

12-29-2008

Borley v. Smith Clerk's Record v. 1 Dckt. 35751

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IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

DEBRA A. BORLEY,
PLAINTIFF-RESPONDENT-CROSS APPELLANT,

VS.

KEVIN D. SMITH,
DEFENDANT-APPELLANT-CROSS RESPONDENT.

*Appealed from the District Court of the Fourth Judicial
District of the State of Idaho, in and for ADA County*

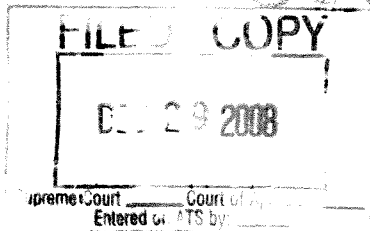
Hon CHERI C. COPSEY, *District Judge*

DEREK A. PICA

Attorney for Appellant

MATTHEW R. BOHN

Attorney for Respondent



35751

IN THE SUPREME COURT OF THE STATE OF IDAHO

DEBRA A. BORLEY,

Plaintiff-Respondent-Cross Appellant,
vs.

KEVIN D. SMITH,

Defendant-Appellant-Cross Respondent.

Supreme Court Case No. 35751

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE CHERI C. COPSEY

DEREK A. PICA

ATTORNEY FOR APPELLANT

BOISE, IDAHO

MATTHEW R. BOHN

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

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REGISTER OF ACTIONS	3

Date: 11/24/2008

North Judicial District Court - Ada County

User: CCTHIEBJ

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Case: CV-DR-2005-00611 Current Judge: Cheri C. Copsey

Debra A Borley vs. Kevin D Smith

Debra A Borley vs. Kevin D Smith

Date	Code	User	Judge
3/22/2005	NEWC	CCEARLJD	New Case Filed
		CCEARLJD	Divorce
	SMFI	CCEARLJD	Summons Filed
	JTRP	CCEARLJD	Joint Tro Property
4/20/2005	ACCP	CCSTACAK	Acceptance Of Service(04/18/05)
	MOTN	CCSTACAK	Motion For Temporary Support
	AFSM	CCSTACAK	Affd Of Debra Borley In Sppt Motn Temp Sppt
	HRSC	CCSTACAK	Hearing Scheduled - Motn Temp Sppt (05/09/2005) Russell A Comstock
5/9/2005	HRVC	CCRICHMA	Hearing Vacated - Motn Temp Sppt
5/11/2005	HRSC	CCBLACJE	Hearing Scheduled - Motion Temp Support (05/23/2005 @ 1:30 Pm) Russell A Comstock
5/13/2005	NOID	CCWATSCL	Notice Of Intent To Take Default
5/17/2005	AMCO	CCCOLEMJ	Amended Complaint Filed
5/20/2005	NOTC	CCEARLJD	Notice Of Intent To Cross Examine
5/23/2005		CCTHOMCM	Answer To Amended Complaint(herndon For) No Prior Appearance (kevin D Smith)
	NOTS	CCWATSCL	Notice Of Service
	HRVC	CCRICHMA	Hearing Vacated - Motion
5/24/2005	NORT	CCMARTLG	Request For Trial Setting
5/25/2005	STIP	CCSTACAK	Stipulation For Entry Of Order
5/26/2005	CTSC	CCRICHMA	Scheduling Order Ptc-8/24/05 @ 2:30pm & Ct-9/15/05 @ 9:00am
5/27/2005	ORDR	CCRICHMA	Order
	CERT	CCRICHMA	Certificate Of Mailing
6/29/2005	NOTS	CCRIVEDA	Notice Of Service
	MOTN	CCWATSCL	Plaintiff's Motion To Compel
	HRSC	CCWATSCL	Hearing Scheduled - Motn To Compel (07/18/2005) Russell A Comstock
7/13/2005	NOTS	CCBLACJE	Notice Of Service
7/18/2005	HRVC	CCRICHMA	Hearing Vacated - Motn To Compel
7/27/2005	NOTS	CCCHILER	Notice Of Service
8/19/2005	MEML	CCDWONCP	Pre-trial Memorandum Lodged
8/25/2005	NOTC	CCCHILER	Notice Of Depositions
9/15/2005	HRVC	CCRICHMA	Hearing Vacated - Court Trial
9/20/2005	STIP	CCTHOMCM	Stipulation For Entry Of Decree Of Divorce
9/22/2005	DPWO	CCRICHMA	Judgment & Decree Of Divorce
	JDMT	CCRICHMA	Certificate Of Mailing
11/9/2005	STIP	CCYRAGMA	Stipulation For Entry Of Qdro

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Date: 11/24/2008

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User: CCTHIEBJ

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Case: CV-DR-2005-00611 Current Judge: Cheri C. Copsey

Debra A Borley vs. Kevin D Smith

Debra A Borley vs. Kevin D Smith

Date	Code	User		Judge
11/15/2005	QDRO	CCTOMPM	Qualified Domestic Relations Order - United	Russell A. Comstock
	QDRO	CCTOMPM	Qualified Domestic Relations Order - Ang	Russell A. Comstock
11/29/2005	STIP	CCWATSCL	Stipulation For Entry Of Amended Qdro	Russell A. Comstock
	REOP	CCEAUCCL	Reopen (case Previously Closed)	Russell A. Comstock
12/7/2005	QDRO	CCTOMPM	Amended Qualified Domestic Relations Order	Russell A. Comstock
	QDRO	CCTOMPM	Amended Qualified Domestic Relations Order	Russell A. Comstock
3/24/2006	CHJG	CCEAUCCL	Notice of Reassignment to Judge McDaniel	Terry McDaniel
	MOTN	CCEAUCCL	Motion to Divide Omitted Asset (Bohn for Debra Borley)	Terry McDaniel
	AFSM	CCEAUCCL	Affidavit of Debra Borley In Support Of Motion	Terry McDaniel
3/27/2006	MOTN	CCEARLJD	Motion for Non-Summary Contempt	Terry McDaniel
	AFFD	CCEARLJD	Affidavit of K Smith in Support of Motion	Terry McDaniel
4/6/2006	NOTC	CCAMESLC	Notice of Arraignment	Terry McDaniel
	HRSC	CCAMESLC	Hearing Scheduled (Motion for Contempt 04/25/2006 09:00 AM) Motion for Non-Summary Contempt	Terry McDaniel
	NOTC	CCCHILER	Notice of Status Conference	Terry McDaniel
	HRSC	CCCHILER	Hearing Scheduled (Status 04/17/2006 04:30 PM) Status Conference	Terry McDaniel
4/17/2006	CONH	MCGERANY	Hearing result for Status held on 04/17/2006 04:30 PM: Conference Held Status Conference	Terry McDaniel
4/18/2006	ANSW	CCCHILER	Answer to Plaintiff's Motion to Divide Omitted Asset (S Herndon for Kevin Smith)	Terry McDaniel
4/24/2006	MISC	CCCHILER	Denial of Contempt	Terry McDaniel
4/25/2006	HRVC	MCGERANY	Hearing result for Motion for Contempt held on 04/25/2006 09:00 AM: Hearing Vacated Motion for Non-Summary Contempt	Terry McDaniel
4/26/2006	ORDR	MCGERANY	Calendaring Order	Terry McDaniel
	HRSC	MCGERANY	Hearing Scheduled (Scheduling Conference 06/13/2006 02:30 PM)	Terry McDaniel
	REQU	CCHARRAK	Request For Trial Setting	Terry McDaniel
5/1/2006	RSPS	CCDWONCP	Response to Request for Trial Setting	Terry McDaniel
6/13/2006	CONH	MCGERANY	Hearing result for Scheduling Conference held on 06/13/2006 02:30 PM: Conference Held	Terry McDaniel
6/19/2006	NOTD	CCWATSCL	Notice Of Taking Deposition	Terry McDaniel
	NOTS	CCWATSCL	Notice Of Service	Terry McDaniel
	NOHG	CCWATSCL	Notice Of Hearing	Terry McDaniel
	HRSC	CCWATSCL	Hearing Scheduled (Hearing Scheduled 08/28/2006 09:00 AM) Motion to Divide and Motion for Contempt	Terry McDaniel
7/19/2006	MOTN	CCDWONCP	Motionfor Leave to Withdraw as Attorney of Record	Terry McDaniel

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Date: 11/24/2008

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Case: CV-DR-2005-00611 Current Judge: Cheri C. Copsey

Debra A Borley vs. Kevin D Smith

Debra A Borley vs. Kevin D Smith

Date	Code	User		Judge
7/19/2006	AFFD	CCDWONCP	Affidavit of Steven L Herndon in Support of Motion for Leave to Withdraw as Counsel of Record	Terry McDaniel
	HRSC	CCDWONCP	Notice of Hearing (Motion to Withdraw 08/01/2006 09:00 AM)	Terry McDaniel
7/26/2006	NOTC	CCBLACJE	Notice of Sub of Counsel (Pica - Herndon)	Terry McDaniel
8/1/2006	HRVC	MCGERANY	Hearing result for Motion to Withdraw held on 08/01/2006 09:00 AM: Hearing Vacated	Terry McDaniel
8/25/2006	MOTN	CCYRAGMA	Motion to Vacate and Reset Hearing	Terry McDaniel
	AFFD	CCYRAGMA	Affidavit of Matthew R Bohn in Support of Motion to Vacate and Reset Hearing	Terry McDaniel
8/28/2006	INHD	MCGERANY	Hearing result for Hearing Scheduled held on 08/28/2006 09:00 AM: Interim Hearing Held Motion to Divide and Motion for Contempt	Terry McDaniel
8/30/2006	ORDR	MCGERANY	Order to Vacate & Reset Hearing	Terry McDaniel
	ORDR	MCGERANY	Calendaring Order	Terry McDaniel
	HRSC	MCGERANY	Hearing Scheduled (Scheduling Conference 09/27/2006 02:00 PM)	Terry McDaniel
9/8/2006	NOTS	CCWRIGRM	Notice Of Service	Terry McDaniel
	MOTD	CCWRIGRM	Motion To Dismiss	Terry McDaniel
	MEMO	CCWRIGRM	Memorandum in Support of Motion	Terry McDaniel
	NOTH	CCWRIGRM	Notice Of Hearing (10/10/06 @ 9:00am) and Status Conference (09/27/06 @ 2:00pm)	Terry McDaniel
	HRSC	CCWRIGRM	Hearing Scheduled (Motion 10/10/2006 09:00 AM)	Terry McDaniel
9/27/2006	CONH	MCGERANY	Hearing result for Scheduling Conference held on 09/27/2006 02:00 PM: Conference Held	Terry McDaniel
10/2/2006	ORDR	MCGERANY	Scheduling Order	Terry McDaniel
	HRSC	MCGERANY	Hearing Scheduled (Pretrial Conference 04/09/2007 02:00 PM)	Terry McDaniel
	HRSC	MCGERANY	Hearing Scheduled (Court Trial 04/27/2007 09:00 AM)	Terry McDaniel
10/10/2006	HRHD	MCGERANY	Hearing result for Motion held on 10/10/2006 09:00 AM: Hearing Held	Terry McDaniel
10/25/2006	NOTD	CCWATSCL	Notice Of Taking Deposition	Terry McDaniel
12/18/2006	NOTC	CCNAVATA	Third Notice of Taking Deposition of Kevin D. Smith	Terry McDaniel
1/17/2007	NOTD	CCAMESLC	Notice Of Taking Deposition	Terry McDaniel
	NOTS	CCMORAML	Notice Of Service	Terry McDaniel
1/18/2007	NOTD	CCCHILER	Fourth Notice of Taking Deposition of Kevin D Smith	Terry McDaniel
2/6/2007	STIP	CCWOODCL	Stipulation for Entry of QDRO RE: United Airlines Pilot Directed Account Plan	Terry McDaniel

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Date: 11/24/2008

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Case: CV-DR-2005-00611 Current Judge: Cheri C. Copsey

Debra A Borley vs. Kevin D Smith

Debra A Borley vs. Kevin D Smith

Date	Code	User	Judge
2/8/2007	QDRO	MCGERANY	Qualified Domestic Relations Order RE: United Airlines Pilot Directed Account Plan
3/27/2007	MOTN	MCBIEHKJ	Motion for Summary Judgment
	AFFD	MCBIEHKJ	Affidavit of Kevin Smith in Support of Motion
	MEMO	MCBIEHKJ	Memorandum in Support of Motion
3/28/2007	AFFD	CCPRICDL	Affidavit of Derek A. Pica
	NOTC	CCCHILER	Notice of Status Conference and Hearing
	HRSC	CCCHILER	Hearing Scheduled (Motion for Summary Judgment 04/24/2007 09:00 AM)
	NOTS	CCNAVATA	Notice Of Service
3/29/2007	NOTS	CCNAVATA	Notice Of Service
4/9/2007	CONH	MCGERANY	Hearing result for Pretrial Conference held on 04/09/2007 02:00 PM: Conference Held
4/16/2007	OBJC	CCBARCCR	Objection to Motion for Summary Judgment
	MEMO	CCBARCCR	Memorandum in Opposition to Motion for Summary Judgment
	AFFD	CCBARCCR	Affidavit of Matthew R Bohn
4/24/2007	HRHD	MCGERANY	Hearing result for Motion for Summary Judgment held on 04/24/2007 09:00 AM: Hearing Held
4/26/2007	STIP	CCBLACJE	Stipulation to Vacate Trial; Take Telephonic Deposition and Order
	HRVC	MCGERANY	Hearing result for Court Trial held on 04/27/2007 09:00 AM: Hearing Vacated
	ORDR	MCGERANY	Order to Vacate Trial & Take Telephonic Deposition
5/14/2007	NODT	CCAMESLC	Notice Of Taking Deposition Duces Tecum
5/22/2007	NDIS	MCGERANY	Notice Of Intent To Dismiss
6/12/2007	ORDR	MCGERANY	Calendaring Order
	HRSC	MCGERANY	Hearing Scheduled (Scheduling Conference 07/11/2007 01:00 PM)
6/26/2007	CONV	MCGERANY	Hearing result for Scheduling Conference held on 07/11/2007 01:00 PM: Conference Vacated ~ Reset to 7-19-07 at 1:00 per Penny w/Pica's office
6/27/2007	HRSC	CCBLACJE	Hearing Scheduled (Hearing Scheduled 07/19/2007 01:00 PM)
7/19/2007	CONH	MCGERANY	Hearing result for Hearing Scheduled held on 07/19/2007 01:00 PM: Conference Held
8/1/2007	MISC	CCBLACJE	Plaintiff & Def's Stipulated Facts
8/13/2007	AFFD	CCCHILER	Affidavit of Derek A Pica
	MEMO	CCCHILER	Supplemental Memorandum in Support of Motion for Summary Judgment

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Date: 11/24/2008

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Case: CV-DR-2005-00611 Current Judge: Cheri C. Copsey

Debra A Borley vs. Kevin D Smith

Debra A Borley vs. Kevin D Smith

Date	Code	User	Judge
8/13/2007	MEMO	CCBLACJE	Memorandum in Support of Motion to Divide Omitted Asset Terry McDaniel
8/29/2007	RPLY	CCCHILER	Plaintiff's Short Reply to Defendant's Supplemental Memorandum in Support of Motion for Summary Judgment Terry McDaniel
8/30/2007	RSPS	CCBLACJE	Response to Plaintiff's Memo in Support of Motion to Divide Omitted Asset Terry McDaniel
10/10/2007	DEOP	MCGERANY	Memorandum Decision Terry McDaniel
10/24/2007	NOHG	CCTOWNRD	Notice Of Hearing Terry McDaniel
	HRSC	CCTOWNRD	Hearing Scheduled (Status 10/29/2007 09:00 AM) Status Conference Terry McDaniel
10/29/2007	CONH	MCGERANY	Hearing result for Status held on 10/29/2007 09:00 AM: Conference Held Status Conference Terry McDaniel
11/20/2007	ORDR	CCRICHMA	Order Granting in Part and Denying in Part Plaintiff's Motion to Divide Omitted Asset Terry McDaniel
	CDIS	CCRICHMA	Civil Disposition entered for: Smith, Kevin D, Defendant; Borley, Debra A, Plaintiff. order date: 11/20/2007 Terry McDaniel
11/28/2007	APDC	CCMAXWSL	Appeal Filed In District Court Cheri C. Copsey
	CHJG	CCMAXWSL	Notice of Reassignment to Judge Copsey Cheri C. Copsey
	NTOA	CCMAXWSL	Notice Of Appeal (Pica for Kevin) Cheri C. Copsey
11/29/2007	OGAP	DCANDEML	Order Governing Procedure On Appeal Cheri C. Copsey
12/4/2007	MECO	CCEARLJD	Memorandum of Cost Cheri C. Copsey
	AFFD	CCEARLJD	Affidavit of Derek Pica Cheri C. Copsey
	MEMC	CCCHILER	Memorandum Of Costs And Attorney Fees Cheri C. Copsey
12/7/2007	OBJE	CCSTROMJ	Objection to Plaintiff's Memorandum for Attorney Fees and Costs Cheri C. Copsey
12/13/2007	OBJE	CCSTROMJ	Objection to Memorandum of Costs and Affidavit of Derek Pica Cheri C. Copsey
12/28/2007	NOTC	CCBLACJE	Notice of Cross Appeal Cheri C. Copsey
1/3/2008	OGAP	DCANDEML	Amended Order Governing Procedure On Appeal Cheri C. Copsey
	BREF	CCWATSCL	Appellant's Brief Cheri C. Copsey
1/29/2008	STIP	MCBIEHKJ	Stipulation for Extension of Time to File Brief Cheri C. Copsey
1/30/2008	NOHG	CCBURGBL	Notice Of Hearing Cheri C. Copsey
	HRSC	CCBURGBL	Hearing Scheduled (Hearing Scheduled 02/26/2008 09:00 AM) Cheri C. Copsey
1/31/2008	ORDR	DCTYLENI	Order Granting Extension of Time to File Respondent's Brief (additional 30 days) Cheri C. Copsey
2/7/2008	BREF	CCWRIGRM	Cross-Appellants Brief Cheri C. Copsey
2/26/2008	HRHD	MCGERANY	Hearing result for Hearing Scheduled held on 02/26/2008 09:00 AM: Hearing Held Terry McDaniel
2/28/2008	ORDR	MCGERANY	Order Denying Attorney Fees Terry McDaniel
	BREF	MCBIEHKJ	Cross Respondents Brief Cheri C. Copsey

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Date: 11/24/2008

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User: CCTHIEBJ

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Case: CV-DR-2005-00611 Current Judge: Cheri C. Copsey

Debra A Borley vs. Kevin D Smith

Debra A Borley vs. Kevin D Smith

Date	Code	User		Judge
2/29/2008	BREF	CCCHILER	Respondent's Brief	Cheri C. Copsey
3/20/2008	BREF	CCMCLILI	Cross-Appellant's Reply Brief	Cheri C. Copsey
3/21/2008	BREF	CCDWONCP	Appellant's Reply Brief Filed	Cheri C. Copsey
4/2/2008	HRSC	CCBARCCR	Notice of Oral Argument Hearing (Hearing Scheduled 07/10/2008 03:30 PM) Apellants' Appel	Cheri C. Copsey
6/27/2008	HRVC	TCWEATJB	Hearing result for Hearing Scheduled held on 07/10/2008 03:30 PM: Hearing Vacated	Cheri C. Copsey
	HRSC	TCWEATJB	Hearing Scheduled (Oral Argument on Appeal 08/21/2008 03:30 PM)	Cheri C. Copsey
8/21/2008	DCHH	TCWEATJB	Hearing result for Oral Argument on Appeal held on 08/21/2008 03:30 PM: District Court Hearing Held Court Reporter: Kim Madsen Number of Transcript Pages for this hearing estimated: Under 100 Pages	Cheri C. Copsey
9/10/2008	DEOP	DCDANSEL	Decision on Appeal - Affirmed in Part and Reversed in Part	Cheri C. Copsey
10/8/2008	APSC	CCTHIEBJ	Appealed To The Supreme Court	Cheri C. Copsey
10/29/2008	NTOA	CCTHIEBJ	Notice Of Cross-Appeal	Cheri C. Copsey

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NO. _____
A.M. _____ 4:34

MAR 22 2005

J. _____
D. _____ 7. Early

STANLEY W. WELSH ISB #1964
COSHO HUMPHREY, LLP
Counselors and Attorneys at Law
PO Box 9518
Boise, ID 83707-9518
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DEBRA A. BORLEY,

Plaintiff,

v.

KEVIN D. SMITH,

Defendant.

Case No. **CV DR 0500611**

COMPLAINT FOR DIVORCE

The above named Plaintiff complains and alleges as follows:

I

Plaintiff is now, and for more than six weeks prior to the commencement of this action has been, a bona fide resident of the State of Idaho.

II

Plaintiff and Defendant were married to each other on June 4, 1994, at Boise, Idaho, and ever since have been and now are husband and wife.

ORIGINAL

III

The parties have no children born the issue of this marriage.

IV

During the parties' marriage they have incurred debt and acquired property. All of the community property and community debts should be divided equitably between them.

V

The Defendant should be ordered to pay to the Plaintiff an amount of spousal support to be determined by the court.

VI

During the parties' marriage, the Defendant has been guilty of acts of adultery which are such in nature as to justify the granting of a divorce to the Plaintiff from the Defendant on the grounds of adultery.

VII

During the parties' marriage, irreconcilable differences have arisen, creating substantial reasons for not continuing the marriage, and establishing sufficient grounds for dissolving the marriage.

WHEREFORE, Plaintiff prays for Judgment as follows:

1. For a divorce on the grounds of irreconcilable differences.
2. For a divorce on the grounds of adultery.
3. The community property and community debts of the parties be divided equitably

between them.

4. The Defendant be ordered to pay to the Plaintiff an amount of spousal support to be determined by the court.

5. For such other and further relief as the Court deems just and proper.

DATED this 22nd day of March, 2005.

COSHO HUMPHREY, LLP




STANLEY W. WELSH
Attorneys for Plaintiff

VERIFICATION

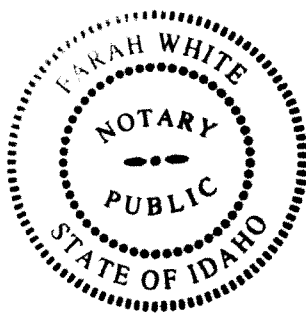
STATE OF IDAHO)
 :SS.
County of Ada)

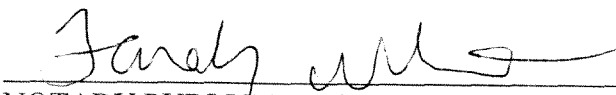
Debra Borley, being first duly sworn on oath, deposes and says:

That she is the Plaintiff in the above entitled action. That he/she has read the within and foregoing Complaint; knows the contents thereof; and that the facts therein stated are true as she verily believes.


Debra Borley

SUBSCRIBED AND SWORN To before me this 2 day of March, 2005.




NOTARY PUBLIC For Idaho
Residing at Boise, Idaho
My Commission Expires: 3/7/11

NO. _____ FILED _____
A.M. _____ P.M. 3:14

MAY 17 2005

J. DAVID NAVARRO, Clerk
by _____ DEPUTY

STANLEY W. WELSH ISB #1964
COSHO HUMPHREY, LLP
Counselors and Attorneys at Law
PO Box 9518
Boise, ID 83707-9518
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DEBRA A. BORLEY,

Plaintiff,

v.

KEVIN D. SMITH,

Defendant.

Case No. CV DR 0500611

**AMENDED COMPLAINT FOR
DIVORCE**

The above named Plaintiff complains and alleges as follows:

I

Plaintiff is now, and for more than six weeks prior to the commencement of this action has been, a bona fide resident of the State of Idaho.

II

Plaintiff and Defendant were ceremonially married to each other on June 4, 1994, at Boise, Idaho. The parties entered into a common law marriage on August 1, 1988, and have been married to each other since August 1, 1988.

III

The parties have no children born the issue of this marriage.

IV

During the parties' marriage they have incurred debt and acquired property. All of the community property and community debts should be divided equitably between them.

V

The Defendant should be ordered to pay to the Plaintiff an amount of spousal support to be determined by the court.

VI

During the parties' marriage, the Defendant has been guilty of acts of adultery which are such in nature as to justify the granting of a divorce to the Plaintiff from the Defendant on the grounds of adultery.

VII

During the parties' marriage, irreconcilable differences have arisen, creating substantial reasons for not continuing the marriage, and establishing sufficient grounds for dissolving the marriage.

WHEREFORE, Plaintiff prays for Judgment as follows:

1. For a divorce on the grounds of irreconcilable differences.
2. For a divorce on the grounds of adultery.
3. The community property and community debts of the parties be divided equitably

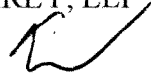
between them.

4. The Defendant be ordered to pay to the Plaintiff an amount of spousal support to be determined by the court.

5. For such other and further relief as the Court deems just and proper.

DATED this 13th day of May, 2005.

COSHO HUMPHREY, LLP

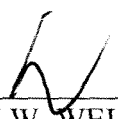


STANLEY W. WELSH
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 13th day of May, 2005, a true and correct copy of the within and foregoing instrument was served upon:

Steven L. Herndon
Reardon, Merris & Herndon, LLP
913 W. River St., Suite 420
Boise, ID 83702
Served by: U. S. Mail



STANLEY W. WELSH

Steven L. Herndon
Attorney at Law
913 W. River Street, Suite 420
Boise, ID 83702-7081
Telephone: (208) 336-2060
Facsimile: (208) 336-2059

Attorney for Defendant
ISB # 1689

NO. 1
A.M. 8:37 FILED P.M.

MAY 23 2005

By J. DAVID NAVARRO, Clerk
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

DEBRA A. BORLEY,

Plaintiff,

KEVIN D. SMITH,

Defendant,

)
) Case No. CV DR 0500611
)
)
) **ANSWER TO AMENDED**
) **COMPLAINT**
)
)
)

COMES NOW, the Defendant, Kevin D. Smith, by and through his attorney of record,
Steven L. Herndon, and answers Plaintiff's Amended Complaint as follows:

I.

Defendant generally denies each and every allegation in Plaintiff's Amended Complaint that is
not specifically admitted herein.

II.

Defendant specifically admits the allegations contained in paragraphs I, III, IV and VII of
Plaintiff's Amended Complaint.


III.

With specific reference to paragraph II, Defendant admits that the parties were married on or about June 4, 1994 at Boise, Idaho.

Wherefore, Defendant prays that:

1. A divorce be granted between the parties;
2. The community property and community debts of the parties be divided equitably; and,
3. Defendant be granted such other and further relief as the Court deems just and proper.

DATED This 23 day of May, 2005.


Steven L. Herndon

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have on this 23 day of May, 2005, served a copy of the within and foregoing NOTICE OF INTENT TO CROSS-EXAMINE PLAINTIFF AND PRODUCE EVIDENCE by:

☐ Hand Delivery
☐ Federal Express
☐ Certified Mail
☒ U.S. Mail
☒ Facsimile Transmission

To: Stanley W. Welsh
Cosh, Humphrey, Greener & Welsh, P.A.
815 West Washington Street
Boise, ID 83702


STEVEN L. HERNDON
Attorney for Plaintiff

RECEIVED

SEP 25 2005

Ada County Clerk

NO. _____
FILED P.M. 436
SEP 22 2005
J. DAVID NAVARRO, CLERK
DEPUTY

STANLEY W. WELSH ISB #1964
MATTHEW R. BOHN, ISB #5967
COSHO HUMPHREY, LLP
800 PARK BLVD., STE. 790
BOISE, ID 83712
PO BOX 9518
BOISE, ID 83707-9518
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DEBRA A. BORLEY,

Plaintiff,

v.

KEVIN D. SMITH,

Defendant.

Case No. CV DR 0500611

**JUDGMENT AND DECREE OF
DIVORCE**

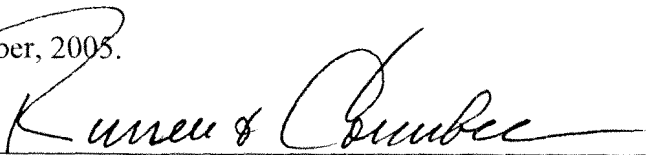
Based upon the Stipulation of the parties, IT IS HEREBY ORDERED, ADJUDGED
AND DECREED AS FOLLOWS:

1. **DIVORCE**: Plaintiff (hereinafter referred to as "Debra") and Defendant (hereinafter referred to as "Kevin") are granted a divorce from each other on the grounds of irreconcilable differences. Each is restored the status of a single person.

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.

DATED this 22nd day of September, 2005.

A handwritten signature in cursive script, appearing to read "Russell A. Comstock", written over a horizontal line.

Honorable Russell A. Comstock
Magistrate

PROPERTY SETTLEMENT AGREEMENT

THIS AGREEMENT is made and entered into this 15 day of September, 2005, by and between Debra Borley, hereinafter referred to as "Debra or Wife," and Kevin Smith, hereinafter referred to as "Kevin or Husband".

1. **RECITALS:** This Agreement is made with reference to the following facts:

1.01. The parties hereto were common law married August 1, 1988, and ceremonially married on or about June 4, 1994, at Boise, Idaho, and ever since have been and still are Husband and Wife.

1.02. Unhappy differences have arisen between the Husband and the Wife, as a result of which they have agreed to separate and enter into this Agreement

2. **TRANSFERS TO WIFE:** The Husband hereby agrees to, and by this Agreement he does hereby transfer, assign and convey unto the Wife as her sole and separate property, and does hereby forever waive any and all rights in and to, the items more particularly described as follows:

2.01. Attached hereto and by this reference incorporated herein, is a Property and Debt Schedule (hereinafter referred to as PDS). Wife is awarded the items under the column entitled "To Wife" as indicated with a dollar amount or an "x".

2.02. Any other property in her possession or under her control except those items specifically being awarded to the Husband.

3. **TRANSFERS TO HUSBAND:** The Wife hereby agrees to, and by this Agreement she does hereby transfer, assign and convey unto the Husband as his sole and

separate property, and does hereby forever waive any and all rights in and to, the items of property more particularly described as follows:

3.01. Attached hereto and by this reference incorporated herein, is a Property and Debt Schedule (hereinafter referred to as PDS). Husband is awarded the items under the column entitled "To Husband" as indicated with a dollar amount or an "x".

3.02. Any other property in his possession or under his control except those items specifically being awarded to the Wife.

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.

During the marriage, Wife has accumulated points with the Guard. An appropriate order should be entered awarding to Husband forty percent (40%) of the points accumulated by Wife with Guard during the marriage.

5. PAYMENT OF DEBTS BY WIFE: Wife agrees to assume and pay the following debts:

5.01. Attached hereto and by this reference incorporated herein, is a Property and Debt Schedule (hereinafter referred to as PDS). Wife is awarded the debts under the column entitled "To Wife" as indicated with a dollar amount or an "x".

5.02. Any other debts incurred by her except those specifically being assumed by the Husband.

5.03. Wife agrees to indemnify and hold Husband harmless from the debts being assumed by her. Further, Wife agrees to remove husband's name from all debts being assumed by her within ninety (90) days from date of this Agreement.

6. **PAYMENT OF DEBTS BY HUSBAND:** Husband agrees to assume and pay the following debts:

6.01. Attached hereto and by this reference incorporated herein, is a Property and Debt Schedule (hereinafter referred to as PDS). Husband is awarded the debts under the column entitled "To Husband" as indicated with a dollar amount or an "x".

6.02. Any other debts incurred by him except those specifically being assumed by the Wife.

6.03. Husband agrees to indemnify and hold Wife harmless from the debts being assumed by him. Further, Husband agrees to remove wife's name from all debts being assumed by him within ninety (90) days from date of this Agreement..

7. **RELEASE:** Subject to the provisions of this Agreement, each party hereto has remised, released and forever discharged, and by these presents does for himself or herself, remise, release and forever discharge the other party of and from any cause or causes of action, claims, rights or demands whatsoever, in law or in equity, which either party ever had or now has against the other, including, without limitation, any claims and demands of either party upon or against the other for support and maintenance as husband and wife or otherwise, except any or all cause or causes of action for divorce.

8. **DISPOSITION OF PROPERTY:** Subject to the provisions of this Agreement, each of the parties hereto may in any way dispose of his or her property of whatever nature, real

or personal; and the parties hereto, each for himself and herself, respectively, and for the respective heirs, legal representatives, executors and administrators and assigns, hereby waives any right of election which he or she may have or hereafter acquire regarding the estate of the other, or any right to take against any last will and testament of the other, whether heretofore or hereafter executed, or as may now or hereafter be provided for in any law of the State of Idaho or any other state or territory of the United States or any foreign country, and hereby renounces and releases all interest, right or claim that he or she now has or might otherwise have against the other, under or by virtue of the laws of any state or country.

9. **BINDING EFFECT:** All of the provisions of this Agreement shall be binding upon the parties hereto and their respective heirs, personal representatives and assigns.

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.

11. **ADDITIONAL DOCUMENTS:** The parties hereto agree to make, execute and deliver such deeds or other documents as may be requested by the other to carry out the full performance of this Agreement.

12. **ADVICE OF COUNSEL:** The parties hereto stipulate that he or she has been represented by counsel and is familiar with the terms and conditions of this Agreement.

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 separate property of the party earning the income, and any income on separate property shall be separate property from and after the date of signing this agreement.

14. DEBTS AFTER SIGNING OF AGREEMENT: The parties hereto stipulate and agree that from and after the date of the signing of this Agreement, any debts incurred by either party hereto shall be the separate debt of the party incurring the debt and shall not be a community debt. The parties hereto agree not to incur any debt for which the other party may be liable.

15. MISCELLANEOUS PROVISIONS:

15.01. The parties hereto both stipulate and agree that they have read and fully understand this Agreement.

15.02. The parties hereto agree that they have entered into this Agreement without undue influence or fraud or coercion or misrepresentation or for any other like cause.

15.03. If 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 attorneys' fees incurred in that action.

15.04. Each of the parties hereto represents to the other that they have made full disclosure of all community assets and community liabilities of which they are aware.

15.05. The parties hereto stipulate and agree that the division of community assets provided for in this Agreement is fair and equitable.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first above written.

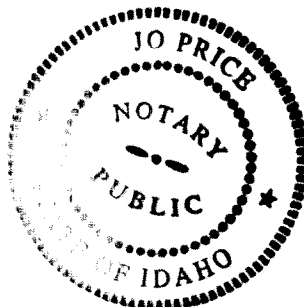
Debra Borley
Debra Borley

Kevin Smith

STATE OF IDAHO)
)ss.
County of Ada)

On this 16th day of September, 2005, before me, the undersigned notary public in and for said State, personally appeared Debra Borley, known to me to be the person whose name is subscribed to the within and foregoing instrument, and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



Jo Price
Notary Public for Idaho
Residing at Burien, Idaho
Commission expires: 10/28/06

STATE OF IDAHO)
)ss.
County of Ada)

On this ____ day of September, 2005, before me, the undersigned notary public in and for said State, personally appeared Kevin Smith known to me to be the person whose name is subscribed to the within and foregoing instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

Notary Public for Idaho
Residing at _____, Idaho
Commission expires: _____

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day
and year first above written.

Debra Borley

Kevin Smith

Kevin Smith

STATE OF IDAHO)

) ss.

County of Ada)

On this _____ day of September, 2005, before me, the undersigned notary public in and for said State, personally appeared Debra Borley, known to me to be the person whose name is subscribed to the within and foregoing instrument, and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

Notary Public for Idaho

Residing at _____, Idaho

Commission expires: _____

STATE OF IDAHO)

) ss.

County of Ada)

On this 15th day of September, 2005, before me, the undersigned notary public in and for said State, personally appeared Kevin Smith known to me to be the person whose name is subscribed to the within and foregoing instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first



My Commission Expires
APRIL 2, 2007

Patricia Parrow

Notary Public for Idaho

Residing at Northglenn, CO, Idaho

Commission expires: 4/2/07

PROPERTY SETTLEMENT AGREEMENT - P.6

SWW/mrw 18523-001/****Unknown: EventsQuery.RTF*** 9/8/05 4:01:05 PM

00027

PROPERTY AND DEBT SCHEDULE

CASE TITLE:

CASE NO:

FILE NO.:18523-001

DATE OF MARRIAGE:

ITEM NO	PROPERTY DESCRIPTION	DEBRA'S EVALUATION AND ALLOCATION						
		MARKET VALUE	LIENS	EQUITY	C/S	TO HUSBAND	TO WIFE	REMARKS
1	Home	\$ 250,000	\$ 147,729	102,271			\$ 102,271	subject to debt thereon
2	Pickup	\$ 25,000	\$ 9,890	15,110		\$ -	\$ 15,110	subject to debt
3	Explorer	\$ 2,700		2,700		\$ -	\$ 2,700	NADA
4	Bronco	\$ 3,000		3,000		\$ 2,000		
5	Boat	\$ 8,000		8,000		\$ -	\$ 8,000	
6	Tractor	\$ 18,000		18,000		\$ -	\$ 18,000	
7	4 wheeler w/Trailer	\$ 3,000		3,000			\$ 3,000	
8	Horse Trailer	\$ 7,000		7,000			\$ 7,000	
9	35' Trailer	\$ 18,000	\$ -	18,000		\$ -	\$ 18,000	
10	Arena Groomer	\$ 800		800			\$ 800	
11	Manure spreader	\$ 600		600			\$ 600	
12	Tractor Snow Blower	\$ 800		800		\$ -	\$ 800	
13	Elliptical	\$ 800		800		\$ 800		
14	Crossbow	\$ 800		800		\$ 800		
15	Staristepper	\$ 200		200		\$ 200		
16	Bench w/ weights	\$ 175		175		\$ 175		
17	Power Block	\$ 80		80		\$ 80		
18	Bikes	\$ 500		500		\$ 500		
19	Bed	\$ 500		500		\$ -	\$ 500	
20	Sofas (3)	\$ 800		800		\$ -	\$ 800	
21	Dining Room set	\$ 400		400		\$ -	\$ 400	
22	Breakfast Set (Eckbangruppe	\$ 200		200	s	X		
23	China Hutch	\$ 400		400		\$ -	\$ 400	
24	Coffee Tables	\$ 120		120		\$ 60	\$ 60	
25	Wall Cabinets	\$ 1,000		1,000		X		
26	Tools	\$ 800		800		\$ -	\$ 800	
27	Shopsmith	\$ 300		300			\$ 300	
28	Horses	\$ 5,000		5,000	s		\$ 5,000	5 horses / 3 are separate property
29	Tack	\$ 8,500		8,500			\$ 8,500	
30	Dishes, pots, silverware	\$ 400		400		\$ 50	\$ 350	
31	computer	\$ 350		350			X	no value
32	Camera	\$ 200		200		\$ -	\$ 200	
33	Telescope	\$ 150		150		\$ 150		
34	Hot tub			-				Part of house
35	Wood Stove			-				Part of house
36	TVs (4)	\$ 300		300		\$ 100	\$ 200	
37	Stereos (2)	\$ 75		75		\$ -	\$ 75	
38	DVD players (2)			-	x		x	
39	Generator	\$ 600		600			\$ 600	
40	Snow blower	\$ 400		400			\$ 400	
41	Preasure Washer	\$ 100		100			\$ 100	
42	401k B plan	\$ 244,582		244,582		\$ 139,291	\$ 105,291	
43	JANUS	\$ 13,510		13,510		\$ 6,755	\$ 6,755	Split
	Kevin's Defined Benefit Plan					X	X	Equal Each party receives 50%

PROPERTY AND DEBT SCHEDULE

CASE TITLE:

CASE NO:

FILE NO.:18523-001

DATE OF MARRIAGE:

ITEM NO.	PROPERTY DESCRIPTION	DEBRA'S EVALUATION AND ALLOCATION						
		MARKET VALUE	LIENS	EQUITY	C/S	TO HUSBAND	TO WIFE	REMARKS
	Debra's US National Guard					X	X	Debra 60% and Kevin 40%
44	Washer, dryer, fridge	\$ 200		200		\$ -	\$ 200	
45	Janus IRA	\$ 5,512		5,512	S		X	Separate property
46	Microsoft Stock			-	s	\$ -	X	a
47	Siding Loan - US Bank		\$ 15,000	(15,000)			X	
48	Credit Card- Capital 1		\$ 23,633	(23,633)		\$ (23,633)	\$ -	
49	American Cent.	\$ 9,624	\$ -	9,624		\$ 9,624		
50	Credit Card- Discover		\$ 5,222	(5,222)			\$ (5,222)	
51	Her Banking accounts			-				
52	Her retirement			-				
53	US Bank		\$ 1,800	(1,800)		\$ (1,800)		
54				-				
55				-				
56				-				
57				-				
58				-				
59				-				
	TOTAL ASSETS	633,478	203,274	430,204		135,152	301,990	

00029

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA

DEBRA A. BORLEY,)
)
Plaintiff,)
) Case No. CVDR05-00611
vs.)
)
KEVIN D. SMITH,) MEMORANDUM DECISION
)
Defendant.)
_____)

This matter came before this court initially by the plaintiff Debra Borley's filing on March 24, 2006 a motion to divide omitted assets. This matter was placed at issue by the defendant filing an answer and was set for final hearing on August 28, 2006.

On the date of the trial plaintiff's attorney had previously filed a motion to vacate the trial based on the fact that defendant Kevin D. Smith through his prior attorney had failed to answer discovery that was pertinent to the conclusion of plaintiff's case.

On that date this court vacated the trial and directed that defendant Kevin D. Smith, hereinafter referred to as Kevin, to comply with the discovery request.

Thereafter on September 8, 2006 defendant Kevin Smith filed a motion to dismiss claiming that there had been no assets omitted and also that this court lacked jurisdiction to hear this case. On September 27, 2006 this matter was reset for trial on April 27, 2007. On October 10, 2006, the date set for the hearing on defendant Kevin Smith's motion to

dismiss, no one appeared at the hearing and therefore pursuant to local rules the motion was deemed withdrawn.

On March 27, 2007 (30 days prior to the trial date) Kevin, through his attorney filed a motion for summary judgment with supporting brief and affidavit. On April 16, 2007 plaintiff, Debra Borley, hereinafter referred to as Debra, through her attorney filed her objection and response to the motion for summary judgment claiming that pursuant to the Idaho Rules of Civil Procedure this motion for summary judgment could not be brought at this time since it was less than 60 days prior to the trial date.

Upon convening a status conference with both party's attorneys it was determined that plaintiff's objection on the timeliness of the motion for summary judgment was proper, however both parties informed the court that they would be able to submit to the court a stipulated set of facts from which this court would be able to treat as cross motions for summary judgment and therefore decide the issues before this court without trial.

Based on these representations of counsel the court vacated the trial set for April 27, 2007.

Thereafter, on July 19, 2007 this court entered a final briefing schedule indicating that the stipulated set of facts needed to be presented to the court no later than August 1, 2007, simultaneous briefs due on August 13, 2007 and thereafter any reply brief would be submitted no later than August 29, 2007.

Pursuant to these agreements the parties submitted to this court a stipulated set of facts that were filed on August 1, 2007 which facts are incorporated into this memorandum decision by reference and will not be repeated here.

Additionally this court has considered the affidavits of both parties, excerpts from depositions of both parties and documents received through discovery which were provided to Kevin Smith through his employment with United Airlines as a pilot both during and after the marriage of the parties. These particular documents are included in the affidavit filed by plaintiff's attorney dated April 16, 2007, and the documents included in the March 27, 2007 affidavit in support of motion for summary judgment filed by defendant Kevin D. Smith.

A condensation of the facts are as follows;

Debra and Kevin were married through common law on August 1, 1998 and thereafter ceremonially married on June 4, 1994.

Thereafter Kevin began working as a pilot for United Airlines in October of 1990.

In May of 2001, pursuant to negotiations between the pilots union and United Airlines it was agreed that if their "A Plan" (defined benefit retirement plan) was terminated pursuant to United Airlines filing for protection under the United States Bankruptcy Code the pilot's would be compensated for these lost benefits on United Airlines recovery out of bankruptcy by the issuance of convertible notes which would be sold and conveyed to the pilots to off-set a portion of their losses incurred in their "A Plan".

The pilots "A Plan" was in fact terminated by the bankruptcy court effective December 30, 2004.

After termination of the "A Plan" the Pension Benefit Guarantee Corporation has replaced, in limited part, the pension benefits the pilots had accrued with the "A Plan" through December 30, 2004.

On September 22, 2005 Debra and Kevin were divorced pursuant to a judgment and decree of divorce, which judgment and decree was entered into by stipulation through a property settlement agreement executed contemporaneous with the entry of the decree of divorce.

The decree of divorce specified that the property settlement agreement was approved by the court but is not merged nor incorporated into the judgment and decree of divorce.

However, the property settlement agreement upon which the decree of divorce was based specifically sets forth under paragraph 10 that the parties agreed that in the event of a divorce decree being entered the parties are requesting that the agreement be merged and incorporated and made part of the judgment and decree of divorce.

No evidence either in the court file or presented by either attorney was ever submitted in an attempt to explain this apparent ambiguity between the decree of divorce and the property settlement agreement.

On February 9, 2006 Kevin received 1,616 shares of United Airlines stock, hereinafter referred to as the stock allocation, valued at approximately \$27.00 per share.

Also in February of 2006 Kevin received distributions from the sale of convertible notes valued at \$30,707.36 and thereafter in March of 2007 received an additional \$25,229.84 as a distribution of a sale of the convertible notes.

On June 23, 2006 United Airlines represented to their pilots in a document meant to explain and answer questions of the pilots concerning the reason for and distribution of the convertible notes originally made reference to in their original letter in 2001.

The main issue in this case is whether or not either or both of the convertible note distributions or the stock distributions were in fact omitted assets under the parties September 2005 decree of divorce.

Merger

The first issues raised by Kevin Smith was that this court lacked the jurisdiction in which to hear this case because the decree of divorce specified that this particular property settlement agreement was not merged into the decree and therefore this court lacked the jurisdiction to either modify or interpret this contract.

However, plaintiff Debra Borley claims that in fact the court continues to have jurisdiction, as it is in a court of equity and has the ability to continue to enforce its decree.

This court, however, views this issue as to whether or not the property settlement agreement was merged and/or integrated into the decree of divorce.

This particular issue on merger/integration has been addressed by the Idaho Court of Appeals in the 1998 case of Keeler vs. Keeler, 131 Idaho 442.

In the *Keeler* case *supra* the Idaho Court of Appeals analyzed the history in Idaho of the merger/integration issue.

Since 1960 in the initial case of Kimball vs. Kimball, 83 Idaho 12, the Idaho Supreme Court has struggled with giving the clear test on determining whether or not an agreement is merged and/or integrated into a decree of divorce allowing the court to modify that agreement as its own decree.

Finally in 1969 in its decision in Phillips vs. Phillips, 93 Idaho 384 the Supreme Court ceased the mental gymnastics previously attempted by the court decisions and

finally clarified the doctrines of integration and merger as they are applied in divorce cases. The Idaho Supreme Court specifically held in the *Phillips* decision;

“It is our belief that in its attempt to determine the intent of the parties regarding integration or non integration of the provisions of separation agreements, this court has been forced to indulge in technical hair splitting. In some cases the court has held agreements to be integrated... While in other cases agreements which were substantially the same but for a word or two have been held to be non-integrated.”

In order to solve this problem the Idaho Supreme Court went on to state:

“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.”

The prior line of cases starting with Kimball vs. Kimball *supra* indicated that even where an agreement has been merged into a decree, support terms can not be judicially modified if the agreement is integrated.” Keeler vs. Keeler *supra*

In defining the meaning of “integrated” the Court of Appeals in citing the history starting with Kimball vs. Kimball *supra* states that “If the parties have agreed that the provisions relating to the division of property and the provisions relating to the support constitute reciprocal consideration (so that the) support provisions are ... necessarily part and parcel of a division of property”.

In the case at bar no evidence was presented other than the document itself as to whether or not this particular agreement was “integrated”.

Clearly, following the rational of the Phillips vs. Phillips *supra* case, there arises a presumption of non-integration unless there is clear and convincing evidence to the contrary. Since there is no evidence as to the integration of this agreement it is presumed under *Phillips supra* that the agreement is not integrated.

The next issue is whether or not this agreement is merged into the decree. In this particular case the fact that we have conflicting provisions, one being in the decree of divorce that says that it is not merged and the other being in the property settlement agreement which stipulates that it is merged creates an ambiguity as to the intent of the parties. 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.

In reading from the four corners of the property settlement agreement it is clear that the intent of the parties was to have this particular document merged into the decree. Why the language was included in the decree of divorce saying not merged into the decree is a mystery to this court.

Therefore based on the doctrine set forth in Phillips vs. 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.

Equity To Consider Omitted Asset

It is unquestioned under Idaho law that in the absence of an appeal from an original decree of divorce the property divisions of that decree are final, res judicata and

no jurisdiction exists to modify property divisions of a divorce decree. McBride vs. McBride, 112 Idaho 959 (S.C. 1987)

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.

Does The Present Property Settlement Agreement Cover The Alleged Omitted Assets?

In her original motion and subsequent arguments Debra claims that the convertible notes that were sold and the proceeds delivered to Kevin were in fact a substitute for the American Airlines pilot "A Plan" (Defined Benefit Pension Plan). Debra also claims that the United Airlines stock that was presented to Kevin in February of 2006 pursuant to the plan of reorganization of United Airlines is in fact community property as she claims it reflects wages earned during the marriage.

In the property settlement agreement and specifically paragraph four 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."

The property settlement agreement also provides for a classification of property/income from after the signing of the property settlement agreement. Paragraph 13 of the property settlement agreement states:

“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.”

Pursuant to the stipulated facts presented to this court along with the letter of understanding sent to the pilots through their union representatives and pursuant to the representations made on the distribution of the convertible notes it is clear to this court that in fact the convertible notes are in fact compensation to the pilot for the termination of their “A Plan” (Defined Benefit Pension Plan) and therefore is a substitute for that defined benefit plan which would qualify it under paragraph four of the property settlement agreement as a division of retirement benefit received by Kevin from United Airlines.

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 rightfully be 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 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.

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.

If however, this matter is appealed and it is determined that in fact this is not to be considered under paragraph four then this court would rule that in fact this was an omitted asset and require the division as set forth above.

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.

Regardless of the above it is clear from Debra's deposition taken on February 9, 2007 that she was well aware of United Airlines offers to compensate the pilots during the bankruptcy in order to resolve the restructuring issues facing United Airlines.

Debra specifically testified that she understood that some time in the future the pilots of United Airlines including Kevin could possibly be compensated for them having their retirement taken away and agreeing to pay cuts during the restructuring.

Debra also testified that she was specifically aware of this possibility when she and Kevin entered into the settlement agreement that is the subject of this litigation.

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.

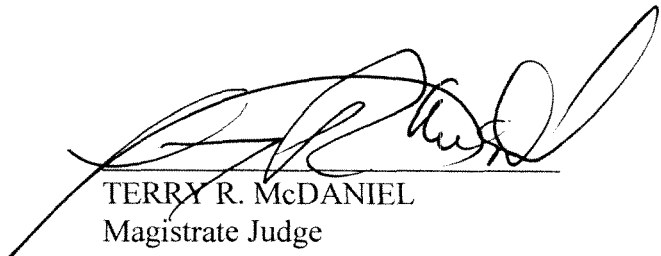
In order for the asset to be omitted it had to be unknown at the time of entering into the agreement. However it is clear that Debra was fully aware that Kevin may receive some compensation when United Airlines emerged from the bankruptcy

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.

Therefore, based on the foregoing analysis this court finds that the convertible notes are in fact a portion of Kevin's retirement benefits and are covered by paragraph four of the property settlement agreement and therefore are not omitted assets and should be divided as specified previously, also the stock allocation/distribution are not omitted assets and are controlled by paragraph 13 of the property settlement agreement and are Kevin's separate property.

Based on the foregoing this court directs that attorney for the plaintiff prepare a order reflecting this memorandum decision which in fact conveys to Debra her proportionate share of the convertible notes as a distribution of the retirement benefits from United Airlines.

Dated this 10 day of October 2007.



TERRY R. McDANIEL
Magistrate Judge

CERTIFICATE OF MAILING

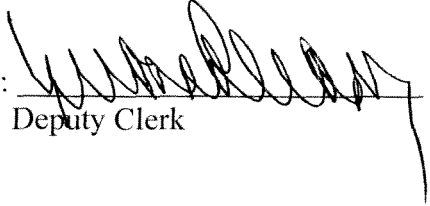
I do hereby certify that I have mailed, by United State Mail, as pursuant to Rule 77(d), Idaho Civil Rules, to each of the attorneys of record in this cause, in envelopes as addressed as follows:

Matthew R. Bohn
COSHO HUMPHREY
P.O. Box 9518
Boise, Idaho 83707-9518

Derek A. Pica
ATTORNEY AT LAW
199 N. Capitol Blvd., Ste. 302
Boise, Idaho 83702

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

Dated this 10th day of October, 2007

By: 
Deputy Clerk

RECEIVED
NOV 19 2007
TERRY R. McDANIEL

NO. _____
A.M. _____ P.M. 145
NOV 20 2007
J. DAVID NAVARRO, Clerk
By MEGAN A. RICHMOND
DEPUTY

MATTHEW R. BOHN ISB #5967
COSHO HUMPHREY, LLP
Counselors and Attorneys at Law
800 PARK BLVD., STE. 790
PO Box 9518
Boise, ID 83707-9518
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DEBRA A. BORLEY,

Plaintiff,

v.

KEVIN D. SMITH,

Defendant.

Case No. CV DR 0500611

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION TO DIVIDE OMITTED
ASSET**

The above-captioned matter was before this court on Plaintiff's Motion to Divide Omitted Asset and Defendant's Motion for Summary Judgment. The case was thereafter submitted to the Court on the parties' jointly filed Stipulated Facts, and the parties' respective Memorandums in support of their own, and in opposition to, each other's motions.

**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION
TO DIVIDE OMITTED ASSET**

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The Court, having reviewed the Stipulated Facts, and the parties' respective Memorandums and the pleadings on file herein, and having filed its Memorandum Decision on October 10, 2007, and being fully advised in the premises, and

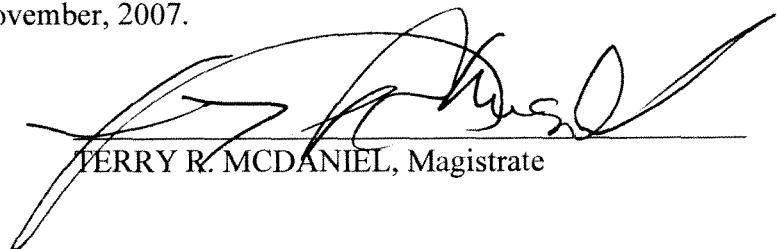
BASED UPON the evidence submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED as follows:

1. Plaintiff's Motion to Divide Omitted Asset as it pertains to the convertible notes is granted, and the convertible notes are hereby ordered to be divided between the parties as follows: By multiplying the amount of the convertible note 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.

2. Plaintiff's Motion to Divide Omitted Asset as it pertains to the stock allocation/distribution is denied for the reasons set forth in the Court's October 10, 2007 Memorandum Decision.

DATED This 20 day of November, 2007.



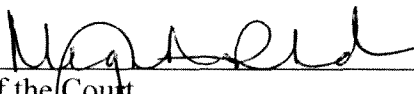
PERRY R. MCDANIEL, Magistrate

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20 day of November, 2007, a true and correct copy of the within and foregoing instrument was served upon:

Derek A. Pica
Attorney at Law
199 N. Capitol Blvd., Ste. 302
Boise, Idaho 83702
Served by: U. s. Mail

Matthew R. Bohn
Cosho Humphrey, LLP
PO Box 9518
Boise, ID 83707-9518
Served by: U. S. Mail



Clerk of the Court

RECEIVED
NOV 28 2007
Ada County Clerk

NO. Trans/11-28-07/SM
AM 10:57 PM

DEREK A. PICA, PLLC
ATTORNEY AT LAW
199 N. CAPITOL BLVD., SUITE 302
BOISE, IDAHO 83702

NOV 28 2007

J. DAVID NAVARRO, Clerk
By **S. MAXWELL**
DEPUTY

TELEPHONE: (208) 336-4144
FACSIMILE: (208) 336-4980
IDAHO STATE BAR NO. 3559

NO TRANSCRIPT
REQUESTED

ATTORNEY FOR Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DEBRA A. BORLEY,)	
)	Case No. CV DR 0500611
Plaintiff,)	
vs.)	
)	NOTICE OF APPEAL
KEVIN D. SMITH,)	
)	
Defendant.)	

TO: Plaintiff/Respondent, Debra A. Borley, and her attorney of record, Matthew R. Bohn of the firm Cosho Humphrey, LLP.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Defendant/Appellant, Kevin D. Smith, appeals against the above named Plaintiff/Respondent to the District Court of the Fourth Judicial District of the State of Idaho, In And For The County of Ada, from the Magistrate Division of the District Court of the Fourth Judicial District of the State of Idaho, In And For The County of Ada, The Honorable Terry R. McDaniel, presiding pursuant to Rule 83(f) of the Idaho Rules of Civil Procedure.

2. This Appeal is taken from the Order Granting in Part and Denying in Part Plaintiff's Motion to Divide Omitted Asset filed on November 20, 2007.

3. This Appeal is taken upon matters of law.
4. The proceedings of the original hearings were not recorded by tape as all matters were submitted to the Court by Stipulation or Affidavit.
5. No transcript is requested or necessary.
6. Issues on Appeal:
 1. Whether the magistrate court had jurisdiction to hear Plaintiff/Respondent's Motion.
 2. Whether the magistrate court erred as a matter of law and fact in ordering that the convertible notes Defendant/Appellant received from his employer, United Airlines, should be divided between the parties.
 3. Whether the magistrate court erred as a matter of law and fact in determining Plaintiff/Respondent's community share.
7. This Appeal is brought pursuant to I.R.C.P. 83(a) and Rule 11 of the Idaho Appellate Rules.

DATED this 27th day of November, 2007.



Derek A. Pica
Attorney for Defendant

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 27th day of November, 2007, I caused a true and correct copy of the foregoing NOTICE OF APPEAL 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
COSHO HUMPHREY, LLP
P.O. Box 9518
Boise, ID 83707-9518

Hand Deliver
U.S. Mail
Facsimile
Overnight Mail

☒
☐
☐
☐



Derek A. Pica

NO. _____
A.M. _____ FILED P.M. 3:44

DEC 28 2007

J. DAVID NAVS PRO, Clerk
By M. SECORNER
DEPUTY

MATTHEW R. BOHN ISB #5967
COSHO HUMPHREY, LLP
800 PARK BLVD., STE. 790
PO BOX 9518
BOISE, ID 83707-9518
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DEBRA A. BORLEY,

Plaintiff/Respondent/
Cross Appellant,

v.

KEVIN D. SMITH,

Defendant/Appellant/
Cross Respondent.

Case No. CV DR 0500611

NOTICE OF CROSS APPEAL

TO: APPELLANT/CROSS RESPONDENT; and Derek A. Pica, his attorney of record:

NOTICE IS HEREBY GIVEN THAT:

1. The above named Cross Appellant, Debra A. Borley, appeals against the above named Cross Respondent to the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, Magistrate Division, from the Order Granting in Part and Denying in Part Plaintiff's Motion to Divide Omitted Asset, entered in the above-entitled action

on November 20, 2007, the Honorable Terry R. McDaniel presiding. This Appeal is filed pursuant to Rule 83(g), of the Idaho Rules of Civil Procedure.

2. Cross Appellant has a right to appeal to the District Court of the Fourth Judicial District of the State of Idaho, and the Order described in paragraph 1 above is appealable under and pursuant to Rules 83(e) and 83(f) of the Idaho Rules of Civil Procedure.

3. This Appeal is taken upon matters of law.

4. The proceedings of the original hearings were not recorded by tape as all matters were submitted to the Court by stipulation or affidavit.

5. No transcript is requested or necessary.

6. Cross Appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 83(n) of the Idaho Rules of Civil Procedure: None.

7. The issues on appeal which the Cross Appellant intends to assert in this appeal are as follows:

(a) Whether the Court erred as a matter of law and fact in determining the method by which the convertible notes were to be divided;

(b) Whether the Court erred as a matter of law and fact in determining that the stock allocation/distribution did not constitute an omitted asset.

DATED this 28th day of December, 2007.

COSHO HUMPHREY, LLP

MATTHEW R. BOHN

Attorneys for Plaintiff/Respondent/Cross Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 28th day of December, 2007, a true and correct copy of the within and foregoing instrument was served upon:

Derek A. Pica
Attorney at Law
199 N. Capitol Blvd., Ste. 302
Boise, Idaho 83702
Served by: U. S. Mail



MATTHEW R. BOHN

NO. _____
A.M. 9:05 FILED P.M. _____

SEP 10 2008
J. DAVID NAVARRO, Clerk
By [Signature] DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DEBRA A. BORLEY,)	
)	
Plaintiff/Respondent/)	
Cross-Appellant,)	
vs.)	CASE NO. CV-DR-0500611
)	
KEVIN D. SMITH,)	
)	
Defendant/Appellant)	DECISION ON APPEAL
Cross-Respondent.)	
_____)	

This matter is before the Court as an Appeal and Cross-Appeal from the Magistrate Division of a decision the Honorable Terry R. McDaniel.

The Magistrate entered his *Findings of Fact, Conclusions of Law and Order* ("Magistrate Findings") on November 20, 2007, and granted in part and denied in part Debra Borley's Motion to Divide Omitted Asset. The Judgment and Decree of Divorce had been entered by stipulation on September 22, 2005. Attached to the Judgment and Decree was a Property Settlement Agreement entered into by the parties.

The Court heard argument on August 21, 2008, and took the matter under advisement on August 26, 2008.

For the reasons stated below, the Court affirms, in part, and reverses, in part, the Magistrate's decision.

PROCEDURAL BACKGROUND

On March 24, 2006, Debra Borley ("Borley") filed a Motion to Divide Omitted Asset. Kevin Smith ("Smith") answered on April 18, 2006. The magistrate court set the Motion for trial, to be held on August 28, 2006.

On August 28, 2006, Borley renewed a request to vacate the trial based on Smith's failure to participate in discovery. After considering Borley's request, the magistrate court vacated the trial and directed Smith to comply with any outstanding discovery. On September 8, 2006, Smith filed a motion to dismiss, claiming that no assets had been omitted and that the court lacked jurisdiction to hear the case. On September 27, 2006, the magistrate court reset Borley's Motion to Divide Omitted Asset for an April 27, 2007, trial. On October 10, 2006, the date set for the hearing on Smith's motion to dismiss, neither party appeared and the magistrate court deemed the motion withdrawn pursuant to local rules.

On March 27, 2007, thirty days before trial, Smith filed a motion for summary judgment with a supporting brief and affidavit. Borley objected, claiming the motion was untimely under the Idaho Rules of Civil Procedure because it was filed less than sixty days prior to the date set for trial. After a status conference with counsel for both parties, the magistrate court determined that Borley's timeliness objection was proper. The parties, nevertheless, informed the magistrate court that they would submit a stipulated set of facts from which the magistrate court could decide whether the Motion to Divide Omitted assets should be granted. The magistrate court decided to treat the case as having been submitted for decision on cross motions for summary judgment. Based, on counsel's representations, the magistrate court vacated the trial set for April 27, 2007.

The parties submitted Plaintiff's and Defendant's Stipulated Facts to the magistrate court on August 1, 2007, as follows:

Stipulated Facts

- a. Smith and Borley entered into a common law marriage on August 1, 1988, and were ceremonially married on June 4, 1994.
- b. Smith began working as a pilot for United Airlines in October 1990.
- c. On or about December 9, 2002, United Airlines filed for bankruptcy protection.

- d. As a result, "the pilots agreed to concessions including reduced pay, loss of work benefits, and loss of pensions in the 2003 restructured agreement."
- e. In May 2001, United Airlines declared that if the pilots' "A Plan" (Defined Benefit Retirement Plan) was terminated, its pilots would be compensated as follows:

7. Convertible Notes. In the event that the A Plan is terminated pursuant to 29 U.S.C. § 1341 or § 1342 following judicial approval of such termination, the Revised 2003 Pilot Agreement and the Plan of Reorganization shall provide for the issuance of \$550 Million of UAL convertible notes as described in Exhibit "D" to this letter of agreement to a trust or other entity designated by the Association. The terms of the UAL of the UAL convertible notes described in Exhibit "D" shall be subject to mutually acceptable modifications to optimize implementation for all parties from an accounting, securities law and tax law perspective.

- f. The Bankruptcy Court terminated the pilots' "A Plan" effective December 30, 2004.
- g. After termination of the "A Plan" on December 30, 2004, the Pension Benefit Guarantee Corporation Insurance System replaced, in limited part, the pension benefits the pilots had accrued under the "A Plan" through December 30, 2004.
- h. On September 22, 2005, Smith and Borley were divorced pursuant to a Judgment and Decree of Divorce which, in pertinent part, set forth the following:

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.

- i. The attached Property Settlement Agreement, in part, provided the following:

2. TRANSFERS TO WIFE: The Husband hereby agrees to, and by this Agreement he does hereby transfer, assign and convey unto the Wife as her sole and separate property, and

does hereby forever waive any and all rights in and to, the items more particularly described as follows:

2.01 Attached hereto and by this reference incorporated herein, is a Property and Debt Schedule (hereinafter referred to as PDS). Wife is awarded the items under the column entitled "To Wife" as indicated with a dollar amount or an "x".

2.02 Any other property in her possession or under her control except those items specifically being awarded to the Husband.

3. **TRANSFERS TO HUSBAND:** The Wife hereby agrees to, and by this Agreement she does hereby transfer, assign and convey unto the Husband as his sole and separate property, and does hereby forever waive any and all rights in and to, the items of property more particularly described as follows:

3.01 Attached hereto and by this reference incorporated herein, is a Property and Debt Schedule (hereinafter referred to as PDS). Husband is awarded the items under the column entitled "To Husband" as indicated with a dollar amount or an "x".

3.02 Any other property in his possession or under his control except those items specifically being awarded to the Wife.

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.

...

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.

...

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 separate property of the party earning the income, and any income on separate property shall be separate property from and after the date of signing this agreement.

...

15. **MISCELLANEOUS PROVISIONS:**

...

15.04 Each of the parties hereto represents to the other that they have made full disclosure of all community assets and community liabilities of which they are aware.

- j. Pursuant to the Revised 2003 Pilot Agreement, on or about February 9, 2006, Borley received 1,616 shares of United Airlines stock (known as the stock allocations/ distributions referenced in paragraph 16 herein), valued at approximately \$27 per share.
- k. In addition to the stock distribution, Borley also received the following:
 - i. Convertible notes (known as the convertible note allocations/distributions) in February of 2006 valued at \$30,707.36 directly deposited into a Schwab IRA account and received an additional \$25,229.84 in convertible notes in March of 2007. These convertible note allocations/distributions represented United Airline's attempt to compensate the pilots for the loss of their "A plan;"
 - ii. An additional 406 shares of stock as part of the stock allocations/ distributions, valued at approximately \$27 per share; and
 - iii. Additional stock distributions as part of the stock allocations/ distributions, but is unsure as to the number of shares, value, etc.
- l. On June 23, 2006, United Airlines represented that the "convertible notes" received by their pilots represented consideration for the loss of their "A Plan" as follows:

Question 1: I understand that eligible pilots will receive cash proceeds from the ALPA convertible note sometime in August 2006. Why am I receiving these proceeds?

Answer 1: As part of the Bankruptcy Exit Agreement, [the pilots] negotiated the right to receive \$550M, face amount, in Senior

Subordinated Convertible Notes to be issued by UAL not later than 100 days after exit from bankruptcy. The MEC ... adopted an allocation methodology under which the Notes [would] be sold as soon as possible after issuance and the net proceeds of the sale ... applied as a partial offset to the losses suffered by the pilots as a result of termination of [their] A plan.

(PDAP Top Off and Taxable Remainder Distribution Method — ALPA Convertible Notes — Questions and Answers, page 3, Question 1).

- m. In order for a pilot to be eligible to receive stock distributions/allocations, said pilot must have been employed on May 1, 2003. For the pilot to actually receive any stock allocations/distributions, the pilot must have been employed by United Airlines on February 1, 2006.
- n. The stock distributions/stock allocations that each eligible pilot received attempted to compensate the pilots for the work rules, compensation, and work benefits that they lost as a result of restructuring their collective bargaining agreement, which is to run from May 1, 2003 through December 31, 2009.
- o. In order for a pilot to receive convertible note distributions/allocations, said pilot must have been employed on February 1, 2006, and have been a qualified member of the A plan as of December 30, 2004.
- p. In determining a pilot's share of the convertible note allocations/distributions, United Airlines took into account each pilot's age, years left to retirement (which is reached at age 60) and seniority. United Airlines projected that the more seniority a pilot had, the greater the projection as to the aircraft that he/she would be flying at retirement. A pilot projected to be flying a 777 at the time of his retirement versus a pilot that would be flying an A320 would be entitled to a greater allocation of convertible notes assuming that the pilots were of the same age. The one with greater seniority would be projected to be flying a more advanced aircraft with higher pay.
- q. Once a pilot received either convertible note allocations/distributions, and/or stock allocations/distributions, he could immediately cease his employment

without any obligation to return any of the funds, convertible notes and/or stock allocations.

r. Borley remains employed by United Airlines as a United Airlines pilot.

On August 13, 2007, Borley filed a memorandum in support of her Motion to Divide Omitted Asset. That same day, Smith filed a supplemental memorandum in support of summary judgment. On August 29, 2008, Borley responded with a short reply to Smith's supplemental memorandum.

In addition to the briefs, the magistrate court considered the affidavits of both parties, excerpts from depositions of both parties, and documents received through discovery which were provided to Smith through his employment with United Airlines as a pilot, both during and after the marriage. These documents were included in the affidavit filed by Borley's attorney dated April 16, 2007 and in the March 27, 2007 affidavit filed in support of Smith's motion for summary judgment.

After reviewing the parties' briefs and supporting documents, the Honorable Terry R. McDaniel entered a Memorandum Decision on October 10, 2007, and entered an Order Granting in Part and Denying in Part Plaintiff's Motion to Divide Omitted Asset on November 20, 2007.

In his Memorandum Decision, the magistrate court first found that the Property Settlement Agreement merged into the decree of divorce, allowing the court to interpret or modify the agreement. The magistrate court then determined that its equitable jurisdiction permitted it to consider a claim for an omitted asset. Finally, the court concluded that neither the convertible notes nor the stock allocation were omitted assets but instead must be allocated respective to paragraphs 4 and 13 of the Property Settlement Agreement. Namely, the convertible notes should be allocated between the parties as retirement benefits according to paragraph 4 and the stock allocation as separate property or income under paragraph 13.

On January 3, 2008, Smith appealed to the Court for relief from the magistrate court's decision. Borley filed a Cross-Appeal on February 7, 2008. Both parties responded and replied. The Court heard argument on August 21, 2008.

ISSUES PRESENTED ON APPEAL

1. Did the magistrate court err as a matter of law in determining that the Property Settlement Agreement was merged into the Judgment and Decree of Divorce?
2. Did the doctrine of *res judicata* prevent the magistrate court from exercising jurisdiction to modify the Judgment and Decree of Divorce?
3. Did the magistrate court err in determining whether a portion of the convertible notes were community property?
4. Did the magistrate court err in applying the time rule method?
5. Is Smith entitled to attorney fees on appeal?

ISSUES PRESENTED ON CROSS-APPEAL

1. Did the magistrate court err in concluding that the "stock allocation" did not constitute an omitted asset?
2. Is Borley entitled to an award of attorney fees and costs on appeal pursuant to Idaho Appellate Rule 35(a)(5), 40, 41 and paragraph 15.03 of the Property Settlement Agreement?

STANDARD OF REVIEW

The Court on appeal will uphold findings of fact made by the magistrate court if they are supported by substantial and competent, even if conflicting, evidence. I.R.C.P. 52(a); *Shurtliff v. Shurtliff*, 112 Idaho 1031, 739 P.2d 330 (1987); *See also Campbell v. Campbell*, 120 Idaho 394, 816 P.2d 350 (Ct. App. 1991). As to questions concerning the application of law, the Court exercises free review. *Carr v. Carr*, 116 Idaho 747, 750, 779 P.2d 422, 425 (Ct.App.1989).

When an action is tried to a court sitting without a jury, appellate review is limited to ascertaining whether the trial court's findings of fact are supported by substantial and competent evidence. *See The Highlands, Inc. v. Hosac*, 130 Idaho 67, 69, 936 P.2d 1309, 1311 (1997); *Kootenai Elec. Co-op. v. Washington Water Power Co.*, 127 Idaho 432, 434, 901 P.2d 1333, 1335 (1995). . . . The trial court's findings of fact will be liberally construed in favor of the judgment entered. *See Id.* "The credibility and weight given to the evidence is in the province of the trial judge as the trier of fact, and the findings made by the trial judge will not be set aside unless clearly erroneous." *Id.*

Browning v. Richard Ernest Ringel & Ervin Meeks Logging Co., 134 Idaho 6, 995 P.2d 351 (2000). The Court will not substitute its view of the facts for the view of the Magistrate court. *Williamson v. City of McCall*, 135 Idaho 452, 19 P.3d 766, 769 (2001) (citing I.R.C.P. 52(a)).

ANALYSIS

A. The Magistrate Court Did Not Err in Determining That the Property Settlement Agreement was Merged Into the Judgment and Decree of Divorce.

The rules of contract construction apply equally to the interpretation of divorce decrees. *Toyama v. Toyama*, 129 Idaho 142, 144, 922 P.2d 1068, 1070 (1996) (citing *Delancey v. Delancey*, 110 Idaho 63, 65, 714 P.2d 32, 34 (1986)). If the language of the decree is clear and unambiguous, the interpretation of its meaning and legal effect are questions of law. *Id.* The meaning of an unambiguous decree must be determined from the plain meaning of the words. *See Idaho v. Hosey*, 134 Idaho 883, 886, 11 P.3d 1101, 1104 (2000). If, however, 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 that focuses on the intent of the parties. *Id.* In that case, the magistrate court's interpretation will be upheld if supported by substantial and competent evidence. *Toyama*, 129 Idaho at 144, 922 P.2d at 1070. The determination of whether a divorce decree is ambiguous is a question of law. *See Commercial Ventures, Inc. v. Rex M. & Lynn Lea Family Trust*, 145 Idaho 208, 177 P.3d 955, 960–61 (2008).

When a settlement agreement has been merged into a decree, property divisions in the agreement may be modified without the mutual consent of the parties because the agreement has become part of the court's decree. *Phillips*, 93 Idaho at 386, 462 P.2d at 51. Absent merger, the settlement agreement stands independent of the decree and the obligations imposed under the agreement are those imposed by contract. *Keeler v. Keeler*, 131 Idaho 442, 444–45, 958 P.2d 599, 601–02 (Idaho Ct. App. 1998) (quoting *Bainbridge v. Bainbridge*, 75 Idaho 13, 24, 265 P.2d 662, 669 (1954)). Under Idaho law,

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 . . . the agreement, certain presumptions arise. In the absence of clear and convincing evidence to the contrary, it will be 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.

Phillips v. Phillips, 93 Idaho 384, 387, 462 P.2d 49, 52 (1969).

The magistrate court did not err in concluding that the Property Settlement Agreement merged into the Judgment and Decree of Divorce. Here, the decree terms and

the agreement terms when construed together are not only ambiguous, but conflicting, making their interpretation a question of fact and entitling the magistrate court's findings to a clearly erroneous standard of review. The Judgment and Divorce Decree states in part that the Property Settlement Agreement "is not merged nor incorporated into this Judgment and Divorce Decree." The Property Settlement Agreement attached to the Judgment in paragraph 10 provides: "[t]he 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." Clearly, these provisions give conflicting pictures of the parties' intent regarding merger.

After considering the evidence, including the language of the divorce decree and the settlement agreement, the magistrate court concluded that the agreement had been merged into the decree. In so holding, the magistrate court determined that the divorce decree language alone did not rise to the level of clear and convincing evidence required to rebut the presumption of merger. This determination, like other findings of fact regarding the weight of evidence, must be given deference unless it is clearly erroneous. There is no error here. The language of the Property Settlement Agreement combined with the fact that the agreement was both attached to the decree of divorce and referred to therein is sufficient to uphold the court's finding, despite the conflicting language in the decree. The Court should not substitute its view of the facts for the view of the magistrate court.

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.

B. The Magistrate Court Had Jurisdiction to Modify the Judgment and Decree of Divorce.

Causes of action for divorce are actions in equity. *McHugh v. McHugh*, 115 Idaho 198, 200, 766 P.2d 133, 135 (1988). “Once the equitable jurisdiction of the court has attached, the court should retain jurisdiction to resolve all portions of the dispute between the parties and render equity to all parties” *Id.* (quoting *Barnard & Son, Inc. v. Akins*, 109 Idaho 466, 469, 708 P.2d 871, 874 (1985)). In *McHugh*, the Idaho Supreme Court cited with approval a California case, *Huddleson v. Huddleson*, 187 Cal.app.3d 1564, 232 Cal.Rptr. 722, 727 (1986), for the proposition that an action to divide an omitted asset in the context of a divorce proceeding is an action in equity and does not seek to modify or reopen a previous final judgment of dissolution. *Id.*

The magistrate court did not err by exercising jurisdiction over this matter. Both parties acknowledge that the magistrate court properly exercised equitable jurisdiction to determine whether the convertible notes and stock allocation constituted omitted assets. Nevertheless, Smith contends that once the court determined that the assets were not omitted, it was barred from proceeding any further by the doctrine of *res judicata*. Smith correctly cites *McBride v. McBride*, 112 Idaho 959, 961, 739 P.2d 258, 260 (1987), for the notion that absent an appeal the property division portions of a divorce decree are final, *res judicata*, and no jurisdiction exists to modify those divisions. However, Smith misapplies *McBride* in the case at bar.

In *McBride*, the plaintiff-appellant filed a petition to modify and vacate a portion of the divorce decree dealing with her husband’s military retirement pay. *Id.* at 960. In the instant case, Borley has not requested a modification of the settlement agreement. Instead, she moved the court to divide assets, namely, the convertible notes and stock allocation, she believed had been omitted from the agreement. In response to Borley’s request, the 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 Borley’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, 694, 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.

C. The Magistrate Court Did Not Err in Determining That a Portion of the Convertible Notes were Community Property.

Smith argues that the magistrate court erred in determining that Borley had a community interest in the convertible notes. Specifically, Smith points to the language of paragraph 4 which provides that Borley is to only receive those benefits Smith accumulated during the marriage. Smith argues that he did not “acquire” the benefit of the convertible notes until he fulfilled the condition of being employed with United through February 1, 2006. Therefore, Smith maintains that the convertible notes constitute separate property or income under paragraph 13. The Court disagrees.

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.

The section of the PDAP Top Off and Taxable Remainder Distribution Method – ALPA Convertible Notes – Questions and Answers referred to in the stipulated facts clearly indicates that the convertible notes represented a partial offset to the losses suffered by Smith and other United Airlines pilots resulting from the termination of their defined benefit retirement plan. The May 2001 Letter of Agreement likewise indicates that the convertible notes were compensation to Smith for the termination of the defined benefit plan which clearly existed at the time of the divorce.

The mere fact that vesting of the benefit of the convertible notes was contingent upon Smith’s continued employment beyond the date of divorce does not mean that benefit was not accumulating in the years preceding the divorce. *See Batra v. Batra*, 135 Idaho 388, 393, 17 P.3d 889, 894 (2001). Smith’s labor before the divorce contributed to the vesting of the right to the convertible notes in the months following the date of divorce. Therefore, the Court upholds the Magistrate’s decision.

D. The Magistrate Court Erred in Applying the Time Rule Method

Additionally, Smith contends that magistrate court erred by applying the time rule method to divide the convertible notes between the parties. The Court agrees. Paragraph 4 of the settlement agreement clearly states that Borley is to receive fifty percent (50%) of the benefit Smith accumulated during the marriage “to be set over to her pursuant to a Qualified Domestic Relations Order.” Section 3 of the Qualified Domestic Relations Order, entered November 15, 2005, states that the Plan will pay fifty percent of Smith’s accrued benefit from the date of marriage, August 1, 1988, through the date of divorce, September 22, 2005. Therefore, if the convertible notes fall under paragraph 4, they should be divided under the accrued benefit method, which values the community interest as one-half of the difference between the value of the retirement account at the date of divorce and the value at the date of marriage. *See Maslen v. Maslen*, 121 Idaho 85, 89–90, 822 P.2d 982, 986–87 (1991).

E. The “Stock Allocation” was an Omitted Asset.

Borley, on Cross-Appeal, contends that the magistrate court erred in concluding that the stock allocation did not constitute an omitted asset. The Court agrees. Paragraph 13 of the settlement agreement clearly provides that “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” Neither of the parties argues that this language should be given any interpretation other than its plain meaning. The question at issue here is at what point Smith earned or acquired the stock allocations.

Borley, in arguing that the stock allocations were omitted, suggests that they were acquired prior to the divorce, beginning on May 1, 2003. Smith’s position is that he did not earn or acquire the stock allocation until February 1, 2006, nearly six months after the divorce was final. If Borley is correct, any portion of the stock allocations that was earned between May 1, 2003, and September 22, 2005 is property of the community, subject to division under the Court’s equitable jurisdiction. On the other hand, if Smith is correct the stock allocations constitute separate property or income under paragraph 13 of the agreement.

An examination of the stipulated facts reveals that the stock allocations were meant to compensate United Airlines’ pilots for “the work rules, compensation, and work

benefits that they lost as a result of restructuring their collective bargaining agreement, which is to run from May 1, 2003 through December 31, 2009.” Presumably, a portion of the stock allocations received by Smith represented the loss of work rules, compensation, and work benefits suffered between May 1, 2003 and the date of the divorce. This portion is clearly community property not covered by the terms of the settlement agreement. As such, it is an omitted asset and must be divided equitably between the parties.

Furthermore, Idaho courts have rejected Smith’s argument that since vesting of the stock allocations was contingent upon his continued employment through February 1, 2006, the allocations constituted separate property. *Batra*, 135 Idaho at 393 17 P.3d at 894 (finding that stock options which vested after date of divorce were partially earned from the plaintiff-appellant’s labor during marriage and, thus, the community had a fractional interest in the stock options vesting in the months following the divorce).

On remand, the magistrate court should determine what portion of the stock allocations were “earned” before September 22, 2005, the date of divorce, and then divide that portion between the parties as equity requires.


F. Attorney Fees.

Both parties request costs and fees on appeal. The Court finds, in an exercise of discretion, that neither party was the prevailing party on all accounts and in a further exercise of discretion denies costs and fees to both parties on appeal.

CONCLUSION

The Court affirms in part and reverses in part. The matter is remanded to the magistrate division to divide the convertible notes under the accrued benefit method and to determine what portion of the stock allocations is to be divided as an omitted asset.

DATED this 9th day of September 2008.


CHERI C. COPSEY
District Judge

CERTIFICATE OF MAILING

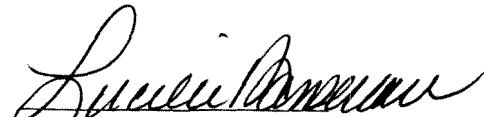
I hereby certify that on this 10th day of September, 2008, I mailed (served) a true and correct copy of the within instrument to:

MATTHEW R. BOHN
COSHO HUMPHREY LLP
P.O. BOX 9518
BOISE, IDAHO 9518

DEREK PICA
199 NORTH CAPITOL BLVD. SUITE 302
BOISE, IDAHO 83702

THE HONORABLE JUDGE TERRY McDANIEL
INTERDEPT. MAIL

J. DAVID NAVARRO
Clerk of the District Court


Deputy Clerk

RECEIVED

OCT 08 2008

Ada County, Idaho

DEREK A. PICA, PLLC
ATTORNEY AT LAW
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BOISE, IDAHO 83702

TELEPHONE: (208) 336-4144
FACSIMILE: (208) 336-4980
IDAHO STATE BAR NO. 3559

ATTORNEY FOR Defendant

NO. 11:26 FILED
A.M. PM

OCT 08 2008

J. DAVID NAVARRO, Clerk
By J. RANDALL
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DEBRA A. BORLEY,)	
)	Case No. CV DR 0500611
Plaintiff/Respondent,)	
)	
vs.)	NOTICE OF APPEAL
)	
KEVIN D. SMITH,)	
)	
Defendant/Appellant.)	
_____)	

TO: Plaintiff/Respondent, Debra A. Borley, and her attorney of record, Matthew R. Bohn of the firm Cosho Humphrey, LLP.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Defendant/Appellant, Kevin D. Smith, appeals against the above named Plaintiff/Respondent to the Idaho Supreme Court from the Decision on Appeal filed on September 10, 2008 in the above-entitled action, Honorable Cheri C. Copsey, presiding.
2. That Defendant/Appellant has a right to appeal to the Idaho Supreme Court, and the Decision on Appeal described in paragraph 1 above is an appealable Order

under and pursuant to Rule 11(a)(2) of the Idaho Appellate Rules.

3. The proceedings of the original hearings were not recorded by tape as all matters were submitted to the Court by Stipulation or Affidavit.

4. A transcript of the argument on appeal before the District Court is not requested.

5. Issues on Appeal:

a. Whether the District Court erred in upholding the magistrate court's ruling that the property settlement agreement was merged into the Judgment and Decree of Divorce.

b. Whether the district court erred in determining the magistrate court had jurisdiction to modify the Judgment and Decree of Divorce.

c. Whether the district court erred in upholding the magistrate court's determination that the convertible notes are community property.

d. Whether the district court erred in reversing the magistrate court's ruling that the stock allocation was not an omitted asset.

6. Appellant requests that the Clerk's Record contain all documents designated in I.A.R. 28.

7. I certify:

a. That a copy of this Notice of Appeal has been served on the Clerk of the District Court.

b. That the Clerk of the District Court has not been paid the estimated fee for preparation of the reporter's transcript as there is no transcript.

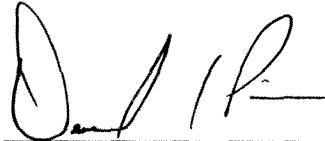
c. That the estimated fee for preparation of the Clerk's Record has

been paid.

d. That the appellate filing fee has been paid.

That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 7th day of October, 2008.



Derek A. Pica
Attorney for Defendant

CERTIFICATE OF SERVICE

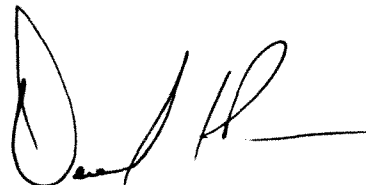
I, the undersigned, certify that on the 7th day of October, 2008, I caused a true and correct copy of the foregoing NOTICE OF APPEAL to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s)

Matthew R. Bohn
COSHO HUMPHREY, LLP
P.O. Box 9518
Boise, ID 83707-9518

Clerk of the District Court
Ada County Courthouse
200 West Front Street
Boise, ID 83702

Hand Deliver
U.S. Mail
Facsimile
Overnight Mail

☒
☐
☐
☐



Derek A. Pica

NO. _____
A.M. _____ FILED P.M. 4:05

OCT 29 2008

J. DAVID NAVARRO, Clerk
By J. RANDALL
DEPUTY

MATTHEW R. BOHN ISB #5967
COSHO HUMPHREY, LLP
800 PARK BLVD., STE. 790
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PO BOX 9518
BOISE, ID 83707-9518
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DEBRA A. BORLEY,

Plaintiff/Respondent/
Cross-Appellant,

v.
KEVIN D. SMITH,

Defendant/Appellant/
Cross-Respondent.

Case No. CV DR 0500611

NOTICE OF CROSS-APPEAL

TO: APPELLANT/CROSS-RESPONDENT; and Derek A. Pica, his attorney of record:

NOTICE IS HEREBY GIVEN THAT:

1. The above named Cross-Appellant, Debra A. Borley, appeals against the above named Cross-Respondent to the Idaho Supreme Court from the Decision on Appeal entered in the above-entitled action on September 10, 2008, the Honorable Cheri C. Copsey, presiding. This Cross-Appeal is filed pursuant to Rules 11 and 15 of the Idaho Appellate Rules.

2. Cross-Appellant has a right to appeal to the Idaho Supreme Court and the Memorandum Decision described in paragraph 1 above is appealable under and pursuant to Rules 11 and 15 of the Idaho Appellate Rules.

3. This Appeal is taken upon matters of law.

4. The proceedings of the original hearings were not recorded by tape as all matters were submitted to the Court by stipulation or affidavit.

5. No transcript is requested or necessary.

6. Cross-Appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28 of the Idaho Appellate Rules: None.

7. The issues on appeal which the Cross-Appellant intends to assert in this appeal are as follows:

(a) Whether the Court erred as a matter of law and fact in denying Cross-Appellant her attorney fees and costs as provided in the Agreement (Property Settlement Agreement) discussed below and on appeal.

8. I certify:

(a) That a copy of this Notice of Cross-Appeal has been served on the Clerk of the District Court;

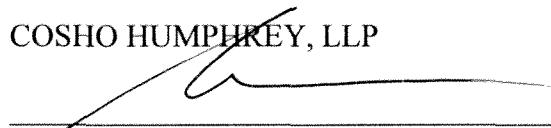
(b) That the Clerk of the District Court has not been paid the estimated fee for preparation of the reporter's transcript as there is no transcript;

(c) That the estimated fee for preparation of the Clerk's Record has been paid;

(d) That the cross-appellant filing fee has been paid.

DATED this 29th day of October, 2008.

COSHO HUMPHREY, LLP



MATTHEW R. BOHN
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 29th day of October, 2008, a true and correct copy of the within and foregoing instrument was served upon:

Derek A. Pica
Attorney at Law
199 N. Capitol Blvd., Ste. 302
Boise, Idaho 83702
Served by: Facsimile: 336-4980



MATTHEW R. BOHN

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DEBRA A. BORLEY,

Plaintiff-Respondent-Cross Appellant,
vs.

KEVIN D. SMITH,

Defendant-Appellant-Cross Respondent.

Supreme Court Case No. 35751

CERTIFICATE OF EXHIBITS

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the
State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the
course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said
Court this 24th day of November, 2008.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

CERTIFICATE OF EXHIBITS

000'73

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DEBRA A. BORLEY,

Plaintiff-Respondent-Cross Appellant,
vs.

KEVIN D. SMITH,

Defendant-Appellant-Cross Respondent.

Supreme Court Case No. 35751

CERTIFICATE OF SERVICE

I, J. DAVID NAVARRO, the undersigned authority, do hereby certify that I have
personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of
the following:

CLERK'S RECORD

to each of the Attorneys of Record in this cause as follows:

DEREK A. PICA

ATTORNEY FOR APPELLANT

BOISE, IDAHO

MATTHEW R. BOHN

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

J. DAVID NAVARRO
Clerk of the District Court

Date of Service: NOV 25 2008

By BRADLEY J. THIES
Deputy Clerk

CERTIFICATE OF SERVICE

000'74

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DEBRA A. BORLEY,

Plaintiff-Respondent-Cross Appellant,

vs.

KEVIN D. SMITH,

Defendant-Appellant-Cross Respondent.

Supreme Court Case No. 35751

CERTIFICATE TO RECORD

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 8th day of October, 2008.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

CERTIFICATE TO RECORD

SEAL

000'75