev. And Hous. Agency*, 783 S.W.2d 563, 566 (Tenn.App. 1989), for the proposition that "the last agreement concerning the same subject matter that has been signed by all parties supersedes all former agreements, and the last contract is the one that embodies the true agreement." (Emphasis added).

916 S.W.2d at 922. The last agreement signed by all parties was the Stipulation of the parties for the Court to enter the Judgment and Decree of Divorce that specifically stated the Property Settlement Agreement was not merged or incorporated into the Judgment

and Decree of Divorce. (R. pp. 19 – 20). Therefore, it is the language contained in the Judgment and Decree of Divorce that controls. It should also be noted that if the Property Settlement Agreement was merged into the Judgment and Decree of Divorce, because of the disparity of the division, the Court would have had to make findings pursuant to Idaho Code § 32-712 that there were compelling reasons for the disparity in the property division. No such findings were made.

III.

EVEN IF THE PROPERTY SETTLEMENT AGREEMENT WERE TO BE
CONSIDERED “MERGED,” THE MAGISTRATE COURT HAD NO
JURISDICTION TO MODIFY THE JUDGMENT AND DECREE OF DIVORCE
PURSUANT TO THE DOCTRINE OF RES JUDICATA.

In McBride v. McBride, 112 Idaho 959, 739 P.2d 258 (1987), the Idaho

Supreme Court held:

In the absence of an appeal from an original decree of divorce the property division portions of that decree are final, *res judicata*, and no jurisdiction exists to modify property provisions of a divorce decree. *Sullivan v. Sullivan* 102 Idaho 737, 639 P.2d 435 (1981); *Paul v. Paul* 97 Idaho 889 556 P.2d 365 (1976); *Lowe v. Lowe* 92 Idaho 208, 440 P.2d 141 (1968). That rule has been modified in circumstances demonstrating fraud, coercion, or overreaching, but no such circumstances are alleged or demonstrated here. (Emphasis added).

112 Idaho at 961. While the magistrate court properly cited McBride v. McBride, 112 Idaho 959, 739 P.2d 258 (1987) in its Memorandum Decision, the Court went on to state:

It is also unquestioned that causes of action for divorce are actions in equity. McHugh vs. McHugh, 115 Idaho 198, Rudd vs. Rudd, 105 Idaho 112.

In the McHugh vs. McHugh *supra* case the Idaho Supreme Court cited with approval the statements made in the California Court of Appeals case of Huddleston vs. Huddleston, 187 Cal. App. 3d 1564 by stating “Wherein the court noted the special treatment courts accord in equity actions, stating that an action to divide an omitted asset, in the

context of a divorce proceeding, is an action in equity, and that such does not seek to modify or reopen the previous final judgment of dissolution.”

Clearly, this court has the equitable jurisdiction to consider a claim for an omitted asset pursuant to the above referenced case authority.

(R. p. 37). While the Court has jurisdiction to determine a claim for an omitted asset, that jurisdiction exists only if there is an omitted asset. In this action, the magistrate court found the convertible notes were not an omitted asset stating:

This court believes that in fact this is not an omitted asset but rather controlled by paragraph four under the division of retirement benefit and specifically under amounts to be received from United Airlines. (Emphasis added).

(R. p. 39). Paragraph 4 of the Property Settlement Agreement states:

4. DIVISION OF RETIREMENT BENEFITS. Husband has been employed by United Airlines and has a pension, either with United Airlines, or now with Pension Benefit Guarantee Association. Wife shall receive 50% of the benefit accumulated by husband during the marriage to be set over to her pursuant to a Qualified Domestic Relations Order.

(R. p. 22, paragraph 4).

As soon as the magistrate court determined that the convertible notes were not an omitted asset and were in fact divided pursuant to paragraph 4 of the Property Settlement Agreement entered into by the parties, the magistrate court should have ruled that it had no jurisdiction to proceed any further pursuant to the doctrine of *res judicata*. Instead, the magistrate court ruled that the convertible notes should be divided in a manner not contemplated by the Property Settlement Agreement stating:

Clearly Debra has no right to receive any retirement benefits accrued by Kevin after the day of divorce and therefore any proceeds received by Kevin through the convertible notes sale and distribution would have to be calculated by multiplying the amount of the distribution by the fraction of Kevin’s age at the date of divorce over 60 (the age for mandatory

retirement). Thereafter, the resulting fractional share would then be divided by 50% to achieve the community distribution to Debra.

(R. p. 10).

The District Court in its Decision on Appeal ruled as follows:

...[T]he magistrate court determined that the convertible notes and stock allocation were not omitted and then proceeded to enforce the decree by allocating the assets under the terms of the settlement agreement. At the outset, the magistrate court retained equitable jurisdiction to consider [Debra's] motion to divide an omitted asset. Secondly, the magistrate court had continuing jurisdiction to enforce the provisions of the divorce decree since all provisions of a divorce decree are generally enforceable by the trial court under Idaho law, including orders to effectuate property divisions between the parties. *Ratkowski v. Ratkowski*, 115 Idaho 692, 294, 769 P.2d 569, 571(1989) (quoting *McDonald v. McDonald*, 55 Idaho 102, 114, 39 P.2d 293, 298 (1934)); *Carr*, 116 Idaho at 751, 779 P.2d at 426. (Emphasis added).

(R. pp. 11 – 12). Debra's Motion to Divide Omitted Asset did not request that the magistrate court enforce the Judgment and Decree of Divorce. (Stipulation to Augment Record filed February 4, 2009, Exhibit "A.") No allegation was alleged by Debra that Debra was awarded an asset in the Judgment and Decree of Divorce and Kevin refused to give Debra her share of that asset. Therefore, no enforcement was sought. If Debra was seeking to enforce the Judgment and Decree of Divorce, she should have alleged a claim for enforcement. See I.R.C.P. 7(b)(1). The sole allegation was that Kevin had received an "omitted asset" that should have been divided in the Judgment and Decree of Divorce and requested the Court divide that omitted asset. The magistrate court found the convertible notes were not an omitted asset as they were covered by paragraph 4 of the Property Settlement Agreement. As such, the convertible notes were already divided and therefore, could not be re-divided again. The magistrate court did not attempt to enforce the Judgment and Decree of Divorce by requiring Kevin to do some act required by the

Judgment and Decree of Divorce. The magistrate court did attempt to divide the convertible notes pursuant to the “time rule” method and the District Court correctly ruled that pursuant to paragraph 4 of the Property Settlement Agreement any community portion of the convertible notes should have been divided pursuant to the “accrued benefit method.” (R. p. 13). However, the magistrate court erred in making any effort to divide the convertible notes as it had no jurisdiction to do so based on res judicata.

IV.

THE CONVERTIBLE NOTES ARE KEVIN’S SEPARATE PROPERTY
PURSUANT TO PARAGRAPHS 4 AND 13 OF THE PROPERTY SETTLEMENT
AGREEMENT AND THEREFORE, THE MAGISTRATE COURT ERRED
IN AWARDING DEBRA A PORTION OF THE NOTES.

“In order for [Kevin] to receive convertible note distributions / allocations, [Kevin] must have been employed on February 1, 2006, and have been a qualified member of the A Plan as of December 30, 2004.” (Stipulation to Augment Record filed February 4, 2009, Exhibit “J”; Plaintiff’s and Defendant’s Stipulated Facts filed August 1, 2007, p. 6, paragraph 16). Paragraph 4 of the Property Settlement Agreement provides in part:

4. DIVISION OF RETIREMENT BENEFITS. Husband has been employed by United Airlines and has a pension, either with United Airlines, or now with Pension Benefit Guarantee Association. Wife shall receive fifty percent (50%) of the benefit accumulated by Husband during the marriage to be set over to her pursuant to a Qualified Domestic Relations Order. (Emphasis added).

(R. p. 22). The convertible notes were not accumulated by Kevin during the marriage as he was not eligible to receive them unless he was employed by United Airlines on February 1, 2006 which was after the parties were divorced. Therefore, pursuant to paragraph 4 of the Property Settlement Agreement, the convertible notes are his

separate property.

Further, paragraph 13 of the Property Settlement Agreement provides:

13. SEPARATE PROPERTY/INCOME AFTER SIGNING OF AGREEMENT: The parties hereto stipulate and agree that from and after the date of the signing of this agreement, any and all property and any income acquired or earned by either party hereto shall be the separate property of the party who has acquired or earned it and the parties shall have no claim thereon. The parties agree that any income earned by either party after the date of signing this agreement shall be the separate property of the party earning the income, and any income or separate property shall be separate property from and after the date of the signing of this agreement. (Emphasis added).

(R. pp. 24 – 25). Had Kevin left his employment with United Airlines prior to February 1, 2006, he would not have received the convertible notes. As such, Kevin had to continue his employment with United Airlines after the date of divorce in September, 2005. Therefore, the convertible notes were both earned and acquired after the date of divorce and are Kevin's separate property. The Court erred in awarding Debra any portion of the convertible notes.

The District Court affirmed the magistrate court's decision that a portion of the convertible notes were community property ruling as follows:

The settlement agreement unambiguously provides that those retirement benefits accumulated during marriage are to be divided equally between the parties. The question is when the benefit of the convertible notes accumulated. The magistrate court correctly concluded that the convertible notes constituted benefits accumulated during the marriage.

(R. p. 63). The magistrate court did not conclude that the convertible notes constituted benefits accumulated during marriage. The magistrate court ruled as follows:

The very wording included in the June 23, 2006 question and answer document which is attached to Matthew Bohn's April 16, 2007 affidavit and specifically the questions and answers to questions one and three clearly indicate that Kevin was receiving this as a "partial offset to the losses suffered by the pilots as a result of termination of their A Plan."

Clearly Debra has a community interest in the terminated “A Plan” and any partial offset for the loss of such “A Plan” would be rightfully a community asset.

The problem arises though on how much of the convertible notes and their proceeds would be distributed as a community asset. Under the answers to question three it is clear that in calculating the losses on the termination of the “A Plan” the provisions under the bankruptcy order anticipated a lump sum distribution to all pilots employed on a certain date and to compensate them for past losses and losses in the future to age 60.

Clearly Debra has no right to receive any retirement benefits accrued by Kevin after the day of divorce ... (Emphasis added).

(R. pp. 38 – 39). The magistrate court did not conclude what portion of the convertible notes, if any, were accumulated during marriage. The magistrate court wanted to use the “time rule” to divide them as to a way to make that determination, however, the time rule allocation conflicts with the accrued benefit division that had already been agreed to in paragraph 4 of the Property Settlement Agreement. In fact, if a portion of the convertible notes were accumulated during marriage then that portion would be divided on a 50 – 50 basis pursuant to paragraph 4 of the Property Settlement Agreement through a Qualified Domestic Relations Order. (R. p. 22). However, the convertible notes were not accumulated or acquired until February 1, 2006 which was after the date of divorce, and as such, are Kevin’s separate property.

The District Court cites Batra v. Batra, 135 Idaho 388, 17 P.3d 889 (2001) for the proposition that the convertible notes were actually accumulated during the marriage even though they did not vest until after marriage. The District Court’s citation of Batra is misplaced. First, Batra deals with flights of stock options, not compensation for the loss of retirement benefits that would have continued to accrue until Kevin Smith’s retirement sixteen years after the retirement benefits were terminated as a result of United Airline’s bankruptcy. Second, Batra divides the option based on a “time rule” method.

As set forth above, paragraph 4 of the Property Settlement Agreement adjudicated a division based upon the accrued benefit method. Since the convertible notes accrued after marriage, they are Kevin Smith's separate property.

V.

THE DISTRICT COURT ERRED WHEN IT REVERSED THE MAGISTRATE COURT AND RULED THE STOCK ALLOCATION WAS AN OMITTED ASSET.

Paragraph 13 of the Property Settlement Agreement provides in part:

13. SEPARATE PROPERTY/INCOME AFTER SIGNING OF AGREEMENT: The parties hereto stipulate and agree that from and after the date of the signing of this Agreement, any and all property or income acquired or earned by either party hereto shall be the separate property of the party who has acquired or earned it and the other party shall have no claim thereon. (Emphasis added).

(R. pp. 24 – 25). The stock allocation Kevin received is clearly income he acquired after the filing of the Judgment and Decree of Divorce on September 22, 2005 and as such, is covered by paragraph 13 of the Property Settlement Agreement. Black's Law Dictionary defines "acquire" in part as follows:

Acquire. To gain by any means, usually by one's own exertions. In law of contracts and of descents, to become owner of property; to make property one's own.

Black's Law Dictionary 12 (5th ed. 1983). Kevin did not become an owner of the stock allocation until February 1, 2006. The magistrate court recognized this when it ruled as follows:

With regards to the stock allocation it is clear to this court pursuant to the February 9, 2006 letter marked as Exhibit 3 to Matthew Bohn's affidavit of April 16, 2007 the income received from the sale of United stock was paid to the pilots because they gave up significant compensation pursuant to work rules, work benefits, and regular compensation to allow for United airlines to go through and exit bankruptcy. To actually receive the stock a pilot, in this case Kevin must have been employed by United Airlines on February 1, 2006. If Kevin had quit or for some reason was

terminated by United Airlines prior to February 1, 2006 then he would not have received the stock distribution/allocation. Therefore Kevin's continued employment with United airlines after the date of divorce of September 2005 makes the stock distribution/allocation compensation that Kevin has earned by staying with the company up through February 1, 2006.

* * *

Therefore, based on the stipulated facts and the deposition of Debra and United Airlines documents reviewed by this court it is clear that the stock allocation would fall under paragraph 13 of the property settlement agreement and would be Kevin's sole and separate property.

In order for the asset to be omitted it had to be unknown at the time of entering into the agreement. However it is clear that Debra was fully aware that Kevin may receive some compensation when United Airlines emerged from the bankruptcy proceeding and could have made provisions for that in this agreement. However, she chose, with this knowledge of a possible income in the future, to sign an agreement where she indicates that any income received in the future would be each parties own separate property. (Emphasis added).

(R. pp. 39 – 41).

The District court confuses the fact that a portion of the stock allocation may have related to Kevin's loss of work rules, compensation, etc. that may have occurred prior to the filing of the Judgment and Decree of Divorce with the fact that the stock allocation was covered by paragraph 13. For the sake of argument only, even if the District Court is correct that a portion of the stock allocation is community income, it was still divided by paragraph 13 of the Property Settlement Agreement as it was awarded to Kevin. Property Settlement Agreements divide community property in divorce cases. Furthermore, the District Court's citation of Batra v. Batra, 135 Idaho 388, 17 P.3d 889 (2001) is once again misplaced. Batra deals with stock options. The stock allocation was not a stock option that was subject to vesting rules. The stock allocation was compensation paid as

consideration for the United Airline pilots agreeing to the restructuring of their labor contract in the bankruptcy proceedings wherein the pilots made substantial concessions.

VI.

KEVIN IS ENTITLED TO ATTORNEY FEES AND COSTS HE HAS INCURRED ON APPEAL AND AS A RESULT OF DEBRA'S CROSS APPEAL.

Kevin should be awarded his attorney fees and costs pursuant to Idaho Appellate Rules 40 and 41 and paragraph 15.03 of the Property Settlement Agreement attached to the September 22, 2005 Judgment and Decree of Divorce, which states the following:

15.03. If an action is instituted to enforce any of the terms of this Agreement, then the losing party agrees to pay to the prevailing party all costs and attorney fees incurred in that action.

(R. p. 25).

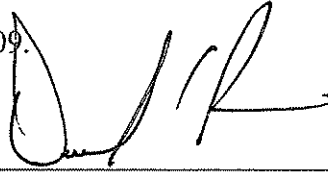
CONCLUSION

The magistrate court had no jurisdiction in this action because the Property Settlement Agreement was not merged into the Judgment and Decree of Divorce. Regardless, as soon as the magistrate court determined that the convertible notes were not an omitted asset he should have dismissed Debra's Motion to Divide Omitted Asset for lack of jurisdiction because of the doctrine of *res judicata*. Further, the magistrate court's decision awarding Debra a portion of the convertible notes should be reversed as the convertible notes are Kevin's separate property.

With regard to the stock allocation, the magistrate court was absolutely correct when it determined the stock allocation was not an omitted asset and was awarded to Kevin as his separate property. The District Court's decision should be reversed as to the stock allocation.

Finally, Kevin should be awarded his attorney fees and costs on appeal.

DATED this 10TH day of March, 2009.



Derek A. Pica
Attorney for Defendant / Appellant

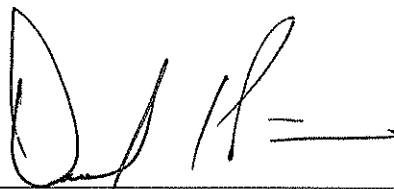
CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 10TH day of March, 2009, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s)

Matthew R. Bohn
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Hand Deliver
U.S. Mail
Facsimile
Overnight Mail

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Derek A. Pica