

11-27-2007

# Dunagan v. Dunagan Clerk's Record v. 1 Dckt. 34516

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"Dunagan v. Dunagan Clerk's Record v. 1 Dckt. 34516" (2007). *Idaho Supreme Court Records & Briefs*. 1648.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/1648](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/1648)

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

LAW CLERK

Docket #34516 Vol 1 of 2

IN THE  
SUPREME COURT  
OF THE  
STATE OF IDAHO

CHRIS M. DUNAGAN,

Plaintiff

and

Respondent

VS.

KELLY A. DUNAGAN,

Defendant

and

Appellant

Appealed from the District Court of the Second  
Judicial District for the State of Idaho, in and  
for Clearwater County

Hon. John R. Stegner District Judge

Garry W. Jones, Jones, Brower & Callery  
P.O. Box 854  
Lewiston, ID 83501

Attorney  for Appellant

Paul T. Clark, Clark & Feeney  
P.O. Box Drawer 285  
Lewiston, ID 83501

Attorney  for Respondent

Filed this \_\_\_\_\_ day of NOV 27, 2007

Supreme Court \_\_\_\_\_ Court of Appeals \_\_\_\_\_  
Entered on ATS by \_\_\_\_\_

By \_\_\_\_\_ Clerk  
Deputy

34516

**IN THE SUPREME COURT OF THE STATE OF IDAHO  
DOCKET #34516**

**CHRIS M. DUNAGAN,**

**Plaintiff/Respondent,**

**Vs.**

**KELLY A. DUNAGAN,**

**Defendant/Appellant,**

---

**Garry W. Jones, Jones, Brower & Callery, P.O. Box 854, Lewiston, ID 83501,**

**Paul T. Clark, Clark and Feeney, P.O. Drawer 285, Lewiston, ID 83501**

**TRANSCRIPT OF APPEAL**

---

**Appealed from District Court of the Second Judicial District of the State of Idaho, in  
and for the County of Clearwater**

**Honorable John R. Stegner, District Judge Presiding**

## TABLE OF CONTENTS

Complaint for Divorce	01
Order Setting Trial	05
Order To Consolidate	08
Order Re: Motion to Compel and Order Vacating Trial	10
Order RE: Motion to Compel	12
Amended Notice of Deposition Duces Tecum – Kelly Dunagan	14
Order Setting Trial	17
<i>Interlocutory Decree of Divorce</i>	20
Memorandum of Authorities	22
<i>Decree of Divorce</i>	27
Memorandum Opinion and Decision	32
Clerk's Certificate	55
Order to Amend Decree of Divorce	56
Amended Decree of Divorce	60
Notice of Appeal	63
Notice of Cross Appeal	67
Court Minutes	69

Opinion on Appeal	70
Notice of Appeal	83
Clerk's Certificate of Exhibits	87
Clerk's Certificate	90
Certificate of Service	91

## INDEX

Amended Decree of Divorce	60
Amended Notice of Deposition Duces Tecum – Kelly Dunagan	14
Certificate of Service	91
Clerk's Certificate	55
Clerk's Certificate	90
Clerk's Certificate of Exhibits	87
Complaint for Divorce	01
Court Minutes	69
Decree of Divorce	27
Interlocutory Decree of Divorce	20
Memorandum of Authorities	22
Memorandum Opinion and Decision	32
Notice of Appeal	63
Notice of Appeal	83
Notice of Cross Appeal	67
Opinion on Appeal	70
Order RE: Motion to Compel	12
Order RE: Motion to Compel and Order Vacating Trial	10
Order Setting Trial	05

Order Setting Trial	17
Order to Amend Decree of Divorce	56
Order to Consolidate	08

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROSIND, IDAHO

2005 AUG -8 A 10: 56

CASE NO. CW05-324

BY CR DEPUTY

1 PAUL THOMAS CLARK  
Idaho State Bar No. 1329  
2 CLARK and FEENEY  
The Train Station, Suite 201  
3 13th and Main Streets  
P. O. Drawer 285  
4 Lewiston, Idaho 83501  
Telephone: (208)743-9516  
5  
6 Attorneys for Plaintiff

7  
8 IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

9 \*\*\*\*\*

10 CHRIS M. DUNAGAN )  
11 )  
12 Plaintiff, )

Case No. CW05-324

13 vs. )

COMPLAINT FOR DIVORCE

14 KELLY A. DUNAGAN, )  
15 Defendant. )

\*\*\*\*\*

16 Plaintiff alleges:

17 I.

18 Plaintiff is now and for more than six weeks last past has been an actual bonafide resident of the  
19 State of Idaho.

20 II.

21 The parties hereto were married at South Lakea Tahoe, Nevada, on May 29, 1999, and ever since  
22 said date have been and now are husband and wife.

23 III.

24 No children have been born as the issue of this marriage  
25



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

IV.

The plaintiff owns several items of separate property all which should be confirmed unto him.

V.

The defendant owns several items of separate property all which should be confirmed unto him.

VI.

During the marriage the parties have acquired various items of community property and have incurred community debts.

VII.

During the marriage of the parties conflicts in views, likes and dislikes, personalities and dispositions have arisen which are so deep as to be irreconcilable and irremediable and render it impossible for the parties to continue together as husband and wife, which conflicts will be set forth on order of the Court, or upon hearing of the matter.

WHEREFORE, plaintiff prays as follows:

1. That a decree of this Court be entered dissolving the bonds of matrimony now and heretofore existing between the plaintiff and the defendant, and granting to the plaintiff an absolute divorce from the defendant;
2. By said decree the Court confirm unto the plaintiff his separate property;
3. By said decree the Court confirm unto the defendant his separate property;
4. That by said decree the Court make an equitable division of the community property of the parties and provide for the payment of the community debts; and
5. For all other just relief.

DATED this 4 day of August, 2005.

CLARK and FEENEY

By [Signature]  
Paul Thomas Clark, a member of the firm.  
Attorneys for Plaintiff.

STATE OF IDAHO )  
 )ss.  
County of Nez Perce )

CHRIS M. DUNAGAN, being first duly sworn on oath, deposes and says:

That he is the Plaintiff named in the foregoing Complaint; that he has read the foregoing instrument.  
knows the contents thereof and the facts stated therein are true to the best of her knowledge, information and belief.

[Signature]  
CHRIS M. DUNAGAN

SUBSCRIBED AND SWORN to before me this 4 day of August, 2005.

Notary Public in and for the State of Idaho  
Residing at: \_\_\_\_\_  
My Commission expires: \_\_\_\_\_

2005 AUG 24 1 P 4: 49

CASE NO. CV05-324

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

BY Jn DEPUTY

CHRIS M. DUNAGAN  
Plaintiff,

Case No. CV 05-00324

vs.

**MUTUAL TEMPORARY  
RESTRAINING ORDER**

KELLY A. DUNAGAN,

Re: property and debt

Defendant.

The parties having entered into a Stipulation for Temporary Restraining Order Re: Property and Debt,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the parties shall be restrained and enjoined during the pendency of this action or until further order of this court from damaging, selling, mortgaging, encumbering, secreting, removing, hiding, transferring or otherwise concealing any of the assets and/or money of the parties and from incurring any debt, other than for ordinary and normal living expenses.

DATED this 24<sup>th</sup> day of August, 2005.

Robert L. Nelsen  
JUDGE

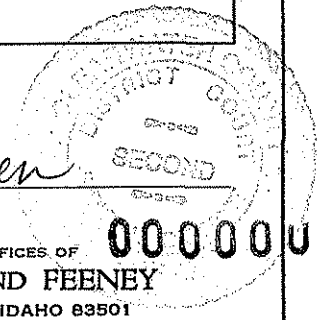
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25<sup>th</sup> day of August, 2005, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Mr. Garry W. Jones Jones, Brower & Callery P.O. Box 854 Lewiston, ID 83501	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy
Paul Thomas Clark Clark and Feeney PO Box 285 1229 Main Street, Ste 201 Lewiston, ID 83501	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy

CLERK OF THE COURT

By: Janis R. Nelsen  
Deputy



CLERK OF DISTRICT COURT  
CLEARWATER COUNTY  
IDAHO

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

2005 OCT -5 A 11:59

CHRIS M. DUNAGAN, )  
)  
Plaintiff, )  
)  
vs. )  
)  
KELLY A. DUNAGAN, )  
)  
Defendant. )  
\_\_\_\_\_ )

CASE NO. CV05-324  
BY [Signature] DEPUTY

ORDER SETTING TRIAL

IT IS HEREBY ORDERED that the above-entitled matter is set for Court Trial in the Magistrate Court of the Second Judicial District of the State of Idaho, in and for the County of Clearwater, at Orofino, Idaho, on January 27, 2006 beginning at the hour of 9:00 a.m.

IT IS FURTHER ORDERED THAT:

1. A Settlement Conference will be held on January 18, 2006 beginning at the hour of 3:30 p.m.
2. Discovery should be initiated so that all responses are due no later than 15 days prior to trial.
3. Pursuant to Idaho Rules of Civil Procedure, Rule 16(h), parties are to file with the Court and serve upon all opposing counsel, or upon parties not represented by counsel, 30 days prior to trial, a list of all exhibits to be offered at trial and a list of names and addresses of all witnesses which such party may call to testify at trial.
4. Each party hereto file with the Court exhibits to be used as evidence during the trial one week prior to the trial date. Plaintiff's

exhibits shall be entitled "Plaintiff's Exhibit No. 1," etc., and defendant's exhibits shall be entitled "Defendant's Exhibit A," etc. Said exhibits shall be accompanied by a statement that counsel has produced for examination by the other party all exhibits to be introduced for examination by the other party all exhibits to be introduced into evidence, and a list of such exhibits shall be attached containing a brief description thereof. Each party should prepare sufficient copies of documentary evidence to provide copies for opposing party to the Court in addition to the original. No exhibits will be permitted at trial other than those described and listed and filed pursuant to this order except when offered for impeachment purposed or when permitted by the Court in the interest of justice.

5. Each party file a statement by January 18, 2006 containing:
  - a. A statement that all answers or supplemental answers to interrogatories or admissions reflect all facts known to date.
  - b. A concise statement of issues of law remaining for trial.
  - c. A concise statement describing the issues of fact remaining for trial.
  - d. A list of all community personal property and the values at which said party would offer to sell or buy each item.
  - e. A proposal for division of community property and debts.

00000006

- f. A list briefly describing all exhibits proposed or offered by any party, which can be admitted into evidence without objection and those exhibits to which only an objection as to relevance or materiality will be raised.
- g. A statement or listing of any evidentiary questions anticipated at the time of the trial.
- h. Authorities and briefs in support of the party's position on any evidentiary questions or issues of the law.

Dated this 5<sup>th</sup> day of October, 2005.



Randall W. Robinson - Magistrate

#### CERTIFICATE OF MAILING

I hereby certify that on this 5<sup>th</sup> day of October, 2005 true copies of the foregoing Order Setting Trial and Discovery was mailed:

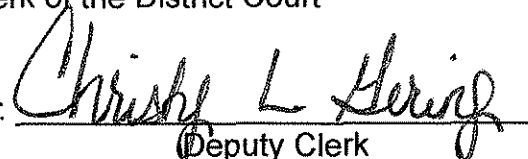
Garry W. Jones  
Jones, Brower & Callery  
P.O. Box 854  
Lewiston, Idaho 83501

Paul Thomas Clark  
Clark and Feeney  
P.O. Drawer 285  
Lewiston, Idaho 83501



ROBIN CHRISTENSEN  
Clerk of the District Court

By:



Christy L. Herwig  
Deputy Clerk

00000007

Garry W. Jones  
 JONES, BROWER & CALLERY, P.L.L.C.  
 Attorneys at Law  
 1304 Idaho Street  
 P.O. Box 854  
 Lewiston, ID 83501  
 (208) 743-3591  
 Idaho State Bar No. 1254

ROBIN CHRISTENSEN  
 CLERK-DISTRICT COURT  
 CLEARWATER COUNTY  
 OROFINO, IDAHO

2005 DEC 14 P 3:14

CASE NO. CV 05-324, 331

BY \_\_\_\_\_ DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

CHRIS M. DUNAGAN,	)	CASE NO. CV 05 - 00324
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER TO CONSOLIDATE
	)	
KELLY A. DUNAGAN,	)	
	)	
Defendant.	)	
_____	)	

Upon stipulation of plaintiff and defendant in Clearwater County case numbers CV 2005 - 00324 and CV 2005 - 00331, it is hereby ordered that said cases be consolidated for hearing, with the complaint filed by KELLY A. DUNAGAN under Case No. CV 2005 - 00331 being treated in all respects as if it were an Answer & Counterclaim in Case No. CV 2005 - 00324, with said KELLY A. DUNAGAN being known in all future actions as the defendant and counter-plaintiff.

DATED this 14<sup>th</sup> day of December, 2005.

  
 \_\_\_\_\_  
 Magistrate

CERTIFICATE OF MAILING

IT IS HEREBY CERTIFY that the undersigned is the (Deputy) Clerk of the above entitled Court; that on the 22<sup>nd</sup> day of December, 2005, the undersigned enclosed a certified copy of the Order to Consolidate, to which this Certificate is attached, issued by the above entitled court in the above entitled action, in an envelope addressed to:

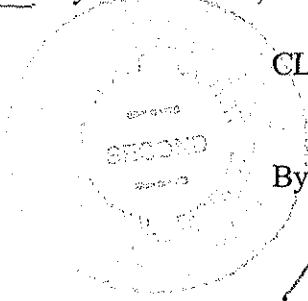
GARRY W. JONES  
JONES, BROWER & CALLERY, P.L.L.C.  
P. O. BOX 854  
LEWISTON, ID 83501

PAUL THOMAS CLARK  
CLARK & FEENEY  
P. O. BOX 285  
LEWISTON, ID 83501

which are the present and last known addresses reported to the undersigned by Garry W. Jones; placed the necessary postage thereon, and deposited the same in the United States Post Office.

DATED this 22<sup>nd</sup> day of December, 2005.

CLERK OF THE DISTRICT COURT



By

A handwritten signature in black ink is written over a horizontal line. The signature appears to be "Paul Thomas Clark".

Deputy



ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

2006 JAN -6 A 9:20

CASE NO. WS-324

CHRIS M. DUNAGAN,  
Plaintiff,

Case No. CV 05-00324

BY        DEPUTY

vs.

**ORDER Re: Motion to Compel and ORDER  
VACATING TRIAL**

KELLY A. DUNAGAN,  
Defendant/Counter-plaintiff.

The above-captioned matter having come on regularly and duly for hearing before the undersigned Judge of the above-entitled Court on Plaintiff's Motion to Continue Trial and Motion to Compel; the Plaintiff, Chris Dunagan, having appeared by and through his attorney of record Paul Thomas Clark; the Defendant, Kelly Dunagan, having appeared by and through her attorney of record Garry Jones; and the Court being fully advised,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Kelly Dunagan shall provide full and complete answers to Plaintiff's Interrogatory Nos 2 and 3 and provide a depreciation schedule in response to Plaintiff's Request for Production of Documents. Said discovery shall be provided to Plaintiff's attorney on or before **January 18, 2006**.

IT IS FURTHER ORDERED that the trial presently scheduled for January 27, 2006, is VACATED and reset for Court trial to commence on **TUESDAY, MARCH 21, 2006, at 9:00 a.m.**

DATED This 5th day of January, 2006.

  
\_\_\_\_\_  
HONORABLE RANDALL ROBINSON

ORDER -1-

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

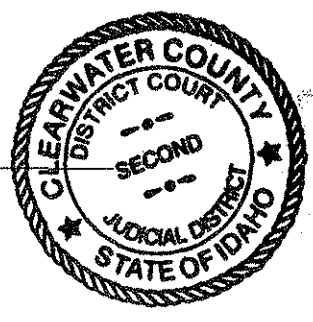
I hereby certify on the 16th  
day of January, 2006, a true copy  
of the foregoing instrument  
was:   k   Mailed  
      \_\_\_ Faxed  
      \_\_\_ Hand delivered  
      \_\_\_ Overnight mail to:

Mr. Garry W. Jones  
Jones, Brower & Callery  
P.O. Box 854  
Lewiston, ID 83501

Paul Thomas Clark  
Clark and Feeney  
PO Box 285  
1229 Main Street, Ste 201  
Lewiston, ID 83501

CLERK OF THE COURT

By [Signature]  
Deputy



ORDER -2-

DISTRICT COURT  
CLEARWATER COUNTY  
IDAHO

2006 MAR 13 A 10:43

FILE NO. CV05-324

BY [Signature] DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

CHRIS M. DUNAGAN, ) Case No. CV 05-0324

Plaintiff, )

v. )

**ORDER RE: MOTION TO COMPEL**

KELLY A. DUNAGAN, )

Defendant. )

Plaintiff's Motion to Compel having come on regularly and duly for hearing before the undersigned Judge of the above-entitled Court; plaintiff having appeared by and through his attorney of record, Paul Thomas Clark, defendant having appeared by and through her attorney of record, Garry Jones, the Court having heard arguments of counsel and being fully advised;

NOW, THEREFORE, IT IS HEREBY ORDERED, that the defendant is ordered to prepare and serve Defendant's Answers to Plaintiff's Second Set of Interrogatories and Request for Production of Documents and Request for Admissions to Plaintiff by March 14, 2006.

DATED this 13th day of March, 2006.

[Signature]  
JUDGE

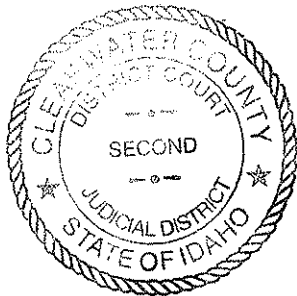
**CLERK'S CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 14<sup>th</sup> day of March, 2006, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Mr. Garry W. Jones Jones, Brower & Callery P.O. Box 854 Lewiston, ID 83501	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy (FAX)
Paul Thomas Clark Clark and Feeney PO Box 285 1229 Main Street, Ste 201 Lewiston, ID 83501	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy (FAX)

CLERK OF THE COURT

*Christy L. Hering*  
Deputy



ORDER RE: MOTION TO COMPEL - 2

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY  
IDAHO

2005 MAR 22 P 12:38

FILE NO. CV05-324

BY W DEPUTY

1 PAUL THOMAS CLARK  
Idaho State Bar No. 1329  
2 CLARK and FEENEY  
The Train Station, Suite 201  
13th and Main Streets  
3 P. O. Drawer 285  
Lewiston, Idaho 83501  
4 Telephone: (208)743-9516

5 Attorneys for Plaintiff

6  
7  
8 IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

9 CHRIS M. DUNAGAN

10 Plaintiff,

11 vs.

12 KELLY A. DUNAGAN,

13 Defendant.

)  
) Case No. CV 05-00324  
)  
)

) **AMENDED NOTICE OF DEPOSITION**  
) **DUCES TECUM - Kelly Dunagan**

) **(April 7, 2006, at 9:00 a.m.)**  
)

14 PLEASE TAKE NOTICE that the undersigned attorney for Plaintiff will take testimony on oral  
15 examination of **KELLY A. DUNAGAN**, before Linda Carlton, Certified Court Reporter, Court Reporter  
16 for the State of Idaho, on **April 7, 2006, at 9:00 a.m.** of that date and thereafter from day to day as the taking  
17 of the deposition may be adjourned at the office of Paul Thomas Clark, 1229 Main Street, Lewiston, Idaho,  
18 at which place you are invited to appear and take part in the examination as you may deem advisable and  
19 proper.


20 YOU ARE FURTHER NOTIFIED that this deposition is being taken duces tecum pursuant to Rule  
21 34, and the deponent is required to produce the following documents:

- 22 1. All writings and instruments of whatsoever nature showing all receipts and also all  
23 expenditures of any sums of money by you for the last three (3) years, including, but not  
24 limited to, check registers, check stubs, canceled checks, bank statements, receipts, billings,  
25 whether paid or unpaid, ledger or account books, bank passbooks for savings or other  
26 accounts, and every other written instrument or thing of whatsoever nature whether  
hereinabove specifically mentioned, in any way relating to any sums of money received or  
expended by you for the preceding three (3) years.

- 1 2. Copies of all deeds, mortgages, closing statements and all other documents dealing with the purchase or sale of any real property by you during the last ten years.
- 2 3. Bank statements, ledgers or account books, bank passbooks for any savings accounts and checking accounts held in your name for the last three (3) years.
- 3
- 4 4. Stock certificates, bonds and evidences of title to any and all property now in your name or the name of nominees for your account.
- 5 5. Loan agreements, notes, repayment schedules and all other documents dealing with loans secured in your name, on which you are presently indebted.
- 6 6. All financial statements including balance sheets and profit and loss statements for each of the last five years, together with any copies of financial statement provided to any lending institutions or financial institution for the purpose of securing credit or any other purpose during said five year period.
- 7
- 8 7. All bank statements, ledgers or account books, bank passbooks for any savings accounts and checking accounts held in your name only for the last three (3) years.
- 9
- 10 8. All bank statements, ledgers or account books, bank passbooks for any savings accounts and checking accounts held in both the Plaintiff and Defendant's names for the last three (3) years.
- 11
- 12 9. Documentation on payment made on the debt of the Krystal Café from January 1, 1999 to the present, including but not limited to the source of the funds used to pay the debt. Example, the Defendant made, among others, a \$20,000 lump sum payment in 2005. The source of and documentation of the funds used to make that payment is requested
- 13
- 14
- 15 10. Copies of all bank statements, ledgers or account books, bank passbooks for any savings and checking accounts for the Krystal Café from January 1, 1999 to the present.
- 16 11. Copies of all investment statements including IRA's, CDs or investments of any kind made by you from January, 1999 to the present.
- 17 12. Copies of your daily account book/accounting journal for the Krystal Cafe from January, 1999 to the present.
- 18

19 DATED This 21 day of March, 2006.

20 CLARK AND FEENEY


21 By:   
Paul Thomas Clark  
22 Attorney for Plaintiff

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 21 day of March, 2006, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Mr. Garry W. Jones Jones, Brower & Callery P.O. Box 854 Lewiston, ID 83501	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy
---	--

By:  \_\_\_\_\_  
Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

DISTRICT COURT  
CLEARWATER COUNTY  
IDAHO

2006 MAR 23 A 7:51

CHRIS M. DUNAGAN, )  
)  
Plaintiff, )  
)  
vs. )  
)  
KELLY A. DUNAGAN, )  
)  
Defendant. )  
\_\_\_\_\_ )

CASE NO. CV2005-0000324

FILE NO. CV2005-324

ORDER SETTING TRIAL

IT IS HEREBY ORDERED that the above-entitled matter is set for court trial in the Magistrate Court of the Second Judicial District of the State of Idaho, in and for the County of Clearwater, at Orofino, Idaho, on **APRIL 26 and 28, 2006** beginning at the hour of **9:00 a.m.**

IT IS FURTHER ORDERED THAT:

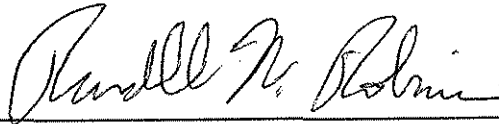
1. A Status Conference will be held on **April 19, 2006** beginning at the hour of **8:30 a.m., to be conducted by telephone. Plaintiff's counsel shall initiate the conference call.**
2. Discovery should be initiated so that all responses are due no later than 15 days prior to trial.
3. Pursuant to Idaho Rules of Civil Procedure, Rule 16(h), parties are to file with the Court and serve upon all opposing counsel, or upon parties not represented by counsel, 30 days prior to trial, a list of all exhibits to be offered at trial and a list of names and addresses of all witnesses which such party may call to testify at trial.



4. Each party hereto file with the Court exhibits to be used as evidence during the trial one week prior to the trial date. Plaintiff's exhibits shall be entitled "Plaintiff's Exhibit No. 1," etc., and defendant's exhibits shall be entitled "Defendant's Exhibit A," etc. Said exhibits shall be accompanied by a statement that counsel has produced for examination by the other party all exhibits to be introduced for examination by the other party all exhibits to be introduced into evidence, and a list of such exhibits shall be attached containing a brief description thereof. Each party should prepare sufficient copies of documentary evidence to provide copies for opposing party to the Court in addition to the original. No exhibits will be permitted at trial other than those described and listed and filed pursuant to this order except when offered for impeachment purposed or when permitted by the Court in the interest of justice.
5. Each party shall file a statement by April 19, 2006 containing:
  - a. A statement that all answers or supplemental answers to interrogatories or admissions reflect all facts known to date.
  - b. A concise statement of issues of law remaining for trial.
  - c. A concise statement describing the issues of fact remaining for trial.
  - d. A list of all community personal property and the values at which said party would offer to sell or buy each item.
  - e. A proposal for division of community property and debts.

- f. A list briefly describing all exhibits proposed or offered by any party, which can be admitted into evidence without objection and those exhibits to which only an objection as to relevance or materiality will be raised.
- g. A statement or listing of any evidentiary questions anticipated at the time of the trial.
- h. Authorities and briefs in support of the party's position on any evidentiary questions or issues of the law.

Dated this 23 day of March, 2006.



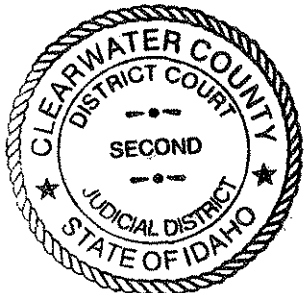
Randall W. Robinson – Magistrate Judge

### CERTIFICATE OF MAILING

I hereby certify that on this 23 day of March, 2006 true copies of the foregoing Order Setting Trial and Discovery was hand delivered or mailed, postage pre-paid, to:

Paul Thomas Clark  
Attorney at Law  
P.O. Box 285  
Lewiston, ID 83501

Garry W. Jones  
Attorney at Law  
P.O. Box 854  
Lewiston, ID 83501



ROBIN CHRISTENSEN  
Clerk of the District Court

By:   
Deputy Clerk

Scanned  
4/13/06

CHRIS M. FEENEY  
DISTRICT COURT  
CLEARWATER COUNTY  
IDAHO

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

2006 MAR 23 P 2:42

CHRIS M. DUNAGAN

Case No. CV 05-00324

FILE NO. 05-324

Plaintiff,

vs.

**INTERLOCUTORY DECREE OF  
DIVORCE**

KELLY A. DUNAGAN,

Defendant.

The parties having appeared before the undersigned Judge of the above-entitled Court; plaintiff having appeared in person and by and through his attorney of record, Paul Thomas Clark; Defendant having appeared in person and by and through her attorney of record, Garry W. Jones; the parties having entered into certain stipulations; and the Court having considered the stipulations of the parties and good cause appearing,

NOW, THEREFORE, based thereon, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I.

The bonds of matrimony now and heretofore existing between plaintiff and defendant be and the same are hereby dissolved and the parties are hereby granted an absolute divorce from the other on the grounds of irreconcilable differences.

II.

Defendant's name is hereby changed to Kelly A. Kircher.

III.

If Defendant continues to reside in the family home and/or continues to occupy the commercial property where her business (Crystal Café) is located, Defendant shall make the payments on said properties and shall receive credit for any principal reduction on the indebtedness thereon from March 21, 2006, forward.

IV.

The trial on the remaining issues regarding property and debt will be held on **Wednesday, April 26, 2006, at 9:00 a.m.** and continuing on **Friday, April 28, 2006, at 9:00 a.m.** at the Clearwater County Courthouse in Orofino, Idaho.

DATED this 23 day of March, 2006, nunc pro tunc to March 21, 2006.

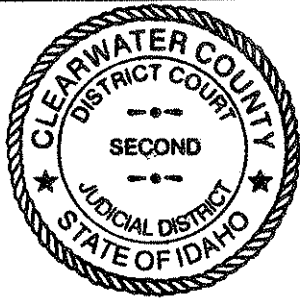
*Randall W. Robinson*

Honorable Randall Robinson

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 23 day of MARCH, 2006, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Mr. Garry W. Jones Jones, Brower & Callery P.O. Box 854 Lewiston, ID 83501	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy
Paul Thomas Clark Clark and Feeney PO Box 285 1229 Main Street, Ste 201 Lewiston, ID 83501	<input checked="" type="checkbox"/> US Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile



CLERK OF THE COURT

By *Wesley F. Edmonson*  
Deputy

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

PAUL THOMAS CLARK  
Idaho State Bar No. 1329  
CLARK and FEENEY  
Attorneys for Plaintiff  
The Train Station, Suite 201  
13th and Main Streets  
P. O. Drawer 285  
Lewiston, Idaho 83501  
Telephone: (208)743-9516

PAUL THOMAS CLARK  
CLARK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2006 JUN 26 A 9:20

CASE NO. CV05-324

BY CP DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

\*\*\*\*\*

CHRIS M. DUNAGAN,	)	
	)	Case No. CV 2005-324
Plaintiff,	)	
	)	<b>MEMORANDUM OF</b>
vs.	)	<b>AUTHORITIES</b>
	)	
KELLY A. DUNAGAN,	)	
	)	
Defendant.	)	

\*\*\*\*\*

COMES NOW, Plaintiff, Chris M. Dunagan, by and through Paul Thomas Clark, Clark and Feeny, his attorney of record, and submits, pursuant to this Court's request, the following Memorandum of Authorities.

**APPLICABLE LAW**

The parol evidence rule provides that when a contract has been reduced to a writing that the parties intend to be a final statement of their agreement, evidence of any prior or contemporaneous agreements or understandings which relate to the same subject matter is not admissible to vary, contradict, or enlarge the terms of the written contract. *Simons v. Simons*, 134 Idaho 824, 828, 11 P.3d 20, 24 (2000) (citations omitted). Parol evidence may be considered to

1 aid the trial court in determining the intent of the drafter of a document if an ambiguity exists. *Id.*  
2 at 828, 11 P.3d at 24 (citation omitted). **If the language of a deed is plain and unambiguous**  
3 **the intention of the parties must be ascertained from the deed, and parol evidence, that is,**  
4 **documentary, oral or real evidence extrinsic to the deed itself, is not admissible to ascertain**  
5 **intent.** *Id.* at 828, 11 P.3d at 24 (citation omitted) (emphasis added). *See also Hall v. Hall*, 116  
6 Idaho 483, 486, 777 P.2d 255, 258 (1989) (Where the deed names both spouses, as husband and  
7 wife, the same parol evidence showing a separate interest necessarily varies the deed and is barred  
8 by the parol evidence rule.)

9 It is well established that when community funds are used to enhance the value of one  
10 spouse's separate property, such enhancement is community property for which the community  
11 is entitled to reimbursement, unless such funds used for enhancement are intended as a gift.  
12 *Hoskinson*, 139 Idaho at 460, 80 P.3d at 1061 (citations omitted). Community funds spent to  
13 reduce the principal of a mortgaged indebtedness on one spouse's separate property retain their  
14 character as community property and can be reimbursed. *Id.* at 460, 80 P.3d at 1061 (citation  
15 omitted). In situations where a spouse's equity in property has been increased through the  
16 application of community funds to the payment of debt on the property, the measure of  
17 reimbursement to the community should be the amount by which such equity is enhanced. *Id.* at  
18 460, 80 P.3d at 1061 (citation omitted).

19  
20 The measure of the reimbursement for community expenditures on separate property is the  
21 increase in value of the property attributable thereto, not the amount or value of the community  
22 contribution. *Id.* at 460, 80 P.3d at 1061 (citations omitted). The party seeking such  
23 reimbursement to the community carries the burden of demonstrating that the community  
24  
25

1 expenditures have enhanced the value of the separate property, and the amount of the  
2 enhancement. *Id.* at 460, 80 P.3d at 1061 (citation omitted).

3 **ARGUMENT**

4 A. THE PAROL EVIDENCE RULE BARS THE INTRODUCTION OF ANY PAROL  
5 EVIDENCE REGARDING ANY INTENT TO TRANSFER INTEREST IN THE  
6 SUBJECT PROPERTY BECAUSE THE QUITCLAIM DEED'S LANGUAGE IS PLAIN  
7 AND UNAMBIGUOUS.

8 In this case, the Defendant is attempting to introduce evidence that contradicts the plain  
9 and unambiguous language of the quitclaim deed to establish that she did not intend to transmute  
10 her separate property interest in the house into community property when she executed said deed.  
11 As set forth above, such evidence is barred by the parol evidence rule.

12 The Defendant transmuted any separate property interest she had in the home to a  
13 community interest when she signed and executed the quitclaim deed. Said quitclaim deed  
14 satisfies the statutory requirements regarding conveyances of real property (*See* I.C. § 55-601) and  
15 satisfies the statutory requirements of I.C. § 32-917. Furthermore said deed is unambiguous. All  
16 of the statutory formalities are met and the deed clearly states that the interest in the subject  
17 property is being transferred to the Plaintiff and Defendant, as husband and wife. As such, the  
18 applicable law requires that the intent must be ascertained from the deed itself and any parol  
19 evidence is not admissible to ascertain intent. Because transmutation of the subject property has  
20 been established by the Plaintiff with clear and convincing evidence, through the plain and  
21 unambiguous language of the quitclaim deed, the Plaintiff respectfully requests that this Court  
22 hold that when the Defendant executed said deed, any separate property interest was transmuted  
23 into community property.  
24

1 The Defendant has cited in support of her position *Hoskinson, supra*. However an  
2 examination of that case shows it offers no support for the Defendant's position. In that case there  
3 were two quitclaim deeds, regarding the plaintiff's separate property house, signed and notarized  
4 on the same day. 139 Idaho at 459, 80 P.3d at 1060. One deed conveyed the defendant's interest  
5 to the plaintiff and the other deed conveyed the plaintiff's interest to the plaintiff and defendant  
6 as husband and wife. *Id.* at 459, 80 P.3d at 1060. The defendant claimed that the deed to  
7 "husband and wife" transmuted the plaintiff's property from separate to community property. *Id.*  
8 at 459, 80 P.3d at 1060. The Court held that the defendant failed to prove a transmutation by clear  
9 and convincing evidence. *Id.* at 459, 80 P.3d at 1060. The Court noted that the evidence did not  
10 establish that the plaintiff intended to make a gift to the community and the Court also noted that  
11 the evidence did not establish whether the deed to the plaintiff and the defendant was signed  
12 before or after the deed to the plaintiff. *Id.* at 459-60, 80 P.3d at 1060-61.

13 In our case there is only one deed, not two conflicting deed's signed and executed on the  
14 same day, and that deed's language is plain and unambiguous thus the parol evidence rule  
15 prohibits introduction of parol evidence in our case. *See Bliss v. Bliss*, 127 Idaho 170, 175, 898  
16 P.2d 1081, 1086 (1995) (Plaintiff should not be allowed, by extrinsic evidence, to contradict the  
17 plain language of the deed and claim he never really intended to convey the land). Said deed is  
18 clear and convincing evidence that the Defendant intended to transmute the property interest into  
19 that of the community.  
20

21 B. THE COMMUNITY IS NOT ENTITLED TO REIMBURSEMENT.


22 The community is barred from reimbursement for community funds spent on the plaintiff's  
23 separate property debt if the defendant failed to show that the community expenditures have  
24



enhanced the value of the separate property and the amount of the enhancement.

DATED this 23<sup>rd</sup> day of June, 2006.

CLARK and FEENEY

  
\_\_\_\_\_  
PAUL THOMAS CLARK  
Attorneys for Plaintiff

I hereby certify on the 23<sup>rd</sup>  
day of June, 2006, a true copy  
of the foregoing instrument  
was:  Mailed  
 Faxed  
 Hand delivered

Mr. Garry W. Jones  
Jones, Brower & Callery  
P.O. Box 854  
Lewiston, ID 83501

CLARK and FEENEY

By   
\_\_\_\_\_  
Attorneys for Plaintiff

SCANNED

7/20/06

Case No. 0105-324  
Filed 7/17/06  
at 10:12 o'clock A M  
Robin Christensen  
Clerk  
By [Signature]  
Deputy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

CHRIS M. DUNAGAN,	)	CASE NO. CV 2005-00324
	)	
Plaintiff,	)	DECREE OF DIVORCE
vs.	)	
	)	
KELLY A. DUNAGAN,	)	
	)	
Defendant.	)	
_____	)	

This matter came before the court on June 20, 2006. A trial was conducted with the parties present and Paul Thomas Clark representing the Plaintiff and Garry Jones representing the Defendant. Based upon the Memorandum Opinion and Decision entered in this case, Judgment is entered as follows:

The Plaintiff is and was a bona fide resident of the State of Idaho and has been a resident for more than six (6) weeks preceding the filing of his complaint.

This Court has jurisdiction to determine the divorce and the property and debt distribution.

An interlocutory divorce was entered between the parties on March 25, 2006 with property and debt issues reserved for the trial that took place on June 20, 2006.

IT IS HEREBY ORDERED AND DECREED:


1. The bonds of matrimony between the Plaintiff and the Defendant were dissolved on the grounds of irreconcilable differences , and the Defendant awarded an absolute decree of divorce from the Plaintiff on June 20, 2006.

2. The property and debts of the parties shall be divided as set forth in Exhibit A, annexed hereto, with the addition that the Plaintiff shall receive a copier from the

Defendant. The parties will sign all necessary papers effectuating the transfer of their interest in the property that is assigned to the other party except for the Crystal Café property, as discussed below.

3. The Defendant shall have sixty (60) days to make an equalization payment to the Plaintiff of \$108,500. Upon payment in full of the equalization payment \$108,500 within said sixty (60) days, the Plaintiff will sign over and release to The Defendant all interest in the Crystal Café. If The Defendant does not make the equalization payment within the prescribed time, the Crystal Café will be put up for sale in a commercially reasonable manner. The Plaintiff and The Defendant will list the Crystal property with an agreed upon realtor. If the parties cannot agree, upon filing of a Motion, this Court will select a realtor. The Defendant may continue to use the property until sold for her business. The Defendant shall keep the business in presentable condition in order to ensure its value for purposes of selling. The Defendant is responsible for paying expenses associated with the property such as water, sewer, garbage, power, and loan payments. Furthermore, the Defendant is to cooperate with the real estate personnel in all aspects in the sale of the property. Neither party will withhold consent to any reasonable offer.

DATED this 17th day of July, 2006



Randall W. Robinson,  
Magistrate Judge

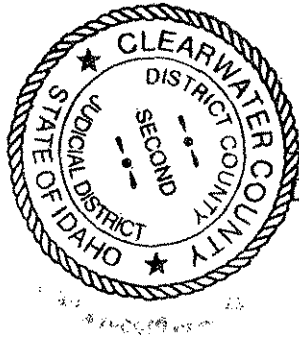
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, on the 18<sup>th</sup> day of July 2006, to the following:

Paul Thomas Clark  
Clark and Feeney  
P.O. Drawer 285  
Lewiston, ID 83501

Garry W. Jones  
Jones, Brower & Callery  
P.O. Box 854  
Lewiston, ID 83501

ROBIN CHRISTENSEN, Clerk

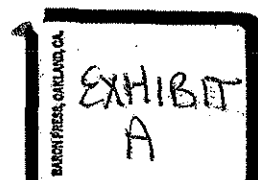


Sue K. Summerton

Deputy Clerk

description	value	debt	equity	to wife	to husband
1) Krystal Café bldg	236,500	39594.64	196,905.36	196,905.36	
2) Krystal Café bus.	8174.91			8174.91	
3) Krystal Café bank acct	14,306.17			14,306.17	
4) Grand Ave house	125,000	58,921.36		66,078.64	
5) wife's retirement acct	10,254.52			10,254.52	
6) husb. retirement acct	18,386.23				18,386.23
7) w. smathers loan	22,244				22,244
8) 2005 tax ret.-wife	2,309.00			2309	
9) Zion's bank acct	2,926.99			2926.99	
10) Orofino C.U. acct					
11) Lewis-Clark C.U. acct	745.77			745.77	
12) Am-West Kelly/Sherrill	2,585.41			2585.41	
13) Bank of Latah - wife					
14) Steve Lyman prints					
15) B of A bank acct-husb.	\$6,000				6000
16) 2005 GMC Denali	29,000	28,877.39	122.61	122.61	
17) oak bedroom set	7500				7500
18) couch	1000				1000
19) TV & stand	900				900
20) fridge	300			300	
21) Kelly's diamonds	S				
22) bedding-before marriage	S				
23) utensils-before marriage	S				
24) oak table & chairs	300			300	
25) comforters	450				450
26) computers	400			400	
27) her office desk	50			50	
28) recliner	100			100	
29) freezer	200			200	
30) stove-wife's before marr.	S				
31) wash/dry-wife's before	S				
32) stereo-wife's before	S				
33) outdoor furn/BBQ-wifes	S				
34) coffee/end tables	750			750	
35) microwave	100			100	
36) 2003 Bayliner boat	9000	10,140.94	-1140.94	-1140.94	
37) DVD/surround sound	200			200	
38) lawn mower	100			100	
39) camcorder	200			200	
40) 2005 Dodge P.U.	26,000	13,800	12,200		12,200
41) flatbed trailer	6000				6000
42) guns	789.95				789.95
43) bucket truck	6000				6000
44) gun safe	1100				1100
45) recliner	200				200
46) telecomm. equip	2000				2000
47) tools	1000				1000
48) fishing/camping gear	1000				1000
49) drift boat-husb. before	S				
50) lawn mower/weedeater	S				
51) 32' travel trailer	0				0

00000030



52) lamp	S				
53) husband's VISA	-3000				-3000
54) taxes dispute	-4500				-4500
totals	536,573	151334.33	208,087.03	295,713.92	78480.23
Equalization Payment	108,500				108,500

00000031

SCANNED

7/20/06

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY  
GRAND, IDAHO

2006 JUL 17 A 10:12

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, AND FOR THE COUNTY OF CLEARWATER CV05-324

CHRIS M. DUNAGAN,

Plaintiff,

vs.

KELLY A. DUNAGAN,

Defendant.

BY SKO DEPUTY

CASE NO. CV2005-00324

MEMORANDUM OPINION  
AND DECISION

This case involves the distribution of debt and property between the parties incident to divorce. An interlocutory divorce was granted on March 23, 2006. A trial was conducted on June 20, 2006 regarding the distribution of property and debt. Paul Thomas Clark represented the Plaintiff, Chris M. Dunagan ("Dunagan"), and Garry W. Jones represented the Defendant, Kelly A. Dunagan (Kircher) ("Kircher"). Dunagan, Kircher, Terry Rudd, Jeff Roberts, and Carmen Coty testified at the trial. Exhibits were admitted into the record and considered. Also considered was a Memorandum submitted by Dunagan a week after the trial on the parole evidence rule and the parties' Pretrial Statements.

This Court has jurisdiction as both parties have resided in Idaho at least six weeks prior to the filing of their actions.

PRELIMINARY FINDINGS OF FACT

The parties married on May 27, 2000. They separated in 2005. An interlocutory divorce was entered on March 23, 2006.

00000032

Prior to marriage, Kircher operated the Crystal Café. On July 24, 2000, the parties acquired the present site of the Crystal Café. \$80,000 of the \$90,000 purchase price was financed through the Bank of Latah. Both Kircher and Dunagan were placed upon the title to the Crystal Café. Shortly after purchase, part of the land adjoining the Crystal Café was sold.

The Crystal Café was gutted out. Massive repairs were performed. Dunagan alleged putting in 2000 hours of work. Kircher testified she put roughly 2000 hours into the renovation of the site and credibly asserted that Dunagan could not have put in that much time. The Crystal Café did not open at the new site until October 1, 2001.

On November 24, 2003, the residential property owned by Kircher was refinanced through Zions Bank. As a condition of the refinancing, Kircher quitclaimed her interest in her home to "Kelly Dunagan and Chris Dunagan, wife and husband." The quitclaim is a form document with the name of Zions Bank on the lower right hand corner. The quitclaim signed by Kircher was filed by Zions Bank with the Clearwater County Recorder. Over Dunagan's objection based on the parole evidence rule, Kircher testified that she signed lots of papers at the closing and did not know that she was giving up any interest in her home to Dunagan. Kircher also testified that she would not have signed the form had she understood she was giving an interest in her property to Dunagan. \$20,000 from the proceeds from the loan was used to pay off a secured loan on an RV, separate property owned by Dunagan. Proceeds were also used to pay an unsecured debt owed by Kircher to her prior spouse.



At the time Dunagan and Kircher entered into marriage, they orally agreed that they would keep their finances separate. During their marriage, Dunagan and Kircher kept their finances separate. Kircher paid all the insurance and payments on the house and her business. Dunagan gave Kircher \$500 on two occasions.

## DISCUSSION

### A. Uneven Distribution.

Kircher argues that an uneven distribution of property and debt should be issued in her favor. Kircher alleges the existence of an oral agreement between her and Dunagan that the parties would keep their property separate and that their actions corresponded to that agreement. Kircher paid all the taxes, insurance and house payments on the real properties during the marriage. The time of cohabitation during the marriage of Kircher and Dunagan was not very long, approximately five years. Kircher requests an uneven distribution of the property based upon this oral agreement and that the home and her business, the Crystal Café be awarded to her.

Idaho Code § 32-917 requires that "all contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as conveyances of land are required to be executed and acknowledged or proved." The Idaho Supreme Court has emphasized the importance of full compliance with Idaho Code § 32-917 before an agreement is recognized:

One of the major purposes for requiring life-changing documents to be written and executed is to impress upon the parties the importance of the legal consequences of the document. For example, prenuptial agreements and wills must be written, signed,

executed, and acknowledged. See I.C. § 32- 922; I.C. § 15-2-502. Dividing the property of a community that may have lasted for decades has consequences at least as important as distributing the assets of the deceased. Indeed, the process of drafting an agreement often shows the parties that they omitted major issues or made hasty assumptions while negotiating. In addition, the requirement of writing and execution substantiates that the parties actually did come to a meeting of the minds in a vitally important area.

*Stevens v. Stevens*, 135 Idaho 224, 229, 16 P.3d 900, 905 (2000).

Kircher recognizes the unenforceability of an oral agreement under Idaho Code § 32-917, but argues that the circumstances surrounding the oral agreement and the parties' adherence to the agreement constitute compelling circumstances, permitting an uneven distribution of property and debt.

"Generally, community property will be divided in a substantially equal manner unless there are compelling reasons which justify otherwise. I.C. § 32-712(1); *Rice v. Rice*, 103 Idaho 85, 645 P.2d 319 (1982)." *Maslen v. Maslen*, 121 Idaho 85, 88, 822 P.2d 982, 985 (1991). Kircher's argument must be rejected.

First, to recognize an oral agreement as a compelling circumstance does violence to the legislative scheme. The parties had ample opportunity to comply with the statute and sign a proper prenuptial or postnuptial agreement if that was their intention. The failure to do so does not provide a compelling reason to ignore the statute requiring a written agreement.

Idaho Code § 32-912 sets forth a list of non-inclusive factors that can be considered in determining whether a division shall be equal. Besides the oral agreement, the only factor argued was the duration of the marriage. However, this factor alone does not constitute a compelling reason to set aside the

substantially equal division of assets. In *Maslen v. Maslen*, 121 Idaho 85, 87, 822 P.2d 982, 984 (1991), the Idaho Supreme Court upheld the magistrate's finding that a short troubled marriage in which a regular living pattern was never established did not provide a compelling circumstance for an uneven distribution.

Generally, to show compelling need, hardship is the most important factor. Thus, an unequal division was upheld on the basis that "Bill, as a profoundly disabled person, probably unemployable and saddled with ongoing expenses related to his condition, required a greater share of the community property to support himself." *Hentges v. Hentges*, 115 Idaho 192, 195, 765 P.2d 1094, 1097 (Ct.App. 1988). See also *Brazier v. Brazier*, 111 Idaho 692, 697, 726 P.2d 1143, 1148 n. 2 (Ct.App. 1986) ("(T)he court may deviate from equality in order to alleviate hardship."). Kircher has failed to show the type of hardship contemplated by the statute to constitute compelling circumstances and thereby justify deviating from the normal rule of a substantially equal division of property and debt.

#### B. Division of the Property and Debt.

The parties' property and debt is divided in accordance with the spread sheet annexed hereto as Exhibit A. An explanation of the rationale for the division is provided as follows.

##### 1. Item 1: Krystal Cafe

The parties agree the Krystal Café building is owned by both parties and that the building and debt should be assigned to Kirchner. The parties differ on the value of the building.

Dunagan relies upon an appraisal performed at his request by Terry Rudd, an appraiser for over forty years. Mr. Rudd's report submitted a restricted use report which cannot be used as the basis for a loan. Mr. Rudd testified that he *would have performed additional research if intended for use to determine loan eligibility.* He estimated that the additional research could increase or decrease the appraised value by five to ten percent.

Mr. Rudd used two methods to calculate the fair market value of the building. He did not use the income approach because he did not have access to the earnings of the Café. Mr. Rudd used the market and cost method. Mr. Rudd conceded each approach has its problems.

The market approach relies upon reviewing comparable sales. The seven sales used by Mr. Rudd included four sales from 2003. Two sales were from Orofino including a lawyer's office, and three sales were of restaurants in Lewiston. Mr. Rudd came up with a square footage price and multiplied it by the size of the premises.

The cost approach takes into account the original price and cost of repairs. The cost approach is normally greater than the market approach. This is especially so in this case as both the original cost and the cost of the repairs are inflated. While Mr. Rudd used the original cost of the sale, he was not aware that a part of the original parcel had been sold off.

Secondly, Dunagan exaggerated the number of hours put into the project, just as he exaggerated the value of the items he seeks to assign to Kircher. Dunagan testified that he put 2000 hours into rebuilding the Café. Mr. Rudd

assigned \$25.00 an hour to his efforts. Kircher credibly testified without rebuttal that Dunagan had spent long periods of time away at his work and that he never performed work when she was not there. Under the most liberal interpretations of Kircher's testimony, she put in 2000 hours of effort. Therefore, Dunagan could not have put in that number of hours that he attributed to his efforts. Mr. Rudd testified that even adjusting for these two factors, his estimate would not be affected by much. As a contractor, Mr. Rudd thought \$176,500 represented a fair value for the repairs which he assigned under the cost method.

Using the cost method, the value of the Crystal Café came to \$256,500. The market value came to \$236,500. Mr. Rudd gave the market value twice the value of the cost method in arriving at his final appraised value of \$241,500. Had *the income method been used*, Mr. Rudd would have given three times the value to the market value, two times to the income value and one value for the cost method.

Kircher estimated a value of \$150,000, but gave no facts to back up her estimate other than relying upon the value of the place when purchased and the slow state of the market. Kircher testified that she was aware of two commercial places that had been up for sale for quite some time. Despite the length of sale, Kircher testified that the price for one of the places, the bowling alley, had even recently increased.

Mr. Rudd conceded that it would take time to sell the Crystal Café. Mr. Rudd opined it could take six months to two years to sell the café; with an auction, the property could be sold after four months of preparation.

An appraisal is not an exact science. However, Mr. Rudd has been in the appraisal business, as noted, for more than 40 years. He has sold homes. He has constructed homes and other buildings as a contractor. He was secure enough in his estimate to say that he would pay the price that he came up with. Based upon Mr. Rudd's expertise, his opinion must be given great weight. Mr. Rudd's methodology is far more reliable in establishing the fair market value of the Café than Kircher's guesswork.

The market value of \$236,500 will be used as the fair market value. Given the small market in Orofino, exact comparable sales are not going to occur. Mr. Rudd credibly testified that the sample businesses he used gave a fair approximation of the fair market value.

The market approach is adopted as a better measure of the fair market value rather than using Mr. Rudd's hybrid method in which the cost method is utilized to arrive at the final fair market value. The cost method, while usually high, came in even higher than to be expected given its failure to take into account the sale of part of the property and its reliance on the amount of work Dunagan allegedly put into the building. In addition, another appraiser, Carmen Coty, testified that she does not use the cost analysis when the sale has taken place more than five years prior. In this case, the sale took place more than five years ago. As Mr. Rudd made clear, the practice of combining the values of the market approach and the cost method is not required by his profession. The impact of using solely the market approach will have little impact and be well within the range of 5 to 10% deviation to the fair market figure that could occur

with additional information. Given the circumstances, the cost method is better applied as a guidepost and not an appropriate measure of the fair market value.

## 2. Item 2: Café Equipment

With respect to the restaurant equipment, Dunagan argues all the items listed on Plaintiff's Exhibit 16 which are purchased after the date of marriage should be valued at their tax cost. There are several problems with Dunagan's argument.

First, Dunagan commits the same error in appraising the value of the equipment as he does in valuing many of the disputed items he assigns to Kircher. The tax cost Dunagan urges as the value of the items represents the purchase price. Kircher credibly testified that kitchen equipment dramatically reduces in value. Kircher sold a dishwasher she never used for \$1000 that she purchased for \$5800. Kircher's accountant, Jeff Roberts, testified the tax cost does not necessarily have anything to do with the fair market value. For example, she bought entire, used kitchen equipment from a restaurant for approximately \$6000 in 2000. She now assigns half the value to the equipment more than five years after purchase. The value after tax depreciation is approximately one-quarter of the value of the equipment.

Second, Dunagan ignores not only that items such as the dishwasher no longer exist, but also seeks to double count items by counting them both in the personal property calculations and also the restaurant business. As explained by Kircher, she incorrectly listed some personal items as assets of the café for tax purposes. Thus, one of the propane stoves listed at item 43 on Plaintiff's Exhibit

16 is personally used and considered in valuing the home. A computer, listed on Defendant's Exhibit A as item 26, also appears as item 47 of Plaintiff's Exhibit 16.

Kircher has purchased \$34,210.08 of items for the restaurant during the marriage to Dunagan excluding the dishwasher. Deducting the propane stove and the computer yields \$31,329.83 of purchases.

There are several values given to the purchase of the restaurant equipment, none of which is entirely satisfactory. As discussed, Dunagan's value using the purchase cost is decidedly too high. Plaintiff's Exhibit 29 represents to the Clearwater County Assessor that the value of the entire personal property at the restaurant as \$6109. The inventory does not appear to include all the items owned by Kircher.

The tax depreciation value assigned to the items purchased after marriage is \$4966.03. Plaintiff's Exhibit 16. On the one hand, this figure seems too small as it only assigns \$1559.83 to the equipment purchased in 2001 that Kircher assigns as having the value of roughly \$3100. On the other hand, it is difficult to project a value as much as \$1333.20 to the carpeting. Thus, the depreciated value is appropriate to use as the value for the older equipment, but not the newer purchases since 2002 which have no tax net book value.

The best measure for the value of the items may well be the sale of the dishwasher which sold for less than one-fifth its value, even though not used and not retained as long as most items on the list. Taking into account the sale of the dishwasher, the depreciated value appears to be the closest to the market value, Conceding that the depreciation schedule may seek to represent a faster



acceleration in the value than what the market would normally bear, the depreciated value in this case comes closer to the true value than cost when purchased.

The depreciated value will only be used for the equipment purchased during 2001. For more recent items, Kircher has assigned a value of \$500 to item 55 and \$200 to item 52 which amount to roughly one-half the original cost. These values will be accepted given Kircher's expertise in purchasing and valuing restaurant equipment and one-half the cost will be assigned as fair market value to the remaining items purchased since 2002. The total amount of the equipment purchased during the marriage excluding the computer, one of the propane stoves, the dishwasher and the copier is \$9649.99.

As a non-essential item to the business, Dunagan will be awarded the copier. Dunagan sets the value of the copier as \$1475.08 and so this value will be adopted. Deducting for the value of the copier, Kircher's equipment will be valued at \$8174.91. This value comports with the value of the restaurant equipment attributed to Kircher just prior to her marriage to Dunagan. Prior to her marriage to Dunagan, Kircher estimated her purchases of restaurant equipment between 1994 and 2000 to be worth \$9840. Plaintiff's Exhibit 36. It can be expected that the initial purchases would consist of essential items that would retain their value more than later purchases.

### 3. Item 3: Krystal Café Savings Account

With respect to item 3, Kircher argues that she should be credited with a separate property interest of \$10,232, the amount of money she alleges in the

account at the time of marriage. Dunagan concedes that tracing is proper. However, Dunagan argues that Kircher has failed to meet her burden in proving the separate character of the property because of months in which no bank records were introduced to show the amount of money in the account. Dunagan also argues that the account dropped below the amount at the time of marriage.

The "party asserting the separate character of property must prove the property is separate with reasonable certainty and particularity." *Weilmunster v. Weilmunster*, 124 Idaho 227, 234, 858 P.2d 766, 773 (Ct. App.1993). "However, our Supreme Court has stated that 'a requirement of showing that community funds were exhausted at the date of purchase of each disputed asset, imposes too heavy a burden of record keeping on the average spouse.' *Speer*, 96 Idaho at 131, 525 P.2d at 326." *Id.* at 238. Although not producing all the bank records, Kircher has shown with reasonable certainty and particularity a separate property interest in the amount of \$8,062.06. \$8,062.06 is the amount of the Latah Bank account on the date of the marriage on May 27, 2000. The bank account has had greater funds than \$8062.06 since then.

Dunagan argues that the fact that the accounts in June 2003 and March 2003 are missing means that Dunagan cannot show her separate property interest sufficiently. The test is whether the separate property interest can be identified with reasonable certainty, not absolute exactitude. Kircher need not produce all the records. In the months before and after March 2003 and June 2003, the account never dipped below \$18,534.93. Since then, the funding level of the account has been persistently above that amount. The present value that

both agree on of \$22,368.23 is far in excess of the \$8062.06. A review of the records does not disclose any large deposits or withdrawals, but very regular deposits and withdrawals reflecting the restaurant business. The \$8062.06 is remote, 70 months prior to the date of the interlocutory divorce. The accounts for several years have not dipped much below \$20,000. Kircher has met her burden even though Defendant's Exhibit B does not show the amounts in the account for the months of March 2003 and June 2003.

Kircher also did not provide bank account statements after December 2005. Again, there is no suggestion that the accounts dipped anywhere close to \$8062.06 from January 2006 through the date of the interlocutory divorce of March 23, 2006.

*Kircher has met her burden in establishing with reasonableness and particularity her separate property interest in the amount of \$8062.06. Thus, the community property interest will be assigned as \$14,306.17.*

#### 4. Item 4: The Home

The parties do not dispute the appraised value of \$125,000 for the home. I find the testimony and report of the licensed appraiser, Carmen Coty, to be persuasive and adopt \$125,000 as the fair market value of the home.

The parties differ as to the amount of community interest in the home. Kircher denies that a legal quitclaim she signed granting her and Dunagan a community property interest in the home is effective.

Kircher testified that she was not aware that the papers Zions Bank gave her in obtaining a loan to purchase the restaurant gave any interest in the home

to Dunagan. She testified that she would not have signed the loan if she had known that the loan involved giving Dunagan an interest in the home. Dunagan objected to this testimony as in violation of the parole evidence rule.

There are three appellate cases addressing the parole evidence rule in the context of deeds. First, in *Hall v. Hall*, 116 Idaho 483, 484, 777 P.2d 255, 256 (1989), the Supreme Court held that testimony from the parents was inadmissible under the parole evidence rule that the parents intended to gift to their son the value of the property that exceeded the agreed upon price. The testimony contradicted the unambiguous language in the deed that the entire value of the property was transferred to the son and his wife.

In *Bliss v. Bliss*, the husband claimed that he had gifted his interest in the land to his wife solely to avoid a tax lien. The Supreme Court held that the husband failed to overcome the presumption of separate property. The Supreme Court rejected the use of the husband's testimony as in contradiction to the unambiguous language in the deed and emphasized, "The policy considerations underlying the rule in *Hall* and similar cases, as well as the statute of frauds, are well founded and enduring." The Court approvingly cited an earlier case in noting that

(t)he statute was enacted to guard against the frailties of human memory and the temptations to litigants and their friendly witnesses to testify to facts and circumstances which never happened. Experience had convinced both jurists and lawmakers that the only safe way to preserve and pass title to real property is by a written conveyance subscribed by the grantor. *The beneficial effects of this statute would be destroyed if a grantor could come in years afterwards and submit oral testimony to show that the conveyance was not intended as an absolute grant but was only intended to create a trusteeship in the grantee.* *Dunn v. Dunn*, 59 Idaho 473,

484, 83 P.2d 471, 475-76 (1938) (emphasis added, citations omitted). Likewise, Gordon should not be allowed, by extrinsic evidence, to contradict the plain language of the deed and claim he never really intended to convey the land. The magistrate correctly ruled that evidence regarding the parties' intent and conversations when the deed was executed was inadmissible to contradict the deed. We find no error in the magistrate's determination that Gordon failed to rebut the statutory presumption of separate property.

*Bliss v. Bliss*, 127 Idaho 170, 175, 898 P.2d 1081, 1086 (1995).

Finally, in *Hoskinson v. Hoskinson*, as here, a spouse argued that "he signed the quitclaim deed simply because the lender presented it to him during the loan closing, that he signed it along with many other papers the lender presented to him, and that he had no intent to transmute his property into community property." *Hoskinson v. Hoskinson*, 139 Idaho 448, 459-460, 80 P.3d 1049, 1060 - 1061 (2003). In *Hoskinson*, the Supreme Court held that the spouse failed to prove a "transmutation by clear and convincing evidence. The evidence did not establish that Reed intended to make a gift to the community." *Id.* at 460.

*Hoskinson* is distinguishable from this case. The court in *Hoskinson* was faced with two quitclaim deeds regarding the same real property signed on the same date and filed at different times. The wife granted her interest in the property to her husband in one quitclaim. In the other quitclaim, the husband deeded his interest in the real property to both the wife and himself. "The evidence did not establish whether the deed to Reed and Elizabeth was signed before or after the deed to Reed." *Id.* The identical date on the two deeds

created the ambiguity necessary to permit testimony as to the intent of the parties.

In this case, there is no ambiguity. The deed is unambiguous in providing that Kircher "do hereby convey, release, remise, and forever quit claim unto Kelly Dunagan and Chris Dunagan, wife and husband" the home at issue. In the absence of any ambiguity or fraud, the parole evidence rule prevents testimony that differs from the unambiguous language of the quitclaim deed. Thus, Kircher's testimony that she did not intend to convey any interest in her home to Dunagan is rejected under the parole evidence rule. The entire value of the home is treated as an asset of the community. The home and debt associated with the home will be assigned to Kircher.

#### 5. Agreement of the Parties.

I have adopted the values and the designations as to who should receive the property and debt as set forth in Plaintiff's Exhibit 1 and Defendant's Exhibit A with the exception of the aforementioned copier. I have also adopted the values and designations the parties stipulated to during the trial which are as follows:

Item 8: The parties agreed at trial that the value of the income tax return of \$2309 should be awarded to Kircher.

Item 14: The parties agreed at trial that the value of the Lyman prints retained by each of the parties offsets each other's value.

Item 20: The refrigerator will be assigned to Kircher at a value of \$300 by agreement of the parties.

Item 36 The 2003 Bayliner Boat will be assigned to Kircher at a value of \$13,000 along with the debt.

7. Disputed items.

Unless otherwise stated, the values of the items Kircher assigned to the items allocated to her have been adopted as the values. Kircher purchased the items and so has a better idea than Dunagan as to their value. Furthermore, I do not find Dunagan's valuations to be credible. Dunagan admitted he used the new value or the purchase value for items 20, 21, 24, 25, 34, 35, 37, and 39. Each of these items he assigns to Kircher. Items he assigns to himself do not reflect the new or purchase value. Item 43, a bucket truck, is assigned a much depreciated value as compared to the Yukon vehicle assigned to Kircher. Leaving aside liquid assets whose value is readily determinable and the three items which they wish to assign to each other, Dunagan grossly inflated the value of items he assigned to Kircher. Dunagan was able to agree with Kircher in Plaintiff's Exhibit 1 prior to trial only as to the value of a freezer and computer of the many items of personal property he assigned to Kircher. This contrasts with Kircher who used the purchase cost as the value twice for items assigned to Dunagan and agreed with Dunagan on the valuation for more items assigned to Dunagan than assigned to her despite Dunagan being awarded far less items.

Item 15: Dunagan testified he had \$4700 in his bank account at the time of trial. However, the key date for valuation is the date of the interlocutory divorce. In light of this date, Plaintiff's Exhibit 1 uses the balances of all other accounts prior to March 25, 2006. Dunagan offered no reason why item 16

should be treated any differently. Thus, \$6000 as agreed to on Plaintiff's Exhibit 1 and Defendant's Exhibit A shall be used as the value.

Items 17, 18, and 19: The parties agree as to the value, but differ as to who should receive the items. Dunagan purchased the items, but does not feel he has room to store the items. The lack of a place to store the items is not a reason to force their sale upon Kircher who does not want them. The items will be assigned to Dunagan.

Item 21 is assigned to Kircher as her separate property. Even Dunagan testified the jewelry was a gift.

Item 41 and 43: Dunagan's values are closer to fair market value than Kircher who used the purchase cost of the items, so Dunagan's values will be adopted as the fair market value.

Items 42 and 46: Kircher testified that Dunagan had purchased guns and telecommunications equipment during their marriage that are not reflected in Dunagan's valuation of the items. Kircher's suspicions may be well-grounded. Despite virtually no contributions for the house payments, Dunagan, upon questioning, could not explain where his salary went. However, Kircher was unable to identify one specific item that was purchased in addition to the items and values listed. Therefore, Kircher failed to meet her burden to show any different value than the value posited by Dunagan who has a great deal of expertise in the area of the value of guns and telecommunication devices. The values attributed by Dunagan for his guns and telecommunications equipment will be adopted as the values for purposes of distribution of property and debt.



Dunagan suggested at trial that Kircher has hidden \$6000 of cash. Kircher admitted to hiding assets in a prior divorce. Half of the discrepancy was explained by Kircher's odd method of bookkeeping which jumped around in dates. The alleged discrepancy could be explained by the use of a money order or certified check. I do not find that Dunagan has shown by a preponderance of the evidence that Kircher has hidden any assets.

Kircher's request for attorney fees as set forth in item 511 in Defendant's Exhibit A is denied as no evidence was adduced showing financial need and thereby entitlement to attorney fees under Idaho Code § 32-704(3).

7. Reimbursement to the Community.

Item 50: Kircher seeks reimbursement to the community of \$20,000 for payment in November 2003 on a 32 foot travel trailer owned by Dunagan.

(W)hen community efforts, labor, industry, or funds enhance the value of separate property, such enhancement is community property for which the community is entitled to reimbursement. The measure of reimbursement for community expenditures on separate property is the increase in value of the property attributable thereto, not the amount or value of the community contribution.

*Martsch v. Martsch*, 103 Idaho 142, 147, 645 P.2d 882, 887 (1982).

There was no testimony or evidence regarding the value of the travel trailer at the time of the payoff in November 2003. The value of the trailer was \$25,000 on June 28, 2000. Plaintiff's Exhibit 15 at 1000578. The amount owing on the trailer on June 28, 2000 was \$20,000. *Id.* It is too remote in time to extrapolate from November 2003 to June 28, 2000 to derive a value that was enhanced by the payment made on the RV.

Dunagan requests reimbursement to the community of the proceeds of a loan that were used to pay off unsecured debts owed to Kircher's first husband. However, no reimbursement is permitted for payments on antenuptial unsecured debts. *Bliss v. Bliss*, 127 Idaho 170, 172-173, 898 P.2d 1081,1083 -1084 (1995).

#### 8. Equalization Payment


Dunagan is entitled to an equalization payment of \$108,500. Kircher will be granted sixty (60) days from the date of this decision in which to make this payment. If Kircher makes such payment in full within said sixty (60) days, Dunagan will sign over and release to Kircher all interest in the Crystal Café. If Kircher does not make the equalization payment within the prescribed time, the Crystal Café will be put up for sale in a commercially reasonable manner. There is no other property available to pay Dunagan his equalization payment.

Dunagan and Kircher will list the Crystal property with an agreed upon realtor. If the parties cannot agree, this Court, upon filing of a Motion, will select a realtor. Kircher may continue to use the property until sold for her business. Kircher shall keep the business in presentable condition in order to ensure its value for purposes of selling. Kircher is responsible for paying expenses associated with the property such as water, sewer, garbage, power, loan payments, etc. Furthermore, Kircher is to cooperate with the real estate personnel in all aspects in the sale of the property. Neither party will withhold consent to any reasonable offer for the Cafe.

CONCLUSION

The parties' assets and debts will be distributed as set forth in Exhibit A, annexed hereto, consistent with this Memorandum. The Crystal Café will be sold in a commercially reasonable manner as discussed above if the equalization payment is not made within sixty (60) days of this Order. The parties will sign all necessary papers effectuating the transfer of their interest in the property that is assigned to the other party.

DATED this 17<sup>th</sup> day of July, 2006.

  
Randall W. Robinson  
Magistrate

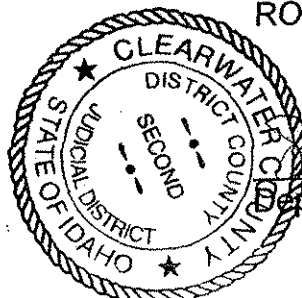
CERTIFICATE OF MAILING

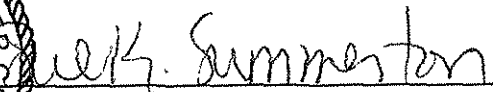
I hereby certify that a true copy of the foregoing MEMORANDUM OPINION AND DECISION was mailed, postage prepaid, this 18<sup>th</sup> day of July, 2006, to the following:

Paul Thomas Clark  
Clark and Feeney  
P.O. Drawer 285  
Lewiston, ID 83501

Garry W. Jones  
Jones, Brower & Callery  
P.O. Box 854  
Lewiston, ID 83501

ROBIN CHRISTENSEN, Clerk

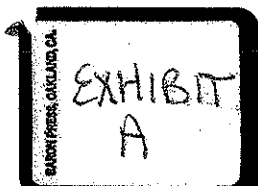


  
Deputy Clerk

description	value	debt	equity	to wife	to husband
1) Krystal Café bldg	236,500	39594.64	196,905.36	196,905.36	
2) Krystal Café bus.	8174.91			8174.91	
3) Krystal Café bank acct	14,306.17			14,306.17	
4) Grand Ave house	125,000	58,921.36		66,078.64	
5) wife's retirement acct	10,254.52			10,254.52	
6) husb. retirement acct	18,386.23				18,386.23
7) w. smathers loan	22,244				22,244
8) 2005 tax ret.-wife	2,309.00			2309	
9) Zion's bank acct	2,926.99			2926.99	
10) Orofino C.U. acct					
11) Lewis-Clark C.U. acct	745.77			745.77	
12) Am-West Kelly/Sherrill	2,585.41			2585.41	
13) Bank of Latah - wife					
14) Steve Lyman prints					
15) B of A bank acct-husb.	\$6,000				6000
16) 2005 GMC Denali	29,000	28,877.39	122.61	122.61	
17) oak bedroom set	7500				7500
18) couch	1000				1000
19) TV & stand	900				900
20) fridge	300			300	
21) Kelly's diamonds	S				
22) bedding-before marriage	S				
23) utensils-before marriage	S				
24) oak table & chairs	300			300	
25) comforters	450				450
26) computers	400			400	
27) her office desk	50			50	
28) recliner	100			100	
29) freezer	200			200	
30) stove-wife's before marr.	S				
31) wash/dry-wife's before	S				
32) stereo-wife's before	S				
33) outdoor furn/BBQ-wifes	S				
34) coffee/end tables	750			750	
35) microwave	100			100	
36) 2003 Bayliner boat	9000	10,140.94	-1140.94	-1140.94	
37) DVD/surround sound	200			200	
38) lawn mower	100			100	
39) camcorder	200			200	
40) 2005 Dodge P.U.	26,000	13,800	12,200		12,200
41) flatbed trailer	6000				6000
42) guns	789.95				789.95
43) bucket truck	6000				6000
44) gun safe	1100				1100
45) recliner	200				200
46) telecomm. equip	2000				2000
47) tools	1000				1000
48) fishing/camping gear	1000				1000
49) drift boat-husb. before	S				
50) lawn mower/weedeater	S				
51) 32' travel trailer	0				

0

00000053



52) lamp	S				
53) husband's VISA	-3000				-3000
54) taxes dispute	-4500				-4500
<u>totals</u>	536,573	151334.33	208,087.03	295,713.92	<u>78480.23</u>
Equalization Payment	108,500				108,500

00000054

JUDICIAL DISTRICT COURT  
CLEARWATER COUNTY  
FLORIDA

2006 AUG -7 A 11:18

DE NO CW05-324

User: VICKY

Second Judicial District Court - Clearwater County

Minutes Report

Y     K     DEPUTY

Page 1 of 1

Case: CV-2005-0000324

Chris M Dunagan vs. Kelly A Dunagan

Selected Items

Hearing type:	Motion to Reconsider	Minutes date:	08/07/2006
Assigned judge:	Randall W. Robinson	Start time:	11:04 AM
Court reporter:		End time:	11:21 AM
Minutes clerk:	VICKY	Audio tape number:	CD181

Parties: Dunagan, Chris; Clark, Paul  
Dunagan, Kelly; Jones, Garry

Tape Counter: 1104 Honorable Randall Robinson presiding. Attorney Tom Clark present, via telephone, representing the Plaintiff. Attorney Garry Jones present, via telephone, representing the Defendant.

Tape Counter: 1104 Court notes Mr. Jones is correct, Decree should be nunc pro tunc back to date of Interlocutory Divorce. Also notes Mr. Jones is requesting the legal description of the real property in items 1 & 4 to be included. Mr. Clark has no objection. Court will grant.

Tape Counter: 1105 Mr. Jones advises just wishes to clarify some points.

Tape Counter: 1105 Court on item #3 believes it should be Ms. Dunagan's responsibility for the expenses of the Krystal Cafe building in event she closes the business prior to sale of the building. It is her building and has all rights of ownership.

Tape Counter: 1106 Mr. Jones argues.

Tape Counter: 1107 Court advises it will be her choice whether to close the business before sale.

Tape Counter: 1108 Mr. Clark agrees with Court's position.

Tape Counter: 1108 Mr. Jones inquires re expenses of sale and equalization payment.

Tape Counter: 1108 Court clarifies expenses associated with the sale should be split between the parties and come out of the shares that have been attributed to the people.

Tape Counter: 1109 Mr. Jones inquires re the equalization payment and taking the shares out, should be adjusted to reflect actual proceeds into the formula. Discussion with Court.

Tape Counter: 1113 Court reluctant to allow a latter adjustment based upon a possibly latter change in market conditions.

Tape Counter: 1115 Mr. Clark agrees with Court.

Tape Counter: 1115 Mr. Jones argues & further discussion with Court.

Tape Counter: 1120 Mr. Clark will stand on the record.

Tape Counter: 1121 Court will review the matter further and will issue a new Decree of Divorce.

Tape Counter: 1121 Court in recess.

00000055

SCANNED

8/31/06

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

DISTRICT COURT  
CLEARWATER COUNTY  
IDAHO

CHRIS M. DUNAGAN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 KELLY A. DUNAGAN, )  
 )  
 Defendant. )

2006 AUG 25 P 2:38

CASE NO. CV2005-0000324

SIG DEPUTY

ORDER TO AMEND DECREE OF DIVORCE

The Defendant requests clarification of this Court's Decree of Divorce entered on July 17, 2006, in five respects.

First, the Defendant requests that the Decree of Divorce be clarified that the Decree of Divorce be established as March 21, 2006, the effective date of Interlocutory Decree of Divorce. This request will be granted. The Decree of Divorce will be amended to reflect the date of March 21, 2006 as the date of divorce.

Second, the Defendant requests that the legal descriptions of the real property be included in the Decree of Divorce. This request will be granted.

Third, the Defendant requests clarification of the responsibilities of the Defendant as to the payment of expenses associated with the Krystal Café building in the event she closes her business prior to the sale of the building. In essence, the Defendant requests a contribution from the Plaintiff to maintain the building should she cease her business. The Defendant's request for such relief is denied.

The Defendant is awarded the business and the building. The building is only sold should the Defendant fail to make the equalization payment. It is up to

the Defendant as to whether she wishes to operate her business or use the building for other purposes such as rental. It is inequitable for the Defendant to keep all the benefits to herself from the building without any payment to the Plaintiff while she operates the business, but burden the Plaintiff with the costs should the Defendant choose to cease operating her business. The Amended Decree is modified to clarify this point.

Fourth, the Defendant requests that this Court clarify the responsibility for sale expenses, including, but not limited to any real estate commissions. The Defendant's request is granted. The reasonable expenses directly incurred by the sale of the building, such as the sales commission, will be equally borne by the parties. One-half of the reasonable expenses directly associated with the sale of the building will be deducted from the equalization payment Plaintiff is due of \$108,500.

Fifth, the Defendant requests clarification of the division of the net proceeds should they not equal the equity contemplated by the Court. At the argument, the Defendant requested that the amount of equalization vary according to the actual amount that the property sells for. The Defendant's proposal has appeal as it gives both the Defendant and the Plaintiff an equal stake in the sale. Despite such appeal, I deny the Defendant's request.

The value of the equalization payment is fixed at the time of the Decree based upon the fair market value of the property at the time of the divorce.

*Brinkmeyer v. Brinkmeyer*, 135 Idaho 596, 600, 21 P.3d 918 (2001). As noted by the Supreme Court, "Any community asset may change in value after the division




of the community. This is not a reason to modify the division." *Ross v. Ross*, 117 Idaho 548, 554, 789 P.2d 1139 (1990). The Plaintiff should not be penalized by the Defendant's actions while controlling use of the building or by the vagaries of the market. By fixing the equalization payment, this Court is removed from becoming intimately involved with the Plaintiff's actions or inactions in controlling the building since the date the value was established. Also, the Defendant has alternatives to selling the Café such as by selling her own home and/or by loans.

The Defendant argues she believes the business to be only worth \$150,000.00 and so the Plaintiff will receive a windfall in obtaining a disproportionate value from the sale of the building. The Defendant at the trial failed to offer any evidence to support her subjective belief as to the value of the building other than anecdotal stories about two local properties that had not sold quickly. The appraiser's value was adopted, a value which the appraiser said he would pay for the property.

#### CONCLUSION

The Defendant's request for clarification that an Amended Decree of Divorce be issued is granted with respect to the dating of the divorce back to March 25, 2006, the legal description of the property be set forth in the decree, and that the reasonable expenses associated with the sale be explicitly split between the parties. The Defendant's request to clarify the divorce is denied in other respects.

DATED this 25th day of August, 2006.

  
RANDALL W. ROBINSON  
Magistrate

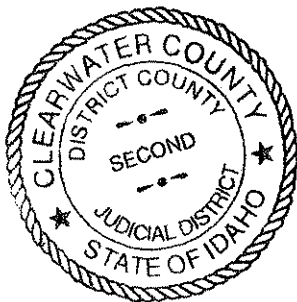
CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was mailed,  
postage prepaid, on the 25<sup>th</sup> day of August, 2006 to:

Paul Thomas Clark  
Attorney at Law  
P.O. Drawer 285  
Lewiston, ID 83501

Garry W. Jones  
Attorney at Law  
P.O. Box 854  
Lewiston, ID 83501

ROBIN CHRISTENSEN  
Clerk of the District Court



By Sue K. Shimmerton  
Deputy

SCANNED

8/31/06

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY  
IDAHO

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

AUG 25 P 2:38

CV05-324

CHRIS M. DUNAGAN,

CASE NO. CV 2005-00324

Plaintiff,

AMENDED DECREE OF DIVORCE

vs.

KELLY A. DUNAGAN,

Defendant.

This matter came before the court on June 20, 2006. A trial was conducted with the parties present and Paul Thomas Clark representing the Plaintiff and Garry Jones representing the Defendant. Based upon the Memorandum Opinion and Decision and the Order to Amend Decree of Divorce entered in this case, Judgment is entered as follows:

The Plaintiff is and was a bona fide resident of the State of Idaho and has been a resident for more than six (6) weeks preceding the filing of his complaint.

This Court has jurisdiction to determine the divorce and the property and debt distribution.

An interlocutory divorce was entered between the parties effective on March 21, 2006 with property and debt issues reserved for the trial that took place on June 20, 2006.

IT IS HEREBY ORDERED AND DECREED:

1. The bonds of matrimony between the Plaintiff and the Defendant are dissolved on the grounds of irreconcilable differences, and the Defendant awarded an


absolute decree of divorce from the Plaintiff nunc pro tunc to March 21, 2006, the effective date of the Interlocutory Decree of Divorce.

2. The property and debts of the parties shall be divided as set forth in Exhibit A, annexed hereto, with the addition that the Plaintiff shall receive a copier from the Defendant. More specifically, with respect to the real property, the Defendant shall be awarded the real property at 12350 Grand Avenue, Orofino, Idaho with the legal description of "Lots 6, 7, and 8, Block 2, Day's Addition, according to the recorded plat thereof, records of Clearwater County, Idaho." The parties will sign all necessary papers effectuating the transfer of their interest in the property that is assigned to the other party except for the Krystal Café property, as discussed below.

3. The Defendant shall also be awarded the real property upon which the Krystal Café is located at 130 Johnson Avenue, Orofino, Idaho with the legal description of "Lots 7 and 8, block 2, Day's Addition, according to the recorded plat thereof, records of Clearwater County, Idaho" upon payment to the Plaintiff of an equalization payment of \$108,500. The Defendant shall have sixty (60) days to make the equalization payment to the Plaintiff of \$108,500. Upon payment in full of the equalization payment of \$108,500 within said sixty (60) days, the Plaintiff will sign over and release to the Defendant all interest in the Krystal Café. If the Defendant does not make the equalization payment within the prescribed time, the Krystal Café will be put up for sale in a commercially reasonable manner. The Plaintiff and the Defendant will list the Krystal Café property with an agreed upon realtor. If the parties cannot agree, upon filing of a Motion, this Court will select a realtor. The Defendant shall cooperate with the real estate personnel in all aspects in the sale of the property. Neither party will withhold consent to any reasonable offer. The Defendant may continue to use the

property until sold for her business or for any other purpose consistent with reasonable use of the building including rental. The Defendant shall keep the building in presentable condition in order to ensure its value for purposes of selling. The Defendant is responsible for paying expenses associated with the property such as water, sewer, garbage, power, and loan payments. Furthermore, the parties shall share equally the reasonable expenses directly associated with the sale. The equalization payment will be reduced by the Plaintiff's one-half share of the reasonable costs directly associated with the sale that are not paid by him prior to the sale.

DATED this 20<sup>th</sup> day of August, 2006



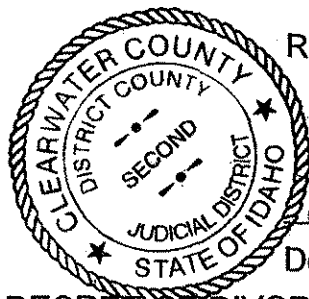
Randall W. Robinson,  
Magistrate Judge

### CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, on the 25<sup>th</sup> day of August 2006, to the following:

Paul Thomas Clark  
Clark and Feeney  
P.O. Drawer 285  
Lewiston, ID 83501

Garry W. Jones  
Jones, Brower & Callery  
P.O. Box 854  
Lewiston, ID 83501



ROBIN CHRISTENSEN, Clerk



Deputy Clerk

Garry W. Jones  
 JONES, BROWER & CALLERY, P.L.L.C.  
 Attorneys at Law  
 1304 Idaho Street  
 P.O. Box 854  
 Lewiston, ID 83501  
 (208) 743-3591  
 Idaho State Bar No. 1254

ROBIN CHRISTENSEN  
 CLERK-DISTRICT COURT  
 CLEARWATER COUNTY  
 OROFINO, IDAHO

2006 OCT -5 A 11:31

CASE NO. CV 2005-324

BY R DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

CHRIS M. DUNAGAN,	)	CASE NO. CV 2005 - 00324
	)	
Plaintiff,	)	
	)	
vs.	)	NOTICE OF APPEAL
	)	
KELLY A. DUNAGAN,	)	Fee Category: R(1)(c)
	)	Fee Amount: \$53.00
Defendant.	)	
_____	)	

COMES NOW, KELLY A. DUNAGAN, defendant, by and through her attorney of record, GARRY W. JONES of the law offices of JONES, BROWER & CALLERY, P.L.L.C., and pursuant to Rule 83, Idaho Rules of Civil Procedure, hereby appeals from the *Amended Decree of Divorce* dated August 25, 2006, entered by the Honorable Randall W. Robinson.

1. The title of the court from which the appeal is taken is the Magistrate Division of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Clearwater.

2. The title of the court to which the appeal is taken is the District Court of the Second Judicial District of the State of Idaho, in and for the County of Clearwater.

3. The date and heading of the judgment(s) from which the appeal is taken is the entry of the Amended Decree of Divorce dated August 25, 2006.

4. The appeal is taken upon both matters of law and fact.

5. The testimony and proceedings of the hearing was heard on June 20, 2006. All proceedings were recorded by audio tape by the Clearwater County Clerk's office. The Clerk of the court, District Court of the Second Judicial District of the State of Idaho, in and for the County of Clearwater, is in possession of the reported record of these proceedings.

6. Issues on appeal:

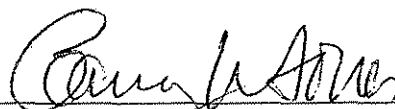
- a. Whether the Court erred in determining that the defendant transmuted her home from her separate property to community property.
- b. Whether the Court erred in failing to award an unequal distribution of property in favor of the defendant.
- c. Whether the Court erred in requiring the defendant to continue to be responsible for the condition of property ordered by the Court to be sold and further requiring the defendant to be responsible for paying all expenses associated with the property such as water, sewer, garbage, power and loan payments.
- d. Whether the Court erred in failing to reallocate sale proceeds from the sale of the Krystal Kafe building in the event the sale price of said building is less than the \$196,906.36 equity contemplated by the Court.
- e. Whether the Court erred in failing to find the existence of an agreement between the parties that they would keep all of their

respective property acquired prior to marriage, as their sole and separate property during their marriage.

7. It is hereby requested pursuant to Idaho Rule of Civil Procedure 83(j) that the appeal be heard as an appellant proceeding and that transcripts be prepared as provided by Idaho Rule of Civil Procedure 83(k).

DATED this 5<sup>th</sup> day of October, 2006.

JONES, BROWER & CALLERY, P.L.L.C.



\_\_\_\_\_  
GARRY W. JONES  
Attorney for Appellant, KELLY A. DUNAGAN,  
Defendant




CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *NOTICE OF APPEAL* was this 5<sup>th</sup> day of October, 2006,

- hand-delivered by providing a copy to: Valley Messenger Service;
- hand-delivered;
- mailed, postage pre-paid, by first class mail; or
- transmitted via facsimile
- transmitted via e-mail

to:

PAUL THOMAS CLARK  
CLARK & FEENEY  
THE TRAIN STATION, SUITE 201  
13<sup>TH</sup> & MAIN STREETS  
P.O. DRAWER 285  
LEWISTON, ID 83501

By   
GARRY W. JONES  
Attorney for Defendant

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2006 OCT 13 P 12:00

CASE NO. CV05-324

BY vr DEPUTY

1 PAUL THOMAS CLARK  
Idaho State Bar No. 1329  
2 CLARK and FEENEY  
Attorneys for Plaintiff  
3 The Train Station, Suite 201  
4 13th and Main Streets  
P. O. Drawer 285  
5 Lewiston, Idaho 83501  
Telephone: (208)743-9516  
6

7 IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
8 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

9 \* \* \* \* \*

10 CHRIS DUNAGAN, )

11 Plaintiff, )

12 vs. )

14 KELLY DUNAGAN, )

15 Defendant. )

Case No. CV 05-00324

13 NOTICE OF CROSS APPEAL

16 \* \* \* \* \*

17 TO: KELLY DUNAGAN AND HER ATTORNEY OF RECORD GARRY JONES, AND THE  
18 CLERK OF THE ABOVE-ENTITLED COURT:

19 Pursuant to Rule 83(f) of the Idaho Rules of Civil Procedure, as well as Rule 11 of the Idaho

20 Appellate Rules, notice is hereby given that:

- 21 1. This appeal is taken from the magistrate's division of the above-entitled court.
- 22 2. This appeal is taken to the district court of the above-entitled court.
- 23 3. This appeal is taken from the Memorandum Opinion and Decision entered July 17,
- 24 2006; The Honorable Randall Robinson presiding.


1 4. This appeal is taken upon matter of law and fact.

2 5. The testimony and/or proceedings of the original trial were recorded and are in the  
3 possession of the Clearwater County Clerk.

4 6. The issue of appeal is: Did the magistrate err in the manner in which he valued the  
5 community property of item 41 on Exhibit A?

6 DATED This 12<sup>th</sup> day of October, 2006.


7  
8 CLARK AND FEENEY

9  
10 By:   
11 Paul Thomas Clark  
Attorney for Plaintiff

12 I hereby certify on the 12<sup>th</sup>  
13 day of October, 2006, a true copy  
14 of the foregoing instrument  
was:  Mailed  
15  Faxed  
 Hand delivered to:

16 Mr. Garry W. Jones  
17 Jones, Brower & Callery  
18 P.O. Box 854  
Lewiston, ID 83501

19 CLARK and FEENEY

20 By:   
21 Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

- COURT MINUTES -

John R. Stegner  
District Judge

Jodi M. Stordiau  
Court Reporter  
Recording: J: 3/2007-06-06  
Time: 1:28 P.M.

Date: June 6, 2007

CHRIS M. DUNAGAN, )  
)  
Plaintiff/Respondent, )  
)  
vs. )  
)  
KELLY A. DUNAGAN KIRCHER, )  
)  
Defendant/Appellant. )  
)  
)  
Defendant. )  
)

Case No. CV-05-00324

APPEARANCES:

Plaintiff/Respondent represented by  
Paul Thomas Clark, Lewiston, ID

Defendant/Appellant represented by  
Garry W. Jones, Lewiston, ID

---

Subject of Proceedings: APPELLATE ARGUMENT

This being the time fixed pursuant to order of the Court for hearing appellate argument in this case, Court noted the presence of counsel.

Mr. Jones argued on behalf of the appellant. Mr. Clark argued on behalf of the respondent. Mr. Jones argued in rebuttal.

Court took the matter under advisement, informing counsel it would render a written decision.

Court recessed at 2:17 P.M.

APPROVED BY:

  
JOHN R. STEGNER  
DISTRICT JUDGE

Terry Odenborg  
Deputy Clerk

COURT MINUTES

00000069

SCANNED  
8/28/07

RODNEY J. JENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
GROFENO, IDAHO

2007 JUL 27 P 1:52

CASE NO. CW05-324

BY [Signature] DEPOSED

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

CHRIS M. DUNAGAN,

Plaintiff/Respondent,

vs.

KELLY A. DUNAGAN KIRCHER,

Defendant/Appellant,

Case No. CV 05-00324

OPINION ON APPEAL

This case is on appeal from the Magistrate Division of Clearwater County, the Honorable Randall W. Robinson presiding. Oral argument was heard June 6, 2007. Garry W. Jones, of the law firm Jones, Brower and Callery, argued on behalf of the Appellant, Kelly A. Dunagan Kircher (Kircher). Paul Thomas Clark, of the law firm Clark and Feeney, argued on behalf of the Respondent, Chris M. Dunagan (Dunagan).

I. BACKGROUND

Shortly after their marriage on May 27, 2000, Kircher and Dunagan purchased the Krystal Café, a business Kircher had been operating prior to the marriage. The couple also purchased the real property on which the business was located. They then

sold a portion of the unrelated real property a short time later. After purchasing the café, the building underwent extensive renovations, finally reopening in October 2001.

On November 24, 2003, residential property which had been owned by Kircher prior to the marriage was refinanced through Zions Bank. As a condition of the refinancing, Kircher quitclaimed her interest in her home to "Kelly Dunagan and Chris Dunagan, wife and husband." Zions Bank subsequently recorded the deed with the Clearwater County Recorder. At trial, Kircher testified that she signed lots of papers at the closing and did not know that she was giving up any interest in her home to Dunagan. She also testified that she would not have signed the conveyance had she understood she was transferring an interest in her property to Dunagan. Dunagan objected to Kircher's testimony on the grounds that it violated the parol evidence rule. The Magistrate Judge initially overruled Dunagan's objection, allowing Kircher's testimony. However, in his Memorandum Opinion and Decision, Judge Robinson ultimately rejected Kircher's testimony because it violated the parol evidence rule. (Memorandum Opinion and Decision, 16).

According to Kircher, at the time the couple married, they orally agreed to keep their finances separate. During their marriage, Dunagan and Kircher in fact kept their finances separate. Kircher paid all insurance and other payments on the house and on the Krystal Café. Dunagan gave Kircher \$500 on two occasions. At trial, Dunagan objected to Kircher's testimony regarding this separation of finances on the grounds that it violated the statute of frauds. The trial court and the parties subsequently engaged in a colloquy regarding the issue. Ultimately, Dunagan's objection was

sustained; however, counsel for Kircher was allowed to elicit the testimony for purposes of attempting to establish a compelling reason for an unequal distribution of community property. In his Memorandum Opinion and Decision, Judge Robinson held that evidence of the oral antenuptial agreement was not admissible under Idaho law, and that even if it were admissible, it failed to establish a compelling circumstance for warranting an unequal distribution of community property.

Dunagan and Kircher separated in 2005 and obtained a divorce on March 23, 2006. On June 20, 2006, a trial was conducted to determine the distribution of property and debt. The trial resulted in Judge Robinson determining an equal disposition of the community property was appropriate. Following an accounting and division of the marital assets, the trial judge ordered Kircher to pay Dunagan an equalization sum of \$108,500. Additionally, the court held the transfer of Dunagan's interest in the Krystal Café to Kircher was predicated upon the equalization payment. The judge gave Kircher sixty days to make the payment or the building would be sold and the proceeds divided equally, as there was no other property that could be sold to achieve a substantially equal distribution of the community property.

Kircher appealed Judge Robinson's decision, raising the following issues:

- 1) Whether the court made a mistake of law in ruling that evidence of an oral antenuptial agreement did not constitute a compelling circumstance for ordering an unequal disposition of the community property;
- 2) Whether the court abused its discretion by ruling that the circumstances surrounding the marital home were not a compelling reason to order an unequal disposition of the community property;
- 3) Whether the court abused its discretion in the disposition of the Krystal Café; and,

- 4) Whether the court achieved "substantial equality" in the disposition of the community property.

On cross-appeal, Dunagan raised one issue concerning the value of a flatbed trailer.

## II. STANDARD OF REVIEW

When acting in the capacity of an appellate court, the district court reviews appeals from the magistrate court according to the same scope and standard of review as the Supreme Court reviews appeals from the district court. I.R.C.P. 83(U)(1). The standard of review varies depending upon whether the issue presented is one of law, of fact, or of discretion. The Magistrate Judge's legal conclusions are subject to free review. *Carter v. Carter*, 143 Idaho 373, 146 P.2d 639, 644. The Magistrate Judge's findings of fact are reviewed to determine if they are supported by substantial and competent evidence. *Henteges v. Henteges*, 115 Idaho 192, 194, 765 P.2d 1094, 1096 (Ct. App. 1988). Finally, questions of discretion are reviewed to determine if the trial court's decision was within his discretion, consistent with applicable legal standards, and reached through the exercise of reason. *Id.* This Court will uphold the Magistrate Judge's decision as long as it is supported by substantial and competent evidence and the Magistrate Judge correctly applied sound legal principles to those facts. *Id.*

## III. DISCUSSION

### A. Oral Antenuptial Agreement

The first issue raised by Kircher involves an antenuptial agreement. I.C. § 32-712(1)(b)(2). Kircher argues that Judge Robinson erred as a matter of law by failing to consider the purported oral antenuptial agreement between herself and Dunagan, to



keep their finances separate. Kircher, on one hand, concedes that statutory law in Idaho requires a contract for a "marriage settlement" to be in writing. See I.C. § 32-917. While conceding that point, Kircher argues for a change in the law. Kircher asks this Court to create an exception for oral marital contracts, which are supported by part performance, similar to the exception widely recognized for real property. See *Jolley v. Clay*, 103 Idaho 171, 177, 646 P.2d 413, 419 (1982). Kircher cites California, Washington, and Colorado case law to the effect that each state has created a part performance exception to the statute of frauds in this context.

Idaho courts, however, have remained firm in holding that to be enforceable, premarital agreements must be in writing. See *Stevens v. Stevens*, 135 Idaho 224, 16 P.3d 900 (2000). In light of the great weight of Idaho authority, this Court holds that a marriage settlement must be in writing and consequently, no part performance exception exists. Thus, the Magistrate Judge's refusal to consider evidence concerning the oral antenuptial agreement was a correct application of Idaho law and Judge Robinson's holding should be affirmed in this regard.

#### **B. Marital Home**

The second issue raised by Kircher is whether the Judge's refusal to consider evidence surrounding the marital home constituted an abuse of discretion. It must be remembered that at the time Kircher refinanced the marital home she quitclaimed the property to herself and Dunagan. At trial, in an attempt to render the transmutation of the marital home ineffective, Kircher testified that she did not realize she was transferring an interest in her house to Dunagan when she quitclaimed an interest to

him. She also testified that had she known, she would not have signed the deed. The Magistrate Judge rejected Kircher's testimony because it was in violation of the parol evidence rule. As a result, Judge Robinson considered the house to be community property and divided its value equally.

On appeal, Kircher does not argue the admissibility of her testimony as it applies to the effectiveness of the deed. Instead, she argues that the Magistrate Judge could have considered the evidence as proof of the hardship she will endure as a result of an equal disposition of the community property. She argues that the list of factors in I.C. § 32-712(1)(b) is not exhaustive and that it was within the Judge Robinson's discretion to consider more evidence to determine whether a hardship would result from an equal disposition of the community property.

Although the statute states that the list of factors is non-exhaustive, the majority of cases where the trial court has allowed an unequal division have discussed hardship in the context of I.C. § 32-712. See e.g. *Hentges*, 115 Idaho at 195, 765 P.2d at 1097. An unequal division was affirmed in *Hentges* because the husband was paralyzed, unemployable, and in need of extensive medical care. The Idaho Court of Appeals recognized the important factors in the case were, *inter alia*, the health and employability of each spouse, the amount and source of each party's income, the needs of each spouse, and his or her potential earning capabilities. The decision to allow an unequal disposition was upheld because, "[the Magistrate's] decision was consistent with the factors set forth in I.C. 32-712..." *Id.* at 196, 765 P.2d at 1098. Furthermore, the purpose of I.C. § 32-712 is, in part, to set guidelines and boundaries for the Magistrate

Judge to follow in making the "threshold decision" between equal and unequal division of community property. See *Donndelinger*, 107 Idaho at 435, 690 P.2d at 370.

This Court concludes that the Magistrate Judge did not abuse his discretion in rejecting Kircher's testimony. Kircher attempted to present the evidence at trial in an effort to invalidate the quitclaim deed. The purpose of the parol evidence rule is to preserve the integrity of written documents. *Miller Const. Co. v. Stresstek, a Div. of L.R. Yegge, Co.*, 108 Idaho 187, 190, 697 P.2d 1201, 1204 (Ct. App. 1985). The testimony was excluded because it was sought to set aside a valid deed. Kircher has failed to explain how evidence, which is rejected because of the parol evidence rule, would become admissible when offered for a different purpose. Although Kircher argues that the testimony was evidence of a hardship, unlike the husband in *Hentges*, she fails to explain her hardship in the context of I.C. § 32-712. The Magistrate Judge's decision to exclude evidence regarding the transmutation of the marital home was within his discretion, consistent with applicable legal standards, and reached through the exercise of reason. Consequently, that decision will not be set aside.

### **C. Disposition of Krystal Café**

Kircher next argues Judge Robinson abused his discretion regarding the Krystal Café in two ways. First, she contends, Judge Robinson failed to follow any of the guidelines set forth by I.C. § 32-713, which govern the disposition of real property. Second, she maintains the judge should have based the equalization sum on the actual sale price, rather than on the fair market value established at trial.

The guidelines set forth by I.C. § 32-713 afford the trial court the option of: (1) awarding the property to one party with a corresponding award of value of property to the other; (2) ordering the property sold and dividing the proceeds equally between the parties; or (3) ordering the property partitioned between the parties. *Larson v. Larson*, 139 Idaho 970, 972, 88 P.3d 1210, 1212. In addition, "in appropriate circumstances, the trial court can also award property to one spouse and order the other to make payments over a reasonable period of time to equalize the division." *Id.*

Judge Robinson's order awards the Krystal Café to Kircher if she makes an equalization payment of \$108,500 within six months. If payment is not made within six months, the building is to be sold and the proceeds divided equally. On appeal Kircher argues that the judge's disposition constitutes an abuse of discretion because it does not award Kircher the building outright, which she argues is required under the first option of I.C. § 32-713. Further, Kircher contends the second option was not followed because if the building is sold, the proceeds cannot be divided equally given that the debt associated with the building was also assigned to Kircher. Thus, she contends, the trial judge abused his discretion because he exercised none of the options available to him under Idaho Code § 32-713.

Kircher's argument, however, ignores the fourth option available under *Larson*, that the trial court can award property to one spouse and order payments made over a reasonable period of time to equalize the division. *See also Smith v. Smith*, 124 Idaho 431, 860 P.2d 634 (1993). At its root, Kircher's real objection is to the value established for the property by the judge. However, Dunagan's real estate expert was essentially

uncontradicted in his valuation, unless one considers the testimony of Kircher, who is neither an expert nor unbiased. While this Court might have decided this case differently, that is clearly not the standard of review to be applied.

The second reason Kircher attacks Judge Robinson's decision regarding the disposition of the Krystal Café is because she believes the judge failed to exercise discretion in basing the equalization sum on the fair market value rather than the sale price. Kircher points to the following language from the judge's opinion as the basis for her argument:

The Defendant's proposal has appeal as it gives both the Defendant and the Plaintiff an equal stake in the sale. Despite such appeal, I deny Defendant's request.

The value of the equalization payment is fixed at the time of the Decree based upon the fair market value of the property at the time of the divorce. *Brinkmeyer v. Brinkmeyer*, 135 Idaho 596, 600, 21 P.3d 918 (2001). As noted by the Supreme Court, "Any community asset may change in value after the division of the community. This is not a reason to modify the division." *Ross v. Ross*, 117 Idaho 548, 554, 789 P.2d 1139 (1990). The Plaintiff should not be penalized by the Defendant's actions while controlling use of the building or by the vagaries of the market. By fixing the equalization payment, this Court is removed from becoming intimately involved with the Plaintiff's actions or inactions in controlling the building since the date the value was established. Also, the Defendant has alternatives to selling the Café such as by selling her own home and/or by loans.

*Order to Amend Decree of Divorce*, pg. 2-3. Kircher argues this language somehow suggests Judge Robinson felt bound to base the equalization payment on the market value of the café rather than its selling price. The first problem with this argument is that it assumes Kircher will sell the building. The judge clearly wanted the person controlling the asset to bear the risk of market changes. It was reasonable to assume

Kircher would keep the building so she could continue running her business. Such a decision could have delayed the equalization payment indefinitely. While it may be possible for a judge to retain jurisdiction, doing so is contrary to established policy favoring finality in judgments. The amended decree suggests the judge consciously exercised his discretion in favor of finality and chose to determine the value of the café at the time of trial, rather than becoming, as he put it "intimately involved with the Plaintiff's actions." *Id.* Thus, the judge's decision was within his discretion, consistent with applicable legal standards, and reached through the exercise of reason. As a result, it should not be set aside.

#### **D. Substantial Equality**

The next issue brought by Kircher's appeal is whether the judge arrived at a substantially equal division of the community property. This is a factual question. As noted, factual questions will not be disturbed if they are based on substantial evidence.

In a case such as this, the judge must divide the community property equally unless there are compelling reasons to do otherwise. *Larson*, 139 Idaho at 972, 88 P.3d at 1212. Although a judge may choose an equal division, the law does not require a mathematically equal division, nor is such a division likely to be achieved. *Shepard v. Shepard*, 94 Idaho 734, 735, 497 P.2d 321, 322 (1972). The goal, rather, is to achieve a division that is substantially equal in value. *Ross v. Ross*, 117 Idaho 548, 554, 789 P.2d 1139, 1145 (1990).

Kircher argues that because the trial judge ordered the equalization sum to be based upon the fair market value of the Krystal Café, as opposed to the eventual sale

price, it cannot be determined whether the division was truly equal. She argues the division will only be equal if the Krystal Café sells for \$236,500, the fair market value of the café determined at trial. She concludes that the building will likely sell for much less, rendering the division unequal. Her argument is unavailing. As noted, the only expert testimony elicited at trial set the value of the café at \$236,500. To the extent Kircher disputes the trial judge's conclusions, she is in reality in disagreement with the proof presented at trial. This is not a valid basis for this Court to disturb the trial judge's decision. Furthermore, in the interest of finality and certainty, the Magistrate Judge is not required to achieve an exactly equal division, rather he is only required to substantially approximate an equal division. A review of the record reveals that the Magistrate Judge did just that. He heard testimony from each side, he weighed that testimony and he made a decision, based on substantial evidence, that approximates an equal division of the community property.

#### **E. Value of Flatbed Trailer**

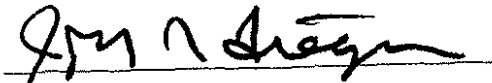
Finally, it is clear from the record, and the parties agree, that Judge Robinson erred in calculating the value of a flatbed trailer. The trailer was valued by the parties at \$600. However, the decree of divorce listed the value as \$6,000. This appears to be a simple typographical error. On this issue and this issue alone, the decision of the trial judge is reversed and remanded to correct this error.

#### **CONCLUSION**

The Magistrate Judge's decision is **AFFIRMED** in its entirety with the exception of the value of Dunagan's flatbed trailer. The case is **REMANDED** to Judge Robinson

for a recalculation of the distribution of the community property of the parties based on the changed value of the flatbed trailer.

Dated this 26<sup>th</sup> day of July, 2007.

  
John R. Stegner  
District Judge



CERTIFICATE OF SERVICE

I do hereby certify that full, true, complete and correct copies of the foregoing  
OPINION ON APPEAL was mailed to:

Garry W. Jones  
Jones, Brower, & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

U.S. Mail  
 Overnight Mail  
 Fax  
 Hand Delivery

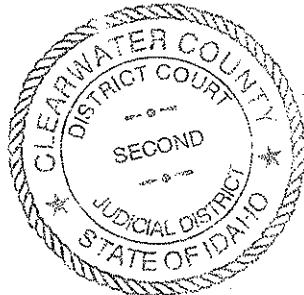
Paul Thomas Clark  
Clark and Feeney  
The Train Station, Suite 201  
13<sup>th</sup> and Main Streets  
P.O. Drawer 285  
Lewiston, ID 83501

U.S. Mail  
 Overnight Mail  
 Fax  
 Hand Delivery

Judge Randall W. Robinson  
Clearwater County Courthouse  
PO Box 446  
Orofino, ID 83544

U.S. Mail  
 Overnight Mail  
 Fax  
 Hand Delivery

On this 27<sup>th</sup> day of July, 2007.



  
Deputy Clerk

Garry W. Jones  
 JONES, BROWER & CALLERY, P.L.L.C.  
 Attorneys at Law  
 1304 Idaho Street  
 P.O. Box 854  
 Lewiston, ID 83501  
 (208) 743-3591  
 Idaho State Bar No. 1254

CLERK-DISTRICT COURT  
 CLEARWATER COUNTY  
 GROFOND, IDAHO

2007 AUG 23 P 12:05

CASE NO. CV05-324

BY SJC DEPT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

CHRIS M. DUNAGAN,	)	CASE NO. CV 05 - 00324
	)	
Respondent,	)	
	)	
vs.	)	NOTICE OF APPEAL
	)	
KELLY A. DUNAGAN,	)	
	)	
Appellant.	)	
_____	)	

TO: CHRIS M. DUNAGAN, the above named respondent; and  
 TO: PAUL THOMAS CLARK, attorney for the above-named respondent; and  
 TO: THE CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

I. The above named appellant, KELLY A. DUNAGAN, appeals against the above named respondent to the Idaho Supreme Court from the *Opinion on Appeal* entered in the above-entitled action on the 26<sup>th</sup> day of July, 2007, Honorable Judge John R. Stegner presiding.

2. That the parties have a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(2) I.A.R.

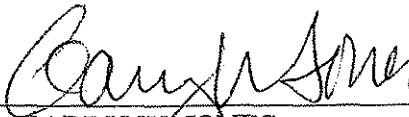
3. The issues on appeal are:

- a. Whether the Court erred in determining that the appellant transmuted her home from her separate property to community property.
- b. Whether the Court erred in failing to award an unequal distribution of property in favor of the appellant.
- c. Whether the Court erred in requiring the appellant to continue to be responsible for the condition of property ordered by the Court to be sold and further requiring the appellant to be responsible for paying all expenses associated with the property such as water, sewer, garbage, power and loan payments.
- d. Whether the Court erred in failing to reallocate sale proceeds from the sale of the Krystal Kafe building in the event the sale price of said building is less than the \$196,906.36 equity contemplated by the Court.
- e. Whether the Court erred in failing to find the existence of an agreement between the parties that they would keep all of their respective property acquired prior to marriage, as their sole and separate property during their marriage.
- f. Such others issues which may be raised by appellant.

4. No orders have been entered sealing any portion of the record.
  
5. The appellants request the preparation of the entire reporter's standard transcript as defined in Rule 25(a), I.A.R.
  
6. The appellant requests the Clerk's record be prepared as automatically included under Rule 28, I.A.R.:
  
7. I certify:
  - (a) That a copy of this notice of appeal has been served on the reporter.
  - (b) That the clerk of the district court has been paid the estimated fee for preparation of the reporter's 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.
  - (e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 22<sup>nd</sup> day of August, 2007.

JONES, BROWER & CALLERY, P.L.L.C.

By   
GARRY W. JONES  
Attorney for Appellant

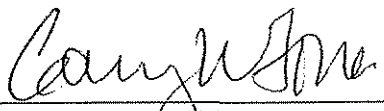
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *NOTICE OF APPEAL* was, this 29<sup>th</sup> day of August, 2007,

- hand-delivered by providing a copy to: Valley Messenger Service; hand-delivered;
- mailed, postage pre-paid, by first class mail; or
- transmitted via facsimile  
To (208) 746-9160

to:

PAUL THOMAS CLARK  
CLARK AND FEENEY  
THE TRAIN STATION, SUITE 201  
13<sup>TH</sup> & MAIN STREETS  
P.O. DRAWER 285  
LEWISTON, ID 83501

By   
GARRY W. JONES  
Attorney for Appellant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

CHRIS M. DUNAGAN,	)	CASE NO. CV2005-00324
	)	
Plaintiff-Respondent,	)	DOCKET NO. #34516
	)	
Vs.	)	CLERK'S CERTIFICATE
	)	OF EXHIBITS
	)	
KELLY A. DUNAGAN,	)	
	)	
Defendant-Appellant,	)	
	)	

I, ROBIN CHRISTENSEN, Clerk of the District County of the Second Judicial District of the State of Idaho, in and for the County of Clearwater, do hereby certify:

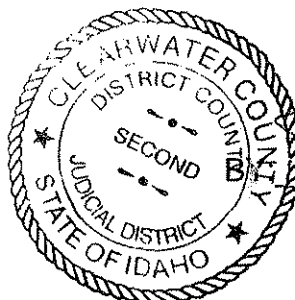
That the following is a list of lodged document which are being forwarded to the Supreme Court as Exhibits in this cause:

EXHIBITS: See Exhibit List filed 10/29/07

LODGED DOCUMENTS:

Transcript of a Court Trial on June 19<sup>th</sup> and 20<sup>th</sup>, 2006.

29<sup>th</sup> IN WITNESS WHEREOF, I have hereunto set my hand and official seal this day of October, 2007.



ROBIN CHRISTENSEN  
Clerk of the District Court

*Deputy*

CLERK'S CERTIFICATE OF EXHIBITS

00000087

## Exhibit Summary

Case: CV-2005-0000324

Chris M Dunagan vs. Kelly A Dunagan

Sorted by Exhibit Number

Number	Description	Result	Storage Location Property Item Number	Destroy Notification Date	Destroy or Return Date
1	1 - Property value and debt list, distribution summary.	Admitted	Court file		
		Assigned to:	Clark, Paul Thomas		
2	2 - 2001 tax return.	Admitted	court file		
		Assigned to:	Clark, Paul Thomas		
3	3 - 2002 tax return.	Admitted	court file		
		Assigned to:	Clark, Paul Thomas		
4	6 - 2005 Tax return.	Admitted	court file		
		Assigned to:	Clark, Paul Thomas		
5	8 - Answer to Plaintiff's 1st set of interrogatories.	Admitted	court file		
		Assigned to:	Clark, Paul Thomas		
6	10 - Purchase/Sale agreement.	Admitted	court file		
		Assigned to:	Clark, Paul Thomas		
7	11 - Loan documents.	Admitted	court file		
		Assigned to:	Clark, Paul Thomas		
8	12 - Restricted use report.	Admitted	court file		
		Assigned to:	Clark, Paul Thomas		
9	13 - Appraisal report by Carmen Cody	Admitted	court file		
		Assigned to:	Clark, Paul Thomas		
10	14 - 2005 Tax return of Christopher Dunagan.	Admitted	court file		
		Assigned to:	Clark, Paul Thomas		
11	15 - Residential loan application.	Admitted	court file		
		Assigned to:	Clark, Paul Thomas		
12	16 - Tax asset detail.	Admitted	court file		
		Assigned to:	Clark, Paul Thomas		
13	23 - Defendant's bank statement.	Admitted	court file		
		Assigned to:	Clark, Paul Thomas		
14	A - Value and debt distribution summary.	Admitted	court file		
		Assigned to:	Jones, Garry W		

00000088

Date: 10/29/2007

Second Judicial District Court - Clearwater County

User: SUE

Time: 10: M

Exhibit Summary

Page 2 of 2

Case: CV-2005-0000324

Chris M Dunagan vs. Kelly A Dunagan

Sorted by Exhibit Number

Number	Description	Result	Storage Location Property Item Number	Destroy Notification Date	Destroy or Return Date
15	B - Chronological bank statements	Admitted	court file		

Assigned to: Jones, Garry W

00000089



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

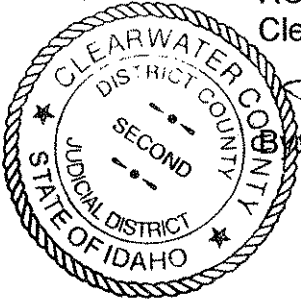
CHRIS M. DUNAGAN,	)	CASE NO. CV2005-00324
	)	
Plaintiff-Respondent,	)	DOCKET NO. #34516
	)	
Vs.	)	CLERK'S CERTIFICATE
	)	
KELLY A. DUNAGAN,	)	
	)	
Defendant-Appellant,	)	
	)	

I, Sue K. Summerton, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Clearwater, 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, full and correct record of the pleading and documents under Rule 28 of the Idaho Appellate Rules.

I further certify that all documents lodged, including briefs, in the above entitled cause will be duly lodged as Exhibits with the Clerk of the Supreme Court, along with the Court Reporter's Transcript, if requested, and Clerk's Record.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Orofino, Idaho this 24th day of October, 2007.

ROBIN CHRISTENSEN  
Clerk of the District Court



Sue K. Summerton  
Deputy

CLERK'S CERTIFICATE

00000090

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

CHRIS M. DUNAGAN, )  
 ) CASE NO. CV2005-00324  
 )  
 Plaintiff-Respondent, ) DOCKET NO. #34516  
 )  
 ) CERTIFICATE OF SERVICE  
 Vs. )  
 )  
 )  
 KELLY A. DUNAGAN, )  
 )  
 )  
 Defendant-Appellant, )  
 )  
 )  
 )

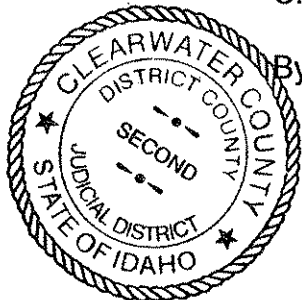
I, Sue K. Summerton, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Clearwater, do hereby certify that I have personally served or mailed, by United States mail, postage prepaid, a copy of the Clerk's Record and Reporter's Transcript, if a transcript was requested, to each of the parties or their Attorney of Record as follows:

Garry W. Jones  
Jones, Brower & Callery  
P.O. Box 854  
Lewiston, ID 83501

Paul T. Clark  
Clark and Feeney  
P.O. Drawer 285  
Lewiston, ID 83501

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal of the said Court this 29<sup>th</sup> day of October, 2007.

ROBIN CHRISTENSEN  
Clerk of the District Court



By: Sue K. Summerton  
Deputy Clerk

CERTIFICATE OF SERVICE

00000091