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IN THE UTAH COURT OF APPEALS

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<tr><td>ROBERT KEITH LEVIN,

Petitioner and Appellee,

vs.

HOPE M. CARLTON,

Respondent and Appellant.</td><td>APPELLEE'S BRIEF

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Civil No. 054700107</td></tr>
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ROBERT KEITH LEVIN, Petitioner and Appellee, vs. HOPE M. CARLTON, Respondent and Appellant.	APPELLEE'S BRIEF Appeal No. 20080192 Civil No. 054700107

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Pursuant to Utah Rule of Appellate Procedure 24(b), Appellee Robert Keith Levin submits the following responsive appellate brief.

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Statement of Jurisdiction

This Court has jurisdiction over this matter pursuant to Utah Code section 78-2(a)-3(j), as this case was poured over from the Utah Supreme Court. *See* Utah Code Ann. § 78-2(a)-3(j).

Issues Presented For Review

1. Did the district court correctly interpret and apply the parties' prenuptial agreement? Prenuptial agreements are "construed and treated as ... contracts in general." *Berman v. Berman*, 749 P.2d 1271, 1273 (Utah Ct. App. 1988). The lower court's "interpretation of a contract presents a question of law, which we review for correctness." *Green River Canal Co. v. Thayn*, 2003 UT 50, ¶ 16, 84 P.3d 1134.

2. Did the district court err when it denied Appellant's motion to compel discovery? "Generally, the trial court is granted broad latitude in handling discovery matters." *R & R Energies v. Mother Earth Industries, Inc.*, 936 P.2d 1068, 1079 (Utah 1997) (citation omitted). This Court will "not find abuse of discretion absent an erroneous conclusion of law or where there is no evidentiary basis for the trial court's rulings." *Askew v. Hardman*, 918 P.2d 469, 472 (Utah 1996).

3. Did the district court err when it determined the amount of the alimony award? District courts have "'considerable discretion in determining alimony ... and [determinations of alimony] will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated.'" *Riley v. Riley*, 2006 UT App 214, ¶ 15, 138 P.3d 84 (quoting *Davis v.*

Davis, 2003 UT App 282, ¶ 7, 76 P.3d 716 (alterations in original)).

4. Did the district court err in regard to its attorney fee determinations? "'The decision to award attorney fees and the amount thereof rests primarily in the sound discretion of the trial court.'" *Riley*, 2006 UT App 214, ¶ 15 (quoting *Childs v. Childs*, 967 P.2d 942, 947 (Utah Ct.App.1998). This determination is reviewed for abuse of that discretion. *See Taylor v. Hansen*, 958 P.2d 923, 931 (Utah Ct. App. 1998) (overruled on other grounds by *Sittner v. Schriever*, 2000 UT 45, 2 P.3d 442).

Statement of the Case

Appellant's "Statement of the Facts" is incorrect and ignores the actual findings made by the district court, which findings have not been properly attacked by Appellant. To successfully challenge these findings, Appellant "must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous." *Shepherd v. Shepherd*, 876 P.2d 429, 431 (Utah Ct. App. 1994) (quotations and citations omitted). "If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case." *Id.* (quotations and citation omitted).

Because Appellant has made no effort to marshal the evidence or attack the district court's factual findings, the facts of this case are as set forth in the district court's Findings

of Fact and Conclusions of Law, R. 2347-2396, a copy of which is attached hereto as Addendum Ex. 1 and incorporated herein by this reference.[1]

Summary of Arguments

Appellant cannot show any error committed by the district court when it interpreted and applied the prenuptial agreement. The terms of that agreement are clear and consistent with the district court's interpretation and application thereof.

Appellant is unable to show any abuse of discretion relating to the district court's discovery ruling; to the contrary, because the information sought by Appellant was irrelevant, the district court's denial of such discovery was correct.

Last, Appellant fails to show any abuse of discretion relating to the district court's alimony award or its determinations relating to attorney fees. Appellant's argument that her version of the facts should have been accepted by the district court is insufficient on appeal, and Appellant offers no legal basis for her argument that the attorney fee awards were improper.

Accordingly, the district court's ruling should be affirmed. In addition, Appellee should be awarded his attorney fees incurred on appeal.

Argument

I. Appellant Fails to Show Any Error Committed by the District Court in its Construction and Application of the Prenuptial Agreement.

---

[1]The district court clarified and modified certain factual findings in a Ruling dated October 12, 2007, which Ruling is attached hereto as Addendum Ex. 2.

Appellant alleges that the district court erred as a matter of law in its construction of the prenuptial agreement (a copy of which is attached hereto as Addendum Ex. 4). Specifically, Appellant argues that the court erred when it failed to construe this agreement in her favor. This argument is without merit.

Utah courts have "explicitly acknowledged the general authority of spouses or prospective spouses to arrange property rights by a contract that is recognized and enforced by a court in the event of a divorce." *Reese v. Reese*, 1999 UT 75, ¶ 24, 984 P.2d 987. "Such agreements are 'construed and treated as...contracts in general.'" *Shepherd*, 876 P.2d at 431 (quoting *Berman v. Berman*, 749 P.2d 1271, 1273 (Utah App.1988). "Therefore, the first step in interpreting a prenuptial agreement is to look 'to the four corners of the agreement to determine the intention of the parties.'" *Id.* (quoting *Neilson v. Neilson*, 780 P.2d 1264, 1267 (Utah Ct. App.1989)).

Prenuptial agreements "'are valid so long as there is no fraud, coercion, or material nondisclosure.'" *Shepherd*, 876 P.2d at 431 (quoting *Huck v. Huck*, 734 P.2d 417, 419 (Utah 1986); *see also Matter of Estate of Beesley*, 883 P.2d 1343 (Utah 1994) ("premarital agreements are valid provided there is no material nondisclosure in connection with their negotiation and execution."). As described by the Utah Supreme Court:

> [T]he general principle derived from our case law is that spouses or prospective spouses may make binding contracts with each other and arrange their affairs as they see fit, insofar as the negotiations are conducted in good faith...and do not unreasonably constrain the court's equitable and statutory duties.

Reese, 1999 UT 75, ¶ 25 (citations omitted).

The district court followed these guidelines and determined that the prenuptial agreement was valid, enforceable and binding on the parties. *See* Ruling on Motion for Partial Summary Judgment (R.1029-34); *see also* Findings of Fact and Conclusions of Law, p.3, ¶ 8 (R. 2349) ("the evidence presented at trial reinforces the Court's determination that the Agreement is valid and enforceable"). The court specifically held that, at the time of the execution of this agreement, both parties "were represented by capable counsel in negotiating the prenuptial agreement and there were negotiations back and forth that resulted in a final agreement that reflected input from both [parties]." Findings of Fact and Conclusions of Law, p.3, ¶ 9.

Appellant does not challenge the district court's findings, nor its conclusion that the prenuptial agreement was "valid and enforceable." Instead, Appellant argues

> In this case, the trial court made no findings, and apparently gave no consideration whatsoever, to whether the ultimate outcome it imposed was just, fair and equitable to both parties.

Appellant's Brief, p. 31. This assertion is without any legal basis; a district court's failure to interpret a prenuptial agreement in Appellant's favor is not a ground for reversal.

As set forth above, the general rule is that prenuptial agreements are valid as long as "there is no fraud, coercion, or material nondisclosure.'" *Shepherd*, 876 P.2d at 431; *see also* *Reese*, 1999 UT 75, ¶ 25. There is no argument by Appellant that any of these exceptions apply. Instead, Appellant offers the unique argument that, because a district court may have

some discretion to modify prenuptial agreements, a district court's decision *not to exercise* that discretion creates a ground for reversal as a matter of law; in other words, the argument seems to be that the failure to exercise discretion constitutes an abuse of that discretion. This argument is unsupported, defies common sense, would eviscerate the general rule set forth in *Reese*, 1999 UT 75, ¶ 25, and would nullify the right of parties to arrange their property division through contract. *See id.*, ¶ 24. There is simply no requirement that a district court, after determining the validity of a prenuptial agreement, conduct an additional and independent factual inquiry as to the fairness of that document. Indeed, it is presumably the analysis set forth in *Shepherd,* 876 P.2d at 431, that answers this question. In any event, even if one gives this unsupported argument the benefit of the doubt, Appellant fails to set forth *any* facts of record that could show that such an inquiry would produce a different result. *See Mule-Hide Products Co., Inc. v. White*, 2002 UT App 1, ¶ 12, 40 P.3d 1155 ("Even where error is found, reversal is appropriate only in those cases where, after review of all the evidence presented at trial, it appears that absent the error, there is a reasonable likelihood that a different result would have been reached." (quotations and citation omitted)).

Accordingly, Appellant has failed to provide a ground for reversal.

II. Appellant Fails to Establish Error by the District Court When it Interpreted "Earnings" Under the Prenuptial Agreement.

Appellant argues that the district court erred when it determined there were no "earnings" to divide between the parties under the prenuptial agreement. Appellant

does not attack the district court's findings on this matter, but merely reargues its unsuccessful position that "earnings" should be interpreted extremely broadly. This argument is insufficient to substantiate district court error.

The district court's determinations regarding "earnings" under the prenuptial agreement were predicated on numerous findings, including the following:

> 36. The Agreement, paragraphs D and F.1 reverses the presumption under California law that any income resulting from the efforts of a husband or wife during marriage, and any property acquired with that income, is community property. Instead, all income, and all property acquired with that income, is separate property unless the Agreement provides otherwise.
>
> 37. Subparagraph D.1 of the Agreement provides that earnings are governed by paragraph F. Subparagraph F.1 of the Agreement provides that earnings from personal services, skills, efforts, talents, or work are separate property, except as the Agreement specifically provides. Subparagraph F.2 of the Agreement creates a community property right in the "earnings" or "base salary" derived from actual effort or employment of Robert. Earnings or base salary are defined as compensation for labor or services performed by Robert, but do not include any benefits associated with such earnings or base salary.
>
> 38. The only earnings or base salary derived from actual efforts of Robert were paid to him during the first four months following the marriage and were promptly consumed on community expenses, thus leaving no community property.
>
> 39. Subparagraph F.3 of the Agreement provides that: In the event [Robert] enters into any type of business venture or ventures from and after the date of marriage from which [Robert] will receive earnings or salary therefrom (regardless of whether such earnings or salary have been derived from actual effort or services performed by [Robert] for or on

behalf of the business venture), such earnings or salary, derived from such business venture or ventures, shall be community property. For purposes of this paragraph F.3, the term "earnings" or "salary" derived from said business venture or ventures <u>excludes</u> pension and deferred income contributions, stock, stock options, bonuses, benefits and rights and perquisites, which items shall remain [Robert's] separate property subject to Paragraphs F.5, F.6, and F.7. It is the parties intention that all property acquired with such "earnings" or "salary" (defined under this Paragraph F.3) shall be community property unless the parties agree otherwise in writing

40. The parties dispute the meaning of the term "earnings" as used in F.3 Robert maintains that the inclusion of the phrase "whether such earnings or salary have been derived from actual effort or services performed by Robert for or on behalf of the business venture" simply loosens the requirement that Robert actually perform services for his business venture to make his earnings or salary community property and the term "earnings" still has the customary meaning under California law. California law defines earnings as salary or wages of a person received because of services provided. Hope maintains that the term "earnings" as used in F.3 includes any and all profits allocated to Robert from [Flat Iron Mesa and the Resort]

41 This Court is required to read the Agreement as whole in order to determine the meaning and intent of the parties and to harmonize its various provisions. Therefore, Subparagraph F.3 must be interpreted in light of the following provisions of the Agreement:

a. Subparagraph F.4 which defines Kellwood payments, except salary, as separate property.

b. Subparagraph F.[illegible] which creates a community property right in bonuses [illegible] by Robert as an employee under limited circumstances. The Court finds

that none of these limited circumstances apply.

c. Subparagraph F.6 which provides an additional community property right in bonuses based on the duration of the marriage. The Court finds that there were no bonuses paid to Robert that would invoke this subparagraph.

d. Subparagraph F.7 which provides a community property right in pension payments based on longevity of the marriage. The Court finds that Robert has not received any pension payments.

e. Subparagraph F.8 excludes any community property participation in stock options or dividends.

f. Subparagraph F.9 which provides that earnings or salary from joint business ventures are community property, but joint business ventures must be established by written agreement. The Court finds that there were no joint business ventures.

g. Paragraph I of the Agreement provides that all profits, rents, increase, appreciation and income from Robert's separate property are also his property. A change in the form of Robert's separate property does not change the characterization of that property. If Robert sells separate property and purchases other property, that new property is also Robert's separate property.

h. Paragraph J of the Agreement provides that devoting time, skill or effort to

separate property does not change it to community property.

42. The Court finds that Hope's asserted meaning of the term "earnings" as used in subparagraph F.3 to mean any kind of profit from any business venture to be untenable. The Court accepts Robert's interpretation as valid under California law and finds that the terms "earnings" means payments based at least in theory on services, such as actual salary, guaranteed payments to a member in a limited liability company, or draws to a partner in an operating business partnership. Any other interpretation would be in conflict with the remainder of the Agreement and render it superfluous. The Court finds it hard to believe that Robert went to the trouble of obtaining such a comprehensive and detailed prenuptial agreement so that he could ensure that Hope could claim one-half of the profits from any business venture in which he would become involved.

43. Hope also attempted to persuade the Court that Robert was actively engaged in the management of Flat Iron Mesa. The Court rejects this argument and finds that Robert had virtually no active involvement in Flat Iron. He was a passive investor. Even if the Court were to adopt Hope's argument however, there would still not be any earnings as contemplated by the Agreement because it was Robert's capital investment, not his business efforts, that resulted in profits from Flat Iron.

44. The Court finds that Robert did not receive any earnings or salary from the Resort or Flat Iron Mesa as contemplated by the Agreement and there is no community property.

45. Although the Court finds that the Agreement in unambiguous and can be interpreted as a matter of law, even if the Court were to consider parol evidence, its interpretation of the term "earnings" would be the same. Robert testified that he always intended that Hope would only participate in his base salary and then in bonuses and pension payments in the limited circumstances set forth above. Robert specifically remembers discussing the contents of F.3 and understanding it to mean that

> Hope would only participate in his wages, salary, or other similar payments resulting from any new active business he may start. Robert's interpretation of the term "earnings" is consistent with the overall expressed purpose of the Agreement. Hope had virtually no recollection of the specific provisions of the Agreement even though her attorney discussed the terms of the Agreement with her on numerous occasions. Hope's description of what she understood the Agreement to mean was general and did not appear to be based on any actual memory of the language of the Agreement or advice of her counsel.

Findings of Fact and Conclusions of Law, ¶¶ 36-45, pp. 11-17 (R.2358-2363). The district court also gave a detailed explanation for its ruling in its September 14, 2007 Memorandum Decision, pp. 11-19 (R.2239-47) (attached hereto as Addendum Ex. 3). Appellant makes no effort to challenge the district court's findings, and this Court may therefore assume that the record supports such findings. *See Shepherd v. Shepherd*, 876 P.2d at 431; *Saunders v. Sharp*, 806 P.2d at 199; *Matter of Estate of Beesley*, 883 P.2d at 1349.

Instead, Appellant re-argues that the term "earnings" should be read extremely broadly, so that it encompasses *any* increase in Appellee's separate property. This argument is once again without basis. The prenuptial agreement defines earnings as "compensation for labor or services performed by Petitioner." Prenuptial agreement, p. 9. Similarly, the California Supreme Court recently held that the common definition of earnings is "the salary or wages of a person." *Prachasaisoradej v. Ralphs Grocery Co., Inc.*, 165 P.3d 133, 138 (Cal. 2007) (citing *American Heritage Dict.*, 2d college ed. 1985). Appellant has not taken a salary or wages in relation to the developments at issue; therefore there are no earnings under the prenuptial agreement. *See* Findings of Fact and Conclusions of Law, ¶¶ 38-42;.

September 14, 2007 Memorandum Decision, p. 17.

Appellant gives no explanation as to why the term "earnings" should be expanded beyond its plain meaning. The law in California, as in Utah, is that premarital agreements are interpreted according to the ordinary rules of contract construction. *See In re Bonds,* 5 P.3d 815, 24 Cal.4th 1, 13 (Cal. 2000); *Shepherd*, 876 P.2d at 431. These rules require that a contract be read as a whole in order to determine the meaning and intent of the parties and to harmonize its various provisions. *See General Precision, Inc. v. Int'l Ass'n of Machinists*, 241 Cal.App.2d 744, 747 (Cal. App. 1966); *Shepherd*, 876 P.2d at 431. The intent of the parties is set forth extensively and repeatedly throughout the prenuptial agreement [illegible] to keep the parties' separate property separate, including all rents, issues, profits, increase, appreciation, and income from that separate property. *See* prenuptial agreement, pg. 19.

To adopt Appellant's interpretation of the prenuptial agreement would not only be in direct contradiction with the obvious meaning and intent of the parties, it would render virtually the entire prenuptial agreement superfluous. *See* Findings of Fact and Conclusions of Law, ¶ 42 ("The Court finds that Hope's asserted meaning of the term "earnings ... to be untenable. The Court...finds that the terms "earnings" means payments based at least in theory on services, such as actual salary.... Any other interpretation would be in conflict with the remainder of the Agreement and render it superfluous."). The prenuptial agreement is not ambiguous and Appellant's attempt to find ambiguities by discussing isolated words and phrases from [the agreement] is unconvincing." *In re Miller*, 2004 WL 1966062 *3 (Cal.App.

2nd. Dist., 2004). The only tenable reading of this section is to interpret it to mean that all earnings or salary taken by Appellee are to be treated as earnings even if his labor and efforts did not directly result in the earnings that were taken. Because the district court found that Appellant has never taken salary or earnings as contemplated by the prenuptial agreement, there are no "earnings."

Moreover, Appellant's focus on the definition of "earnings" as set forth in the prenuptial agreement is performed in a vacuum; she supplies this Court with no facts that could support a different ruling, even if the Court were to accept her definition of "earnings." Thus, much like in the preceding section, Appellant fails to set forth any facts of record that could show that a different definition of "earnings" would produce a different result. *See Mule-Hide Products Co., Inc. v. White*, 2002 UT App 1, ¶ 12 40 P.3d 1155 (holding that "reversal is appropriate only in those cases where, after review of all the evidence presented at trial, it appears that absent the error, there is a reasonable likelihood that a different result would have been reached.").

Accordingly, Appellant fails to set forth a reason to reverse the district court's determinations relating to "earnings" as defined by the prenuptial agreement.

III. Appellant Fails to Show Error in the District Court's Discovery Ruling.

Appellant appears to assert that the district court erred when it denied Appellant's motion to compel discovery relating to earnings subsequent to the parties' separation. The argument is unclear because Appellant fails to reference any particular order from which she

appeals. In any event, Appellant fails to show the district court abused its discretion.

"Generally, the trial court is granted broad latitude in handling discovery matters." *R & R Energies v. Mother Earth Industries, Inc.*, 936 P.2d 1068, 1079 (Utah 1997) (citing *Utah Dep't of Transp. v. Osguthorpe*, 892 P.2d 4, 6 (Utah 1995)). This Court will "not find abuse of discretion absent an erroneous conclusion of law or where there is no evidentiary basis for the trial court's rulings." *Askew v. Hardman*, 918 P.2d 469, 472 (Utah 1996). In *Shepherd v. Shepherd*, 876 P.2d 429 (Utah Ct. App. 1994), plaintiff argued that the trial court erred by limiting the trial proceedings solely to the issue of whether the prenuptial agreement was valid and binding. This Court disagreed, holding:

> A trial court has broad discretion to determine the manner in which proceedings before it are conducted.. We will not interfere with a trial court's decision to limit proceedings unless the trial court abused its discretion. In the present case, the trial court limited testimony, for a period of time, to the question of the validity and enforceability of the prenuptial agreement. Since the validity and enforceability of the prenuptial agreement was a central issue as to how the court would determine the value and distribution of the marital estate, the trial court did not abuse its discretion in limiting testimony and evidence to that question.

Id. at 432.

Here, Appellant moved to compel discovery of Appellee's earnings subsequent to the date of the parties' separation. *See* Motion to Compel (R. 1308-10). Appellee objected on the basis that the inquiry was irrelevant because, under California law, "[t]he earnings and accumulations of a spouse and the minor children living with, or in the custody of, the

spouse, while living separate and apart from the other spouse, are the separate property of the spouse." Obj. and Memo. in Opp. to Motion to Compel, p. 3 (quoting Cal.Fam.Code §771) (R.1410). The district court agreed with Appellee:

> The court denies the motion to compel. The court hereby determines that California law will govern the property settlement in this case. The court is persuaded that California law does not allow earnings after a couple stops living together to be treated as community property. The prenuptial agreement does not expressly, nor by fair implication of the meaning of any provision thereof, alter the application of this aspect of California law. Wife is only entitled to property that derives from marital earnings. It is therefore appropriate that earnings and property after December 31, 2005, be off limits to discovery.

Ruling on Motion to Compel, p. 1 (R.1527).

Appellant makes no mention of this ruling, and fails to describe precisely why she believes the district court abused its discretion therein. Instead, Appellant simply reasserts her incorrect legal argument - that, despite the clear language of the governing California statute, the district court should have allowed discovery as to post-separation earnings.

As Appellee argued below, Section X of the prenuptial agreement provides that it "shall be subject to and interpreted under the laws of the State of California." *See* prenuptial agreement, p. 42. California law provides that the community interest in any earnings ends on separation. *See* Cal.Fam.Code §771 ("The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse."). Because the parties

separated in late 2005, Appellant had no right to discover anything "earned" by Appellee in 2006 or 2007; such information was irrelevant.

Appellant cites anew to *In re Marriage of Geraci*, 144 Cal.App. 4th 1278 (Cal.App. 2nd. Dist., 2006), to support her argument that post-separation earnings are community property. In *Geraci,* the court addressed the "inherent tension" between the rule that a community property business should be valued as of the date of trial and the rule that *a spouse's earnings after separation are his or her separate property*. *Id.* at 1290 (emphasis added). The court felt it was inequitable to value a community property business at the date of trial when the post-separation efforts of one spouse had "greatly increased the community estate which must then be divided with the other spouse." *Id.* (citation omitted). The court held that "*because earnings and accumulations following separation are the spouse's separate property*, it follows that the community interest should be valued as of the date of separation-the cutoff date for the acquisition of community assets." *Id.* at 1291 (emphasis added).

This holding undermines Appellant's argument. In *Geraci,* there was never an issue as to the categorization of post-separation earnings which are clearly the separate property of the spouse who earned them. The language that Appellant cites from *Geraci* relates to the valuation of a "community property business," not post-separation earnings. *Id.* at 1290. Section 2552 has no impact whatsoever on the classification or valuation of post-separation earnings which are unambiguously defined as separate property pursuant to Section 771. In

addition, the argument that the phrase "from and after the date of marriage" somehow trumps California law that post-separation earnings are separate property is without any basis.

These arguments were presented to the district court, which correctly held that, under the clear California statute, post-separation earnings were irrelevant and therefore not discoverable. Appellant is unable to show the district court abused its discretion in this regard.

Appellant makes a second argument, that the district court's ruling was erroneous as a matter of Utah law since such earnings "bear on the determination of alimony." Appellant has failed to show where this argument was preserved below. In any event, post-separation earnings were *irrelevant* to the district court's alimony determination. "The fundamental purpose of alimony is to enable the receiving spouse to maintain as nearly as possible the standard of living enjoyed during the marriage and to prevent the spouse from becoming a public charge." *Bridenbaugh v. Bridenbaugh*, 786 P.2d 241, 242 (Utah Ct. App.1990) (quotations and citation omitted). "In determining whether to award alimony and in setting the amount, a trial court must consider the needs of the recipient spouse; the earning capacity of the recipient spouse; the ability of the obligor spouse to provide support; and, the length of the marriage." *Kelley v. Kelley*, 2000 UT App 236, ¶ 26, 9 P.3d 171 (quotations and citations omitted); *see also Batty v. Batty*, 2006 UT App 506, ¶ 4, 153 P.3d 827. "If these factors have been considered, we will not disturb the trial court's alimony award unless such a serious inequity has resulted as to manifest a clear abuse of discretion." *Childs v. Childs*,

967 P.2d 942, 946 (Utah Ct. App.1998) (quotations and citations omitted).

Utah Code section 30-3-5(8) provides certain factors a district court shall consider when making alimony determinations. *See* Utah Code Ann. § 30-3-5(8). The district court specifically analyzed each such factor. *See* Findings of Fact and Conclusions of Law, ¶¶ 46-71, pp. 17-23 (R. 2363-69). The district court determined that "[Appellee] has stipulated to the Court that he can afford any reasonable alimony award, thus fulfilling the Court's inquiry into the third factor." *Id.*, ¶ 49.

This finding, which is not challenged on appeal, is dispositive. Where Appellee concedes that he can and will pay *whatever* reasonable alimony is awarded, no purpose is served by requiring him to disclose post-separation earnings. *See Bridenbaugh,* 786 P.2d at 243 ("Plaintiff...claims the court erred by refusing to allow full discovery of defendant's current financial condition. We find no merit in this argument, as defendant conceded that his present income was eight times that at the time of the divorce... No purpose would have been served by providing any more detailed information.") The purpose of alimony is to "enable the receiving spouse to maintain as nearly as possible the standard of living enjoyed during the marriage," *id.* at 242; the disclosure of Appellee's post-separation earnings adds nothing to this analysis.

Accordingly, Appellant shows no error committed by the district court.

IV. and V. Appellant's Arguments Relating to Standard of Living Expenses and Alimony Adjustment Fail Due to Failure to Challenge the Underlying Factual Findings.

Appellant argues in sections IV and V of her brief that the district court erred when it determined the amount of the alimony award, urging in each case that her version of the facts should have been accepted. *See* Brief of Appellant, p. 42, 44-45. Because Appellant has failed to properly attack the district court's factual findings, these arguments are insufficient to establish reversible error.

Appellant's first argument is simple enough: Appellant's factual allegations regarding her monthly monetary requirements should have been accepted by the court. Appellant's second argument is more difficult to follow. Appellant initially suggests the district court should have determined that additional alimony was proper pursuant to Utah Code section 30-3-5(8)(a)(vii) (relating to educational expenses). However, Appellant fails to give any reason why this section would apply, given the fact that Appellee's "education" took place long ago and had *no bearing* on this case. *See, e.g.*, Findings of Fact and Conclusions of Law, ¶ 5, pp. 2-3 (R.2348-49) (noting that Appellee had already accumulated his wealth through business ventures prior to the parties' marriage). Appellant then suggests that the district court should have augmented her alimony award based on her allegations of "contributions" to post-separation earnings. In each argument, Appellant fails to make any citation to the record for the allegations she asserts. More importantly, Appellant fails to even reference the district court's findings as to alimony.

The district court made numerous, detailed findings in regard to the amount of and the basis for the alimony award. *See* Findings of Fact and Conclusions of Law, ¶¶ 52-68,

pp. 18-22 (R.2364-68). In the end, the district court even augmented the alimony award by allowing for a significant "cushion" should Appellant remarry. *See id.*, ¶¶ 69-71, pp. 22-23 (R.2368-69).

To successfully challenge these findings, Appellant "must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous." *Shepherd v. Shepherd*, 876 P.2d 429, 431 (Utah Ct. App. 1994) (quotations and citations omitted). "'If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case.'" *Id.* (quoting *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991)).

Plaintiff has made *no effort* to challenge the findings relating to alimony in the instant case, and has failed to marshal any evidence in support thereof.[2] Simply reasserting a few facts, with no citation to the record, and no reference to the facts as determined by the district court, falls far short of meeting Appellant's burden:

Again, to successfully challenge factual findings such

---

[2]Indeed, the district court *specifically rejected* the testimony supplied by Appellant as to the amount necessary, finding that "this amount is exaggerated and does not accurately reflect the historic expenditures of the parties as documented in the evidence that was presented by both parties." Findings of Fact and Conclusions of Law, ¶ 56, p. 19 (R.2365). The district court also specifically noted Appellee's work at the Resort, but determined that, under the prenuptial agreement, this was deemed to be a gift. *See id.*, ¶ 52, p. 18 (R. 2364).

> as these, an appellant must first marshal all of the evidence that supports the findings and then demonstrate that even viewing it in the light most favorable to the district court, the evidence is insufficient to support the finding. In her brief, La Juana makes no effort to marshal the evidence in support of the voluntariness findings; in fact, she does not even mention the district court's findings. Instead, she simply reargues the facts. This approach is inappropriate. The district court is in the best position to weigh conflicting testimony, assess credibility, and from this make findings of fact. An appellate court does not lightly disturb the verdict of a jury or the factual findings of a trial court. Accordingly, absent a proper showing, we will not revisit the facts on appeal.

Matter of Estate of Beesley, 883 P.2d 1343, 1349 (Utah 1994) (citations omitted). This Court may therefore assume that the record supports the district court's findings in regard to the amount of the alimony award. This assumption necessarily precludes Appellant's arguments.

District courts have "considerable discretion in determining alimony ... and [determinations of alimony] will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated." *Riley v. Riley*, 2006 UT App 214, ¶ 15, 138 P.3d 84 (quoting *Davis v. Davis*, 2003 UT App 282, ¶ 7, 76 P.3d 716 (alterations in original)). *See also Andrus v. Andrus*, 2007 UT App 291, ¶ 9, 169 P.3d 754 ("We will review the trial court's decisions regarding child support and alimony under the abuse of discretion standard.").

Appellant's two arguments relating to the district court's alimony award fail to show an abuse of discretion. Thus, Appellant has once again failed to provide any reason

to disturb the district court's determination.

VI and VII. Appellant is Unable to Show the District Court Abused its Discretion Regarding its Attorney Fee Determinations.

Appellant argues that the district court erred when it (1) awarded Appellee his attorney fees pursuant to the terms of the prenuptial agreement, and (2) ordered Appellant to pay a portion of her own fees incurred below. Appellant is unable to show that the district court abused its discretion with regard to either determination.

"The decision to award attorney fees and the amount thereof rests primarily in the sound discretion of the trial court." *Riley*, 2006 UT App 214, ¶ 15 (quoting *Childs v. Childs*, 967 P.2d 942, 947 (Utah Ct. App.1998). This determination is reviewed for abuse of that discretion. *See Taylor v. Hansen*, 958 P.2d 923, 931 (Utah Ct. App. 1998) (overruled on other grounds by *Sittner v. Schriever*, 2000 UT 45, 2 P.3d 442). A district court abuses its discretion "if there is no reasonable basis for the decision." *Langeland v. Monarch Motors, Inc.*, 952 P.2d 1058, 1061 (Utah 1998).

The district court's determinations regarding attorney fees were predicated on numerous findings, *see* Findings of Fact and Conclusions of Law, ¶¶ 72-85, pp. 24-27 (R.2370-73), including the following:

> 72. There are two attorney fee issues in this case: (1) should Hope be required to reimburse Robert for all or part of the attorney fees that he has advanced for her pursuant to the Order of this Court; and (2) has either party prevailed in a dispute arising out of the terms, conditions, and obligations imposed by the Agreement, thus entitling them to recover their attorney fees under paragraph Z of the Agreement.

73. The Court informed Hope on several occasions, in order to ensure that it was clear to her, that it may require her to reimburse Robert for the attorney fees that he was required to advance to her. The Court also permitted Robert to challenge the reasonableness of any fees billed by Hope's counsel. The Court ordered Robert to pay Hope's reasonable attorney fees to ensure that hope had an opportunity to present her best case to the Court and that she not be overwhelmed by Robert's resources.

74. Through June 30, 2007, Hope incurred litigation expenses of $120,000 of which Robert has paid $80,000 and disputed $40,000. At the close of trial, the Court ordered Robert to pay the disputed fees which he has done.

75. Through August 28, 2007, Robert had incurred litigation expenses of $124,000 just in securing a determination of the validity and enforcement of the Agreement.

76. The Court finds that Hope's fees were reasonable and that her position was not so untenable that she should be required to cover all of her own fees.

77. The Court finds that Hope has approximately $35,000.00 in a securities account that was gifted to her by Robert during the course of the marriage as well as the alimony that she will be receiving from Robert. At the inception of this case, Hope did not have the resources to match Robert's efforts without assistance that the Court finds is no longer needed. The Court finds that Hope shall be required to use the funds in her security account along with her income, if needed, to cover at a minimum $30,000 of her own fees, plus whatever amount her fees since June 30, 2007, exceed $30,000.

78. The Court finds that Robert shall not be required to pay any further litigation expenses of Hope and, if Hope's litigation expenses incurred since June 30, 2007 are less than $30,000, Robert shall be entitled to a refund of the

difference.

79. The Court finds that Robert is the prevailing party in the dispute arising out of the terms, conditions, and obligations imposed by paragraph [Z] of the prenuptial Agreement.

80. The Court finds that Hope's claims for community property were based first on her efforts to invalidate the Agreement, second on her claim that she was co-owner of the Resort, and third, that she was entitled to one-half of Robert's distributions from Flat Iron Mesa and one-half of the operation cash flow of the Resort.

81. The Court finds that Hope has failed to establish any of these claims and cannot be considered the prevailing party in the aspects of this dispute that involved the Agreement.

82. The Court finds that Robert is the prevailing party and in accordance with paragraph Z of the Agreement, the Court must award Robert his fees incurred in connection with the dispute over the application of the Agreement.

84. The Court finds that Robert is entitled to recover these fees from Hope by deducting $5,000 from each month's alimony payment and that the award of fees shall bear interest at the rate of 6.99% per annum from October 1, 2007 until paid in full.

85. The Court recognizes that allowing Robert to deduct $5,000 per month from awarded alimony of $15,000 per month will mean that Hope will not receive enough money to maintain her at the standard of living she enjoyed during the marriage. Hope will naturally have to curtail her living standard but will still be able to maintain a comfortable lifestyle. This temporary curtailment is the natural consequence of her decision to pursue a claim for community property when the clear intention of the Agreement she signed before marrying was to sharply limit the creation of

> community property. That same Agreement requires that the prevailing party in a dispute over the effect of the agreement recovers attorney fees. To increase alimony so Hope can pay those fees would make that portion of the Agreement meaningless.

Id. Appellant makes no effort to challenge these findings, and this Court may therefore assume that the record supports the district court's findings. *See Shepherd v. Shepherd*, 876 P.2d at 431; *Saunders v. Sharp*, 806 P.2d at 199.

The district court further explained its ruling relating to Appellant's attorney fees as follows:

> With respect to [this] issue, the court promised, when it originally required Robert to pay Hope's attorney fees, that it may require her to reimburse him. It was important to ensure that Hope had an opportunity to present her best case to the court and that she not be overwhelmed by Robert's resources. Hope incurred litigation expenses of $120,000 through June 30, 2007. Robert had paid $80,000 of those fees and disputed $40,000. At the close of trial, the court instructed Robert to pay those fees.... The theory on which Utah law permits a court to require one party to a divorce to advance the fees of the other is to permit each side an equal opportunity to present its case. Hope did not have the resources to match Robert's effort without assistance. However, she did have approximately $35,000 in her securities account from gifts Robert made during the course of the marriage. The court should have required her to use that account at lest in substantial part. The court will require that Hope pay $30,000 of her own fees, plus whatever amount her fees since June 30, 3007, exceed $30,000. In other words, Robert shall not be required to pay any litigation expense incurred by Hope after June 30, 2007, and, if those expenses are less than $30,000, the difference shall be refunded to Robert.

Sept. 14, 2007 Memorandum Decision, pp. 25-26 (R.2253-54).

Appellant filed a postjudgment motion relating to the award of attorney fees, which was granted in part (namely, a reduction of alimony to pay for Appellee's fees from $5,000 to $2,500 per month, *see* Order Granting in Part and Denying in Part Motion to Amend and Denying a New Trial, p. 2 (R.2542)) and denied in part (as to Appellant's request for payment of her own fees):

> [T]he motion should be granted to the extent of decreasing the monthly payment of the awarded attorney fees that the Respondent should make to the Petitioner by reduction in her alimony from $5,000.00 to $2,500.00 per month; that the request for attorney fees should be denied pursuant to the provision of Paragraph Z of the Prenuptial Agreement between the parties and the provisions of Section 30-3-3(1), which authorizes the Court to order payment of costs and attorneys fees, which the Court had granted in part and ordered Petitioner to pay and not reimburse Respondent for a portion of her fees.
>
> The Court previously determined that the first $120,000 of Hope's fees were reasonable and does not reconsider that determination. However, Hope's lack of success on her property claims has affected the Court's evaluation of her claim for additional fees. The Court's decision does not involve any application of Sections 30-3-3(2) or (4), Utah Code. Were it to apply those sections, Hope might be required to reimburse a good share of the $120,000 Robert has paid toward her fees. The Court also did not consider, in evaluating Hope's motion, that Robert paid $120,000 towards the purchase of a home for Petitioner and the minor child of the parties before she began to accrue any fees with her present counsel.

Id.

Appellant now argues that the district court erred when it awarded Appellee his

fees, assigning error to the fact that the district court strictly applied the attorney fee provision in the prenuptial agreement. Appellant also argues that the district court erred when it determined that Appellant should pay a portion of her own fees. Each of these arguments shall be addressed in turn.

a. The District Court Correctly Interpreted the Prenuptial Agreement When it Awarded Appellee His Attorney Fees.

There is no dispute that the prenuptial agreement was valid and binding on the parties. Such agreements are "construed and treated as contracts in general." *Shepherd v. Shepherd*, 876 P.2d 429, 431(Utah Ct. App. 1994). Furthermore, a court's award of attorney fees in light of a valid prenuptial agreement is not governed by equitable law, it is "controlled by the terms of the agreement governing challenges to its validity." *Montoya v. Montoya*, 909 A.2d 947, 956 (Conn. 2006); *see also Pysell v. Keck*, 559 S.E.2d 677, 678 (Va. 2002) ("Antenuptial agreements, like marital property settlements, are contracts subject to the rules of construction applicable to contracts generally, including the application of the plain meaning of unambiguous contractual terms.").

This contract provided that the prevailing party in a dispute involving the Agreement "shall be entitled to recover reasonable attorney fees, costs and expenses." Prenuptial agreement, pg. 43 (emphasis added). The use of the term "shall" is "language of command" and thus implies a mandatory condition. *Herr v. Salt Lake County,* 525 P.2d 728, 729 (Utah 1974). Therefore, the district court was required to award fees to the prevailing party, Appellee.

Rather than address the district court's findings, Appellant argues that the district court erred when it determined it was compelled to apply the prenuptial agreement in this manner. Appellant cites *no authority* supporting her position that a district court must make additional findings before enforcing the terms of a valid contract. Instead, Appellant argues without basis that public policy requires further investigation. This argument is inadequate to overturn the district court's determination.

For instance, Appellant cites the Utah Premarital Agreement Act for the proposition that parties may contract with respect to "any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty." Utah Code Ann. § 30-8-4(1)(g). However, there is no authority provided that an award of attorney fees pursuant to the express terms of a contract violates any public policy. Instead, Appellant's argument begs the question that is left unanswered - what violation of public policy occurred in this instance?

Appellant cites to the "important public policy such public policy of giving both parties the chance to present their claims." Appellant's Brief, p. 46. However, Appellant ignores the fact that the district court *specifically ordered* Appellee to pay all of Appellant's attorney fees through June 30, 2007, to *ensure that Appellant had an equal opportunity to present her case*. *See* Findings of Fact and Conclusions of Law, ¶ 73 (R.2370).

Appellant also cites to a Colorado case, *In re Marriage of Ikelar*, 161 P.3d 663

(Colo. 2007), for the proposition that an unconscionable prenuptial agreement need not be enforced. The court in *Ikelar* was concerned with ensuring that both sides have adequate resources to effectively litigate the case, not the enforceability of a valid agreement. *Id.* at 670-71. Thus, the district court's determination was consistent with *Ikelar*. In any event, Appellant has set forth no argument as to *why* the prenuptial agreement is "unconscionable" and fails to raise any facts that could support such an argument. Indeed, this is contrary to the district court's determination that the prenuptial agreement was valid and enforceable. *See* Ruling on Motion for Partial Summary Judgment (R.1029-34).

In the end, the law allows parties to a prenuptial agreement to agree to all matters not in violation of public policy. *See* Utah Code Ann. § 30-8-4. Appellant has failed to make any showing that the prenuptial agreement violated any particular public policy, or that the district court erred when it interpreted and enforced that agreement.

b. Appellant Shows No Abuse of Discretion Relating to the District Court's Determination That Appellant Should Pay a Portion of Her Own Attorney Fees.

Next, Appellant argues that the district court erred when it ordered her to pay a portion of her own attorney fees incurred below. Appellant argues that this decision is somehow inconsistent with section 30-3-3, and that the district court did not make required findings under this section.

This argument is misguided for two reasons. First, it ignores the fact that this

determination, as set forth above, was *not* based on interpretation of section 30-3-3. See Order Granting in Part and Denying in Part Motion to Amend, p. 2 (R.2542). Instead, the determination that Appellant must pay a portion of her own fees was based on the prenuptial agreement and the fact that Appellant was not the "prevailing party" in the underlying action. *See id.* Appellant does not argue that the prenuptial agreement was incorrectly interpreted, and certainly does not argue she was a prevailing party below.

In addition, this argument fails under the plain terms of section 30-3-3, which provides in relevant part:

> (1) In any action filed under Title 30, Chapter 3, Divorce, Chapter 4, Separate Maintenance, or Title 78B, Chapter 7, Part 1, Cohabitant Abuse Act, and in any action to establish an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party *to enable the other party to prosecute or defend the action*. The order may include provision for costs of the action.
>
> (2) In any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees *upon determining that the party substantially prevailed upon the claim or defense*. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party is impecunious or enters in the record the reason for not awarding fees.

Utah Code Ann. § 30-3-3(1), (2) (emphasis added). This section "grants courts discretion to award attorney fees in domestic cases. Trial courts have discretion to award fees, so long as the award is based on findings regarding the need of the receiving spouse, the

ability of the payor spouse to pay and the reasonableness of the fees." *Schaumberg v. Schaumberg*, 875 P.2d 598, 604 (Utah Ct. App. 1994).

It is undisputed that the district court did, in fact, award Appellant $120,000 in attorney fees in order to "prosecute or defend the action." Utah Code Ann. § 30-3-3(1). See Sept. 14, 2007 Memorandum Decision, pp. 25-26 (R.2253-54). Thus, Appellant cannot (and does not) argue that the district court erred in some fashion under subsection 30-3-3(1).

Moreover, subsection 30-3-3(2) was not even *applicable* because the district court determined that Appellant was *not* "the party [that] substantially prevailed upon the claim or defense." Utah Code Ann. § 30-3-3(2); *see also* Findings of Fact and Conclusions of Law, ¶ 81 (R.2372). Instead, the district court utilized its discretion when it allowed Appellant her fees up to $120,000, but refused to grant fees in excess of that amount. Appellant fails to show that this constitutes an abuse of discretion. Indeed, the district court had warned Appellant early on that this might, in fact, be the result:

> He'll pay the attorney fees, but you need to understand this is just for now, and this is just to ensure that she has an opportunity to fairly litigate. But there is no reason why you shouldn't think that in the end I will not give him credit against everything he's required to pay her for everything he has already paid, including her attorneys' fees.

See November 17, 2006 Evidentiary Hearing Transcript, pp. 167-68 (R. 2554). Because the district court determined that Appellant was not the prevailing party, there was no reason for the court to ensure that "the award is based on findings regarding the need of

the receiving spouse, the ability of the payor spouse to pay and the reasonableness of the fees." *Schaumberg*, 875 P.2d at 604. *See Taylor v. Hansen*, 958 P.2d 923, 931 ("Because Taylor's motions were denied in their entirety, *she was not entitled to an award of costs or fees, and the trial court did not abuse its discretion in refusing to award attorney fees* or costs to Taylor under section 30-3-3.") (citing *Haumont v. Haumont*, 793 P.2d 421, 427 (Utah Ct. App. 1990)) (emphasis added).

In any event, Appellant's argument fails because the district court *made* sufficient findings. In regard to ability to pay and need of the receiving spouse, the district court determined that Appellee "has stipulated to the Court that he can afford any reasonable alimony award," *see* Findings of Fact and Conclusions of Law, ¶ 49 (R.2364), and determined that Appellant had "$35,000 in her securities account from gifts Robert made during the course of the marriage. The court should have required her to use that account at lest in substantial part." Sept. 14, 2007 Memorandum Decision, pp. 25-26 (R.2253-54). In addition, the district court noted that "the first $120,000 of Hope's fees were reasonable and does not reconsider that determination. However, Hope's lack of success on her property claims has affected the Court's evaluation of her claim for additional fees." Order Granting in Part and Denying in Part Motion to Amend, p. 2 (R.2542). Thus, even if subsection 30-3-3(2) applied here, Appellant's argument that insufficient findings were made, or that such findings do not support the district court's conclusion are unfounded.

In sum, Appellant fails to show the district court abused its discretion when it

awarded Appellee his attorney fees pursuant to the prenuptial agreement or when it ordered Appellant to pay a portion of her own fees.

Request for Attorney Fees Incurred on Appeal

Appellee was awarded attorney fees below as the "prevailing party" pursuant to the terms of the parties' prenuptial agreement. *See* Findings of Fact and Conclusions of Law, ¶¶ 79-85 (R.2371-73). Appellee is therefore entitled to attorney fees incurred on appeal. *See Pack v. Case*, 2001 UT App 232, ¶ 39, 30 P.3d 436 ("When a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal." (Internal quotations and citation omitted.)).

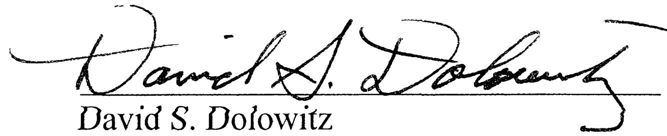
Appellee hereby requests an award of his attorney fees incurred on appeal, and requests remand to the district court for a determination of such fees.

Conclusion

Appellant fails to meet her burden on appeal. She is unable to show any error committed by the district court, let alone reversible error. Accordingly, Appellee respectfully requests that this Court affirm the district court's determinations and award his attorney fees incurred on appeal.

DATED this 29th day of January, 2009.

COHNE, RAPPAPORT & SEGAL, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of January, 2009, I caused to be served a true and correct copy of the foregoing Appellees' Brief via First Class Mail, postage fully pre-paid, to the following:

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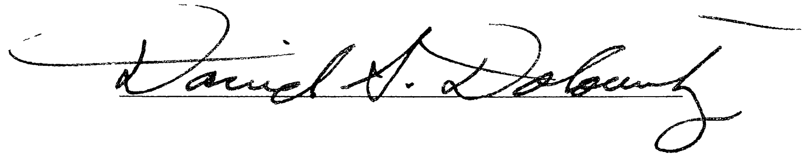

ADDENDUM

EXHIBIT 1

JONES WALDO

OCT 1 9 2007

RECEIVED

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IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR GRAND COUNTY, STATE OF UTAH

ROBERT KEITH LEVIN,	:	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
Petitioner,	:	
	:	Civil No. 05 470 0107
v.	:	
	:	Judge: Lyle R. Anderson
HOPE M. CARLTON-LEVIN	:	
Respondent.	:	

This matter came regularly before the Court for a three-day bench trial before the Honorable Lyle R. Anderson on September 5-7, 2007. Petitioner was present and represented by his counsel David S. Dolowitz and Joshua K. Peterman. Respondent was present and represented by her counsel Kenneth A. Okazaki and Andrew G. Deiss. The

\b(B)

Court, having heard the testimony of the parties and witnesses for and on behalf of the parties, and having considered the exhibits admitted into evidence during the course of the trial and having considered the opinions of expert witnesses testifying on behalf of the parties and being fully advised in the premises and having issued its Memorandum Decision on September 14, 2007, now makes the following:

FINDINGS OF FACT

1. The Petitioner and the Respondent were both residents of Grand County, State of Utah, and had been so for three months prior to the filing of the above-entitled action on December 22, 2005.

2. Robert Keith Levin and Hope Marie Carlton Levin were married on September 14, 1991 in the State of California.

3. Each of the parties has asked the Court to end their marriage on the ground that they have irreconcilable differences. The Court finds that the parties do have irreconcilable differences which make continuation of their marriage impossible and each is entitled to a divorce from the other.

4. One child has been born as issue of this marriage, Calliway Jo, Age 10, born February 10, 1997.

5. At the time of the marriage, Robert had accumulated assets worth over ten million dollars. He had accumulated his wealth primarily in the women's apparel

industry. At the date of marriage, Robert was completing his obligation to work for Kellwood, the company to which he had sold his women's apparel business.

6. At the time of the marriage, Hope was twenty-five (25) years old. She had enjoyed some success in the film, television, and advertising industry as a model and actress, but had certainly not become a star. She had acted in some obscure films, and her television appearances were sporadic. The highest amount that Hope earned in one year before she married Robert was $44,000.00 in 1989.

7. Being concerned about protecting his present assets, future investments and future business activities, Petitioner insisted that the parties negotiate and enter into a prenuptial agreement.

8. Before marrying, Robert and Hope signed a prenuptial agreement ("Agreement") which the Court determined on summary judgment was valid and enforceable. The evidence presented at trial reinforces the Court's determination that the Agreement is valid and enforceable.

9. Both Robert and Hope were represented by capable counsel in negotiating the prenuptial agreement and there were negotiations back and forth that resulted in a final agreement that reflected input from both Hope and Robert.

10. For three or four months after the wedding, Robert continued to receive salary and residual payments from Kellwood. He testified his salary, under the prenuptial

agreement, was community income and it was consumed as community support and the Court finds this is correct under the prenuptial agreement and applicable California law.

11. At the time Robert finally terminated from Kellwood, he received a final buyout payment of approximately two (2) million dollars ($2,000,000.00) which, under the prenuptial agreement remained his separate property.

12. Shortly after they married, Robert and Hope moved to Park City, Utah where they lived a luxurious leisure lifestyle which included frequent houseboating trips at Lake Powell.

13. Although living in Utah may have impeded development of Hope's career, she was free to travel to other areas of the country to take advantage of any career opportunities.

14. In 1994, Robert purchased ranch property adjacent to the Colorado River in Grand County, Utah. Robert and Hope moved to the ranch and began to develop it with the intent to make it a destination resort.

15. The ranch was purchased for $800,000.00 but Robert invested approximately twelve million Dollars ($12,000,000.00) of his separate property including some borrowed money in the development of the ranch. The ranch was named Sorrel River Ranch Resort ("Resort").

16. The process of transforming the ranch to a destination resort was difficult

and both parties worked to effect the transformation. While the parties worked to build the Resort, they also enjoyed numerous amenities at the resort. Hope was able to pursue her love of horses as well as take advantage of the Resort's pool, spa, and dining room as these amenities were developed.

17. One of the benefits of living and working at the Resort is that many of the parties' living expenses were covered by the business, in exchange for having the parties readily accessible to work in the business.

18. Robert elected to run the Resort through a limited liability company called Levinius, L.L.C. ("Levinius"). The land on which the Resort is located is owned by other Utah partnerships which are in turn owned by Levinius.

19. Robert has sole control of the Resort through his control of Levinius. Neither Levinius or any of the properties or entities through which the Resort is operated were ever in Hope's name; title always remained in Robert's name.

20. There are no written agreements granting Hope an ownership interest in the Resort, Levinius, or any of the subsidiary companies.

21. The Resort did not have any taxable earnings until 2005, when it reported taxable income of approximately $200,000.00 on revenues of approximately four point four million dollars ($4,400,000.00). Even after application of this 2005 income, Levinius had accumulated taxable losses of approximately two (2) million

($2,000,000.00) at the end of 2005. By this time, Levinius also had approximately three point six million ($3,600,000.00) of accumulated depreciation.

22. Hope's spending habits were the source of regular arguments between Hope and Robert but the Court believes that Hope was generally able to purchase anything that she wanted.

23. In 2003, Robert became a passive investor in a limited liability company that developed lots on Flat Iron Mesa in San Juan County, Utah. Robert was adamant that he was so consumed with the development of the Resort that he could devote virtually no time to the development of Flat Iron Mesa.

24. John Ogden, the Managing Member of Flat Iron Mesa Partners, LLC did virtually all of the work related to the development of Flat Iron Mesa project.

25. Under the investment agreement for the Flat Iron Mesa project, Robert received sixty per cent (60%) of the profits of the company and by the time that all of the lots had been sold in 2007, Robert had received profits of approximately one point five million ($1,500,000.00).

Issues Presented at Trial

26. The parties resolved by stipulation all of the issues relating to custody, parent time, and child support of their child Calli Jo. The Court approved this stipulation and its implementing Order, as written. A copy of this Stipulation and Order is attached

hereto as **Exhibit "A"** and incorporated by reference.

27. The issues at trial were: (1) was there a breach of the Agreement that would invalidate the Agreement; (2) the existence and amount of community property;(3) the approximate amount and duration of alimony; and (4) attorney fees.

28. The premarital agreement (Exhibit 6) is extensive and detailed. It provides that it is to be interpreted pursuant to California law. Alimony is expressly excluded from the Agreement and shall be awarded pursuant to Utah law.

Specific Findings of Fact In Regard to Each Issue Presented

A. COMMUNITY PROPERTY:

Alleged Breach of the Premarital Agreement

29. The Court finds that there was no breach of the Agreement that would result in an invalidation of the Agreement. Hope alleged several facts in support of her claim that the Agreement should be invalidated; however, none of the instances, even if proven, are sufficient to warrant an invalidation of the Agreement. Even if established, the Court would be required to apply the rule that a contract is not invalidated except for a substantial breach and none of the failures to perform alleged by Hope constitute such a breach.

a. Taxes–Paragraph O of the Agreement imposes on Robert the duty to report his income on federal and state tax returns. Hope alleged that

the deductions claimed by Robert on his tax returns raise a question whether Robert satisfied this obligation. However, also in paragraph O, Robert promises to indemnify Hope against any claims, assessment, deficiencies, interest, penalties, fees, and costs attributable to his income arising out of any filed tax return. This specific remedy is the remedy available to Hope, not invalidation of the Agreement.

b. Insurance–Paragraph P of the Agreement imposes on Robert the duty to maintain $250,000.00 of life insurance on himself naming Hope as the beneficiary as long as they are married and living together. Robert satisfied this obligation. This paragraph also requires Robert to notify Hope before cancelling the insurance. Robert has cancelled the policy since separation but did not notify Hope that he had done so. However, this paragraph provides the specific remedy for this failure. Robert essentially became an insurer of his life and would have been required to pay $250,000.00 to Hope if he died without insurance in force. This specific remedy trumps the general remedy of invalidating the agreement. Obviously, now that Hope knows that the insurance has been cancelled, it is her responsibility to secure

replacement coverage if desired. Robert's only duty will be to cooperate with that process.

c. Good Faith and Fair Dealing–Hope alleged that Robert manipulated his activities and the financial statements of his companies and the payment or non-payment of salary to prevent the accumulation of community property and that he had to work in ways that created community property. Hope's argument is undermined by Paragraph F.2 of the Agreement which permits Robert to pursue any vocation, occupation or profession. Hope failed to persuade the Court that Robert manipulated any opportunity to receive salary. The Court finds that it was reasonable for Robert to work at the Resort without compensation as long as the Resort was not profitable. Even after the Resort became profitable, it was reasonable for Robert to wait until he had received a return on his initial capital investment before paying himself a salary. Even though neither Robert or Hope ever received a salary from the Resort, they each received extensive and substantial benefits from living at the Resort.

d. Fiduciary Duty–The Agreement is clear that a fiduciary duty exists only when community property exists. The Court finds that there

was and is no community property and therefore, Robert had no fiduciary duty to Hope.

Partnership

30. The Court finds that Hope has presented no agreement signed by Robert which makes her a partner in any of his business enterprises. The prenuptial agreement provides that community property comes into existence only as the Agreement provides. Paragraph D.3 clearly provides that Robert's separate property becomes community property only if a document of title so indicates and Robert clearly acknowledges the relinquishment of a one-half interest in the property. No evidence of such a document was produced and Robert testified no such document had ever been created or executed. Hope did not contradict this testimony.

31. The Court finds that Hope's claim that she became a partner in Robert's separate property via verbal conduct is not credible nor supported by law. Hope presented evidence that Robert talked to her on several occasions to tell her she must conduct herself as an "owner." Robert denies these conversations ever took place and that he and Hope frequently argued about her lack of ownership. Hope also presented a video clip of a television show featuring the Resort which described her as "co-owner."

32. The Court is aware of no authority that creates an ownership interest simply

because third parties believe such ownership exists. The theory of partnership by estoppel, as asserted by Hope, cannot be used to create a partnership interest. The purpose of this theory is to protect creditors who relied on representations that they were dealing with a partnership. Additionally, the Agreement expressly provides in paragraph W.2 that the use of such expressions such as "our property," "our house," "our bank account," or other similar phrases does not alter the characterization of separate property.

33. Hope presented the testimony of Stuart Berman who briefly held an ownership interest in the Resort. Mr. Berman testified that all discussions between him and Robert included the implicit assumption that Hope was a co-owner of Robert's interest. The Court finds that Mr. Berman's testimony is not credible. His testimony is undermined by his obvious anger at Robert, which persists even though he made $475,000.00 on an investment of $1,721,000.00 in just eight (8) months. His testimony is also seriously undermined by the actual language of the agreements between himself and Robert that Mr. Berman had drafted. Hope appears in only one of these agreements, and only in the capacity of a consenting spouse, which a careful California lawyer would require when dealing with a married man who insists his wife has no ownership interest. The Court finds that it is obvious that Mr. Berman knew that Hope was not a co-owner.

34. The Court also finds that Hope's argument that her putative ownership interest in Levinius is unaffected by the Agreement's requirement of a writing because

Levinius is not a party to the Agreement is without merit. Robert is a party to this action and is entitled to the protection of the Agreement.

35. The Court finds that Hope's claim that she became a partner of Robert's entities by virtue of a verbal agreement is rejected because (1) the Agreement expressly requires a written agreement to create a partnership; and (2) Hope's claims that a verbal agreement was made are not credible.

Earnings

36. The Agreement, paragraphs D and F.1 reverses the presumption under California law that any income resulting from the efforts of a husband or wife during marriage, and any property acquired with that income, is community property. Instead, all income, and all property acquired with that income, is separate property unless the Agreement provides otherwise.

37. Subparagraph D.1 of the Agreement provides that earnings are governed by paragraph F. Subparagraph F.1 of the Agreement provides that earnings from personal services, skills, efforts, talents, or work are separate property, except as the Agreement specifically provides. Subparagraph F.2 of the Agreement creates a community property right in the "earnings" or "base salary" derived from actual effort or employment of Robert. Earnings or base salary are defined as compensation for labor or services performed by Robert, but do not include any benefits associated with such earnings or

base salary.

38. The only earnings or base salary derived from actual efforts of Robert were paid to him during the first four months following the marriage and were promptly consumed on community expenses, thus leaving no community property.

39. Subparagraph F.3 of the Agreement provides that:

> In the event [Robert] enters into any type of business venture or ventures from and after the date of marriage from which [Robert] will receive earnings or salary therefrom (regardless of whether such earnings or salary have been derived from actual effort or services performed by [Robert] for or on behalf of the business venture), such earnings or salary, derived from such business venture or ventures, shall be community property. For purposes of this paragraph f.3, the term "earnings" or "salary" derived from said business venture or ventures <u>excludes</u> pension and deferred income contributions, stock, stock options, bonuses, benefits and rights and perquisites, which items shall remain [Robert's] separate property subject to Paragraphs F.5, F.6, and F.7. It is the parties intention that all property acquired with such "earnings" or "salary" (defined under this Paragraph F.3) shall be community property unless the parties agree otherwise in writing.

40. The parties dispute the meaning of the term "earnings" as used in F.3. Robert maintains that the inclusion of the phrase "whether such earnings or salary have been derived from actual effort or services performed by Robert for or on behalf of the business venture" simply loosens the requirement that Robert actually perform services for his business venture to make his earnings or salary community property and the term "earnings" still has the customary meaning under California law. California law defines earnings as salary or wages of a person received because of services provided. Hope

maintains that the term "earnings" as used in F.3 includes any and all profits allocated to Robert from Flat Iron Mesa and the Resort.

41. This Court is required to read the Agreement as a whole in order to determine the meaning and intent of the parties and to harmonize its various provisions. Therefore, Subparagraph F.3 must be interpreted in light of the following provisions of the Agreement:

a. Subparagraph F.4 which defines Kellwood payments, except salary, as separate property.

b. Subparagraph F.5 which creates a community property right in bonuses received by Robert as an employee under limited circumstances. The Court finds that none of these limited circumstances apply.

c. Subparagraph F.6 which provides an additional community property right in bonuses based on the duration of the marriage. The Court finds that there were no bonuses paid to Robert that would invoke this subparagraph.

d. Subparagraph F.7 which provides a community property right in pension payments based on longevity of the marriage. The Court finds that Robert has not received any pension payments.

e. Subparagraph F.8 excludes any community property participation in stock options or dividends.

f. Subparagraph F.9 which provides that earnings or salary from joint business ventures are community property, but joint business ventures must be established by written agreement. The Court finds that there were no joint business ventures.

g. Paragraph I of the Agreement provides that all profits, rents, increase, appreciation and income from Robert's separate property are also his property. A change in the form of Robert's separate property does not change the characterization of that property. If Robert sells separate property and purchases other property, that new property is also Robert's separate property.

h. Paragraph J of the Agreement provides that devoting time, skill or effort to separate property does not change it to community property.

42. The Court finds that Hope's asserted meaning of the term "earnings" as used in subparagraph F.3 to mean any kind of profit from any business venture to be incorrect. The Court accepts Robert's interpretation as valid under California law and finds that the term "earnings" means payments based at least in theory on services, such as actual salary, guaranteed payments to a member in a limited liability company, or

draws to a partner in an operating business partnership. Any other interpretation would be in conflict with the remainder of the Agreement and render it superfluous. The Court finds it hard to believe that Robert went to the trouble of obtaining such a comprehensive and detailed prenuptial agreement so that he could ensure that Hope could claim one-half of the profits from any business venture in which he would become involved.

43. Hope also attempted to persuade the Court that Robert was actively engaged in the management of Flat Iron Mesa. The Court rejects this argument and finds that Robert had virtually no active involvement in Flat Iron. He was a passive investor. Even if the Court were to adopt Hope's argument however, there would still not be any earnings as contemplated by the Agreement because it was Robert's capital investment, not his business efforts, that resulted in profits from Flat Iron.

44. The Court finds that Robert did not receive any earnings or salary from the Resort or Flat Iron Mesa as contemplated by the Agreement and there is no community property.

45. Although the Court finds that the Agreement is unambiguous and can be interpreted as a matter of law, even if the Court were to consider parol evidence, its interpretation of the term "earnings" would be the same. Robert testified that he always intended that Hope would only participate in his base salary and then in bonuses and pension payments in the limited circumstances set forth above. Robert specifically

remembers discussing the contents of F.3 and understanding it to mean that Hope would only participate in his wages, salary, or other similar payments resulting from any new active business he may start. Robert's interpretation of the term "earnings" is consistent with the overall expressed purpose of the Agreement. Hope had virtually no recollection of the specific provisions of the Agreement even though her attorney discussed the terms of the Agreement with her on numerous occasions. Hope's description of what she understood the Agreement to mean was general and did not appear to be based on any actual memory of the language of the Agreement or advice of her counsel.

B. ALIMONY

46. In making its alimony determination, the Court has considered: (1) the financial conditions and needs of Hope; (2) the ability of Hope to produce a sufficient income for herself; (3) the ability of Robert to provide support; (4) the length of the marriage; (5) whether Hope has custody of minor children requiring support; (6) whether the recipient spouse worked in a business owned or operated by the payor spouse; and (7) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

47. Although some evidence of fault was presented, the Court has not considered the fault of either of the parties in making its determination.

48. The Court finds that it need not reach a specific finding regarding the second factor because its alimony determination does not impute any income to Hope that would reduce the alimony award.

49. Robert has stipulated to the Court that he can afford any reasonable alimony award, thus fulfilling the Court's inquiry into the third factor.

50. The Court finds that alimony should be awarded for a duration consistent with the length of the parties' marriage subject to the conditions set forth below in paragraph 71, that is fourteen (14) years and three (3) months.

51. The Court finds that Hope currently has primary physical custody of the parties' child and that the child's needs are met through the level of child support to which the parties have stipulated and agreed. The amount of the child support that the parties agreed to exceeds the guidelines set forth in the Utah Code and meets the actual needs of the child. If the parties agree that the child should attend private school, Robert should be responsible for paying reasonable tuition.

52. The Court finds that Hope did work at the Resort which is owned and operated by Robert as his separate property. However, subparagraph J.3 of the Agreement specifically provides that the expenditure of time, effort, skill, and money by one party for the benefit of the separate property of the other party shall be deemed to be a gift to the other unless otherwise agreed to in writing. No such writing was ever created.

53. The Court finds that the financial conditions and needs of Hope to maintain Hope in the lifestyle to which she was accustomed during the marriage requires an alimony award of $15,000.00 per month subject to the conditions set forth below in paragraph 71.

54. The Court has reached its alimony award by looking at the documented historic expenditures to approximate what monthly alimony payment will enable Hope to enjoy the standard of living that she enjoyed during the marriage.

55. The Court finds that the parties spent approximately $9,000.00 per month on Hope's expenses before separation and after separation, Hope spent approximately $10,500.00 per month.

56. Hope presented expert testimony from Richard Hoffman that her pre-separation expenses were for luxuries and that her necessities were provided for as an incident to her living at the Resort. Mr. Hoffman testified that in order to restore her marital standard of living, Hope would need alimony of $19,707.00 per month. Mr. Hoffman also added to this figures $5,000.00 per month for income taxes, and $6,800.00 per month to allow Hope to purchase and additional residence for $1,000,000.00. Thus, Hope demanded alimony of $30,000.00 per month but the Court finds that this amount is exaggerated and does not accurately reflect the historic expenditures of the parties as documented in the evidence that was presented by both parties.

57. The Court rejects that the $5,000.00 Robert gave Hope each of the last three (3) months prior to separation represents any effort to match actual historic expenditures. Hope's expert substituted this $5,000.00 for the documented $1,800.00 in pre-separation monthly expenditures. The Court finds that the $1,800.00 accurately represents that parties' actual expenditures and accordingly reduces Mr. Hoffman's proposed budget by $3,200.00.

58. The Court also rejects Mr. Hoffman's proposal that Hope be awarded alimony sufficient for her to afford a one million dollar ($1,000,000.00) residence. The Court finds that Hope's present residence is similar in appearance and quality to the residence in which she lives at the Resort. Accordingly, the Court reduces Hope's proposed budget by $6,800.00 which is the monthly amount that he had included for the purchase of a new home.

59. The Court finds that Mr. Hoffman's proposed monthly barn expenses of $2,100.00 for three horses is overstated. Based on the actual documented expenditures related to caring for horses at the Resort, sometimes including these same horses, and recognizing the fact that there were economies of scale at the Resort that Hope may not now enjoy, the Court finds that Hope's barn expenses will be $600.00 per month. Accordingly, the Court reduces Hope's proposed budget by $1,500.00.

60. The Court finds that Hope's proposed budget includes $550.00 per month

for private school tuition for the parties' child. The Court finds that the child does not currently attend private school and the Court cannot determine whether the child will need or want to attend private school in the future. The Court also finds that the child's tuition would not properly be treated as alimony but rather as child support and accordingly eliminates $550.00 from Hope's proposed budget.

61. The Court also finds that because it is not imputing any income to Hope, thus requiring her to work outside the home, Hope does not require a housekeeper or nanny to match her marital standard of living. Since Hope no longer has duties at the Resort, she is able to maintain the property where she now lives without the need to hire any employees. The Court finds that this arrangement will not cause Hope to work any harder than she did during the marriage. Accordingly, the Court eliminates these figures from Hope's proposed budget.

62. The Court also eliminates from Hope's proposed budget the $1,150.00 per month that she had allocated for "savings." The Court finds that the purpose of alimony is to permit the maintenance of a marital standard of living for a specified period after the termination of the marriage, not to allow the setting aside of a nest egg to maintain the marriage partner thereafter. There is nothing in the evidence to suggest that Robert regularly set aside any money for Hope's retirement during the marriage.

63. Robert also presented a budget to the Court but the Court finds that

Robert's proposed budget understates certain expenses and makes certain assumptions that the Court rejects.

64. The Court finds that although Robert may not have liked the fact that Hope received laser hair removal treatment and plastic surgery, Hope maintaining her appearance with surgical and similar procedures was a routine part of life for Hope.

65. As the Court finds that Hope should not be required to work outside the home, it does not impute any income to Hope.

66. The Court's best estimate of barn expenses is $600 per month.

67. With the foregoing adjustments, and considering the actual expenditures of the parties during their marriage, the Court finds that Hope will require $12,000.00 per month after taxes to maintain her marital standard of living and thus found that she would need a monthly payment of $15,000.00.

68. Neither parties' expert calculated the tax burden for alimony at this level. Mr. Hoffman estimated that the combined federal and state tax burden on $24,500.00 of monthly alimony was approximately twenty per cent (20%). Based on the calculation supplied by Hope's expert, the Court finds that monthly alimony of $15,000.00 should yield Hope $12,000.00 after taxes.

69. The Court finds that Robert and Hope were married fourteen (14) years and (3) three months before separation, thus making the duration of alimony presumptively

fourteen years and three months.

70. Alimony usually terminates on remarriage or cohabitation. Hope argued that special circumstances-her loss of a potentially rewarding career as a model and actress-warrant making the alimony non-terminable. The Court finds that it is hard to imagine anything more speculative than the future film or modeling career of someone who has not achieved "star" or "super model" status. However, the Agreement authorizes the Court to consider Hope's career as a factor in any aspect of alimony.

71. The Court finds that in order to permit Hope to make a gradual adjustment to a different lifestyle if she should decide to remarry, as well as a cushion towards establishing a new career, alimony should last for five years even if Hope remarries or cohabits and that it should continue thereafter, even with remarriage or cohabitation, at a reduced level of $7,500.00 per month for five more years after which it will be eliminated. To clarify, if Hope remarries or cohabits before October 1, 2012, alimony will not be reduced or eliminated until October 1, 2012, when it will be reduced to $7,500.00, regardless of whether Hope is still remarried or cohabitating. If Hope remarries or cohabits after October 1, 2012, but before October 1, 2017, it will be reduced to $7,500.00 until October 1, 2017, when it will be eliminated regardless of whether Hope is still remarried or cohabitating. Remarriage or cohabitation after October 1, 2017 will cause an immediate elimination of alimony.

C. ATTORNEY FEES

72. There are two attorney fee issues in this case: (1) should Hope be required to reimburse Robert for all or part of the attorney fees that he has advanced for her pursuant to the Order of this Court; and (2) has either party prevailed in a dispute arising out of the terms, conditions, and obligations imposed by the Agreement, thus entitling them to recover their attorney fees under paragraph Z of the Agreement.

73. The Court informed Hope on several occasions, in order to ensure that it was clear to her, that it may require her to reimburse Robert for the attorney fees that he was required to advance to her. The Court also permitted Robert to challenge the reasonableness of any fees billed by Hope's counsel. The Court ordered Robert to pay Hope's reasonable attorney fees to ensure that hope had an opportunity to present her best case to the Court and that she not be overwhelmed by Robert's resources.

74. Through June 30, 2007, Hope incurred litigation expenses of $120,000.00 of which Robert has paid approximately $80,000.00 and disputed approximately $40,000.00. At the close of trial, the Court ordered Robert to pay the disputed fees which he has done.

75. Through August 28, 2007, Robert had incurred litigation expenses of $124,000.00 just in securing a determination of the validity and enforcement of the Agreement.

76. The Court finds that Hope's fees were reasonable and that her position was not so untenable that she should be required to cover all of her own fees.

77. The Court finds that Hope has approximately $35,000.00 in a securities account that was gifted to her by Robert during the course of the marriage as well as the alimony that she will be receiving from Robert. At the inception of this case, Hope did not have the resources to match Robert's efforts without assistance that the Court finds is no longer needed. The Court finds that Hope should be required to use the funds in her security account along with her income, if needed, to cover at a minimum $30,000 of her own fees, plus whatever amount her fees since June 30, 2007, exceed $30,000.

78. The Court finds that Robert should not be required to pay any further litigation expenses of Hope and, if Hope's litigation expenses incurred since June 30, 2007 are less than $30,000.00, Robert should be entitled to a refund of the difference.

79. The Court finds that Robert is the prevailing party in the dispute arising out of the terms, conditions, and obligations imposed by paragraph Z of the prenuptial Agreement.

80. The Court finds that Hope's claims for community property were based first on her efforts to invalidate the Agreement, second on her claim that she was co-owner of the Resort, and third, that she was entitled to one-half of Robert's distributions from Flat Iron Mesa and one-half of the operation cash flow of the Resort.

81. The Court finds that Hope has failed to establish any of these claims and cannot be considered the prevailing party in the aspects of this dispute that involved the Agreement.

82. The Court finds that Robert is the prevailing party and in accordance with paragraph Z of the Agreement, the Court must award Robert his fees incurred in connection with the dispute over the application of the Agreement.

83. The Court finds that Robert has established reasonable and necessary fees and charges in the amount of $167,884.75 through the end of trial that were related to enforcing the terms, conditions, and obligations imposed by the Agreement.

84. The Court finds that Robert is entitled to recover these fees from Hope by deducting $5,000.00 from each month's alimony payment and that the award of fees shall bear interest at the rate of 6.99% per annum from October 1, 2007 until paid in full.

85. The Court recognizes that allowing Robert to deduct $5,000 per month from awarded alimony of $15,000 per month will mean that Hope will not receive enough money to maintain her at the standard of living she enjoyed during the marriage. Hope will naturally have to curtail her living standard but will still be able to maintain a comfortable lifestyle. This temporary curtailment is the natural consequence of her decision to pursue a claim for community property when the clear intention of the Agreement she signed before marrying was to sharply limit the creation of community

property. That same Agreement requires that the prevailing party in a dispute over the effect of the agreement recovers attorney fees. To increase alimony so Hope can pay those fees would make that portion of the Agreement meaningless.

Based on the preceding findings, the Court enters the following:

CONCLUSIONS OF LAW

1. The Court concludes that it has jurisdiction over the parties to this action, their minor child, and the subject matter of the action.

2. Robert and Hope should be awarded a Decree of Divorce terminating their marriage which should become final upon entry.

3. The Order based on the stipulation entered into by the parties relating to child support, parent time, and custody of Callie Jo, attached hereto as **Exhibit "A,"** is in the best interest of the child and shall be accepted and ratified by the Court and incorporated into the Decree of Divorce.

4. The prenuptial Agreement entered into by the parties is valid, binding, and enforceable as written.

5. There was no breach of the prenuptial Agreement that would require the Court to invalidate the Agreement.

6. Hope is not a partner in the Resort, Levinius, LLC, Flat Iron Mesa, or any other entity in which Robert has any interest.

7. The prenuptial Agreement is unambiguous and can be interpreted and applied as a matter of law.

8. The only salary or earnings that Robert has received since the date of the parties' marriage was received during the first four months of marriage and was immediately consumed by community living expenses, thus resulting in no community property pursuant to the prenuptial Agreement.

9. Robert has not received any other earnings or salary as contemplated by the prenuptial Agreement from any venture or entity, including but not limited to, the Resort or Flat Iron Mesa that would result in the creation of community property.

10. There is no community property that would create a marital estate subject to division between Robert and Hope under their premarital agreement.

11. Hope should be awarded alimony as follows:

   a. If Hope does not remarry or cohabit, she should receive monthly alimony payments of $15,000.00 for fourteen (14) years and three (3) months commencing on October 1, 2007.

   b. If Hope remarries or cohabits within five years of October 1, 2007, she should receive an alimony award of $15,000 per month until October 1, 2012 after which she should receive a reduced monthly alimony award in the amount of $7,500.00 regardless of whether she

is still remarried or cohabitation until October 1, 2017 after which date alimony will terminate.

c. If Hope remarries or cohabits after October 1, 2012, her alimony award should be immediately reduced to $7,500.00 per month until October 1, 2017 after which her alimony will terminate regardless of whether she is still remarried or cohabitation.

d. If Hope remarries or cohabits after October 1, 2017, but before the passage of fourteen (14) years and three (3) months, alimony shall immediately cease.

12. The alimony payments herein above awarded should be considered to be governed by § 71 of the Internal Revenue Code and be tax deductible to Robert and taxable income to Hope pursuant to §215 of the Internal Revenue Code.

13. Hope shall pay, at a minimum, $30,000.00 of her legal fees by paying all of her fees and expenses incurred since June 30, 2007 and if these fees are less than $30,000.00, she should pay Robert a refund of the difference.

14. Robert is not required to pay any further litigation expenses on behalf of Hope, including but not limited to, attorney fees, costs, and witness fees.

15. Robert is the prevailing party in this action and pursuant to paragraph Z of the prenuptial Agreement, Robert is entitled to recover the $167,884.75 in legal fees that

he incurred in enforcing the terms, conditions, and obligations imposed by the prenuptial Agreement. This balance should accrue interest at the rate of 6.99% per annum from October 1, 2007 until paid in full.

16. Robert is entitled to recover these fees from Hope by deducting $5,000.00 per month from her alimony payment until the $167,884.75 together with interest is paid in full. An amortization table reflecting the payment schedule is attached hereto as **Exhibit B**.

DATED this ___ day of ____________, 2007.

BY THE COURT:

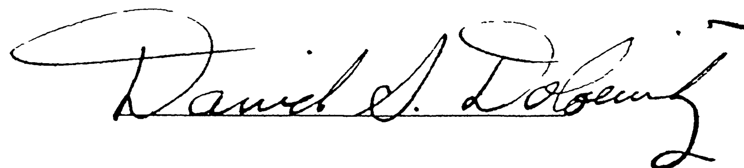
____
Honorable Lyle R. Anderson
Seventh District Court Judge

Findings of Fact and Conclusions of Law 10-17-07 wpd

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am a member of and/or employed by the law firm of COHNE, RAPPAPORT & SEGAL, P.C.,257 East 200 South, 7th Floor, Salt Lake City, Utah 84111, and that on the 18th day of October, 2007, I caused a true and correct copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW** to be served by U.S. Mail to the following individual(s):

Kenneth A. Okazaki, Esq.
Jones Waldo Holbrook & McDonough
170 South Main Street, #1500
Salt Lake City, Utah 84101
Attorney for Respondent



Findings of Fact and Conclusions of Law 10-17-07.wpd

EXHIBIT 2

SEVENTH DISTRICT COURT
Grand County

FILED OCT _ 2007
CLERK OF THE COURT
BY ______ Deputy

THE SEVENTH DISTRICT JUDICIAL COURT IN AND FOR GRAND COUNTY
STATE OF UTAH

ROBERT KEITH LEVIN, Plaintiff, vs HOPE M. CARLTON-LEVIN Defendants,	RULING Case No. 054700107 Judge Lyle R. Anderson

The court has reviewed the findings, conclusions and decree submitted by petitioner and the objection filed by respondent. Because the court has determined that some language should be changed, it will not sign the submitted findings, conclusions and decree.

The court directs that counsel for petitioner make the following changes:

1. Paragraph 15 of the findings should be amended by adding "including some borrowed money" between "property" and "in" in the first sentence. "Name" in the second sentence should be changed to "named."

2. Paragraph 29.b. of the findings should be changed by deleting the last sentence and adding "Obviously, now that Hope knows the insurance has been cancelled, it is her responsibility

to secure replacement coverage if desired. Robert's only duty will be to cooperate with that process."

3. Paragraph 29.c. of the findings should be changed to add "the financial statements of his companies and the payment or non-payment of salary" between "activities" and "to" in the first sentence.

4. Paragraph 40 of the findings should be changed to delete "any business venture" from the last sentence and replace it with "Flat Iron Mesa and the Resort."

5. Paragraph 52 of the findings should be changed by deleting the last sentence.

6. Paragraph 53 should be deleted in its entirety.

7. A paragraph should be added after current paragraph 66, which reads "The court's best estimate of "barn expenses" is $600 per month."

8. The "2" in paragraph 79 should be changed to "Z."

9. Paragraph 15 of the decree should be changed by adding. "only" between "is" and "entitled." and adding these sentences, "Notwithstanding this deduction, the court clarifies that the amount of alimony Hope is to be paid is $15,000 per month, from which a deduction to pay this judgment is to be made. Hope's

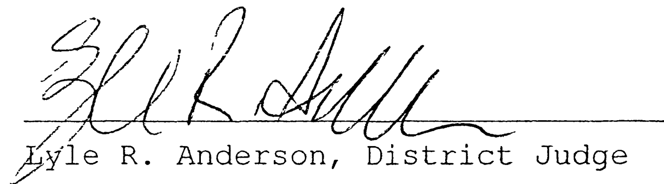
alimony is not reduced; a deduction is being made to pay the judgment."

The other objections made by respondent are noted and overruled. Respondent correctly notes that some of the findings go beyond what was expressly stated in the Memorandum Decision. Where those proposed findings reflect findings the court implicitly made or would have made if asked to do so, they are now adopted by the court by overruling the objection. Where the court has directed that words be deleted, no finding is made and no negative implication of a contrary finding should be inferred.

The court recognizes that allowing Robert to deduct $5,000 per month from awarded alimony of $15,000 per month will mean that Hope will not receive enough money to maintain her at the standard of living she enjoyed during marriage. She will naturally have to curtail her living standard, but will still be able to maintain a comfortable lifestyle. This temporary curtailment is the natural consequence of her decision to pursue a claim for community property when the clear intention of the agreement she signed before marrying was to sharply limit the creation of community property. That same agreement requires that the prevailing party in a dispute over the effect of the agreement recovers attorney fees. To increase alimony so Hope

can pay those fees would make that portion of the agreement meaningless.

Dated this 12th day of October, 2007.



Lyle R. Anderson, District Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 054700107 by the method and on the date specified.

METHOD	NAME
Mail	STEPHEN C CLARK Attorney RES 170 SOUTH MAIN ST STE 1500 SALT LAKE CITY, UT 84101-1020
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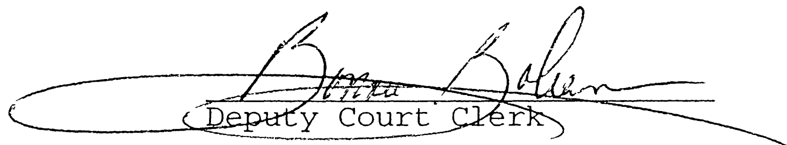
Dated this 12th day of October, 2007.



Deputy Court Clerk

EXHIBIT 3

THE SEVENTH DISTRICT JUDICIAL COURT IN AND FOR GRAND COUNTY
STATE OF UTAH

ROBERT KEITH LEVIN, Plaintiff, vs HOPE M. CARLTON LEVIN Defendants,	MEMORANDUM DECISION Case No. 054700107 Judge Lyle R. Anderson

Robert Keith Levin ("Robert") and Hope Marie Carlton-Levin ("Hope") were married on September 14, 1991. Both have now asked the court to end their marriage on the ground that they have irreconcilable differences. The court finds that they do have irreconcilable differences, and that each is entitled to a divorce from the other.

FACTUAL BACKGROUND

Robert had assets worth over $10 million when Robert and Hope married. He accumulated his wealth primarily in the women's apparel industry. When the couple married, he was just completing his obligation to work for Kellwood, the company to which he had sold his women's apparel business. For three or four months after the wedding, he continued to receive salary

from Kellwood. He also received residual payments based on the success of the business he had sold to Kellwood.

At the time they married, Hope was 25 years old. She had enjoyed some success in the film, television and advertising industry as a model and actress, but had certainly not become a star. She had acted in some obscure films, and her television appearances were sporadic. Even though her public debut was in 1985, the highest amount she earned before she married Robert was $44,000 in 1989.

Before marrying, Robert and Hope signed a Prenuptial Agreement (the "Agreement"). The court determined on summary judgment that the Agreement was valid at its inception. The evidence presented at trial reinforces the court's summary determination. Hope and Robert were both represented by capable counsel and there were negotiations back and forth that resulted in an agreement that reflected input from both Hope and Robert.

Shortly after they married, Robert and Hope moved to Park City, Utah. They lived a luxurious leisure lifestyle in Park City, which included frequent trips to Lake Powell to relax on their houseboat. Living in Utah may have impeded development of Hope's career, but she was free to travel to other areas to take advantage of career opportunities. Hope and Robert had money and

time to enjoy a wide variety of travel and entertainment opportunities.

In 1994, Robert purchased ranch property adjacent to the Colorado River in Grand County, Utah. Robert and Hope moved to the ranch and began to develop it with an eye to making it a destination resort. The ranch was purchased for $800,000, but Robert eventually invested about $11 million in the ranch, including some borrowed money. At some point, the ranch became known as Sorrel River Ranch Resort (the "Resort"). The Resort did not have taxable earnings until 2005, when it reported taxable income of about $200,000 on revenues of about $4.4 million.

The process of getting from a traditional ranch to a destination resort was difficult. Both Robert and Hope worked to effect the transformation. Their daughter, Calli Jo, was born in 1997. While Robert and Hope worked to build the Resort and make it a success, they also continued to enjoy numerous amenities at the Resort. Hope was able to pursue her love of horses because the Resort had a barn and included horseback riding as a service available to guests. As a spa, pool, and dining room were developed at the Resort, Hope was able to take advantage of those amenities. Thus, even though Hope worked in the business, she

also continued to enjoy an amenities lifestyle. Although Hope's expenditures were the source of regular arguments between Hope and Robert, the court believes she was generally able to purchase anything she desired to purchase.

Beginning in 2003, Robert became an investor in a limited liability company that developed lots on Flat Iron Mesa in San Juan County, Utah. Robert was willing to invest in the company and keep the financial records, but was adamant that he was so consumed with the development of the Resort that he could devote virtually no time to the development on Flat Iron Mesa. Another member of that company, John Ogden, did virtually all of the work. Robert received 60% of the profits of that company. By the time all of the lots had been sold in 2007, Robert had received profits of about $1.5 million.

Hope and Robert both agree that one of the benefits of living and working at the Resort is that many of the expenses of living were covered by the business, in exchange for having Hope and Robert readily accessible to work in the business.

Robert elected to run the Resort through a limited liability company called Levinius, L.L.C. ("Levinius"). It appears that the land on which the Resort is located is owned by other limited liability companies which are in turn owned by Levinius. In

short, Robert controls the Resort through his control of Levinius. There are no written agreements granting Hope an ownership interest in the Resort, Levinius, or any of the subsidiary companies.

Levinius did not show taxable income until 2005. Even after the application of 2005 income, Levinius had accumulated taxable losses of about $2 million at the end of 2005. By that time, Levinius also had about $3.6 million of accumulated depreciation.

THE ISSUES

Commendably, Robert and Hope have resolved all of the issues relating to their child, Calli Jo, who is now ten years old. The court hereby approves their stipulation regarding custody, parent time, and child support.

The two issues litigated at trial were 1) the existence and amount of community property, and 2) the appropriate amount and duration of alimony. The court will first address community property.

COMMUNITY PROPERTY

Robert and Hope were married in California, but have lived in Utah for over ten years. Were it not for the Agreement this court would probably apply Utah law in dividing their property, which affords trial courts great latitude in considering the

contributions of both parties to the accumulation of wealth during the marriage. The Agreement is lengthy and detailed. The Agreement provides that it is governed by California law.

A. Alleged Breach

Hope maintains that the Agreement is not effective if either party breaches any of its obligations thereunder. She cites the following language from paragraph 1 of the Agreement:

> "The effectiveness of this Agreement is expressly conditioned upon. . . each party's . . . performance of the terms and conditions contained herein."

Hope maintains that Robert failed to perform the terms and conditions of the Agreement by 1) failing to pay income taxes, (2) failing to maintain insurance on Robert's life for Hope's benefit, 3) failing to comply with the duty of good faith and fair dealing implicit in every contract, and 4) failing to fulfill his fiduciary duty to Hope. She maintains that those breaches invalidate the Agreement. The court examines each argument in turn.

A. 1. Taxes

Paragraph O. of the Agreement imposes on Robert the obligation to report his income for the purposes of federal or state income tax returns. Hope maintains that the aggressive deductions claimed on their past tax returns raise a question

whether Robert has satisfied this obligation. However, also in paragraph O., Robert promises to indemnify Hope against any claims, assessment, deficiencies, interest, penalties, fees and costs attributable to his income arising out of any filed tax return. This specific remedy is clearly the remedy Hope and Robert agreed upon for possible failure to properly report income, not the invalidation of the Agreement.

A. 2. Insurance

Paragraph P. of the Agreement imposes on Robert the obligation to maintain $250,000 of life insurance on his life naming Hope as beneficiary as long as they are married and living together. This obligation he has satisfied. However, subparagraph P.4. also requires Robert to notify Hope before cancelling this insurance and to require his insurance company to notify her as well. Robert admits he has cancelled that policy since separation without giving and requiring that notice. Hope claims this invalidates the Agreement. However, subparagraph P.4. provides a specific remedy for this failure - Robert's estate essentially becomes an insurer of his life and must pay $250,000 to Hope if he dies without insurance in force. As with the taxes, the specific remedy trumps the general remedy of invalidating the Agreement.

A. 3. Good Faith and Fair Dealing

Hope argues that Robert violated his duty of good faith and fair dealing by manipulating his activities, the financial statements of his companies, and his receipt of salary from his businesses to prevent the accumulation of community property. Hope's claim that Robert must work in ways that create community property is undermined by subparagraph F.2. of the Agreement, which allows Robert to "pursue any vocation, occupation or profession". Hope has also failed to persuade the court that Robert manipulated any opportunity to receive salary. It was reasonable to work at the Resort without compensation as long as the Resort was not profitable. Even after profitability, it is appropriate to wait until a return on investment is made before paying a salary to Robert. Finally, even though neither Robert nor Hope received a salary from the Resort, each of them received extensive and substantial benefits from living at the Resort.

A. 4. Fiduciary Duty

Hope claims that Robert violated his fiduciary duty to her. However, the Agreement makes clear that Robert has a fiduciary duty only when community property exists. If no community property exists, he has no duty.

With all of these claims of a failure to perform, the court would in any event be required to apply the rule that a contract is not invalidated except for a substantial breach. The court rejects Hope's claims that the Agreement is invalid because Robert did not perform his obligations thereunder.

Partnership

Although Hope has presented no agreement signed by Robert which makes her a partner in any of his business enterprises, she maintains that there is substantial evidence that he did in fact make her a partner. Her evidence includes her own testimony that Robert talked to her on at least three occasions to tell her how she must conduct herself as an "owner". Robert denies these conversations. He maintains that he and Hope frequently argued about her lack of ownership. Hope also presented a clip of a television program featuring the Resort which described her as a "co-owner". Several magazine articles featuring the Resort referred to Hope as an "owner". Finally, Hope presented the testimony of Stuart Berman, the former lawyer of Robert in California, who briefly shared an ownership interest in the Resort with Robert in 1999. Berman testified that all discussions between him and Robert included the implicit assumption that Hope was a "co-owner" of Robert's interest.

The court is aware of no authority that creates a ownership interest simply because third parties believe such ownership exists. The belief of those third parties could, under some circumstances be sufficient evidence of ownership, but the ownership would have to be created by agreement of the parties. Subparagraph W. 2 of the Agreement expressly provides that the use of "such expressions as 'our property', 'our house' or 'our bank account'" does not alter the Agreement. The Agreement provides that community property comes into existence only as the Agreement provides. Paragraph D. 3. of the Agreement clearly provides that separate property becomes community property only if a document of title so indicates <u>and</u> the relinquishing party clearly acknowledges the relinquishment of a one-half interest in the property.

Stuart Berman's testimony is undermined by his obvious anger at Robert, which persists even though he made $475,000 on an investment of $1,721,000 in just eight months. His testimony is also seriously undermined by the actual language of the agreements between Berman and Robert. Hope signed only one of those agreements, and only in the capacity of a consenting spouse, which a careful lawyer from California would require when dealing with a married man who insists his wife actually has no

ownership interests. It is obvious that Berman knew Hope was not a co-owner.

Hope claims that her putative ownership interest in Levinius is unaffected by the Agreement's requirement of a writing because she asserts it against Levinius, not against Robert. Levinius, of course, is not a party to this action. Robert is, and he is entitled to the protection of the Agreement. Hope's claim that she became a partner by virtue of verbal agreements is rejected because 1) the Agreement requires a written agreement to create a partnership, and 2) her claims that a verbal agreement was made are not credible.

The Meaning of "Earnings"

The court now turns to what it considers Hope's strongest claim; that subparagraph F.3. of the Agreement provides that the profits or cash flow from Flat Iron Mesa and/or the Resort, are community property.

The Agreement reverses the presumption under California law that any income resulting from the efforts of a husband or wife during marriage, and any property acquired with that income, is community property. Instead, all income, and all property acquired with that income, is separate property, unless the Agreement otherwise provides. Subparagraph D.1. of the Agreement

provides that earnings are governed by paragraph F. Subparagraph F.1. of the Agreement provides that earnings from personal services, skills, efforts, talents or work are separate property, except as the Agreement specifically provides. Subparagraph F.2. of the Agreement creates a community property right in the "earnings" or "base salary" derived from actual effort or employment of Robert. "Earnings" or "base salary" are defined as compensation for labor or services performed by Robert, but not including any benefits associated with the "earnings" or "base salary". The only earnings or base salary derived from actual efforts of Robert were paid during the four months following the marriage, were deposited in the joint account and promptly consumed on community expenses.

Subparagraph F.4. defines the Kellwood payments, except salary, as separate property. Subparagraph F.5. provides a community property right in bonuses received by Robert as an employee under limited circumstances. Subparagraph F.6. provides an additional community property right in bonuses based on the duration of the marriage. Subparagraph F.7. provides a community property right in pension payments based on longevity of the marriage. Subparagraph F.8. excludes any community property participation in stock options or dividends. Subparagraph F.9.

provides that earnings or salary from joint business ventures between Hope and Robert are community property, but joint business ventures are established by written agreement. Subparagraph F.10. makes all of Hope's earnings separate.

Paragraph I. of the Agreement provides that all profits, rents, increase, appreciation and income from Robert's separate property are also his property. A change in the form of Robert's separate property does not change the characterization of that property. If Robert sells separate property and purchases other property, the new property is also separate property. Paragraph J. of the Agreement provides that devoting time, skills or effort to separate property does not change it to community property.

Against this background, the court is asked to interpret subparagraph F.3, which reads as follows:

> "In the event ROBBIE enters into any type of business venture or ventures from and after the date of marriage from which ROBBIE will receive earnings or salary therefrom (regardless of whether such earnings or salary have been derived from actual effort or services performed by ROBBIE for or on behalf of the business venture), such earnings or salary, derived from business ventures or ventures, shall be community property. For purposes of this paragraph F.3., the term "earnings" or "salary" derived from said business ventures or ventures excludes pension and deferred income contributions, stock, stock options, bonuses, benefits and rights, and perquisites, which items shall remain ROBBIE's separate property subject to Paragraphs F.5, F.6. and F.7. It is the parties intention that all property

acquired with such "earnings" or "salary" (defined under this Paragraph F.3.) shall be community property unless the parties agree otherwise in writing."

Robert maintains that the words "salary" and "earnings" have the same meaning in subparagraph F.3. as they had in subparagraph F.2. Hope, on the other hand, points out that the language that followed "earnings" and "base salary" in F.2 were "derived from actual effort or employment of ROBBIE", whereas the words that follow "earnings" and "salary" in F.3. are "regardless of whether such earnings or salary have been derived from actual effort or services performed by ROBBIE". Robert explains this as loosening the requirement that Robert actually perform services for his business venture to make his earnings or salary community property, but maintains that "earnings" still have the customary meaning under California law of payment received because of services provided, as opposed to investments made. Hope maintains that both Flat Iron Mesa and the Resort are business ventures entered into by Robert, and that any profits allocated to Robert from those ventures are "earnings" that are community property under F.3.

There is no question that, in the absence of the Agreement, the profits of Flat Iron Mesa would be Robert's separate property because the investment in Flat Iron Mesa was funded by Robert's

separate property. Hope made an effort to persuade the court that Robert was actively involved in the management of Flat Iron Mesa. Even if the court were convinced of that, it was Robert's money, not his business efforts, that made the Flat Iron Mesa profits possible. The Resort is a somewhat different situation; Robert's investment in the Resort was critical to its success, but his management was also a factor.

Reading the Agreement as a whole, particularly in view of the portions of the Agreement described above, the court is convinced that "earnings" in subparagraph F.3. means payments based at least in theory on services, such as actual salary, guaranteed payments to a member in a limited liability company, or draws to a partner in an operating business partnership. It does not mean any kind of profits from a business venture.

Were the court to consider parol evidence, its finding about the meaning of "earnings" would be the same. Robert testified that he always intended that Hope would participate primarily in his base salary from employment and then in bonuses and pension payments only under limited circumsyances. He remembers specifically discussing F.3. and understanding it to mean that Hope would participate only in his wages, salary or similar payments from any new businesses he may start. Hope's

recollection of specific provisions of the Agreement is virtually non existent. Her description of what she understood the Agreement to mean was general and did not appear to be based on actual memory of the language of the Agreement or advice of her attorney concerning its meaning. Moreover, Robert's interpretation is more consistent with the overall expressed purpose of the Agreement. It is hard to believe that Robert went to the trouble of obtaining a prenuptial agreement so he could ensure that Hope would claim one-half of profits from any business ventures in which he would become involved.

Because the parties presented evidence of what profits Flat Iron Mesa and the Resort have realized, and because the court expects that an appeal of this decision is likely, the court will also analyze what Hope should receive if her interpretation of F.3. is ultimately accepted.

A. Flat Iron Mesa

Under California law community property ceases to accumulate when the parties separate. This also appears to be the intent of the Agreement. See subparagraph F.1. of the Agreement. Hope and Robert had certainly separated by the end of 2005, so Hope would be entitled at most, to any profits of Flat Iron Mesa earned by

the end of 2005. Robert's share of profits from Flat Iron Mesa was $476,609 in 2003, $294,465 in 2004, and $285,006 in 2005.

The court is not persuaded that Flat Iron Mesa was a business venture within the meaning of F.3. It was an investment. Robert contributed nothing of significance to Flat Iron Mesa other than his money. Any profits he received were clearly unearned income.

B. The Resort

If F.3. makes the profits of the Resort community property, the court must decide whether the Resort had any profits. From its inception through the end of 2005, the Resort had an accumulated taxable loss of $2 million. It also had accumulated depreciation of $3.6 million. Since depreciation does not represent an expenditure of cash, Hope argues that accumulated depreciation must be added to taxable income to calculate operating cash flow, which is what she contends F.3. means by "earnings."

The court recognizes that the reason the Resort has $3.6 million of accumulated depreciation is that Robert has invested $11 million of his separate property and borrowed money in the Resort. The Resort was certainly not a cash cow through 2005. Moreover, the court agrees with Robert's expert that, even if

depreciation does not represent an expenditure of cash, it does represent an allowance for replacing wasting assets which wear out and must eventually be replaced. While it may be that the depreciation allowance under U.S. tax laws is more generous than would actually be required for replacing wasting assets, the court does not agree that no allowance is required. In the absence of better information about an appropriate allowance, the court falls back on that provided under U.S. tax law.

In all of this analysis, it is worth noting that Robert has made enormous cash investments in the Resort, in addition to devoting himself to making the Resort profitable. Hope also devoted herself to making the Resort profitable, but she made no cash investment in the Resort. Both Hope and Robert, though they worked hard, enjoyed the amenities of the Resort and lived a luxurious lifestyle. Under Utah law, Hope is entitled to sufficient alimony to preserve that lifestyle. Under Utah law, the court would properly award Hope only a small percentage, if any, of the Resort. Under California law, the Resort would likely remain separate property of Robert, subject to possible compensation of Hope for her contribution to its success. Under the Agreement, interpreting F.3. as Hope desires, Hope would be entitled only to one-half of accumulated profits received by

Robert, less one half of those profits applied to community expenses. The only distributions to Robert from the Resort were in 2003 and 2005, and totaled about $280,000. Thus, the most community property Hope would be entitled to is $140,000, reduced by community expenses over the course of the marriage. She has already received a voluntary property settlement from Robert of over $100,000.

For the reasons set forth above the court determines that there is no community property to divide.

Alimony

Robert maintains that Hope is entitled to no more than $10,000 per month alimony. Hope seeks $30,000 per month. Since Robert has stipulated that he can afford any reasonable alimony award, the only question is what amount of alimony will maintain Hope in the lifestyle to which she was accustomed during the marriage.

The parties spent about $9,000 per month on Hope's expenses before separation. After separation, Hope spent about $10,500 per month. Hope's expert witness presented a proposed budget that amounted, in many ways, to combining pre-separation and post-separation expenses. His argument was that the pre-separation expenses were basically for luxuries and that Hope's necessities

were provided as an incident to her residence at the Resort. After separation, Hope's witness testified, Hope eliminated most luxuries and spent her temporary alimony on necessities. Thus, to restore her marital standard of living, Hope would need $19,707 per month. Her expert added to this figure about $5,000 per month for income taxes, and $6,800 per month to purchase an additional residence for about $1 million. Thus, Hope demands alimony of $30,000 per month.

The court does not fully agree with the budget Robert proposes for Hope. For example, Robert proposes to reduce Hope's allowance for medical treatments not covered by insurance - a category that historically included laser treatment and plastic surgery - to an amount that would cover only deductibles and co-payments for medically necessary procedures. Regardless of how Robert feels or felt about the necessity of plastic surgery, the evidence at trial clearly established that maintaining her appearance with surgical and similar procedures was a routine part of life for Hope.

Robert also argues that Hope should be expected to work outside the home. However, the evidence was clear that Hope worked only at the Resort. Even there, it was necessary to hire

housekeepers and nannies to take care of the residence and Calli Jo when Hope worked at the Resort.

On the other hand, the court does not agree with Hope that she must have a housekeeper/nanny to match her marital standard of living. Since she no longer has duties at the Resort, she should be able to maintain the property where she now lives without the need to hire any employees. This will not cause her to work any harder than she did during the marriage.

The most difficult challenge for the court is to approximate the cost of elements of Hope's marital life that were not purely economic. How can a court make available all of the amenities provided at the Resort? How is the court to value the apparent perquisite Hope enjoyed of being able to buy almost anything she wanted and go anywhere she wanted? Once Hope separated from Robert, she no longer had any access to his substantial monetary reserves. This is something the court cannot replace with alimony. However, it is possible, by looking at historic expenditures, to approximate what monthly payment will enable Hope to enjoy the standard of living she enjoyed during the marriage.

The court starts with the budget proposed by Hope's expert, Richard Hoffman ("Hoffman"). The court disagrees with Hoffman

that the $5,000 of "mad money" Robert gave Hope each of the last few months before separation represents any effort to match historic expenditures. Hoffman substituted the $5,000 for $1800 of documented pre-separation monthly expenditures. The court accordingly reduces Hoffman's budget by $3,200. The court is also unpersuaded that Hope needs a second marital residence worth $1 million to match her marital lifestyle. As best this court can determine, her present residence is similar in appearance and quality to the place she lived at the Resort.

Robert also challenges Hope's proposed "barn expenses" of $2,100 per month. Hope has taken her horses to her new home, where she has a barn to house them. Based on actual expenditures for horses at the Resort, sometimes including these same horses, Robert maintains that $400 per month is sufficient. The court agrees that Hope has overstated these projected expenses, but also agrees that there were economies of scale at the Resort that Hope may not now enjoy. The court's best estimate of "barn expenses" is $600 per month.

Hope includes $550 per month in her budget for private school tuition for Calli Jo. Whether Calli Jo will need or want to attend private school is something no one presently knows. Moreover, her tuition would not properly be treated as alimony,

but rather as child support. The court accordingly eliminates this from Hope's proposed budget.

Finally, the court eliminates the budget allocated for "savings" of $1,150 per month. As far as this court can determine, the purpose of alimony is to permit the maintenance of a marital standard of living for a specified period after the end of the marriage, not to allow the setting aside of a nest egg to maintain the marriage partner thereafter. Nothing in the evidence suggests that Robert regularly set aside anything like $1,150 per month for Hope's retirement during the marriage.

With these adjustments the court finds that Hope will require $12,000 per month after taxes to maintain her marital standard of living. The tax burden for alimony at this level has not been calculated by either expert. Robert's expert estimated that the combined federal and state tax burden on $10,000 of monthly alimony was 19.1%. Hope's expert estimated that the combined federal and state burden on $24,500 of month alimony was about 20%. Monthly alimony before taxes of $15,000 should yield $12,000 per month after taxes. The court awards Hope alimony of $15,000 per month.

<u>Permanency of Alimony</u>

Because Hope and Robert were married fourteen years and

three months before separation, the maximum duration of alimony is presumptively fourteen years and three months. Alimony usually terminates on remarriage or cohabitation. Hope argues that special circumstances - her loss of a potentially rewarding career as a model and actress - warrant making this alimony non-terminable. It is hard to imagine something more speculative than the future film or modeling career of someone who has not achieved "star" or "super model" status. However, the Agreement does authorize this court to consider Hope's career as a factor in any aspect of alimony.

In order to permit Hope to make a gradual adjustment to a different lifestyle if she should decide to remarry, as well as a cushion towards establishing a new career, the decree will provide that alimony will last for at least five years even if Hope remarries or cohabits, and that it shall continue thereafter, even with remarriage or cohabitation, at a reduced level of $7,500 per month, for five more years. In other words, if Hope remarries or cohabits before October 1, 2012, alimony will not be reduced or eliminated until October 1, 2012, when it will be reduced to $7,500 per month. If she remarries after October 1, 2012, but before October 1, 2017, it will be reduced to $7,500 until October 1, 2017, when it will be eliminated.

Remarriage or cohabitation after October 1, 2017, will cause an immediate elimination of alimony.

Child Support

Hope and Robert have agreed on child support of $1,000 per month. If the parties determine that Calli Jo should attend private school, Robert shall pay reasonable tuition.

Attorney Fees

There are two attorney fee issues in this case; first, whether Hope should be required to reimburse Robert for all or part of the fees he advanced for her and second, whether either party has prevailed in a dispute arising out of the terms, conditions and obligations imposed by the Agreement, and is therefore entitled to recover attorney fees under paragraph Z. of the Agreement.

With respect to the first issue, the court promised, when it originally required Robert to pay Hope's attorney fees, that it may require her to reimburse him. It was important to ensure that Hope had an opportunity to present her best case to the court and that she not be overwhelmed by Robert's resources. Hope incurred litigation expenses of $120,000 through June 30, 2007. Robert had paid $80,000 of those fees and disputed

$40,000. At the close of trial, the court instructed Robert to pay those fees. Through August 28, 2007, Robert had incurred litigation expenses of $124,000 just in securing a determination of the validity and enforcement of the Agreement. The court is unable to say that Hope's fees are unreasonable in amount when they are less than Robert's fees. Also, even though the court ultimately found for Robert on the property issues, the court cannot find that Hope's position was so untenable that she should be required to cover her own fees.

The theory on which Utah law permits a court to require one party to a divorce to advance the fees of the other is to permit each side an equal opportunity to present its case. Hope did not have the resources to match Robert's effort without assistance. However, she did have approximately $35,000 in her securities account from gifts Robert made during the course of the marriage. The court should have required her to use that account at least in substantial part. The court will require that Hope pay $30,000 of her own fees, plus whatever amount her fees since June 30, 2007, exceed $30,000. In other words, Robert shall not be required to pay any litigation expense incurred by Hope after June 30, 2007, and, if those expenses are less than $30,000, the difference shall be refunded to Robert.

With respect to paragraph Z. of the Agreement, the court finds that Robert is the prevailing party in the dispute "arising out of the terms, conditions and obligations imposed by" the Agreement. Hope's claims for community property were based first on her effort to invalidate the Agreement, second on her claim that she was a co-owner of the Resort, and third, that she was entitled to one-half of Robert's distributions from Flat Iron Mesa and one-half of the "operating cash flow' of the Resort. Given the disposition of all those claims, this court cannot consider Hope the prevailing party in the aspects of this dispute that involved the Agreement. Robert is the prevailing party.

In accordance with paragraph Z. of the Agreement, the court must award Robert his fees in connection with the dispute over the application of the Agreement. He claims $167,884.75 through the end of trial. Those services were necessary and the charges therefor were reasonable. The court awards Robert his fees of $167,884.75.

Robert may recover his fees only by deducting $5,000 from each month's alimony payment. The award of fees shall bear interest at 6.99% per annum from October 1, 2007.

Counsel for Robert should submit findings, conclusions and a decree pursuant to Rule 7, URCP.

Dated this 14th day of September, 2007.

Lyle R. Anderson, District Judge

SIGNATURE STAMP USED WITH APPROVAL OF ABOVE-NAMED JUDGE

CLERK/DEPUTY CLERK

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 054700107 by the method and on the date specified.

METHOD	NAME
Mail	DAVID S DOLOWITZ Attorney PET 257 E 200 S STE 700 SALT LAKE CITY, UT 84111
Mail	KENNETH A OKAZAKI Attorney RES 170 S MAIN ST STE 1500 SALT LAKE CITY UT 84101

Dated this 14th day of September, 2007.

Deputy Court Clerk

EXHIBIT 4

PRENUPTIAL AGREEMENT

THIS PRENUPTIAL AGREEMENT (the "Agreement") is made and entered into this [illegible] day of [illegible], 1991, in the City of Los Angeles, County of Los Angeles, State of California, by and between HOPE MARIE RIZZITANO (hereinafter referred to as "HOPE") and ROBERT LEVIN (hereinafter referred to as "ROBBIE"), with reference to the following facts:

1. This Agreement is entered into in consideration of marriage and the promises contained herein. The effectiveness of this Agreement is expressly conditioned upon such marriage between the parties actually taking place and each party's subsequent performance of the terms and conditions contained herein. If, for any reason, the marriage does not take place, this Agreement will be of no force or effect.

2. ROBBIE has been previously married and divorced, and has one son, PAUL LEVIN, age 20. HOPE has not been previously married and has no children.

3. The parties hereto desire and do hereby define the respective rights of each in the property, income, assets, and liabilities that each may have or may thereafter acquire, and the parties agree that, except as may expressly be set forth herein, all property, real and personal, owned by either of them at the time of the contemplated marriage, from whatever source, including any growth in the value of said property, whether or

not due to the efforts of one or both of the parties during the marriage, shall be and remain the separate property of the person who initially owned or subsequently acquired the property, and neither shall acquire any interest or right to any of the property of the other.

4. ROBBIE has substantially disclosed to HOPE, by the attached Exhibit "A", the nature, extent and value of his property interests, including, without limitation, his various present business and investment interests and his present and potential income from various sources, including without limitation, his business and investment interests. The parties acknowledge that the total value of ROBBIE's property interests is estimated to be in excess of $10,000,000.00.

5. HOPE has substantially disclosed to ROBBIE, by the attached Exhibit "B", the nature, extent and value of her property interests, including, without limitation, her various present business and investment interests and her present and potential income from various sources, including, without limitation, her business and investment interests. The parties acknowledge that the total value of HOPE's property interests is estimated to be in excess of $_______.

6. HOPE and ROBBIE acknowledge to each other that each does not now have, possess, or claim any rights or interest in the present or future income, property, or assets of the other, except as hereinafter specifically provided for.

NOW, THEREFORE, in consideration of the foregoing, and of the terms, covenants, and conditions herein contained, the parties hereto agree to the following:

A. <u>BINDING AGREEMENT</u>

HOPE's and ROBBIE's rights with respect to the property owned by either of them at the time of the contemplated marriage or acquired during marriage to each other shall be subject to the terms of this Agreement.

B. <u>DISCLOSURE OF PROPERTY</u>

1. At the time this Agreement is executed, ROBBIE sets forth in Exhibit "A", attached hereto and by this reference incorporated herein, substantially all real and personal property in which he has an interest and the extent of that interest, and any other resources or means of support.

2. At the time this Agreement is executed, HOPE sets forth in Exhibit "B", attached hereto and by this reference incorporated herein, substantially all real and personal property in which she has an interest and the extent of that interest, and any other resources or means of support.

3. At the time this Agreement is executed, ROBBIE sets forth in Exhibit "C", attached hereto and by this reference incorporated herein, substantially all obligations for which he is liable.

4. At the time this Agreement is executed, HOPE sets forth in Exhibit "D", attached hereto and by this reference

incorporated herein, substantially all obligations for which she is liable.

5. The foregoing disclosures are for courtesy only and not an inducement to enter into this Agreement. ROBBIE and HOPE agree that each is willing to enter into this Agreement freely and voluntarily regardless of the nature, extent or total amount of the present or future assets, liabilities, income or expenses of the other, and each party voluntarily and expressly waives hereto any right to disclosure of the property and/or obligations of the other party beyond the disclosures provided in this Agreement.

C. REPRESENTATION BY INDEPENDENT COUNSEL

HOPE acknowledges that she has been represented by independent counsel, FLYNN, KNERR & OYLER by CONNOLLY OYLER, ESQ., and ROBBIE acknowledges that he has been represented by independent counsel, SIMKE, CHODOS, SILBERFELD & ANTEAU, INC. by RONALD W. ANTEAU, ESQ., in preparation of this Agreement; that counsel representing each party is of his or her own choosing; and that this Agreement has been read by the parties and that its meaning and legal consequence have been explained fully to them by their counsel and are understood.

D. PROPERTIES OF EACH SPOUSE THAT ARE TO REMAIN SEPARATE

1. ROBBIE and HOPE agree that all property, including the property set forth in Exhibit "A", belonging to ROBBIE at the commencement of the marriage shall remain his separate property.

ROBBIE shall have sole management and control over the property, and the property shall be subject to his disposition as his separate property in the same manner as if no marriage had been entered into. All earnings of ROBBIE during the marriage shall be characterized as defined hereinbelow and as more fully set forth in Paragraph F. below.

2. HOPE and ROBBIE agree that all property, including the property set forth in Exhibit "B", belonging to HOPE at the commencement of the marriage shall remain her separate property. HOPE shall have sole management and control over the property, and the property shall be subject to her disposition as her separate property in the same manner as if no marriage had been entered into. All earnings of HOPE during the marriage shall be characterized as defined hereinbelow and as more fully set forth in Paragraph F. below.

3. Without this Agreement, the parties acknowledge that property acquired during marriage in California could be categorized as community property. Community property is defined by Civil Code, §687, which states, "Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either," and by Section 5110, which states, "except as provided in Sections 5107, 5108, and 5126, all real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state

and property held in trust pursuant to Section 5110.150, is community property...". The parties acknowledge and agree that they understand and are aware of the fact that under community property law, each would be entitled to a one-half (1/2) interest in the property and income of the other when same is acquired under the definition of community property. ROBBIE and HOPE understand and agree that, by this Agreement, there shall be no community property and that all assets, no matter when acquired, shall be the sole and separate property of the party so acquiring it unless specifically designated otherwise in this Agreement and/or on a document of title contrary to the terms of this Agreement, and each party acknowledges that he or she is relinquishing a one-half (1/2) interest in property or income acquired by the other party as a direct result. Notwithstanding anything to the contrary stated above or below in this Agreement, the parties desire to and do retain the right to purchase and take title to property (real and personal) as joint tenants or tenants-in-common or community property if so designated on a document of title.

Each party waives any right of management and control over the separate property of the other party and acknowledges that there is no fiduciary duty with respect to each spouse's management and control over the separate property in relation to the other spouse. The parties further acknowledge that, without this Agreement, there could be rights of joint

management and control of the community personal property, if any, as well as a fiduciary duty that each spouse act in good faith with respect to the other spouse in the management and control of the community property. Each party acknowledges that he or she understands that, except for the community property or joint property rights created or reserved under this Agreement, which rights and claims remain governed by Civil Code, §5125, et seq., each waives all rights pertaining to joint management and control of the community property, if any, as well as the duty to act in good faith with respect to same, and all rights and claims against the other for breach of fiduciary duty and/or for an accounting of the property and obligations, pursuant to Civil Code, §5125, et seq.

E. MUTUAL WAIVER OF MARVIN V. MARVIN CLAIMS

1. HOPE might be entitled to receive compensation based upon reasonable value of services rendered by her to ROBBIE during the non-marital relationship of the parties. HOPE hereby agrees that, notwithstanding the expenditures of her time, skill and effort during the non-marital relationship for which she might be entitled to receive compensation, HOPE waives all rights and claims to receive such compensation for services rendered by her including any rights which may inure to her after the effective date of this Agreement through the date of the parties' marriage. HOPE expressly waives any right or claims she may have under the case of Marvin v. Marvin.

Notwithstanding the fact that ROBBIE might have voluntarily provided HOPE with support or maintenance during the non-marital relationship of the parties, such conduct shall not be construed as an agreement, either express or implied, to provide HOPE with support or maintenance.

2. ROBBIE might be entitled to receive compensation based upon reasonable value of services rendered by him to HOPE during the non-marital relationship of the parties. ROBBIE hereby agrees that, notwithstanding the expenditures of his time, skill and effort during the non-marital relationship for which he might be entitled to receive compensation, ROBBIE waives all rights and claims to receive such compensation for services rendered by him including any rights which may inure to him after the effective date of this Agreement through the date of the parties' marriage. ROBBIE expressly waives any right or claims he may have under the case of Marvin v. Marvin, supra.

Notwithstanding the fact that HOPE might have voluntarily provided ROBBIE with support or maintenance during the non-marital relationship of the parties, such conduct shall not be construed as an agreement, either express or implied, to provide ROBBIE with support or maintenance.

F. PROPERTIES OF EACH SPOUSE THAT ARE TO BE COMMUNITY

1. Without this Agreement, the parties acknowledge that all earnings or income resulting from the personal services, skills, efforts, talent, or work of the parties during the time

that they are married and living together could be categorized as community property under California law. ROBBIE and HOPE understand and agree that, by this Agreement, any earnings or income resulting from the personal services, skills, efforts, talents, or work of each of the parties during the time they are married and living together, and any property acquired therewith, shall be and remain the separate property of the party whose personal services, skills, efforts, talent, or work result in such earnings or income, **except as set forth hereinbelow.**

2. Except as otherwise expressly provided in this Agreement, ROBBIE and HOPE understand and agree that the "earnings" or "base salary", or accumulations from such earnings or salary, derived from actual effort or employment of ROBBIE, from and after the date of marriage, shall be community property. For purposes of this paragraph, the terms "base salary" or "earnings" are defined as compensation for labor or services performed by ROBBIE, excluding pension and deferred contributions, stock, stock options, bonuses, benefits and rights, and perquisites, received by ROBBIE from his employment, which items shall remain ROBBIE's separate property. It is the parties' intention that all property acquired with such community property earnings of ROBBIE shall be community property, unless the parties agree otherwise in writing. In this regard, the parties specifically acknowledge and agree that ROBBIE is fully free during the course of the marriage to pursue any vocation,

occupation or profession, and nothing herein shall limit ROBBIE in this regard.

3. In the event ROBBIE enters into any type of business venture or ventures from and after the date of marriage from which ROBBIE will receive earnings or salary therefrom (regardless of whether such earnings or salary have been derived from actual effort or services performed by ROBBIE for or on behalf of the business venture), such earnings or salary, or accumulations from such earnings or salary, derived from said business venture or ventures, shall be community property. For purposes of this paragraph F.3., the term "earnings" or "salary" derived from said business venture or ventures excludes pension and deferred income contributions, stock, stock options, bonuses, benefits and rights, and perquisites, which items shall remain ROBBIE's separate property subject to Paragraphs F.5., F.6. and F.7. It is the parties' intention that all property acquired with such "earnings" or "salary" (defined under this Paragraph F.3.) shall be community property unless the parties agree otherwise in writing.

4. In regard to ROBBIE's relationship with Kellwood, the parties acknowledge that the earn out which ROBBIE is receiving from Kellwood, which continues through December 31, 1993, is, and shall be, ROBBIE's separate property. Same shall not be taken into consideration in any manner regarding ROBBIE's earnings, salary, or accumulations from such earnings or salary.

5. The parties wish to create a community property participation in ROBBIE's separate property earnings which are related to bonuses which ROBBIE receives from his employment. In this regard, the parties are differentiating between four (4) different circumstances, those being circumstances wherein (a) ROBBIE is employed as an employee in the same industry (i.e., the clothing industry); (b) ROBBIE is employed as an employee in a business area outside the clothing industry; (c) ROBBIE is rendering services to a corporation in which he is a principal shareholder (owning ten percent (10%) or more of the stock) and is being compensated for said efforts; and, (d) ROBBIE is rendering services on behalf of a corporation in which he owns less than ten percent (10%) of the stock therein, and he is being compensated for said efforts. In each of these instances, the parties have entered into an agreement as to the community's participation in monies derived by ROBBIE over and above the earnings and/or base salary as set forth in Paragraphs F.2. and F.3. above. The parties' agreement in regard to each of these alternatives are:

a. ROBBIE will be entitled to receive, as his separate property, any bonus up to five (5) times a multiple of his salary, and any amount in excess thereof shall be community property. (The separate property aspect of the bonus is subject to the community property participation therein as hereinafter set forth in Paragraph F.6.)

By way of example (for illustration only and with no representation that such sums will be earned), if ROBBIE has a salary of $300,000.00, and receives a bonus of $2,000,000.00., ROBBIE shall be entitled to a separate property interest in the bonus of a multiple of five (5) times the salary, i.e., $300,000.00 in salary, $1,500,000.00 in bonus, and the balance thereof, $500,000.00, shall be community property.

b. ROBBIE will be entitled to a separate property interest in a bonus of a multiple of three (3) times his salary, with the balance of the bonus, if any, being community property. (The separate property aspect of the bonus is subject to the community property participation therein as hereinafter set forth in Paragraph F.6.)

By way of example (for illustration only and with no representation that such sums will be earned), if ROBBIE has a salary of $300,000.00 and receives a bonus of $2,000,000.00 ROBBIE will be entitled to a separate property interest in the bonus of three (3) times the salary, i.e., $900,000.00, with the balance thereof of $1,100,000.00 being community property. (Total earnings of $2,300,000.00; Salary: $300,000.00, separate property bonus: $900,000.00, community property bonus: $1,100,000.00.)

c. ROBBIE will be entitled to receive, as his separate property, any bonus up to five (5) times a multiple of his salary, and any amount in excess thereof shall be community property. (The separate property aspect of the bonus is subject

to the community property participation therein as hereinafter set forth in Paragraph F.6.)

By way of example (for illustration only and with no representation that such sums will be earned), if ROBBIE has a salary of $300,000.00, and receives a bonus of $2,000,000.00., ROBBIE shall be entitled to a separate property interest in the bonus of a multiple of five (5) times the salary, i.e., $300,000.00 in salary, $1,500,000.00 in bonus, and the balance thereof, $500,000.00, shall be community property.

d. ROBBIE will be entitled to a separate property interest in a bonus of a multiple of three (3) times his salary, with the balance of the bonus, if any, being community property. (The separate property aspect of the bonus is subject to the community property participation therein as hereinafter set forth in Paragraph F.6.)

By way of example (for illustration only and with no representation that such sums will be earned), if ROBBIE has a salary of $300,000.00 and receives a bonus of $2,000,000.00 ROBBIE will be entitled to a separate property interest in the bonus of three (3) times the salary, i.e., $900,000.00, with the balance thereof of $1,100,000.00 being community property. (Total earnings of $2,300,000.00; Salary: $300,000.00, separate property bonus: $900,000.00, community property bonus: $1,100,000.00.)

e. Any bonus received by ROBBIE from Kellwood is excluded from the provisions of Paragraphs F.5.a. through F.5.d.

(as more specifically set forth in Paragraph F.4. above).

6. In addition to the participation hereinabove set forth, the community shall participate in ROBBIE's separate property bonus at a rate of five percent (5%) per year, commencing December 31, 1992, and continuing at a rate of five percent (5%) per year for each full year the parties are married thereafter, not to exceed the community having a maximum of a fifty percent (50%) interest in the separate property bonus, (i.e. at the maximum point in time, any interest in the separate property bonus would be fifty percent (50%) ROBBIE's separate property and fifty percent (50%) community property, which would occur at the earliest for the year December 31, 2001).

By way of example, at the end of 1992, as in the hypothetical set forth in Paragraph F.5.a. above, the community would be entitled to receive five percent (5%) of the hypothetical separate property bonus of $2,000,000.00 (i.e., $100,000.00).

7. Additionally, as to any pension and/or deferred compensation that ROBBIE will be receiving as a result of the employment situations hereinabove set forth, the community shall be entitled to share in said pension and/or deferred compensation at a rate of five percent (5%) per year, commencing December 31, 1992, and continuing at a rate of five percent (5%) per year for each full year the parties are married thereafter, not to exceed the community having a maximum of a fifty percent (50%) interest

in the separate property pension and/or deferred compensation, (i.e. at the maximum point in time, any interest in the separate property pension and/or deferred compensation contributions would be fifty percent (50%) ROBBIE's separate property and fifty percent (50%) community property, which would occur at the earliest for the year December 31, 2001).

8. At no time will the community have any interest of any kind in any stock options and/or dividends that arise as a result of any of ROBBIE's employment, as hereinabove set forth.

9. In the event the parties enter into any type of joint business venture or ventures from and after the date of marriage, the earnings or salary, or accumulations from such earnings or salary, derived from said joint business venture or ventures, shall be community property. For purpose of this paragraph, the parties understand and agree that a joint business venture will be established where the parties have entered into a written agreement to establish same. The parties understand and agree that they will share equally all benefits derived from said joint business venture or ventures (including earnings, salary, accumulations from such earnings or salary, stock, stock options, *and perquisites), and all liabilities and obligations related* thereto.

10. ROBBIE and HOPE understand and agree that except as otherwise provided in this Agreement, any earnings, or income resulting from the personal services, skills, efforts, talent, or

work of HOPE during the time that HOPE and ROBBIE are married and living together and any property acquired therewith, shall be and remain the separate property of HOPE.

G. MUTUAL WAIVERS

1. Except as otherwise provided in Paragraph F. hereinabove of this Agreement, all property of any kind or nature, including but not limited to the earnings, income and other distributions of any kind or nature, resulting from personal services, skill, effort, management and work by either party after the marriage shall be the separate property of the party so acquiring said property and shall be subject in the same manner as though the proposed marriage never had been entered into. Each party acknowledges that he or she understands that, except for this Agreement, all of the earnings, income and other distributions resulting from the personal services, skill, effort, management and work of the acquiring party after the marriage, would be community property but that, by this Agreement, only certain earnings, income and other distributions are made the separate property of the party acquiring said earnings and income.

2. Except as may otherwise be provided in this Agreement, each of the parties hereto shall have an immediate right to dispose of, transfer in any manner, or bequeath by Will, his or her respective interest in and to (i) any and all property belonging to him or her prior to the effective date hereof, (ii)

any separate property hereafter acquired, and (iii) his or her respective share of any community and quasi-community property hereafter acquired. Without limiting the generality of the foregoing, and subject to any contrary provisions of this Agreement and/or subject to the execution of a valid Will, confirmed by Codicil or republished subsequent to the effective date of this Agreement, ROBBIE and HOPE hereby waive, discharge and release any and all right, claim or interest, whether actual, inchoate, or contingent, in law and equity, that he or she might acquire in the separate property or community of the other by reason of the proposed marriage, including, without limitation:

a. The rights or claims of Dower, Curtesy, or any statutory or common law substitutes for one party's right to an interest in the other party's property provided by the statutes of the State of California or any other state in which the parties may die, be domiciled or in which they own real property;

b. The right of election to take against the Will of the other;

c. The right to act as executor and/or administrator of the estate of the other, except in the event that the deceased dies intestate;

d. The right to a family allowance;

e. The right to a probate homestead;

f. The right to have exempt property set aside;

g. The right to a distributive share of the estate of the other should he or she die intestate (including such property that would otherwise be community property but for this Agreement); and,

h. The right to take the statutory share of an omitted spouse.

H. WILLS

1. Any pre-existing Will, testament, or trust instrument, or any other instrument which disposes of the estate of the other in death, shall remain in full force and effect, and shall not be revoked in whole or part by the occurrence of the marriage. Each party specifically waives the benefit of all probate or other similar statutes which might be in existence with respect to revocation of Wills on marriage, including without limitation, California Probate Code, §6560, and similar statutes in other jurisdictions.

2. Nothing contained herein shall constitute a waiver by either party of any bequest or devise that the other party may choose to make to him or her by Will or Codicil after the execution of this Agreement. However, the parties acknowledge that, except as otherwise provided for herein, no promises of any kind have been made by either of them about any such bequest or devise.

Additionally, both parties acknowledge that there have been no oral representations of any kind as to any right or

any interest in the other's estate, now or in the future, whether by way of Will, trust, or any other form of bequest, nor has there been any oral promise or any other oral representation that any such right or interest shall be provided as a part of or in consideration of the entering into this Prenuptial Agreement.

I. PROFITS FROM SEPARATE PROPERTY

1. The parties agree that all rents, issues, profits, increase, appreciation and income from the separate property of ROBBIE, whether real or personal, shall remain his separate property. The parties agree that a change in the form of ROBBIE's separate property shall not constitute a change of characterization, and the separate property shall remain ROBBIE's separate property regardless of any change in form. By way of illustration only, if ROBBIE sells one of his separate properties and deposits the proceeds from the sale in a bank account, that bank account will remain ROBBIE's separate property; if ROBBIE uses the payments he receives on a note secured by a deed of trust to invest in a business, that business, together with all of its assets, tangible and intangible, will remain ROBBIE's separate property; if ROBBIE purchases an apartment building with his separate assets, the new apartment building will remain ROBBIE's separate property.

2. The parties agree that all rents, issues, profits, increase, appreciation and income from the separate property of HOPE, whether real or personal, shall remain her separate

property. The parties agree that a change in the form of HOPE's separate property shall not constitute a change in characterization, and the separate property shall remain HOPE's separate property regardless of any change in form. The illustration set forth in Paragraph I.1. above is incorporated herein by reference.

J. EFFECT OF TIME, SKILL AND EFFORT

1. The parties agree that ROBBIE may devote considerable time, skill and effort to the investment and management of his separate property and the income from it. The parties agree that, notwithstanding that the expenditure of ROBBIE's time, skill and effort might constitute a community interest or asset in the absence of this Agreement which would otherwise entitle HOPE to one-half (1/2) thereof, there shall not be any community interest from the expenditure of ROBBIE's time, skill, and effort on his separate property, and any rents, issues, profits, increase, appreciation and income from the separate property of ROBBIE shall remain the separate property of ROBBIE.

2. The parties agree that HOPE may devote considerable time, skill and effort to the investment and management of her separate property and the income from it. The parties agree that, notwithstanding that the expenditure of HOPE's time, skill and effort might constitute a community interest or asset in the absence of this Agreement which would

otherwise entitle ROBBIE to one-half (1/2) thereof, there shall not be any community interest from the expenditure of HOPE's time, skill and effort on her separate property, and any rents, issues, profits, increase, appreciation and income from the separate property of HOPE shall remain the separate property of HOPE.

3. The expenditure of time, effort, skill and money by one party for the benefit of the separate property of the other party shall be deemed to be a gift to the other unless otherwise agreed to in writing.

K. **WAIVER OF INTEREST IN GOODWILL**

Each party acknowledges that the other, by virtue of his or her career development before marriage and during the term of the marriage, may have acquired or may acquire a factor of goodwill (or any analogous or comparable factor, however described) in his or her profession, practice or other business entity or entities, and may increase or decrease the value during the marriage. Each party hereby agrees that any such goodwill (or analogous) factor is and shall remain the separate property of the party in whose profession, practice or business entity the goodwill exists, and that any increase or decrease in such goodwill factor during the term of the marriage, shall not effect, and shall not be considered in determining, the parties' marital property rights pursuant to the laws of the State of California, or pursuant to the provisions of this Agreement.

L. EFFECT OF COMMINGLING

The occurrence of commingling or otherwise failing to segregate the separate property or separate income of either party shall neither change nor constitute a change in the character of that property, nor shall it constitute a transmutation of that separate property or income into community, quasi-community, joint marital, or similar type of property.

M. REAL AND PERSONAL PROPERTY

1. Any personal property acquired by the parties jointly hereafter (defined as an acquisition where title is taken in both parties' names, or where the parties sign a writing as to the joint nature of such acquisition), shall be owned by them as tenants-in-common or joint tenants or community property, as the parties then so decide, each party holding an undivided one-half (1/2) interest.

2. Any motor vehicles, trailers, boats or other items of personal property subject to registration and certificates of ownership by the State of California or other states, countries or jurisdictions, shall be the property of the person whose name is shown as the registered owner on the certificate of ownership, and if title is taken in both names, or where the parties sign a writing as to the joint nature of such acquisition, shall be owned by them as tenants-in-common or joint tenants or community property, as the parties then so decide, each party holding an undivided one-half (1/2) interest.

3. Any real property acquired by the parties jointly in California or any other state hereafter shall be owned by each as tenants-in-common or joint tenants or community property as the parties so decide, each party holding an interest according to title. Notwithstanding the foregoing, in the event the parties jointly purchase a residence and/or income property, (defined as an acquisition where title is taken in both parties' names or where the parties make a writing as to the joint nature of such acquisition), where title or a writing does not set forth a disproportionate interest, although the parties make no promises to do so, if either ROBBIE or HOPE contributes more than his or her equal share toward the down payment, reduction of principal on mortgage payments, or improvements, then the party contributing more than his or her equal share shall retain a right of reimbursement pursuant to Civil Code, §4800.2, from the net sale proceeds of the property. For purposes herein, "net sale proceeds" is defined as gross cash sale proceeds less all costs associated with the sale of the property, including brokers' fees, the payment of all liens and encumbrances against said property, and the payment of all appropriate taxes. By way of illustration only, if ROBBIE contributes one hundred percent (100%) toward the down payment, reduction of principal or mortgage payments and/or improvements, then ROBBIE shall retain a right of reimbursement for one hundred percent (100%) of his contribution (representing the excess contribution) directly from

the net sale proceeds of the property; if ROBBIE contributes eighty percent (80%) and HOPE contributes twenty percent (20%) toward the down payment, reduction of principal on mortgage, and/or improvements, then ROBBIE shall retain a right of reimbursement for sixty percent (60%) of the contribution (representing the excess contribution) directly from the net sale proceeds of the property. In either of the foregoing examples, any equity or net sales proceeds remaining after reimbursement pursuant to Civil Code, §4800.2 shall be equally divided between the parties.

4. *Except as specifically provided in this Agreement* executed by the parties hereafter, all real and personal property acquired by either of the parties hereafter, except property acquired in the name of both parties or where the parties have made a writing as to the joint nature of such property or purchased from the funds in their joint checking and/or savings account(s) set forth in Paragraph R.5, below, shall be the separate property of the party acquiring the property. All real and personal property in which title is taken in the name of HOPE shall be the separate property of HOPE. All real and personal property in which title is taken in the name of ROBBIE shall be the separate property of ROBBIE. ROBBIE or HOPE may, from time to time, sell and/or purchase with his or her separate property additional real or personal property. Said additional investments shall remain the respective party's separate

property. ROBBIE and HOPE may, from time to time, sign loan documents to enable the other to acquire property. The fact that either party signs the loan application thereon, and loans are given based on same, will not alter title thereto and such property shall be and remain the separate property of the title holder. ROBBIE and HOPE shall indemnify and hold each other harmless from any liability assessed against either of them as a result of his or her signing any such loan applications for the other party's separate property acquisition. Unless otherwise agreed to in writing, or as provided in paragraph M.3. (regarding joint purchase of residence and/or income property), if either party makes payment on a mortgage or pays property taxes or makes improvements to or repairs, using either community or separate property, on any property for the other's benefit those funds shall be transmuted and deemed to be a gift to the other party and any right of reimbursement is waived so that the title to said property shall control in determining the interest of ROBBIE or HOPE in said property and the party making said payment shall not be entitled to any reimbursement.

5. ROBBIE and HOPE agree that any contributions to any *retirement plan, pension plan, profit sharing plan, KEOGH or* IRA made on behalf of HOPE after the date of marriage which are attributable to services rendered by HOPE after the date of marriage shall remain the separate property of HOPE, and, except as otherwise provided herein, shall be subject to HOPE's

disposition in the same manner as though the proposed marriage never had been entered into.

ROBBIE acknowledges and agrees that he shall have no right, title or interest in and to any portion of HOPE's pension plan.

Pursuant to the terms of any such pension plan and/or as a matter of federal law, ROBBIE has been advised and understands that he may be entitled to survivor benefits under any such pension plan of HOPE and ROBBIE hereby waives all of his respective rights under any such pension plan and acknowledges that the effect of such waiver will be to deprive him of any and all such survivor benefits. ROBBIE agrees that, immediately after marriage, he will execute all forms required to effectuate the waiver of his rights to survivor benefits under any such pension plan of HOPE, including, without limitation, the Waiver Election of the Qualified Pre-retirement Survivor Annuity With Spousal Consent ("Waiver Form") which is attached hereto and incorporated herein as Exhibit "E". If HOPE dies prior to the time when ROBBIE signs such forms, including the Waiver Form, ROBBIE agrees to hold any funds received by him from any such pension plan of HOPE as constructive trustee for the benefit of HOPE's otherwise designated beneficiaries or, if none, her estate, and to immediately deliver any such funds to any such beneficiaries of HOPE or her estate.

6. ROBBIE and HOPE agree that any contributions and

appreciation thereon to any retirement plan, pension plan, profit sharing plan, KEOGH or IRA made on behalf of ROBBIE after the date of marriage which are attributable to services rendered by ROBBIE after the date of marriage shall remain the separate property of ROBBIE, and, except as otherwise provided herein, shall be subject to ROBBIE's disposition in the same manner as though the proposed marriage never had been entered into.

HOPE acknowledges and agrees that she shall have no right, title or interest in any portion of ROBBIE's pension plan(s).

Pursuant to the terms of any such pension plan and/or as a matter of federal law, HOPE has been advised and understands that she may be entitled to survivor benefits under any such pension plan of ROBBIE, and HOPE hereby waives all of her respective rights under any such pension plan and acknowledges that the effect of such waiver will be to deprive her of any and all such survivor benefits. HOPE agrees that, immediately after marriage, she will execute all forms required to effectuate the waiver of her rights to survivor benefits under any such pension plan of ROBBIE, including, without limitation, the Waiver Election of the Qualified Pre-retirement Survivor Annuity With Spousal Consent ("Waiver Form") which is attached hereto and incorporated herein as Exhibit "E". If ROBBIE dies prior to the time when HOPE signs such forms, including the Waiver Form, HOPE agrees to hold any funds received by her from

any such pension plan of ROBBIE as constructive trustee for the benefit of ROBBIE's otherwise designated beneficiaries or, if none, his estate, and to immediately deliver any such funds to any such beneficiaries of ROBBIE or his estate.

N. GIFTS

1. HOPE and ROBBIE agree that all property received by either party hereto by gift, bequest or devise shall remain the separate property of the receiving party; provided, however, that all wedding and anniversary gifts from third persons shall be considered community property and each party is entitled to a one-half (1/2) interest in said gifts.

2. For an action, i.e., a payment, disbursement, transfer, etc., to constitute a gift between the parties, it must be accompanied by a writing which expressly declares that it is made as a gift. This provision does not apply to a gift between the parties of any one item of clothing, wearing apparel or jewelry with a market value of less than TEN THOUSAND DOLLARS ($10,000.00) or other tangible articles of a personal nature that is used solely or principally by the party to whom the gift is made. (The placing by one party of title in the name of the other party, as hereinbefore set forth, shall constitute a sufficient writing to establish a gift under this section.)

O. TAXES

1. ROBBIE and HOPE agree that ROBBIE shall have the option of whether or not to file joint federal or state income

tax returns with HOPE for any and all tax years, so long as the parties are married. The election, if any, by ROBBIE, after the parties' marriage, to file a federal or state income tax return or a joint return, rather than a separate return, shall not constitute a creation of any community property or of any other rights or interests in contravention of this Agreement.

2. If ROBBIE and HOPE file joint returns, the parties agree that the tax liability of each party on any such returns, to be paid from his or her separate property, shall be allocated in the proportion that the tax liability of each party bears to the aggregate tax liability of both parties, such proportion to be determined based on a calculation of the single status tax liability of each. For example, if ROBBIE had filed a tax return as a single individual and his tax liability would have been TWENTY-FIVE THOUSAND DOLLARS ($25,000.00), and HOPE's tax return filed as a single individual would have had a liability of FOUR THOUSAND DOLLARS ($4,000.00), HOPE shall pay four twenty-ninths (4/29ths) of the total tax liability on such returns, and ROBBIE shall pay twenty-five twenty-ninths (25/29ths) of the total tax liability on such returns. (In no event will HOPE's obligation to contribute to the tax liability exceed her tax liability if she had filed separately from ROBBIE.)

In the event ROBBIE elects for ROBBIE and HOPE to file separate returns, ROBBIE agrees that he will be responsible for any tax incurred by either party on their separate returns

and, in this regard, ROBBIE shall be entitled to use, for the payment of such tax liability, any withholding made on behalf of each of the parties.

3. The parties agree that ROBBIE shall be solely responsible for the costs, if any, of preparing the joint returns.

4. ROBBIE hereby indemnifies and agrees to hold HOPE harmless from any and all claims, assessments, deficiencies, interest, penalties and fees and costs attributable to his income arising out of any federal or state income tax return heretofore or hereafter signed and filed by ROBBIE and HOPE jointly or ROBBIE solely. HOPE hereby indemnifies and agrees to hold ROBBIE harmless from any and all claims, assessment, deficiencies, interest, penalties and fees and costs attributable to her income arising out of any federal or state income tax return heretofore or hereafter signed and filed by ROBBIE and HOPE jointly or HOPE solely.

5. ROBBIE agrees to report his income for the purposes of federal or state income tax returns, all income of whatsoever nature received by him or accruing to him from whatever source from the date of this Agreement and throughout the marriage of ROBBIE and HOPE, and to indemnify and hold HOPE harmless from any and all claims, assessments, deficiencies, penalties and fees and costs arising out of his non-inclusion of any such income or disallowance of any deduction.

6. HOPE agrees to report her income, as required by law for the purposes of federal or state income tax returns, all income of whatsoever nature received by her or accruing to her from whatever source, from the date of this Agreement and throughout the marriage of ROBBIE and HOPE, and to indemnify and hold ROBBIE harmless from any and all claims, assessments, deficiencies, penalties and fees and costs arising out of her non-inclusion of any such income or disallowance of any deduction.

P. LIFE INSURANCE

1. HOPE shall have the right, at her own expense, to obtain a policy of life insurance insuring the life of ROBBIE in any amount that HOPE, at her sole discretion, elects. HOPE shall own said policy as her sole and separate property. ROBBIE shall cooperate in submitting to any physical examination, no more than one (1) time per year, which is necessary to obtain and/or maintain said life insurance policy. HOPE waives the right to seek from ROBBIE any reimbursement for any payments made on the life insurance policy.

2. ROBBIE shall have the right, at his own expense, to obtain a policy of life insurance insuring the life of HOPE in any amount that ROBBIE, at his sole discretion, elects. ROBBIE shall own said policy as his sole and separate property. HOPE shall cooperate in submitting to any physical examination, no more than one (1) time per year, which is necessary to obtain

and/or maintain said life insurance policy. ROBBIE waives the right to seek from HOPE any reimbursement for any payments made on the life insurance policy.

3. In the unlikely event of a dissolution of marriage between the parties, the parties agree that each shall have the right to receive and have transferred to them the policy or policies insuring their life and, in the event a party chooses to exercise their right to cause the other party to transfer such a policy to them, the party then receiving the policy shall pay to the other party the cash surrender value, if any, of said policy forthwith.

4. Notwithstanding the foregoing, ROBBIE shall acquire and maintain insurance on his life naming HOPE as the beneficiary, so long as the parties are married and living together, in an amount no less than $250,000.00 face value, free of any obligation. Within ninety (90) days of the execution of this Agreement, ROBBIE shall deliver to HOPE satisfactory proof that the policy or policies have been obtained, the amount of coverage and that the beneficiary designation is properly endorsed on the policy or policies. In the event ROBBIE elects *to cancel and/or change said life insurance carrier and/or the* beneficiary designation thereon, ROBBIE shall notify HOPE at least thirty (30) days prior to any such cancellation and/or change. Additionally, ROBBIE shall instruct the insurance carrier, in writing, that the carrier is to provide notice to

HOPE of ROBBIE's intent to cancel and/or change said life insurance carrier and/or beneficiary at least fifteen (15) days before any such cancellation and/or change is instituted. ROBBIE acknowledges and agrees that in the event the insurance policy or policies referenced hereinabove in this Paragraph P.4. are not in effect at the time of ROBBIE's death, his estate or successors are responsible for providing identical benefits to HOPE.

5. In the unlikely event of a dissolution of marriage between the parties, ROBBIE's obligation to maintain said life insurance referenced in Paragraph P.4. for HOPE's benefit shall terminate and ROBBIE shall own said policy as his sole and separate property, and shall have the absolute right to designate any third person(s) as beneficiary, unless a court determines otherwise as security for spousal support.

Q. FURNITURE AND FURNISHINGS

1. All furniture and furnishings, antiques and works of art owned by ROBBIE prior to the date of marriage shall remain the separate property of ROBBIE. All furniture and furnishings, antiques and works of art owned by HOPE prior to the date of marriage shall remain the separate property of HOPE. All furniture and furnishings, antiques and works of art acquired during the time of marriage with ROBBIE's separate property or as a gift shall be the separate property of ROBBIE. All furniture and furnishings, antiques and works of art acquired during the time of marriage with HOPE's separate property or as a gift shall

be the separate property of HOPE. All furniture and furnishings, antiques and works of art acquired jointly during the time of marriage shall be owned by ROBBIE and HOPE as tenants-in-common or joint tenants or community property as the parties may decide, each party holding an undivided one-half (1/2) interest. (Said acquisition is defined as a purchase where title is taken in both parties' names or where the parties make a writing as to the nature of such acquisition.)

2. In the event the funds of either party or the joint funds of the parties are used to recover, re-upholster, and/or repair the separate property furniture and furnishings, antiques or works of art of the other, such payment and/or disbursement shall be deemed to be a gift to said party with there being no right of reimbursement in regard to same nor any interest in said item of furniture and furnishings, antiques or works of art unless otherwise agreed in writing.

3. In the unlikely event of a dissolution of marriage between the parties, HOPE will receive any furniture and furnishings, antiques, and works of art which are her separate property, and ROBBIE will receive any that are his separate property. As to any joint acquisitions of furniture and furnishings, antiques and works of art, if the parties are unable to agree on a division thereof, same shall be divided by alternative selection, based upon a jointly appraised value, with the party winning the flip of a coin making the first selection.

In the event any items remain which are not divided between the parties, same shall be contributed to a charity to be mutually chosen by the parties with the parties to each receive one-half (1/2) of the charitable deduction.

R. <u>SEPARATE AND COMMUNITY OBLIGATIONS</u>

1. All obligations secured by, or incurred for the purchase of, real and/or personal property set forth in Exhibit "A" shall remain the separate obligations of ROBBIE. ROBBIE warrants and represents that he does not have an interest in any real or personal property other than as set forth in Exhibit "A". If it shall hereafter be determined that ROBBIE has an interest in any real and/or personal property other than as set forth in Exhibit "A", that was acquired prior to the execution of this Agreement, all obligations secured by or incurred for the purchase of such real and/or personal property shall remain the separate obligations of ROBBIE. HOPE shall not be liable for any of those obligations, and ROBBIE shall indemnify and hold HOPE harmless from any claims thereon by any creditors of ROBBIE, and from all fees and expenses that might be incurred in connection therewith.

2. All obligations secured by, or incurred for the purchase of, real and/or personal property set forth in Exhibit "B" shall remain the separate obligations of HOPE. HOPE warrants and represents that she does not have an interest in any real or personal property other than as set forth in Exhibit "B". If it

shall hereafter be determined that HOPE has an interest in any real and/or personal property other than as set forth in Exhibit "B", that was acquired prior to the execution of this Agreement, all obligations secured by or incurred for the purchase of such real and/or personal property shall remain the separate obligations of HOPE. ROBBIE shall not be liable for any of those obligations, and HOPE shall indemnify and hold ROBBIE harmless from any claims thereon by any creditors of HOPE, and from all fees and expenses that might be incurred in connection therewith.

3. All obligations set forth in Exhibit "C" of the Agreement, including, without limitations, any income tax obligations for any year prior to the year of marriage, shall remain the separate obligations of ROBBIE. ROBBIE warrants and represents that he does not have any obligations for which he is liable other than as set forth in Exhibit "C". If it shall hereafter be determined that ROBBIE has any obligations for which he is liable other than as set forth in Exhibit "C", all such obligations shall remain the separate obligations of ROBBIE. HOPE shall not be liable for those obligations, and ROBBIE shall indemnify HOPE from them and from all fees and expenses that might be incurred in connection therewith.

4. All obligations set forth in Exhibit "D" of the Agreement, including, without limitation, any income tax obligations for any year prior to the year of marriage, shall remain the separate obligations of HOPE. HOPE warrants and

represents that she does not have any obligations for which she is liable other than as set forth in Exhibit "D". If it shall hereafter be determined that HOPE has any obligations for which she is liable other than as set forth in Exhibit "D", all such obligations shall remain the separate obligations of HOPE. ROBBIE shall not be liable for those obligations, and HOPE shall indemnify ROBBIE from them and from all fees and expenses that might be incurred in connection therewith.

5. Notwithstanding anything stated to the contrary above and below in this Agreement or any other written Agreement executed by the parties hereafter, so long as the parties are married and living together, the parties shall maintain a joint checking and/or savings account (held in joint tenancy with right of survivorship) into which both parties shall make contributions from his or her community earnings (as defined in Paragraph F. hereinabove) and from his or her separate property, as the parties may agree, to meet the living expenses of the parties. Such funds additionally may be used to make joint purchases or for such other purposes as the parties may from time to time agree. The parties may also maintain one or more joint credit cards, which credit card charges shall be used solely for joint living expenses, which shall be paid from the joint checking and/or savings account.

6. As used herein the term "living expenses" includes, but is not limited to, the monthly payments on the

residence in which the parties are residing together (including principal, interest, taxes, upkeep and maintenance and association fees, if any), food, household supplies, housekeeper, utilities, including water, gas, electricity, cable, and telephone, laundry and cleaning, homeowner's insurance, personal upkeep, medical insurance, accident and auto insurance, gasoline, oil and auto repairs, joint vacation, joint entertainment expenses, and joint gifts, and other such expenses as the parties mutually agree upon in writing.

7. Any and all monies, whether from each parties' separate funds, or from the parties' joint funds, or community earnings (defined in Paragraph F. hereinabove), including, but without limitation to, monies from the parties' joint checking account and/or savings account as set forth in Paragraph R.5. hereinabove, used to maintain, improve or otherwise enhance either parties' separate property shall create no joint interest in said separate property unless the parties specifically otherwise agree in writing. The parties hereby waive any and all right to reimbursement of any kind of their separate or joint funds from any source, and any expenses of maintenance, improvement or enhancement of the other party's separate property paid from any source including, but not limited to funds from the parties' joint checking and/or savings account as set forth in Paragraph R.5. Any and all such monies used to maintain, improve or enhance either party's separate property is deemed to

be a gift to that party. Additionally, any and all monies, whether from each party's separate funds or from the parties' joint funds (or from community property as defined in Paragraph F. hereinabove), used to maintain, improve, or otherwise enhance the parties' community property is deemed to be a gift to the community property and the party contributing same hereby waives any and all right to reimbursement of any kind of their separate or joint funds and such maintenance, except as set forth in Paragraph M.3. hereinabove regarding joint purchase of a residence or income property.

S. EXECUTION OF OTHER INSTRUMENTS

1. Each party agrees that he or she shall, at the request of the other, take all steps, and execute, acknowledge and deliver to the other party all further instruments, necessary or expedient to effectuate the purposes and intent of this Agreement and shall do so in timely fashion when requested.

2. Notwithstanding the failure of either party to execute any such instrument, this Agreement shall be in all respects operative as though said instruments were signed.

3. HOPE further agrees to execute, acknowledge and deliver to ROBBIE quitclaim deeds on all real property purchased by ROBBIE from his separate property. ROBBIE agrees to execute, acknowledge and deliver to HOPE quitclaim deeds on all real property purchased by HOPE from her separate property.

///

T. PARTIES BOUND

This Agreement shall be binding upon the parties hereto and their respective heirs, executors, assigns, trustees, administrators, successors and personal representatives.

U. SPOUSAL SUPPORT AGREEMENT

This Agreement covers only property rights and intentionally does not address spousal support issues. The issues of spousal support are not waived by either party and shall be reserved to the jurisdiction of the court or written agreement of the parties.

ROBBIE acknowledges that, in the event the parties eliminate spending any extended time in Southern California and reside in a rural area, if HOPE is still pursuing her acting and/or modeling career, she will potentially be unable to continue pursuing same under the new circumstances and, in the unlikely event the parties terminate their relationship, the court may take this into consideration regarding any support issue, notwithstanding the fact that this conceivable could be a marriage of short duration.

V. GENERAL RELEASE

By this Agreement, ROBBIE and HOPE intend to define all rights and obligations between them. Except as otherwise expressly provided in this Agreement, each of them releases the other from all debts, liabilities and obligations of every kind, previously incurred, including both personal obligations and

encumbrances on the other party's separate property.

Except for the claims, demands and rights in this Agreement created or reserved against either of the parties hereto, which claim, demands and rights are expressly reserved from the operation of this paragraph, each of the parties hereto, for himself and herself and their respective heirs, executors, administrators and assigns, hereby releases and discharges the other party and his or her respective heirs, executors, administrators and assigns, of and from any and all past claims and demands of every kind, nature and description.

Each of the parties hereto does hereby waive with respect to the other the provisions of Section 1542 of the Civil Code of the State of California relating to claims affected by a general release, which provides as follows:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.",

and, except as aforesaid, this Agreement is intended to and does release all claims, which either of the parties may have against the other.

W. ENTIRE AGREEMENT; MODIFICATION

1. This Agreement contains the entire understanding

and agreement of the parties, and there have been no promises, representations, agreements, warranties, or undertakings by either party or to the other, either oral or written, of any character or nature, except as set forth herein. This Agreement may be altered, amended, or modified only by an instrument in writing, executed and acknowledged by the parties to this Agreement, and by no other means.

2. The parties agree that they occasionally may use such expressions as "our property", "our house" or "our bank account" when referring to property that is, by the terms of this Agreement, separate property. The parties further agree that they sometimes may commingle separate property and/or property that would otherwise be community property but for this Agreement, or may make statements or take actions that are or appear to be inconsistent with the terms of this Agreement. Notwithstanding any of the above, the parties agree that this Agreement may be altered, amended, or modified only as set forth in Paragraph W.1., above.

X. APPLICABLE LAW

This Agreement is executed in the State of California and shall be subject to and interpreted under the laws of the State of California. Although this Agreement is executed in the State of California and it makes reference to separate, community and quasi-community property, the parties agree that it is their intent that this Agreement shall cover all rights of property,

whether the property is situated within or without the State of California, or within or without the United States of America.

Y. SEVERABILITY

Every provision of this Agreement is intended to be severable. In the event any terms, provision, covenant, or condition of this Agreement is declared to be illegal or invalid for any reason whatsoever by a court of competent jurisdiction, such illegality or invalidity shall not affect the other terms and provisions hereof, which shall remain binding and enforceable.

Z. ATTORNEYS' FEES

In the event of a dispute between the parties arising out of the terms, conditions and obligations imposed by this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees, costs and expenses incurred in connection therewith. This provision shall not constitute a waiver by either party of attorneys' fees and costs which may be awarded by the Court relative to issues of spousal support, child support, modifications and/or enforcement thereof pursuant to the Family Law Act (California Civil Code, §4000 et seq.).

AA. WAIVER

No waiver of any of the provisions of this Agreement shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding

unless executed in writing by the party making the waiver.

AB. ATTORNEY'S CERTIFICATE

The parties and their counsel agree that the execution of the Attorney's Certificate by the attorney on behalf of either of the parties shall not constitute a waiver of the attorney/client privilege between the attorney and the party they represent.

AC. CAPTIONS

The captions of the various paragraphs in this Agreement are for the convenience of the parties only, and none of them are intended to be any part of the text of this Agreement, nor intended to be referred to in construing any of the provisions hereof.

AD. EXECUTION IN COUNTERPARTS

This Agreement may be executed in counterparts, each of which shall be deemed to be an original and all such counterparts shall together constitute one and the same instrument.

AE. DRAFTING OF AGREEMENT

HOPE and ROBBIE both acknowledge and agree that both parties actively participated in the negotiation and drafting of this Agreement, and should any ambiguities exist in this Agreement, same shall not be construed against the one drafting this Agreement.

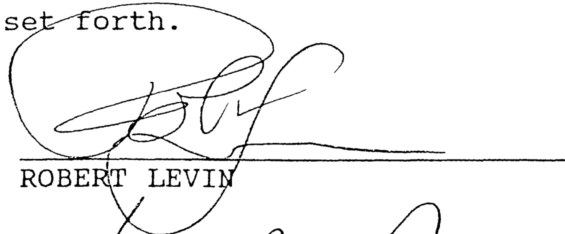
AF. EFFECTIVE DATE

This Agreement shall be effective as of the date

hereinbefore set forth.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date hereinafter set forth.

Dated 9-13-91



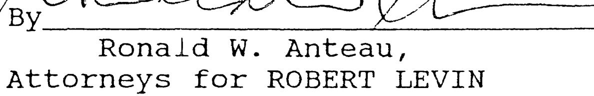
ROBERT LEVIN

Dated Sept 12, 1991

HOPE MARIE RIZZITANO

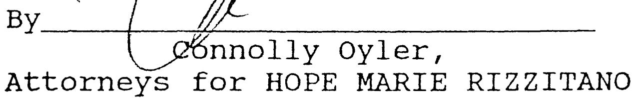
APPROVED AS TO FORM AND CONTENT:

SIMKE, CHODOS, SILBERFELD &
ANTEAU, INC.



By__________________________
Ronald W. Anteau,
Attorneys for ROBERT LEVIN

FLYNN, KNERR & OYLER



By__________________________
Connolly Oyler,
Attorneys for HOPE MARIE RIZZITANO

ATTORNEY'S CERTIFICATE

The undersigned hereby certifies that he is an Attorney at Law duly licensed and admitted to the practice of law in the State of California; that he has been employed by HOPE MARIE RIZZITANO, one of the parties to the foregoing Agreement; that he has advised and consulted with HOPE MARIE RIZZITANO with respect to her and ROBERT LEVIN's rights and has fully explained to her the legal significance under California law the foregoing agreement, and the effect which it has upon her rights; that HOPE MARIE RIZZITANO, after having been so advised by the undersigned, acknowledged to the undersigned that she understood fully the terms of the foregoing Agreement and the legal effect thereof within the State of California, and that she executed the same freely and voluntarily; and that the undersigned has no reason to believe that HOPE MARIE RIZZITANO did not understand fully such terms and effects, or that she did not freely and voluntarily execute said Agreement, such execution being in the undersigned's presence.

Dated ______________, 1991

FLYNN, KNERR & OYLER

By______________________

Connolly Oyler
Attorneys for
HOPE MARIE RIZZITANO

AGRFI101.LEV

ATTORNEY'S CERTIFICATE

The undersigned hereby certifies that he is an Attorney at Law duly licensed and admitted to the practice of law in the State of California; that he has been employed by ROBERT LEVIN, one of the parties to the foregoing Agreement; that he has advised and consulted with ROBERT LEVIN with respect to his and HOPE MARIE RIZZITANO's rights and has fully explained to him the legal significance under California law the foregoing Agreement, and the effect which it has upon his rights; that ROBERT LEVIN, after having been so advised by the undersigned, acknowledged to the undersigned that he understood fully the terms of the foregoing Agreement and the legal effect thereof within the State of California, and that he executed the same freely and voluntarily; and that the undersigned has no reason to believe that ROBERT LEVIN did not understand fully such terms and effects, or that he did not freely and voluntarily execute said Agreement, such execution being in the undersigned's presence.

DATED 9/14, 1991

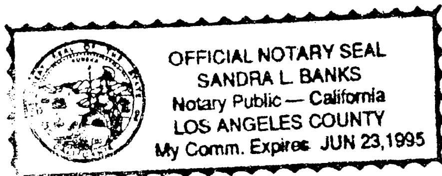
SIMKE, CHODOS, SILBERFELD &
ANTEAU, INC.

By ______________________
Ronald W. Anteau
Attorneys for ROBERT LEVIN

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

On this 12th day of September, 1991, before me the undersigned, a Notary Public in and for said County and State, residing herein duly commissioned and sworn, personally appeared HOPE MARIE RIZZITANO, known to me (or proven to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledge to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year in this certificate first above written.

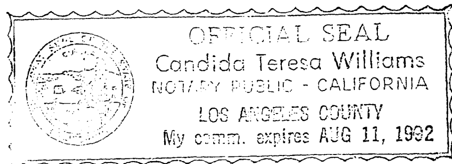


Sandra L. Banks
Notary Public in and for the County of Los Angeles, State of California

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

On this 13TH day of SEPTEMBER, 1991, before me the undersigned, a Notary Public in and for said County and State, residing herein duly commissioned and sworn, personally appeared ROBERT LEVIN, known to me (or proven to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledge to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year in this certificate first above written.



Candida Teresa Williams
Notary Public in and for the County of Los Angeles, State of California

EXHIBIT "A"

SEPARATE PROPERTY OF ROBERT LEVIN

Stocks and Bonds	$ 6,000,000
Pension, 401K, IRA, Profit Sharing, etc.	280,000
Real Estate	1,300,000
Loans Receivable and Trust Deeds	2,100,000
Furniture, Furnishings, Electronics, and Artwork (at cost)	180,000
Motor Vehicles	71,000
Musical Instruments	28,000
Gun Collection	20,000
Jewelry	22,000
Coin Collection 2,500 Gold Coins 800 Silver Coins	Value Not Determined
TOTAL	In Excess of $10,000,000

EXHIBIT "B"

SEPARATE PROPERTY OF HOPE MARIE RIZZITANO

EXHIBIT "C"

DEBTS AND OBLIGATIONS OF ROBERT LEVIN

None.

EXHIBIT "D"

DEBTS AND OBLIGATIONS OF HOPE MARIE RIZZITANO

WAIVER ELECTION OF THE QUALIFIED PRERETIREMENT SURVIVOR ANNUITY WITH SPOUSAL CONSENT

_______________________________________ ("Company")
(Name of Company)

_______________________________________ ("Plan")
(Name of Plan)

THIS WAIVER ELECTION AND SPOUSAL CONSENT FORM AFFECTS VALUABLE RIGHTS TO DEATH BENEFITS UNDER THE PLAN, AND THE COMPANY ENCOURAGES YOU AND YOUR SPOUSE TO SEEK THE ADVICE OF YOUR LAWYER, ESTATE PLANNER OR OTHER TAX ADVISOR BEFORE SIGNING.

WAIVER ELECTION

I am a Participant in the Plan. I have read the EXPLANATION OF THE QUALIFIED PRERETIREMENT SURVIVOR ANNUITY. I understand that: (1) if I die before I retire and I have been married for at least one year, any death benefit under the Plan will be paid to my spouse in a monthly pension annuity for the life of my spouse (a "spousal annuity") unless my spouse and I sign this Waiver Election and Consent; (2) I have the right to waive (give up) the spousal annuity, but only if my spouse consents to the waiver; and (3) if my spouse consents to the waiver, I have the right to (i) choose a beneficiary other than my spouse to receive any death benefit from the Plan; (ii) specify a form of pension benefit payment other than a survivor annuity; and (iii) cancel any waiver at any time during my life without my spouse's consent.

Please check one box below. If you do not check a box, this Waiver Election is void and any death benefits will be paid to your spouse in the form of a Qualified Preretirement Survivor Annuity.

[Check Box A if you want your spouse to receive any death benefit but you want the benefits to be paid in a form other than a spousal annuity. Your spouse must check Box 1 of the Spousal Consent.]

[__] A. I waive (give up) the payment of a survivor annuity to my spouse and request that any death benefits payable on my death be paid to my spouse in the form stated in the most recent Beneficiary Designation on file with the Plan.

[Check Box B if you want to name a beneficiary other than your spouse now but you will not be able to change the beneficiary in the future without getting your spouse's consent -- this is called a Specific Waiver Election. Your spouse must check Box 2 of the Spousal Consent and must sign at Box III of the Application for Participation and Beneficiary Designation.]

[__] B. I waive (give up) the payment of a Qualified Preretirement Survivor Annuity to my spouse if I die before I retire and request payment of my benefits to the persons named in the most recent Beneficiary Designation on file with the Plan.

[Check Box C if you want to name a beneficiary other than your spouse and also want to be able to change the beneficiary at any time without getting your spouse's consent again in the future -- this is called a General Waiver Election. Your spouse must check Box 3 of the Spousal Consent.]

[__] C. I waive (give up) the payment of a Qualified Pre-retirement Survivor Annuity to my spouse if I die before I retire and request payment of my benefits as stated in the most recent Beneficiary Designation on file with the Plan.

Executed this ______ of ______________________,

____
Signature of Participant

____
Name of Participant (Please Print)

SPOUSAL CONSENT

I declare under penalty of perjury that (1) I am the spouse of the Participant making the Waiver Election above; (2) I am not acting under duress or undue influence; and (3) I have read and understand my right to survivor benefits under the Plan as stated in the attached "Explanation of the Qualified Preretirement Survivor Annuity."

Please check the appropriate box below. If you do not check a box or if you check the wrong box, this Spousal Consent is void and any death benefits will be paid to you in the form of a Qualified Preretirement Survivor Annuity.

[Check Box 1 if your spouse checked Box A of the Waiver Election.]

[__] 1. Spousal Consent to Form of Benefit. I understand that federal law gives me the automatic right to receive survivor benefits from the Plan if any death benefits are due upon my spouse's death. I also understand that if I consent to this Waiver Election, I am giving up my right to receive the survivor benefits under the Plan in a monthly survivor annuity which federal law would give to me automatically, and I consent to this. I also understand that (1) the effect of this Waiver Election is to cause my right to my spouse's death benefits under the Plan to be paid to me in a way which may not provide me with income for the rest of my life; (2) my spouse may change the way in which his or her death benefits may be paid to me at any time without consulting me; and (3) I cannot cancel my consent.

[Check Box 2 if your spouse checked Box B of the Waiver Election.]

[__] 2. Spousal Consent to Specific Waiver Election. I understand that federal law gives me the automatic right to receive survivor benefits from the Plan if any death benefits are due upon my spouse's death. I also understand that if I consent to this Waiver Election, I am giving up my right to receive survivor benefits from the Plan which federal law would give to me automatically and I consent to this. I also understand that (1) my spouse has named another beneficiary to receive any death benefits from the Plan and this causes me to lose valuable death benefits which would have been paid to me and I also consent to this; (2) my spouse may not change the designated beneficiary without my consent; (3) my spouse may cause the death benefits to be paid to the designated beneficiary in any form that he or she chooses and I also consent to this; (4) my spouse may not change the form of benefit without my consent; and (5) I cannot cancel my consent.

[Check Box 3 if your spouse checked Box C of the Waiver Election.]

[__] 3. Spousal Consent to General Waiver Election. I understand that federal law gives me the automatic right to receive survivor benefits from the Plan if any death benefits are due upon my spouse's death. I also understand that if I consent to this Waiver Election, I am giving up my right to receive survivor benefits from the Plan which federal law would give to me automatically, and I consent to this. I also understand that a more limited consent could have been chosen under either Option 1 or 2 above. I also understand that (1) if my spouse names a beneficiary other than me, this will cause me to lose valuable death benefits which would have been paid to me and I also consent to this; (2) even if my spouse names me as the beneficiary of his or her death benefits, he or she may change the named beneficiary at any time without consulting me, and I also consent to this; (3) even if my spouse names me as the beneficiary of his or her death benefits, he or she may cause the death benefits under the Plan to be paid to me in a way which may not provide me with income for the rest of my life, and I also consent to this; and (4) I cannot cancel my consent.

Signed this ___ day of ________________, 19__.

____
Signature of Participant's Spouse

Witnessed by:

____
Plan Representative

OR

STATE OF CALIFORNIA)
) ss.
COUNTY OF ______________)

On ________________________ before me, the undersigned, a Notary Public in and for said State, personally appeared ______________________________, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged that [he/she] executed the same.

WITNESS my hand and official seal.

____
Notary Public in and for
said County and State

EXPLANATION OF QUALIFIED PRERETIREMENT SURVIVOR ANNUITY

_______________________________ ("Company")

_______________________________ ("Plan")
(Name of Plan)

Please read this explanation carefully! If you are married:

YOUR SPOUSE WILL AUTOMATICALLY RECEIVE ANY DEATH BENEFIT FROM THE PLAN IN THE FORM OF A QUALIFIED PRERETIREMENT SURVIVOR ANNUITY IF YOU HAVE BEEN MARRIED FOR AT LEAST ONE YEAR ON YOUR DATE OF DEATH UNLESS YOU CHOOSE ANOTHER FORM OF PAYMENT OF YOUR BENEFITS OR ANOTHER BENEFICIARY BY SIGNING A WAIVER ELECTION AND YOUR SPOUSE SIGNS A CONSENT FORM.

WHAT IS THE QUALIFIED PRERETIREMENT SURVIVOR ANNUITY?

A Qualified Preretirement Survivor Annuity gives your spouse a monthly pension payment for the rest of his or her life if you die before retirement. The exact amount of the monthly pension payment your spouse will receive will depend on (1) the kind of plan the Company has; (2) the earliest age at which you can receive payment of benefits from the Plan; (3) the form of pension benefit payment required by the Plan; and (4) your earned pension or account balance at the time of your death.

If the Plan is a defined contribution plan (profit sharing, money purchase or target benefit pension, or stock bonus) the monthly pension payment will be the amount that can be purchased with your entire account balance at the time of your death.

If the Plan is a defined benefit pension plan, your spouse will receive a monthly pension for the rest of his or her life equal to the monthly retirement pension you would have received if you retired from the Company the day before your death.

In either type of plan, if the Qualified Preretirement Survivor Annuity is worth $3,500.00 or less, then the Plan may simply pay the death benefit in one lump sum. But the death benefit will still be paid to your surviving spouse unless you choose another Beneficiary and your spouse consents.

WHAT IS THE WAIVER ELECTION?

When you become age 35 (or when you leave the Company if you are under age 35 and have a vested benefit), you may give up (waive) the Qualified Preretirement Survivor Annuity by signing a form called a Waiver Election. This means that you may give up (waive) the right:

(1) to have your death benefit paid to your spouse as a survivor annuity, or

(2) to have your spouse automatically named as your beneficiary, or

(3) to both (1) and (2).

If you give up (waive) either or both of these rights, you may cancel the Waiver Election any time before your death. This will reinstate the Qualified Preretirement Survivor Annuity to your spouse unless you sign a new Waiver Election. Your spouse must consent in writing before a notary public or Plan representative to your Waiver Election but your spouse does not have to consent if you want to cancel your Waiver Election.

If you give up (waive) the Qualified Preretirement Survivor Annuity and your spouse consents, then you may (1) name a beneficiary other than your spouse to receive any death benefits from the Plan; and (2) specify a form of benefit payment other than a survivor annuity, whether payable to your surviving spouse or to another beneficiary.

If you are not married when you die, generally any death benefit payable under the Plan will be paid to your named beneficiary. But this may not be true if your marital status had changed prior to your death. Therefore, you should immediately notify the Company of any change in your marital status.

WHAT IS THE EFFECT OF A WAIVER ELECTION?

If you give up (waive) the Qualified Preretirement Survivor Annuity and name another beneficiary to receive any death benefits and your spouse consents, you must understand that your spouse will not receive any benefits from the plan upon your death.

The federal law gives to your spouse the automatic right to receive payment of a death benefit from the Plan upon your death. It is important that you and your spouse understand your rights and obligations concerning your death benefit.

This automatic right should not be given up by you and your spouse without careful consideration and consultation with your lawyer, estate planner or other tax advisor.